

University of the Western Cape



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MODE II

Minimum Resale Price Maintenance In South Africa: Rule of reason or per se prohibition?

Mini thesis submitted in partial fulfilment of the requirements for the LLM degree in the Faculty of Law of the University of the Western Cape.

By

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Plagiarism Declaration:

“I declare that ‘**Minimum Resale Price Maintenance in South Africa: Rule of reason or per se prohibition?**’ is own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references”.

Signed..... Date.....

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Dedications:

I dedicate this work to my mother Nelly Ncambathi Mdluli (10/10/1945-22/11/2011). You may not be around but your precious soul still lingers on. RIP Mdluli Sikhandzisa Mkholo Losundvu Netinyawo Takhe.



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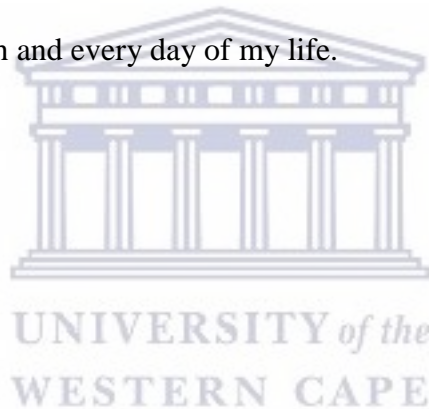
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Key Words

Competition Law

Consumer welfare

Economic efficiency

Fixed prices

Inter-brand competition

Intra- brand competition

Minimum resale price maintenance

Per se illegality

Rule of reason prohibition

Vertical restrictive practices



Abbreviations and/ or Acronyms

ANC	African National Congress
BER	Block Exemption Regulations
CAC	Competition Appeal Court
CC	Competition Commission
EC	European Community
ECC	European Community Courts
EU	European Union
ECJ	European Court of Justice
EEC	European Economic Community
FTC	Federal Trade Commission
RPM	Resale price maintenance
TFEU	Treaty of the Functioning of the European Union
USA	United States of America



CHAPTER 1	7
1.1 INTRODUCTION	7
1.2. Vertical arrangements defined	8
1.3. Theorising vertical arrangements	9
1.4. Minimum resale price maintenance defined	10
1.5. Inter-brand/ intra-brand competition	10
1.6. Per se prohibition /rule of reason prohibition	11
1.7. Significance of study	12
1.8. Aim of research	19
1.9. Methodology	20
1.10. Chapter outline	21
CHAPTER 2	22
THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE IN SOUTH AFRICA	22
2.1. Introduction	22
2.2. Historical Development of the Prohibition of Minimum Resale Price Maintenance in South Africa	23
2.3. The Regulation of Monopolistic Conditions Act 24 of 1955	24
2.4. S v South African Philips (Pty) Ltd and Others	25
2.5. The 1979 Legislation	27
2.6. Competition Act 89 of 1998	28
2.7. Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa Pty Ltd and Others (Tribunal Decision)	30
2.7.1. Appeal	34
2.8. Comments and analysis	38
CHAPTER 3	40
THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE IN THE USA ..	40
3.1. Introduction	40
3.2. Historical background of minimum resale price maintenance in America	40
3.3. Leegin Creative Leather Prods, Inc. v. PSKS, Inc	47
3.3.1. Dissenting Opinion	55
3.4. Comments and Criticisms post Leegin	57
Chapter 4	61
THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE IN THE EU. ...	61
4.1. Introduction	61

4.2. Evolution of minimum resale price maintenance in the EU	62
4.3. Minimum Resale Price Maintenance under Article 81	66
4.4. Article 101 TFEU	71
4.5. Application and Interpretation of Article 101 to minimum resale price maintenance in the European Community	71
4.5.1. Agreements	73
4.5.2. Object or effect doctrine	75
4.5.3. Does the effects based approach amount to the rule of reason approach?	79
4.6. Article 101(3) and Commission Regulation (EU) No.330/2010	81
4.6.1. Hard-core restrictions Article 4 of Regulation 330/2010	83
4.6.2. Application of Article 101 and Commission Regulation (EU) No.330/2010 to minimum RPM	84
Comments	85
Chapter 5 CONCLUSION	88
The way forward for South Africa	89
BIBLIOGRAPHY	91



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CHAPTER 1

1.1 INTRODUCTION

The field of competition law has in an unprecedented way experienced an incredibly vast geographical expansion within a short period of time and as such it is no longer the exclusive feature of developed countries only.¹ Competition law as a body of legal rules aims at protecting the process of competition in the market.² It deals with market imperfections with the desire to restore competition conditions in the market economy.³ Whilst specific competition law objectives may differ from jurisdiction to jurisdiction, it is settled between competition law scholars that, the general goals of competition law are to promote efficiency, adaptability and development of the economy together with the provision of consumer welfare.⁴

In the Republic of South Africa, the goals and objectives of competition law may be found in the preamble of the Competition Act 89 of 1998 as well as in section 2 of the Act.⁵ Section 2 of the Competition Act expressly states the purpose and objectives of the Act as follows:

- “(a) to promote the efficiency, adaptability and development of the economy;*
- (b) to provide consumers with competitive prices and product choices;*
- (c) to promote employment and advance the social and economic welfare of South Africans;*
- (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;*

¹ Dabbah MM (2010) International and Comparative Competition Law Cambridge University Press New York 1. According to Dabbah M, Competition Law has been adopted in over 120 jurisdictions around the world.

² Dabbah MM (2010) International and Comparative Competition Law Cambridge University Press New York 13.

³ Dabbah MM (2010) International and Comparative Competition Law, Cambridge University Press New York 13

⁴ Brassey M et al (2002) Competition Law 1st ed Juta Law 2.

⁵ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 1-52

(e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

(f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons.”⁶

The wording of the Act envisions public interest objectives alongside the traditional economic efficiency goals.⁷ In line with its aims and objectives, the Competition Act regulates mergers and prohibits certain conducts by firms, such as horizontal and restrictive practices, and abuse of dominance.⁸

1.2. Vertical arrangements defined

Vertical arrangements are agreements between firms operating at different levels of the production chain, and in most instances include the manufacturer, distributor and the retailer.⁹

In most instances vertical arrangements take place where the products or services distributed directly by the manufacture and the circulation of the goods is left to independent entities with experience in dealing with the goods and have also familiarised themselves with the market where the goods are to be sold.¹⁰ Of importance to the existence of a vertical arrangement is that the firms are not acting as competitors in the context of the arrangement that they are in, as they do not operate in the same relevant market.¹¹ In most instances the restrictions included in vertical agreements are usually in the following nature: firstly, the seller in such

⁶ Section 2 of Act 89 of 1998.

⁷ Hartzenberg T (2006) Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries Northwestern Journal of International Law and Business Vol.26 Issue 3 667.

⁸ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-3.

⁹ Raychaudhuri T (2011) Vertical Restraints in Competition Law: The Need to Strike the Balance Between Regulation and Competition NUJS Law Review Vol.4 615.

¹⁰ Colino SM (2010) Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes Hart Publishing Oxford and Portland Oregon 1.

¹¹ Colino SM (2010) Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes Hart Publishing Oxford and Portland Oregon 1.

circumstances usually accepts not to supply goods to anybody else other than the buyer within a particular territory (territorial distribution).¹² Secondly, the purchaser may agree not to buy goods from other providers (exclusive purchasing).¹³ And lastly, the conditions under which the products can be resold may be determined in the agreement, particularly as regards to price, location or consumers.¹⁴ Consequently these restrictions may effectively establish a division of labour between the different levels of production, thus hindering competition.¹⁵

1.3. Theorising vertical arrangements

The regulatory approach towards vertical restraints under competition law is far from settled. Economic theorists are of the view that if inter-brand competition exists then restrictions on intra-brand competition should not be capable of adversely affecting competition.¹⁶ Instead, it is submitted that the efficiency-enhancing effects of such vertical arrangements would outweigh any possible risks to competition in the market.¹⁷ The Chicago School of thought, which became dominant in America in the late 1970s and 1980s and also possesses considerable influence in competition policy around the world, dictates that efficiency as defined by the market should be the only goal of competition law.¹⁸ In their reasoning they have gone as far as arguing that all vertical arrangements are ultimately pro-competitive, and that there is no need to regulate them.¹⁹ However, as Sutherland and Kemp rightly point out, this argument by the Chicago school of thought disregards the fact that even though some

¹² Colino SM (2010) *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* Hart Publishing Oxford and Portland Oregon 1.

¹³ Colino SM (2010) *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* Hart Publishing Oxford and Portland Oregon 1.

¹⁴ Colino SM (2010) *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* Hart Publishing Oxford and Portland Oregon 1.

¹⁵ Colino SM (2010) *Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes* Hart Publishing Oxford and Portland Oregon 1.

¹⁶ For a discussion of these terms, see 1.5 below.

¹⁷ Raychaudhuri T (2011) *Vertical Restraints in Competition Law: The Need to Strike a Balance Between Regulation and Competition* NUJS Law Review Vol.4 609.

¹⁸ Hovenkamp H (1985) *Antitrust Policy After Chicago* Michigan Law Review Vol.84 N.o.2 215.

¹⁹ Sutherland P and Kemp K (2000) *Competition Law of South Africa* LexisNexis Butterworths 6-5

vertical arrangements may be pro-competitive there are others which are in fact anti-competitive and therefore the need for them to be regulated by competition law is of paramount importance.²⁰

1.4. Minimum resale price maintenance defined

Resale price maintenance, hereafter referred to as RPM, is a type of vertical arrangement regulated by competition law. RPM is an agreement in which a manufacturer sets a price that retailers may charge. The price set may either take the form of setting a price floor (minimum RPM) or a price ceiling (maximum RPM).²¹ RPM is a vertical restraint that limits intra-brand price competition, by restricting the price at which retailers may sell a manufacturer's product.²² It may also increase intra-brand competition with regards to non-price elements.²³ Minimum RPM, which is the gist of this paper, is prohibited under competition law in many jurisdictions, including under Section 5(2) of the South African Competition Act.

1.5. Inter-brand/ intra-brand competition

With regards to vertical arrangements, a distinction is always drawn between inter-brand competition and intra-brand competition.²⁴ Inter-brand competition relates to competition that exists between the products that are sold through different vertical distribution chains, an example being the competition between Avon cosmetics and Justine cosmetics.²⁵ Such

²⁰ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-5. See also Raychaudhuri T (2011) Vertical Restraints in Competition Law: The Need to Strike a Balance Between Regulation and Competition NUJS Law Review Vol.4 609.

²¹ Cho SE (2013) Reports on Korean Law: A Comparative Analysis on Resale Price Maintenance; Korean Supreme Court's Current Standpoint on Minimum Resale Price Maintenance In Light of Leegin Creative Leather Korea University Law Review 2.

²² Jacobs ME (2012) Legal Treatment of Vertical Restraints: Some Lessons from The On-going International Debates A Research Paper for the Fiscalia Nacional Economica available at <http://ssrn.com/abstract=2169113> (accessed 5 June 2015). This practice may take forms ranging from agreements that directly control the retailer's transaction prices to policies that do so indirectly.

²³ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd Cheltenham UK 426.

²⁴ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-5.

²⁵ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-5.

competition takes place within the relevant market.²⁶ Some scholars point out that if individually maintained, RPM should not affect inter-brand competition. Instead they argue that RPM might enhance inter-brand competition by giving the suppliers the possibility to steer the prices of their products on the retail market.²⁷ On the other hand intra-brand competition relates to competition that exists between distributors of the same brand of products, an example being competition between the different distributors of Avon cosmetics.²⁸ Resale price maintenance greatly affects intra-brand competition simply because, if the retail price is fully fixed by the supplier and at times the brand owner, there will be no room for intra-brand price competition between retailers selling the branded product.²⁹ Minimum RPM in particular also has the effect of limiting the possibilities of retailers to engage intra-brand competition.³⁰ As will be shown in the next chapters, the position taken towards minimum RPM in a particular jurisdiction depends on whether priority is given to inter-brand or intra-brand competition.³¹ This distinction between inter-brand and intra-brand competition gives a valuable insight into the economics and arguments for and against vertical restrictive practices together with its regulatory approach.³²

1.6. Per se prohibition /rule of reason prohibition

Notwithstanding its prohibition in South Africa, the debate of whether minimum RPM should in fact be *per se* is still far from settled. The “rule of reason” standard requires the “fact finder” to weigh all the circumstances of a case in deciding whether a restrictive practice should indeed

²⁶ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd, Cheltenham UK 426.

²⁷ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd, Cheltenham UK 431.

²⁸ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-6.

²⁹ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd Cheltenham UK 426.

³⁰ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd Cheltenham UK 431.

³¹ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd Cheltenham UK 431-432

³² Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-6.

be prohibited as imposing an unreasonable restraint on competition.³³ As stated in *Continental T.V. Inc v GTE Sylvania Inc*, 433 U.S. 36, 49 (1977)., the appropriate factors to be taken into account in such a fact-finding process include “the specific information” about the relevant business, together with the restraint’s history, nature and effect.³⁴ The plaintiff in such circumstances bears an initial burden of showing that the alleged agreement or practice produces adverse anticompetitive effect within the relevant product and geographic markets.³⁵ Once the plaintiff has adduced adequate evidence of actual anti-competitive effect, the burden then shifts to the defendant to show that the challenged agreement or practice promotes a sufficient procompetitive effect.³⁶ The main aim and function of this rule is distinguished between restraints with anti-competitive effects that are harmful to the consumer, and restraints that are in the consumer’s best interest.³⁷ On the other hand restraints that are *per se* prohibited are treated as restraints that are necessarily illegal, and the *per se* prohibition eliminates the need to study the reasonableness of that individual restraint in light of the real market forces at play.³⁸

1.7. Significance of study

Vertical restrictive practices are regulated under section 5 of the Competition Act.³⁹ Section 5(1) addresses general vertical restrictive arrangements between firms. Such vertical arrangements may take the form of exclusive distribution arrangements, tying agreements and exclusive dealing agreements. Such arrangements are usually judged in accordance with the

³³ *Continental T.V. Inc v GTE Sylvania Inc*, 433 U.S. 36, 49, 1977.

³⁴ *Continental T.V. Inc v GTE Sylvania Inc*, 433 U.S. 36, 49, 1977.

³⁵ Parikshith N Final Report Competition Commission of India-Demystifying the Rule of Per Se and Rule of Reason in the Indian Context 2011 8 available at <http://www.cci.gov.in/images/media/researchreports> (accessed 23 July 2015)

³⁶ Parikshith N Final Report Competition Commission of India-Demystifying the Rule of Per Se and Rule of Reason in the Indian Context 2011 8 available at <http://www.cci.gov.in/images/media/researchreports> (accessed 23 July 2015)

³⁷ *Leegin Creative Leather Prods, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

³⁸ *United States v General Motor Corp* 384 U.S. (1966).

³⁹ Act 89 of 1998 (as amended)

rule of reason.⁴⁰ And section 5(2) addresses minimum resale price maintenance. Section 5(2) expressly states that the “*practice of minimum resale price maintenance is prohibited in the Republic*”.⁴¹ Section 5(3) which acts as a qualification to section 5(2) states that “a supplier or producer may however recommend a minimum resale price provided:

- a) *The supplier or producer makes it clear to the reseller that the recommendation is not binding; and*
- b) *If the product has its price stated on it, the words “recommended price” appear next to the stated price”.*⁴²

In interpreting and applying these provisions on minimum RPM, one must take into account section 1(2) and 1(3) of the Competition Act. Section 1(2) states that the Act should be interpreted in a manner that is consistent with the constitution and in compliance with international law obligations of the Republic, bearing in mind the purpose and objectives of the Act.⁴³ Furthermore, the interpretation and application process of any provision of the Competition Act may as stated under section 1(3) take into account foreign and international law.⁴⁴

In the Republic of South Africa, minimum RPM is *per se* prohibited and it is the only form of vertical arrangement to which an administrative fine may be imposed on a particular firm without any proof that it is a repeat of a conduct previously found to be a prohibited practice by the South African Competition Authorities.⁴⁵ The land-mark case on minimum RPM, is *Competition Commission v Federal Mogul Aftermarket South Africa (Pty) Ltd*,⁴⁶ where the

⁴⁰ Section 5 (1) of Act 89 of 1998. See also Sutherland and Kemp 6-3

⁴¹ Section 5 (2) of Act 89 of 1998.

⁴² Section 5(3) of Act 89 of 1998.

⁴³ Section 1(2) of Act 89 of 1998.

⁴⁴ Section 1(3) of Act 89 of 1998.

⁴⁵ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-52.

⁴⁶ *Competition Commission of South Africa v Federal Mogul and Others, Case No.08/CR/Mar01.*

competition tribunal stated that, for the purposes of section 5(2) of the Competition Act,⁴⁷ the “practice” of minimum RPM should be widely interpreted.⁴⁸ Accordingly for the purposes of section 5(2), the determination of whether there was an agreement to set prices is irrelevant for the purposes of section 5(2).⁴⁹ The Competition Commission must also be able to establish on a balance of probabilities that a minimum price was indeed enforced by that particular firm.⁵⁰ In this regard, two elements of the practice of minimum RPM must be established. Firstly there must be an understanding regarding the pricing conventions governing the activities at issue, and secondly there must be a sanction in place to enforce that particular pricing convention.⁵¹ The Competition Tribunal in justifying the *per se* prohibition of minimum RPM in *Competition Commission v Federal Mogul Aftermarket South Africa (Pty) Ltd*⁵² stated that RPM could be used to create a brand and also increase market power through differentiation with the effect of reduction in investment innovation and price increase to the detriment of the consumers.⁵³ Federal Mogul appealed the decision of the tribunal to the Competition Appeal Court, and the Court first cautioned against the use of principles borrowed from foreign jurisdictions, and stated obiter that “whilst foreign jurisprudence can be informative and is always welcomed in South African Law, these foreign principles must however be applied with caution.”⁵⁴ The court held that section 5(2) is distinguishable from Section 1 of the Sherman Act,⁵⁵ in that the provision does not warrant the requirement of an agreement nor is an

⁴⁷ Act 89 of 1998

⁴⁸ *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01 para 23.

⁴⁹ *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01 para 23

⁵⁰ *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01 para 23.

⁵¹ *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01 para 70

⁵² *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01.

⁵³ *Competition Commission of South Africa v Federal Mogul and Others*, Case No.08/CR/Mar01. Sutherland and Kemp correctly criticise the observation of the Tribunal, and argue that if it were possible to increase revenue by increasing prices, because consumers would believe the product to be worth more, then it could have been achieved without resale maintenance. The only reason for the resale price maintenance would then be to distribute the revenue for increased prices to the distributors.

⁵⁴ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission and Another*, Case No. 33/CAC/Sep03 6.

⁵⁵ Sherman Anti-Trust Act 1890.

agreement necessary to show evidence of a prohibited practice.⁵⁶ The use of the word “practice” instead of an agreement, is according to the Appeal Court a clear indication that the drafters of the Act regard minimum RPM as an “egregiously anticompetitive activity and as such wished to state so in terse and clear terms.”⁵⁷ The court reiterated the tribunal’s view that in order to establish a contravention of section 5(2) it is enough to provide evidence which shows that a supplier has imposed on its distributors a price at which its goods are to be resold, and the distributors are thereby induced to comply with this minimum price on pain of sanction for non-compliance.⁵⁸

Until 2007, minimum RPM was *per se* prohibited in the United States under Section 1 of the Sherman Act.⁵⁹ The rule against minimum RPM was established in *Dr Miles Medical Co. v John D. Park and Sons Co.*⁶⁰ Dr Miles Medical Co, was a company engaged in the manufacture and sales of proprietary medicines.⁶¹ In the process of protecting its “trade sales and business” together with conserving the goodwill and reputation of the company, it established a method of “governing, regulating and controlling” the sale of its products.⁶² In this process the company fixed the price of its own sales through a contract agreement to jobbers, wholesales, wholesale dealers and retail prices that dealt with their products, and the failure to adhere to the fixed prices resulted in sanctions on the parties to the agreement.⁶³ Dr Miles therefore approached the court for an injunction restraining the defendant from maliciously interfering with the agreements put in place between the company and other wholesale and retail

⁵⁶ Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission and Another, Case No. 33/CAC/Sep03 8.

⁵⁷ Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission and Another, Case No. 33/CAC/Sep03 8.

⁵⁸ Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission and Another, Case No. 33/CAC/Sep03 8.

⁵⁹ NBER Working Paper Series Exclusionary Minimum Resale Price Maintenance Working Paper 16564 available at <http://www.nber.org/papers/w16564> (accessed 23 June 2015)

⁶⁰ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373.

⁶¹ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 375.

⁶² *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 375.

⁶³ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 374.

merchants.⁶⁴ The Court held that the agreement between dealers, having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void.⁶⁵ The Court further stated that such agreements are *per se* prohibited and are not saved by the advantages which the participants to the agreement expect to derive from the enhanced price to the consumer.⁶⁶ After the *Dr Miles* decision, considerable discomfort with the *per se* prohibition of minimum RPM was shown in a number of case decision that followed *Dr Miles*.⁶⁷ One such case is *Continental T.V. Inc v GTE Sylvania Inc*⁶⁸ where Justice White suggested that price maintenance like non-price vertical restrictions should be judged according to the rule of reason.⁶⁹ The case that formally overturned the *per se* prohibition for minimum RPM in America is *Leegin Creative Leather Prods., Inc. v. PSKS, Inc*⁷⁰ where, in a 5-4 decision, the court after consulting extensively on economic literature concluded that the rule of reason must be used for vertical price restraints.⁷¹

The rules of the European Commission maintain that minimum RPM is not aligned with the economic goals of European Competition Law.⁷² The European Union prohibits minimum RPM under Article 101 of the Treaty of the Functioning of the European Union (TFEU).⁷³ The

⁶⁴ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 374. The defendant in this case was not party to the contract. However the defendant had previously dealt with the complainant and had full knowledge of all the facts relation to the trade in its medicines. Furthermore, the defendant had been requested by the complainant and refused to enter into the wholesale contract required by the complainant.

⁶⁵ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 406-408.

⁶⁶ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373 at 408.

⁶⁷ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-38.

⁶⁸ 433 U.S. 36 (1977).

⁶⁹ *Continental T.V. Inc v GTE Sylvania Inc*, 433 U.S. 36 (1977). Justice White made this suggestion obiter dictum, in his separate judgement. Such discontent about the *per se* rule was also shown in *Monsanto Co v Spray-Rite Service Corp* *Monsanto v Spray-Rite Service Corp* 104 S Ct 1464 (1984)

⁷⁰ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373. The Court in their reasoning pointed out several pro-competitive benefits from minimum RPM, and further noted that the Decision in *Dr Miles* was at that time based on a formalistic legal thinking as opposed to a consideration of business realities. See also Hylton K.N (2010) Antitrust Law and Economics Edward Elgar Publishing for an extensive discussion of the court's reasoning.

⁷¹ *Dr Miles Medical Co. v John D. Park and Sons Co*, 220 US 373.

⁷² Reindt AP (2010) Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach Fordham International Law Journal Vol.33 1303.

⁷³ Treaty of the Functioning of the European Union (Consolidated version 2012) OJC 326 (2012)

European Community does however have block exemptions for vertical restraints that provides for an effects-based approach towards vertical arrangements.⁷⁴ For a company to satisfy the exemption criteria under Article 101, the agreement must among other requirements not contain any of the hard-core restrictions set out in the Block Exemption Regulations.⁷⁵ Article 4 of the Exemption Regulations regards minimum RPM as a “hard-core” restriction and thus treats minimum RPM very harshly.⁷⁶ Minimum RPM, as a result does not meet the exemption criteria under Article 101(3) of the TFEU, is therefore still regarded as *per se* prohibited.⁷⁷ Unfortunately there has not been any EU case dealing with Article 101 of the TFEU Treaty, however in *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*⁷⁸ the European Court of Justice held the following:

*“If an examination of the risks leads to the conclusion that there is an agreement between undertakings within the meaning of Article 81 EC, as regards the sale of goods to third parties, the fixing of the retail price of those goods constitutes a restriction of competition expressly provided for in Article 81(1)(a) EC which brings that agreement within the scope of the prohibition laid down in that provision to the extent to which all the other conditions for the application of that provision are satisfied, namely that that agreement has as its object or effect to restrict appreciably competition within the common market and is capable of affecting trade between Member States”.*⁷⁹

In the *Carglass* decision,⁸⁰ the commission, in interpreting the definition of an “agreement” stated that “for there to be an agreement, it is sufficient for the undertakings to have expressed

⁷⁴ Article 101 (3) of the TFEU Treaty.

⁷⁵ Article 2 of Commission Regulation (EU) No.330/2010 of 20 April 2010.

⁷⁶ Devlin F (2009) Resale Price Maintenance and Leeging: Opening Kay’s Kloset Opened the Lid on Pandora’s Box in Global Competition Law Houston Journal of International Law Vol.31 Issue 3 582.

⁷⁷ Reindt A P (2010) Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach Fordham International Law Journal Vol.33 1303.

⁷⁸ *Case C-279/06 (hereafter simply “CEPSA”).*

⁷⁹ *Case C-279/06 para 42.*

⁸⁰ *Comp /39125-Carglass.*

their joint intention to behave in the market in a certain way.⁸¹ Thus an agreement for the purposes of the TFEU can be said to exist when the parties adhere to a common plan which limits their individual commercial conduct by determining the lines of their mutual action in the market.⁸² Thus the agreement does not have to be in writing nor are any formalities necessary, neither is an advance agreement required for an infringement of Article 101.⁸³

Some writers and scholars argue for the rule of reason approach to minimum RPM, on the basis that minimum RPM promotes inter-brand competition, encourages and rewards retailer investments in facilities, pre-sale services and brand promotion.⁸⁴ They argue that minimum RPM offers quality certification, reduces the prospect of free-riding, facilitates market entry for new brands, encourages post-sale services and provides a standard marketing and distinguishing technique for a manufacturer's status goods.⁸⁵ Martin Brassey *et al*, arguing for the rule of reason approach, submit that it is illogical to presume that a vertical restraint has been imposed for competitive or anti-competitive considerations.⁸⁶ Therefore all vertical restraints must be scrutinized against all competitive effects on a case by case basis, in order to determine whether that restraint is anti-competitive or pro-competitive.⁸⁷ Sutherland and Kemp acknowledge that minimum RPM may be used for anti-competitive practices, however they argue that there is a need for a legislative amendment on minimum RPM, alternatively they argue for a narrow interpretation of the prohibition of minimum RPM.⁸⁸ Reindt argues that the *per se* prohibition of minimum RPM, unreasonably limits the ability of competition authorities and Courts to gather the necessary experience and empirical evidence in minimum RPM in

⁸¹ *Comp/39125-Carglass. Para 475.*

⁸² *Comp/39125-Carglass, para 774.*

⁸³ *Comp/39125-Carglass, para 774.*

⁸⁴ Devlin F (2009) Resale Price Maintenance and Leeging: Opening Kay's Kloset Opened the Lid on Pandora's Box in Global Competition Law Houston Journal of International Law Vol.31 Issue 3 582

⁸⁵ Devlin F (2009) Resale Price Maintenance and Leeging: Opening Kay's Kloset Opened the Lid on Pandora's Box in Global Competition Law Houston Journal of International Law Vol.31 Issue 3 582

⁸⁶ Brassey M et al (2002) Competition Law 1ST ed Juta Law 170

⁸⁷ Brassey M et al (2002) Competition Law 1ST ed Juta Law 170

⁸⁸ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-39.

order to develop improved methods to accurately distinguish between harmful and beneficial cases of minimum RPM.⁸⁹

In contrast to the above, some writers argue that RPM should continue to be *per se* prohibited. Jacobs argues that despite the pro-competitive benefits of RPM, such as the strengthening of inter-brand competition by eliminating free riders at the retail level, RPM can also result in the facilitation of manufacturer and retail cartels, the restoration of an upstream firm's ability to exercise market power, and the elimination of both inter-brand and intra-brand competition.⁹⁰ Gundlachi *et al*, further argues that RPM may also lead to reduced efficiency and innovation and other anti-competitive effects independent of the purposes of its adoption.⁹¹ In the case of a dominant firms, RPM can be abused to forestall innovation in distribution that decreases costs.⁹²

It is submitted that competition authorities must always take cognisance of the fact that minimum RPM, despite its anti-competitive effect, may in some circumstances be pro-competitive. Therefore we cannot turn a blind eye on these pro-competitive effects, but each case should be decided on its own merits.

1.8. Aim of research

Following the Federal Mogul decision, prominent South African competition law scholars criticised the decision of the Tribunal and the Appeal Court. Furthermore, a quick glance of various state jurisdictions makes it clear that the confusion continues to cloud the legitimacy

⁸⁹ Reindt AP (2010) Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach Fordham International Law Journal Vol.33 1303.

⁹⁰ Jacobs ME (2012) Legal Treatment of Vertical Restraints: Some Lessons from The On-going International Debates A Research Paper for the Fiscalia Nacional Economica 2 available at <http://ssrn.com/abstract=2169113> (accessed 5 June 2015).

⁹¹ Gundlachi GT et al (2011) Resale Price Maintenance and Freeriding: Insights from Multichannel Research Academy of Marketing Science Review 20.

⁹² *Leegin Creative Leather Products., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007). A manufacturer with market power may also be tempted to use RPM to give retailers an incentive not to sell the products of smaller rivals or new entrants, thereby leading to the squeezing out new entrants in the market.

and acceptability of minimum RPM as a pro-competitive tool under competition law.⁹³ Notwithstanding that a number of writers and theorists argue for the rule of reason approach to minimum RPM, and even giving empirical evidence on the pro-competitive effects of minimum RPM, this vertical restraint is still *per se* prohibited in a number of jurisdictions.⁹⁴ What this contribution seeks to achieve is to analyse minimum resale price maintenance as a vertical restraint under section 5(2) of the Competition Act,⁹⁵ and further to answer whether the time has come for South African Competition Law to move away from the *per se* prohibition of minimum RPM to the rule of reason approach. In the alternative, this contribution also evaluates whether the Competition Authorities should move from a wide to narrow interpretation of the prohibition in Section 5(2) of the Competition Act.

1.9. Methodology

This contribution will review legislative acts, international instruments, textbooks, journal articles, case law and other relevant publications on minimum RPM. Through a comparative study of South Africa, America (USA) and the European Union (EU), it will be examined on how these prohibitions to minimum RPM, are interpreted and applied. Unfortunately, apart from South Africa there has not been any African state that has dealt with minimum RPM, hence the comparative study is based on the USA together with the EU. Furthermore because the competition authorities and courts in South Africa tend to follow the reasoning of these two jurisdictions in making competition decision, a comparative study on the EU and the USA makes academic sense.

⁹³ Gulati B (2012) Minimum Resale Price Maintenance Agreements: Economic and Commercial Justifications Manchester Journal of International Economic Law Vol.9 Issue 1 95.

⁹⁴ Leegin Creative Leather Prods, Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

⁹⁵ Competition Act 89 of 1998.

1.10. Chapter outline

- 1 Chapter 1 introduces the topic of the mini thesis, the rationale for the paper together with the aims and objectives thereof.
2. Chapter 2: Will focus on minimum RPM in South Africa, and how it is applied by the South African Competition Authorities. This chapter will further analyse the Competition Tribunals decision on Federal Mogul together with the Competition Appeal Court decision.
3. Chapter 3 will focus on minimum RPM, in the USA and the approach taken on the prohibition of minimum RPM in the USA. It will first look at the origin of the *per se* prohibition of minimum RPM in the Sherman Act and the *Dr Miles* case. It will then discuss the *Leegin* case (both the majority and minority decision), and the rationale of move from *a per se* to rule of reason approach to minimum RPM.
4. Chapter 4 will focus on minimum RPM in the EU community, and the approach taken on the prohibition of minimum RPM in the EU.
5. Chapter 5 will provides a general overview of the paper, its conclusion together with its submissions on the approach on minimum RPM

CHAPTER 2

THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE IN SOUTH AFRICA

2.1. Introduction

Just like many developing countries, South Africa's economy consists of highly concentrated markets with significant barriers to entry.⁹⁶ This is as a result of the country's apartheid policies, distancing itself from world markets through its historical reliance on natural-resource extraction.⁹⁷ Isolation from world markets as a result of apartheid led to an inward-looking economy, whereby private businesses were protected and key industries were developed and supported by the apartheid government.⁹⁸ It is in this period where the culture of anticompetitive practices was fostered, and sadly still continues even today in the new democratic South Africa.⁹⁹ It therefore not surprising that resale price maintenance has proven to be a common practice in this era.¹⁰⁰

Before discussing the prohibition of minimum RPM in South Africa, a brief overview of the historical development of South African competition law in relation to minimum RPM, is imperative. Thus this chapter will first discuss the development of competition law in South Africa, and then discuss the current status of minimum RPM. Furthermore, this chapter will discuss Federal Mogul as it is the landmark case on minimum RPM.

⁹⁶ Moodaliyar K and Roberts S (2012) *The Development of Competition Law and Economics in South Africa* Human Sciences Research Council Cape Town South Africa ix.

⁹⁷ Moodaliyar K and Roberts S (2012) *The Development of Competition Law and Economics in South Africa* Human Sciences Research Council Cape Town South Africa ix.

⁹⁸ Moodaliyar K and Roberts S (2012) *The Development of Competition Law and Economics in South Africa* Human Sciences Research Council Cape Town South Africa ix.

⁹⁹ Moodaliyar K and Roberts S (2012) *The Development of Competition Law and Economics in South Africa* Human Sciences Research Council Cape Town South Africa ix.

¹⁰⁰ Lewis D (2012) *Enforcing Competition Rules in South Africa: Thieves at the Dinner Table* International Development Centre Edward Elgar Publishing 135.

2.2. Historical Development of the Prohibition of Minimum Resale Price Maintenance in South Africa

Until 1955, minimum RPM was effectively allowed to take place in South Africa. It was regulated under the common law, whereby minimum RPM was legal, and any aggrieved party could apply to a civil court for relief if that particular aggrieved party could show that the practice was “an unreasonable restraint and detrimental to the public interest.”¹⁰¹ With the exception of the common law, South Africa had little statutory regulation of competition restraints.¹⁰²

The first legal instrument of competition policy drafted to deal with resale price maintenance (RPM) was the Board of Trade and Industries Act 33 of 1924, which was later replaced by the Board of Trade and Industries Act 19 of 1944. On the instruction of the relevant Minister, the Board of Trade and Industry was empowered to investigate and advise the government on the attractiveness of RPM and other alleged monopolistic conditions.¹⁰³ The Unlawful Determination of Prices Act 24 of 1931 prohibited RPM in respect of petrol.¹⁰⁴ The Undue Restraints of Trade Act 59 of 1949 also prohibited RPM together with certain other practices in respect of goods which were declared “controlled articles” by proclamation after recommendation by the Board of Trade.¹⁰⁵

¹⁰¹ Mouton DJ (1969) Resale Price Maintenance in the Republic of South Africa The Antitrust Bulletin 981.

¹⁰² Mouton DJ (1969) Resale Price Maintenance in the Republic of South Africa The Antitrust Bulletin 981.

¹⁰³ Smith A (1994) The Treatment of Collective Resale Price Maintenance in South Africa South African Mercantile Law Journal 6.

¹⁰⁴ Act 24 of 1931.

¹⁰⁵ Act 59 of 1949. This Act was put in place as an interim measure only and was superseded by the 1955 legislation before its provisions could be put to task.

2.3. The Regulation of Monopolistic Conditions Act 24 of 1955

The 1955 Competition law¹⁰⁶ was very cautious and permissive. It was able to define and even controlled a number of “monopolistic conditions” that were potentially anticompetitive.¹⁰⁷ But most significantly none of these practices were prohibited *per se*.¹⁰⁸ Instead, a provision was made for an administrative process to examine particular cases and recommend action.¹⁰⁹ The standard of analysis was simply the “public interest” analysis, which brought about a lot of criticism.¹¹⁰

The Board of Trade and Industries was charged with investigatory powers, recommending remedies, negotiation and supervising compliance.¹¹¹ The Board’s decision could be appealed to a special court. What is noteworthy is the fact that the Board had no independent powers, either of investigation or relief.¹¹² Rather the Minister was the one empowered to decide what was to be investigated and what relief if any would be applied.¹¹³ The law’s remedies and sanctions were prescriptive only, and the violation of such orders could be subject to criminal prosecution.¹¹⁴ It must be pointed out that this law was rarely used, and as such, in the over 20 years of its existence, the minister ordered only 18 investigations.¹¹⁵ It was only in April 1969

¹⁰⁶ Act 24 of 1955.

¹⁰⁷ OECD Peer Review: Competition Law and Policy in South Africa (2003) 12 available at <http://www.oecd.org> (accessed 22 October 2014).

¹⁰⁸ OECD Peer Review: Competition Law and Policy in South Africa (2003) 12 available at <http://www.oecd.org> (accessed 22 October 2014).

¹⁰⁹ OECD Peer Review: Competition Law and Policy in South Africa (2003) 12 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹⁰ OECD Peer Review: Competition Law and Policy in South Africa (2003) 12 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹¹ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹² OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹³ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹⁴ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹¹⁵ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

that resale price maintenance was prohibited in South Africa,¹¹⁶ through General Notice 372 GG 2374 of 28 April 1969, which declared unlawful “*any agreement, understanding, business practice or method which has or is calculated to have of directly or indirectly compelling or inducing a reseller to observe a specified resale price.*”¹¹⁷

It should be noted that commodities like petrol, tyres and tubes, books, magazines and newspapers were exempt from the provisions of the Notice.¹¹⁸ Prosecutions under these Regulations were very rare, specifically because of the difficulty that the State had in obtaining proof of resale price maintenance contraventions. One noteworthy case where the court successfully prosecuted a resale price maintenance crime was in *S v South African Philips (Pty) Ltd and Others*.¹¹⁹

2.4. S v South African Philips (Pty) Ltd and Others

In this case, the accused persons (the company, managing director and a number of its employees) were charged with contravening Notice 1038 of the Regulations of the Monopolistic Conditions Act,¹²⁰ by unlawfully fixing prices at which retailers were obliged to sell television sets and other equipment manufactured by Philips SA.¹²¹ The very essence of the offence was that there had to be a specific price which was sought to be maintained, and such price had to be specified.¹²² The price did not have to be stated as long as it had been imparted or conveyed in a manner that made it definite, clear, not ambiguous or open to misunderstanding.¹²³ What the State had to prove and of paramount importance was the non-

¹¹⁶ Aronstam P (1977) Resale Price Maintenance South African Law Journal Issue 94 142.

¹¹⁷ General Notice 372 GG 2374

¹¹⁸ General Notice 372 GG 2374

¹¹⁹ 1977 (1) SA 446 (C)

¹²⁰ Act 24 of 1955

¹²¹ *S v South African Philips (Pty) Ltd and Others* 1977 (1) SA 446 (C)

¹²² *S v South African Philips (Pty) Ltd and Others* 1977 (1) SA 446 (C) para 448.

¹²³ *S v South African Philips (Pty) Ltd and Others* 1977 (1) SA 446 (C) para 449.

existence of doubt as to the price, what it sought to maintain and that indeed such price was communicated.¹²⁴

Justice Van Zyl, when delivering his judgement first looked at the scope and application of the Notice.¹²⁵ The court firstly pointed out that for the purposes of the provisions, the price need not be stated, as long as it has been imparted or conveyed in a manner that makes it definite, clear, and non-ambiguous.¹²⁶ For the purposes of resale price maintenance the offence was not only committed when the reseller actually sold at a specific price, but also occurred when it is likely that it will have such an effect.¹²⁷ Thus the actual behaviour of the reseller was not of importance, however it was the likely effect of the seller's behaviour that was of importance, namely that it was likely to induce a reseller to observe a specific price, and such observance need not be in respect of each and every occasion when he resells.¹²⁸ Justice Van Zyl further stated obiter that the Act was designed not only to assist and protect the reseller, but also the general public against the stipulating and maintaining of prices and it was also designed to regulate the general effect of monopolistic conditions.¹²⁹ This is because RPM is an effective way to maintain prices with those that are prepared to observe specified resale prices, whilst the public would not be able to purchase the seller's merchandise at any discounted price. The court concluded by stating that for the purposes of RPM "any agreement which had or was likely to have the effect of compelling or inducing any reseller to observe any specified resale price was unlawful."¹³⁰

¹²⁴ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 448-449.

¹²⁵ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 449.

¹²⁶ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 449.

¹²⁷ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 449.

¹²⁸ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 450.

¹²⁹ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 450.

¹³⁰ *S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)* para 450.

2.5. The 1979 Legislation

A commission of enquiry appointed in 1975 severely criticised the enforcement system of the 1955 Act.¹³¹ It submitted that making investigations dependent on the Minister's direction subjected enforcement to too much political influence.¹³² Furthermore the Boards were in conflict, and its chief role of determining tariff levels in order to protect local businesses was hardly a strong position from which to challenge the conduct of those businesses.¹³³ The Commission then called for a new competition body with more resources, stronger penalties against violation of the law and the extension of the law to cover mergers.¹³⁴ It was through the Commission's recommendation that the Maintenance and Promotion of Competition Act 96 of 1979 was enacted.¹³⁵ This legislation created a competition board, appointed by the Minister of Trade and Industry, which could investigate matters on its own initiative.¹³⁶

On the 14th of November 1984, the Competition Board after initiating its own investigations in terms of Section 10(1) (C) of the Act, concluded that resale price maintenance was *per se* unlawful as it is contrary to the public interest, and therefore outlawed such conduct by way of notice in the Government Gazette.¹³⁷ Individual exemptions could still be granted in terms of Section 9 once it had been demonstrated that individual cases were in the public interest.¹³⁸

¹³¹ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹³² OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹³³ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹³⁴ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹³⁵ Smith A (1994) The Treatment of Collective Resale Price Maintenance in South Africa South African Mercantile Law Journal 68.

¹³⁶ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹³⁷ GN 801 Government Gazette 10211 of 2 May 1986.

¹³⁸ Smith A (1994) The Treatment of Collective Resale Price Maintenance in South Africa South African Mercantile Law Journal 68-69.

2.6. Competition Act 89 of 1998

Following the new democratic dispensation, reviewing competition policy was high on the agenda of the first democratic government.¹³⁹ As part of the African National Congress (ANC) Policy Guidelines, an ambitious competition policy was included for a new and democratic South Africa.¹⁴⁰ One goal for this reform was to remedy concentration of economic power on the basis that it had been detrimental to balanced economic development.¹⁴¹ The plan was to adopt a law with international norms and practices, together with the curbing of economic minority domination and to promote greater efficiency in the private sector.¹⁴²

The major criticism by the ANC-led government of the competition legislation it had inherited pre-1994, was that it did not adequately address the extent of concentration of ownership and market share.¹⁴³ It was widely accepted that the Competition Board was relatively ineffective, and after being in the policy agenda since 1994, negotiations on a new law were undertaken with great vigour, with the new Competition Act coming into force on the first of September 1999.¹⁴⁴ The Act makes provision to establish a Competition Commission (CC) with the primary responsibility for determining and investigating prohibited conduct under the Act¹⁴⁵ a Competition Tribunal to make rulings on most cases and a Competition Appeal Court (CAC) for purposes of appealing decisions.¹⁴⁶ The Act deals with two main areas, namely prohibited

¹³⁹ <http://www.compcom.co.za/about/> (accessed 14 August 2015). The intention to review South Africa's competition law regime was documented in the White Paper on Construction and Development in 1994, through Notice 1954 Gazette 16085 of 23 November 1994.

¹⁴⁰ <http://www.compcom.co.za/about/> (accessed 14 August 2015).

¹⁴¹ OECD Peer Review: Competition Law and Policy in South Africa (2003) 13 available at <http://www.oecd.org> (accessed 22 October 2014).

¹⁴² <http://www.compcom.co.za/about/> (accessed 14 August 2015).

¹⁴³ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁴⁴ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

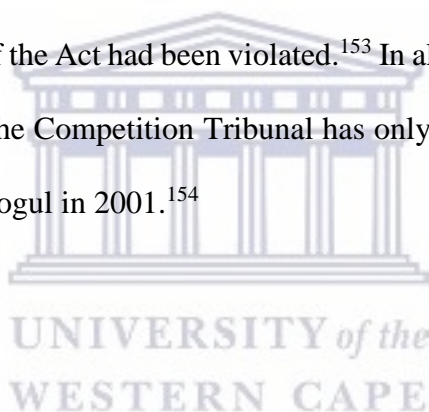
¹⁴⁵ Section 19-21 of Act 89 of 1998.

¹⁴⁶ Section 26 and 27 of Act 89 of 1998. For the powers and functions of the Competition Appeal Court, see section(s) 36 and 37 of Act 89 of 1998.

practices and mergers.¹⁴⁷ Prohibited practices are further separated into restrictive practices (either horizontal or vertical restrictive practices) and abuses of a dominant position.¹⁴⁸

The objectives of the Act are broad and take into account a range of policy concerns, which will not always be necessarily be consistent with each other in the actual evaluation of cases.¹⁴⁹

What is significant about the new Act is that, unlike the past competition regulators, the CC has received a plethora of complaints of prohibited practices.¹⁵⁰ It must be noted however that despite the receipt of such numerous complaints, very few investigations have been referred to the competition tribunal for adjudication.¹⁵¹ This is partly because of complaints being misguided or frivolous, given the high concentration in the economy and indications of monopolistic or collusive behaviour.¹⁵² There has however been numerous consent orders in cases where per se provision of the Act had been violated.¹⁵³ In all the investigations conducted and consent orders obtained, the Competition Tribunal has only ruled on one minimum RPM case namely that of Federal Mogul in 2001.¹⁵⁴



¹⁴⁷ Prohibited practices are covered in Chapter 2 and mergers covered in Chapter 3 of Act 89 of 1998 respectively.

¹⁴⁸ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁴⁹ For the objectives of Competition Act see the preamble and section 2 of Act 89 of 1998.

¹⁵⁰ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁵¹ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁵² Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁵³ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

¹⁵⁴ Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) 7 available at <http://www.tips.org.za/mode/385> (accessed 22 November 2014).

2.7. Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa Pty Ltd and Others (Tribunal Decision)

In this case the complainant, Mr Koos Erasmus, the managing director of Pee Dee Wholesalers (Pty) Ltd, a company which distributed friction products, consisting mainly of Ferodo products, a leading brand in the market, filed a complaint with the Competition Commission in November 1999.¹⁵⁵ Mr Erasmus alleged that he had been forced out of business, as a result of Federal Mogul's decision to reduce the rebate at which they supplied him with products as a result of Pee Dee Wholesalers' participation in a price war.¹⁵⁶ Mr Erasmus alleged that because he offered Federal Mogul products at a lower price than that imposed by competitors, his rebate was reduced, and consequently his margins were cut, thus leading to his business being non-viable.¹⁵⁷ From the perspective of the enforcement of the Competition Act, the Competition Tribunal was faced with determining whether Federal Mogul's action of slashing Pee Dee Wholesalers' rebate constituted an infringement of Section 5(2) of the Competition Act as alleged by the Competition Commission.¹⁵⁸ Section 5(2) as stated in chapter expressly states that the "practice of minimum resale price maintenance is prohibited", unless a supplier or producer recommends a non-binding recommended minimum resale price.¹⁵⁹

¹⁵⁵ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number. 08/CR/Mar01*.para 2.

¹⁵⁶ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number. 08/CR/Mar01*.para 3. Federal Mogul Aftermarkets is part of the Federal Mogul Group of companies, which is a United States Corporation registered on the New York Stock Exchange. It is responsible for sales and distribution of a range of motor-car components inclusive of Ferodo, the products of a large multinational manufacturer of braking equipment.

¹⁵⁷ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number. 08/CR/Mar01*.para 3.

¹⁵⁸ Act 89 of 1998.

¹⁵⁹ Section 5(3) of Act 89 of 1998.

In its decision the Tribunal first stated that section 5(2) does not need the conclusion of an agreement, whereby a breach or violation of such an agreement is followed by a sanction, as averred by the respondents.¹⁶⁰ The Tribunal in paragraph 23 stated as follows:

“...section 5(2) does not on the face of it accord with [this] interpretation. It states plainly that the “practice” of minimum resale price maintenance is prohibited with no reference to an ‘agreement’ to maintain minimum prices...”

The Tribunal did not go into details with the issue of whether an agreement is fundamental or not, for the purposes of Section 5(2), of the Act. Instead the court stated that it will not determine on whether an agreement took place or not because there was sufficient evidence of an understanding in the industry regarding the price at which the distributors such as Pee Dee Wholesalers are generally obliged to sell Ferodo products to their customers.¹⁶¹ The Tribunal further went on and stated that even if there was insufficient evidence of an understanding, “a unilateral determination of a minimum resale price backed up by a sanction for non-compliance still falls foul of Section 5(2).”¹⁶² What the Tribunal therefore merely had to ascertain was why Federal Mogul reduced Pee Dee Wholesalers’ discount.¹⁶³

In its enquiry the tribunal first looked at the determination of Federal Mogul’s rebate in trying to figure out the cause of the cut to the complainant. There was however a factual dispute as to the structure of the rebate which Federal Mogul gave to its customers.¹⁶⁴ The Tribunal upheld the complainant’s version of the rebate structure, and held that:

¹⁶⁰ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 22-23.*

¹⁶¹ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 23.*

¹⁶² *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 23.*

¹⁶³ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 23.*

¹⁶⁴ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 27.* The complainant in this case insisted that Federal Mogul’s pricing of Ferodo

*“...it is clear that the scale of purchases is the pre-eminent, indeed the sole determinant of the level of the rebate afforded at the Federal Mogul customer. This does not of course mean that Federal Mogul was somehow prevented from using in selected cases a reduction in the rebate to punish a customer for a poor payment record, that is, for poor credit worthiness. This will have to be established by the evidence. However, where all the evidence suggests that the rebate is volume related and that the settlement discount is designed to encourage timeous payment or creditworthiness, one must approach specifically the respondent’s insistence that in this single case it reduced the rebate because of considerations related to creditworthiness”.*¹⁶⁵

The Tribunal, on the issue of the Section 5(2) violation stated, that there was as a result of a meeting that took place at Erasmus’s office, there was clear evidence that the rebate was reduced in response to Erasmus’ participation in the price war. In its observation it noted:

“...evidence aside, Nel’s claim that the level of rebate is determined by credit worthiness is unconvincing purely as a matter of business logic and experience. The rebate is determined by up front- indeed the term “rebate” is somewhat misleading because the level of rebate is simply synonymous with, it is actually the sole determinant of the basic price at which Ferodo products are sold to the wholesale distributors. It is common business practice to change a premium price to a customer deemed for whatever reason, to be credit risk thus reducing his potential margins and increasing, if anything, the level of credit risk. If a customer is deemed not to be credit worthy then this assessment will surely be reflected in the volume of credit extended. It

products operates off a standard structure of rebates, with the scale of monthly purchases the sole determinant of the rebate actually received by any given customer. The top discount rate available to the larger purchasers of Ferodo products is 47.5%. The respondent on the other hand insisted that there was no standard rebate structure, however the rebate was determined by a number of factors, most importantly being the customer’s volume of purchases and the customer’s creditworthiness.

¹⁶⁵ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01 para 33.*

*is also common and sensible business to ameliorate the credit risk by the provision of targeted incentives, such as the settlement discount offered by Federal Mogul”.*¹⁶⁶

The tribunal further said that even if the defendant’s version were to be taken into account, the mere fact that the respondent upped the recommended credit limit of Pee Dee Gauteng from R1 million to R1.5 million was enough to show that they did not in any way doubt Pee Dee Gauteng’s credit worthiness.¹⁶⁷ Even though the evidence before it also showed that Erasmus was a “tardy” debtor, Federal Mogul seemed not to be fazed by his actions.¹⁶⁸ This was evidenced by Federal Mogul’s persistent disinclination to use the settlement discount for the purposes for which it was “expressly and solely intended, namely to reign in tardy debtors, but instead used the rebate”.¹⁶⁹

The tribunal further stated that even though it was common business practice in the industry to grant rebates to the customers of wholesale distributors, evidence did however suggest that the rebate was cut as a result of the complainant’s participation in a price war.¹⁷⁰ Secondly the respondent’s financial director’s letter addressed to the commission also suggested that the rebate was cut as a result of a price war.¹⁷¹ The tribunal stated that:

“...but on a balance of probabilities, a more likely explanation is that the reduction in the rebate was never intended to force Erasmus to trade at a lower level or to improve his payment record and so, despite the executive’s assiduous attention to their dealings with Erasmus, these

¹⁶⁶ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 35.

¹⁶⁷ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 37.

¹⁶⁸ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 41.

¹⁶⁹ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 41.

¹⁷⁰ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case Number 08/CR/Mar01* para 47.

¹⁷¹ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 49. Part of the letter stated that Pee Dee entered into a price war situation, which disrupted the market, causing problems for Federal-Mogul users.

aspects of the relationship were not monitored. This is because the reduction was not concerned with these matters. It was rather intended to convey a short, sharp message to those involved or prospectively involved in the price war with Midas”

The tribunal then concluded that the distribution of Ferodo Products was governed by a well-known and clearly understood convention regarding pricing, whereby wholesalers made Ferodo products available to their customers at a price equivalent to 35% of the Federal Mogul Aftermarket list price.¹⁷² It had further been established that periodic meetings were held for the purposes of monitoring compliance with the understanding between the parties.¹⁷³ From these meetings it was further understood that if the rebate that the wholesalers granted their customers was not maintained in accordance with such understanding, such conduct will be followed by a form of sanction from Federal Mogul.¹⁷⁴ The tribunal ultimately concluded that such conduct amounted to the contravention of section 5(2) of the Competition Act.¹⁷⁵

2.7.1. Appeal

After having been ordered to pay an administrative penalty of R3 million, Federal Mogul approached the CAC, in order to appeal the Tribunal's respective decisions. In its appeal Federal Mogul contended that the competition tribunal was mistaken in fact and in law that the appellant had violated section 5(2) of the Competition Act,¹⁷⁶ that section 59 of the Act is unconstitutional in that it permits the Tribunal, an administrative body, to impose a penalty for

¹⁷² *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 80.

¹⁷³ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 80.

¹⁷⁴ *Competition Commission of South Africa v Federal Mogul Aftermarket Southern Africa (Pty) Ltd Case No. 08/CR/Mar01* para 80.

¹⁷⁵ Act 89 of 1998.

¹⁷⁶ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 2.*

the infringement of the Act,¹⁷⁷ and that the penalty imposed of R3 million on the appellant by the Tribunal was not appropriate, taking into account the various factors listed in section 59(3) of the Act.¹⁷⁸

In substantiating the above contention, the appellants submitted that the purposes of prohibiting RPM was to prevent the conclusion of agreements between manufacturers and dealers which, in effect, would require the manufacturer to enforce a horizontal price fixing arrangements between such dealers.¹⁷⁹ They argued that resale price maintenance was not in the view of the appellant, aimed at preventing manufacturers from enhancing the efficiency of their distribution structures.¹⁸⁰ Relying on the doctrine developed in *US v Colgate and Company*¹⁸¹, the appellants contended that the prohibition of resale price maintenance was not designed to restrict the long recognised right of a trader or manufacturer to announce in advance the circumstances under which he will refuse to sell.¹⁸² As such, when a manufacturer announces its intention not to deal with price cutters and dealers respond by not cutting prices it could not then be said that there is a violation of section 5(2) of the Competition Act.¹⁸³ The appellant further argued that there are many pro-competitive reasons why manufacturers may want to stipulate the price at which its goods are sold in the market, and as such this limitation allows manufacturers the freedom to conduct relationships with its dealers in a manner which

¹⁷⁷ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 2*. In this regard, the appellants contended that the Tribunal should not have exercised any power under section 59 to impose any such penalty on the appellant.

¹⁷⁸ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 2*.

¹⁷⁹ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4*.

¹⁸⁰ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4*.

¹⁸¹ *250 US 300 (1919)*.

¹⁸² *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4*.

¹⁸³ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4*.

enhances market efficiency.¹⁸⁴ Accordingly, the appellant contended that in order to establish resale RPM, it is necessary to show that the manufacturer coerced non-compliant parties out of the “vertical agreement” to which the manufacturer is a party, and not merely based on the manufacturer’s “unilateral decision” to impose such restraint.¹⁸⁵

In its judgement the court first pointed out that one must be cautious of applying principles borrowed from other competition law regimes.¹⁸⁶ It was noted that imploring the court to interpret section 5 of the South African Competition Act “through the prism of the United States competition law jurisprudence requires more than a ritual invocation of *dicta* gleaned from a particular decision(s) of the US Supreme Court”.¹⁸⁷ Instead such application, demanded an examination of the jurisprudential reasoning of the particular judgements along with the dominant economic thinking when they were delivered.¹⁸⁸ It also requires the court to look the broad South African policy and socio-economic objectives of the Act, and consideration as to whether the cited *dicta* fits in with the express wording of the Act.¹⁸⁹

The court then went on further to state that section 1 of the Sherman Act is distinguishable from section 5(2) of the South African Competition Act.¹⁹⁰ This the Court stated was because there is no provision for the requirement of an “agreement” in section 5(2), or the requirement

¹⁸⁴ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4.*

¹⁸⁵ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 4*

¹⁸⁶ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 5.*

¹⁸⁷ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 5.*

¹⁸⁸ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 5.*

¹⁸⁹ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 6.*

¹⁹⁰ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 8.*

of an agreement as a necessity in order to show evidence of the prohibited practice.¹⁹¹ The court stated as follows:

*“Significantly, section 5(1) of the Act expressly provides for an agreement between parties in a vertical relationship being prohibited, whereas section 5(2) employs the word “practice. The drafters of the Act clearly regarded resale price maintenance as an egregiously anti-competitive activity and wished to state so in terse and clear terms. The wording of the section indicates that to establish a contravention thereof, it suffices to produce evidence which shows that a supplier has imposed on its distributors a price at which its goods are to be resold and the distributors are thereby induced to comply with this minimum price on pain of a sanction for non-compliance. There is no justification for the application of foreign dicta that not only may be at odds with an express purpose of the Act but the result of which would lead to support for an interpretation which is at war with the express words of the section”.*¹⁹²

The court further stated that the need to prove the existence of an “agreement” certainly placed a greater burden on the complainant or respondent.¹⁹³ The express omission of the word “agreement” was done to reduce such onerous burden which rests with the commission or complainant.¹⁹⁴

On the issue of unilateral determination of minimum resale price, the court looked at the facts before it, and just like the Tribunal rejected the appellant’s contention that creditworthiness was the primary consideration in the decision to cut down on the complainant’s rebate.¹⁹⁵ The

¹⁹¹ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 8.*

¹⁹² *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 8.*

¹⁹³ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 8.*

¹⁹⁴ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 9*

¹⁹⁵ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 20.* The letter explicitly stated that PD Wholesalers’ rebate was reduced to 40% because it had followed the price war, despite having being requested not to do so.

CAC held that, from the evidence presented it was evident that because the complainant had entered into a price war, thus diverging from the understanding regarding the pricing of the appellant's products, the appellant resorted to reducing the complainant's rebate in an effort to discipline them.¹⁹⁶ The court in upholding the Tribunal's decision held that the reduction in the rebate was intended to illustrate to the complainant and other would-be transgressors the consequences of not sticking to manufacturer's rules and standards.¹⁹⁷ Furthermore the court regarded the administrative penalty of R3 million imposed by the Competition Tribunal as appropriate in this case.¹⁹⁸

2.8. Comments and analysis

As mentioned above, section 5(2) states that "the practice of resale price maintenance is prohibited."¹⁹⁹ Thus the *per se* prohibition of minimum RPM is said to apply to the "practice" of minimum RPM.²⁰⁰ For the purposes of section 5(2), the requirement of an agreement is not pertinent, but rather the effect thereof. Accordingly all the authorities need to see is whether there is an understanding or a unilateral determination of a resale price backed by a sanction for non-compliance.²⁰¹ This in turn means that there must at least be an implied acceptance. This implied acceptance theory, as rightly pointed out by Sutherland and Kemp, is a bit problematic, as this theory seems to stretch the concept of agreement too far, and it is doubtful

¹⁹⁶ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 21*

¹⁹⁷ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission Case No. 33/CAC/Sept03 21.*

¹⁹⁸ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission, Case No. 33/CAC/Sept03.* See also Dini M (2004) Recent Developments in Restrictive Practices Cases Investigated by the Competition Commission available at <http://www.bowman.co.za/News-Blog/Blog/recent-developments-in-restrictive-practices-cases-investigated-by-the-competition-commission> (accessed 15 November 2014)

¹⁹⁹ Section 5(2) of Act 89 of 1998.

²⁰⁰ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-47. The Competition Appeal court in *Federal Mogul*, stated that for the purpose of section 5(2) the word "practice" connotes a form of repetitious or habitual conduct of a kind which can be discerned from the evidence as being known and recognised to the interested parties.

²⁰¹ *Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission, Case No. 33/CAC/Sept03.* See also Sutherland and Kemp (2000)6-48.

on whether it fits with the definition of “agreement” in terms of the Act.²⁰² What must also be pointed out in this case is that the Tribunal and the CAC did not discuss any pro-competitive effects of minimum resale price despite such competitive effects being part of Federal Mogul’s arguments.²⁰³ Instead the Court spent most of its reasoning warning about the dangers of applying doctrines used in other jurisdictions.²⁰⁴ However the most surprising aspect of these judgements is that both judgements did not dwell much on the substantive issues of minimum RPM. Sutherland and Kemp note that competition authorities seemed to be reluctant to engage in substantive competition law issues, thereby harming the development of competition law in the country.²⁰⁵ For a first case to come before the Tribunal and Appeal Court, the presiding officers should have at least taken the criticism of the *per se* prohibition of minimum RPM into account when interpreting section 5(2) of the Act.²⁰⁶ The court did not pay closer attention to the fundamental distinction drawn in competition law between unilateral and joint conduct, when it should have done so.²⁰⁷ As a final aside, despite the fact that one should be careful of merely following foreign *dicta*, it is submitted that the court should have analysed the Colgate Doctrine as there are very important policy aspects behind it which justified proper consideration.²⁰⁸ Accordingly these aspects will be discussed in the next chapter.

²⁰² Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-49.

²⁰³ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50.

²⁰⁴ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50.

²⁰⁵ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50.

²⁰⁶ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50

²⁰⁷ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50

²⁰⁸ Sutherland P and Kemp K (2000) Competition Law of South Africa LexisNexis Butterworths 6-50.

CHAPTER 3

THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE

IN THE USA

3.1. Introduction

Resale price maintenance is regulated in the United States of America, by the Sherman Antitrust Act, which forms part of Title 15, Chapter 1 of the US Code.²⁰⁹ Since its inception in 1890, American Courts have on numerous occasions spoken out strongly against minimum RPM agreements.²¹⁰ This chapter will first look at the evolution of the prohibition of minimum RPM in America. And then make comparisons with the prohibition of minimum RPM in South Africa.

3.2. Historical background of minimum resale price maintenance in America.

In 1890, Congress passed the Sherman Act.²¹¹ Among others the Sherman Act prohibited manufacturers from requiring its retailers to sell at a fixed price as such conduct was found to be anti-competitive because it gave manufacturers too much power to control distribution.²¹² The manufacturer could as a result of breach or not abiding by the agreed set price by retailers refuse to deliver the product.²¹³

In 1911, the Supreme Court addressed the issue of minimum RPM in *Dr Miles Medical Co. vs. Park & Sons Co*²¹⁴ holding that agreements where all parties involved were required to comply was illegal.²¹⁵ With this decision, RPM practices were declared *per se* prohibited.²¹⁶ In this

²⁰⁹ Aronstam P (1977) Resale Price Maintenance, South African Law Journal Issue 94 142.

²¹⁰ Aronstam P (1977) 142.

²¹¹ The Sherman Antitrust Act 1890, Ch.647, 26 Stat.209, 15 U.S.C. 1-7. See also Kucuk U.S. and Timmermans H.J.P. (2012) Resale Price Maintenance: The U.S. and E.U. Perspectives Journal of Retailing and Consumer Services Vol.19 538.

²¹² Kucuk U.S. and Timmermans H.J.P. (2012) 538.

²¹³ Kucuk U.S. and Timmermans H.J.P. (2012) 538.

²¹⁴ 220 U.S. 373 (1911).

²¹⁵ 220 U.S. 373 (1911) at 225.

²¹⁶ Kucuk U.S. and Timmermans H.J.P. (2012) 538.

case the complainant, a manufacturer of proprietary medicines presented a system, by which it sought to maintain prices fixed by it for all the sales of its products, both at wholesale and retail level.²¹⁷ Its purpose was to establish minimum prices at which sales could be made by its vendees and by all subsequent purchasers who circulated in its remedies.²¹⁸ Its plan was thus to govern directly the entire trade in the medicines it manufactured, embracing interstate commerce as well as commerce within the state respectively.²¹⁹ To accomplish this result, it adopted two forms of restrictive agreements limiting trade in the articles to those who become parties to one or the other.²²⁰ The one sort of contract, known as "*Consignment Contract -- Wholesale*," had been made with over four hundred jobbers and wholesale dealers, and the other described as "*Retail Agency Contract*," with twenty-five thousand retail dealers in the United States.²²¹

The defendant was a wholesale drug store who had refused to enter into the required contract, and was charged with procuring medicines for sale at "cut prices" by inducing those who made the contracts to violate the restrictions.²²² The complainant accordingly sought relief based on the malicious interferences with the contract between Dr Miles and its other retailers.²²³ The court had to deliberate on whether the vertical restrictive agreements were valid in terms of the Sherman Act.²²⁴

Justice Hughes delivering the opinion of the court, described the features of the agreement as follows:

²¹⁷ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 374.

²¹⁸ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 375.

²¹⁹ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 375.

²²⁰ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 376.

²²¹ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 381-382.

²²² *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 393.

²²³ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 394.

²²⁴ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 395.

*"The contracting wholesalers or jobbers covenant that they will sell to no one who does not come with complainant's license to buy, and that they will not sell below a minimum price dictated by complainant. Next, all competition between retailers is destroyed, for each such retailer can obtain his supply only by signing one of the uniform contracts prepared for retailers, whereby he covenants not to sell to anyone who proposes to sell again unless the buyer is authorized in writing by the complainant, and not to sell at less than a standard price named in the agreement. Thus, all room for competition between retailers, who supply the public, is made impossible. If these contracts leave any room at any point of the line for the usual play of competition between the dealers in the product marketed by complainant, it is not discoverable. Thus, a combination between the manufacturer, the wholesalers, and the retailers to maintain prices and stifle competition has been brought about."*²²⁵

The court went on to say that agreements or combinations between dealers, having for their sole purpose the destruction of competition and the fixing of prices are injurious to the public interest and void.²²⁶ They are therefore not saved by the advantages which the participants expect to derive from the enhanced price to the consumer.²²⁷ Ultimately such agreements were held to be inconsistent with both the common law and the Sherman Act.²²⁸

Of particular importance in this case is the dissenting judgement of Justice Holmes, who stated that the question that the court was to adjudicate on was whether the law forbids the purchaser to contract with his vendor that he will not sell below a certain price.²²⁹ In answering this question, Justice Holmes held that the owner was acting within his rights by regulating the prices to be charged by other vendors.²³⁰ Justice Holmes pointed out that there was no statute

²²⁵ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 399-400.

²²⁶ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 408.

²²⁷ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 408.

²²⁸ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 409.

²²⁹ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 410-411.

²³⁰ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 411.

covering the case, and no body of precedent that by certain logic required the conclusion that the court had reached.²³¹ Justice Holmes pointed out that:

*“The most enlightened judicial policy is to let people manage their own business in their own way, unless the ground for interference is very clear”.*²³²

Eight years later, the jurisprudence shifted, as the court granted more leeway for manufacturers to set minimum resale prices for their products in *US v Colgate*²³³. In its decision, the court held that in cases where there was no written contract or formal agreement between the manufacturers and the distributors, as well as no coercion or discrimination in enforcement, the manufacturer may set a minimum resale price for their products.²³⁴ This reasoning is what is known in competition law as the “Colgate Doctrine.”²³⁵ In the Colgate case, the court was required to interpret an indictment against Colgate & Co, a corporation engaged in manufacturing and selling soap and toilet items in the United States.²³⁶ The indictment alleged that Colgate & Co “knowingly and unlawfully created and engaged in a combination with said wholesalers and retail dealers in the Eastern District of Virginia, and throughout the United States, for the purposes and with the effect of procuring adherence on the part of such dealers in reselling such products sold to them to resale prices fixed by the Colgate & Co, and of preventing such dealers from reselling such products at lower price, thus stifling competition amongst such wholesale dealers and amongst such retail dealers.”²³⁷

The court first pointed out that the purpose of the Sherman Act is to prohibit monopolies, contracts and combinations which probably would unduly interfere with the free exercise of

²³¹ *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at 411.

²³² *Dr Miles Med.Co.v John D. Park & Sons Co., US 373 (1911)* at411.

²³³ *US v Colgate Co, 250 U.S. 300 (1919)*.

²³⁴ *US v Colgate Co, 250 U.S. 300 (1919)* at 307-308.

²³⁵ Kucuk U.S. and Timmermans H.J.P. (2012) 538.

²³⁶ *US v Colgate Co, 250 U.S. 300 (1919)* at 301-302.

²³⁷ *United States vs Colgate Co, 250 U.S. 300 (1919)* at 302-303.

their rights by those engaged in trade or commerce.²³⁸ The court further stated that in the absence of any purpose to create or maintain a monopoly, the Sherman Act did not restrict the long recognised right of a trader or manufacturer engaged in a private business to freely exercise his own independent discretion to choose parties with whom he will deal.²³⁹ The court further stated that the trader or manufacturer may also announce in advance the circumstances under which he will refuse to sell, as the manufacturer or trader carries an entirely private business and can sell to whomever he pleases.²⁴⁰ This reasoning by the court of course accords with Justice Holmes's dissenting judgement in *Dr Miles*.

In 1931, "Fair Trade" was approved on a state by state basis with the exception of the federal prohibition against vertical price fixing.²⁴¹ The reasoning behind the fair trade agreement was to protect the smaller retailer who was fighting for a place in the distribution system against large chain retailers.²⁴² In other words, if RPM is widely applied in the market, it could in turn save many small retailers and enhance market competition.²⁴³ In *Old Dear-born Distributing Corp*²⁴⁴ the court approved the fair trade laws, including a non-signer clause for the dealer who refuses to sign a minimum RPM contract or agreement.²⁴⁵ In 1937, through the Miller-Tydings Fair Trade Act,²⁴⁶ individual states were given the right to opt out of the Supreme Court's ruling forbidding minimum RPM.²⁴⁷ The Court did however find that the Act was not applicable to

²³⁸ *United States vs Colgate Co*, 250 U.S. 300 (1919) at 307.

²³⁹ *United States vs Colgate Co*, 250 U.S. 300 (1919) at 307.

²⁴⁰ *United States vs Colgate Co*, 250 U.S. 300 (1919) at 307.

²⁴¹ Barbora J The law of vertical territorial and price restraints in the EU and in the USA: a critical analysis of vertical territorial and price restraints-an argument against legalisation(PhD thesis, Glasgow University, 2012) 67 available at <http://theses.gla.ac.uk/id/eprint/3313> (accessed 7 February 2015)

²⁴² Albert JB (2012) Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies *Fordham Law Review* Vol.80 1698.

²⁴³ Kucuk U.S. and Timmermans H.J.P. (2012) 538.

²⁴⁴ (1936), 299 U.S. 183.

²⁴⁵ Tor A and Rinner WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason After Leegin *University of Illinois Law Review* 809.

²⁴⁶ 50 Stat.693 (1937).

²⁴⁷ Tor A and Rinner WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason After Leegin *University of Illinois Law Review* 809.

non-signer provisions of State laws in *Schwegmann Bros vs. Calvert Distillers Comp*,²⁴⁸ and thus gave rights to States to enact laws with non-signer provisions.²⁴⁹

In 1952, the McGuire-Keogh Act²⁵⁰ recognised the legality of non-signer provisions and also allowed individual states to opt out of the court's decree forbidding minimum RPM.²⁵¹ The constitutionality of the Act was upheld in *Eli Lilly & Co v Schwegmann Bros*,²⁵² resulting in many States dropping their Fair Trade laws in the late 1950's and thus stopped applying minimum RPM prohibitions.²⁵³

It was only in the beginning of the 1960's that the Supreme Court took a strong stand against RPM involving coercion.²⁵⁴ During this period the legality of RPM was discussed in terms of the practice of the concept by other channel members and non-price constraints.²⁵⁵ In *United States vs Park Davis & Co*²⁵⁶ the court held that the refusal to sell products that applied minimum RPM to wholesalers as well as discounting retailers, unless the wholesalers and retailers are both voluntarily compliant with minimum resale pricing policy was legal.²⁵⁷ In *United States vs Arnold Schwinn & Co*²⁵⁸ the *per se* illegality applied to most "resale restraints", including both price restraints and non-price restraints between manufacturers and retailers was largely overturned in favour of the rule of reason approach.²⁵⁹ The court in this case generally prohibited manufacturer control of product marketing once the dealer received the goods.²⁶⁰

²⁴⁸ *Schwegmann Bros vs. Calvert Distillers Comp* (1951). 341. U.S. 384.

²⁴⁹ *Schwegmann Bros vs. Calvert Distillers Comp* (1951). 341. U.S. 384 at 395.

²⁵⁰ McGuire-Keogh Act, 66. Stat. 631 (1952).

²⁵¹ McGuire-Keogh Act, 66. Stat. 631 (1952).

²⁵² (1953), 346 U.S. 856.

²⁵³ Kucuk U.S. and Timmermans H.J.P. (2012) 538.

²⁵⁴ Kucuk U.S. and Timmermans H.J.P. (2012) 539.

²⁵⁵ Kucuk U.S. and Timmermans H.J.P. (2012) 539.

²⁵⁶ *United States vs Park Davis & Co* (1960) 362 U.S. 29

²⁵⁷ *United States vs Park Davis & Co* (1960) 362 U.S. 29

²⁵⁸ *United States vs Arnold Schwinn & Co* (1967) 388 U.S. 365

²⁵⁹ *United States vs Arnold Schwinn & Co* (1967) 388 U.S. 365 at 379-382.

²⁶⁰ *United States vs Arnold Schwinn & Co* (1967) 388 U.S. 365 at 379

The court however did reason that some vertical restraints could improve competition by allowing smaller businesses to compete.²⁶¹

In the 1970's the point of departure for evaluating the legality of minimum RPM changed and focus was placed on the effects it had on consumers.²⁶² This was as a result of the Consumer Goods Price Act²⁶³ which replaced the Fair Trade Law in 1975.²⁶⁴ As a result of this legislation, minimum RPM was again treated as a *per se* violation of the Sherman Act.²⁶⁵ Consequently in *Continental TV Inc. vs GTE Sylvania, Inc*²⁶⁶ the court indicated that that the rule of reason applied to vertical non-price arrangements.²⁶⁷ The Court explicitly stated that for a departure from the rule of reason standard a "demonstrable economic effect was required rather than a formalistic line drawing".²⁶⁸

Minimum RPM rulings and discussions focused on more detailed and tedious issues in the 1980s.²⁶⁹ There were many cases dealing with minimum RPM in this period, the most noteworthy case being *Russell Stover Candies Inc. vs Federal Trade Commission*.²⁷⁰ In this case, Russell Stover refused to work with retailers who did not apply minimum resale pricing.²⁷¹ The court issued a cease and desist order obligating Russell Stover to announce that the retail prices are suggested prices only. Russell Stover appealed the matter to the 8th Circuit

²⁶¹ *United States vs Arnold Schwinn & Co* (1967) 388 U.S. 365 at 380

²⁶² Albert JB (2012) Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies Fordham Law Review Vol.80 1698.

²⁶³ Barbora J (2012) *The law of vertical territorial and price restraints in the EU and in the USA: a critical analysis of vertical territorial and price restraints-an argument against legalisation* (PhD thesis, Glasgow University, 2012) 68 available at <http://theses.gla.ac.uk/id/eprint/3313> (accessed 7 February 2015).

²⁶⁴ Ippolito P M (1991) Resale Price Maintenance: Empirical Evidence from Litigation The Journal of Law and Economics Vol.34 No.2 263.

²⁶⁵ McKay A and Smith DA The Empirical Effects of Minimum Resale Price Kilts Booth Marketing Series Paper No.1-009 (2004) 4 available at <http://ssrn.com/abstract=2513533> (accessed 23 June 2015).

²⁶⁶ *Continental TV Inc vs GTE Sylvania, Inc* (1977) 433 U.S. 36

²⁶⁷ *Continental TV Inc vs GTE Sylvania, Inc* (1977) 433 U.S. 36 at 42-47. Vertical non-price restraints were defined as exclusive territories and/or exclusive dealing.

²⁶⁸ *Continental TV Inc vs GTE Sylvania, Inc* (1977) 433 U.S. 36 at 58-59.

²⁶⁹ Kucuk U.S. and Timmermans H.J.P. (2012) 538

²⁷⁰ 718F.2d 256

²⁷¹ Kucuk U.S. and Timmermans H.J.P. (2012) 538

court, whose decision reaffirmed the Colgate doctrine.²⁷² Finally in 2007, in *Leegin Creative Leather Prods, Inc. v. PSKS, Inc*, the Supreme Court, did away with the *per se* rule to minimum RPM, and introduced the rule of reason approach for all forms of vertical restraints.

3.3. Leegin Creative Leather Prods, Inc. v. PSKS, Inc.

Leegin was a designer, manufacturer and distributor of leather goods and accessories, and the respondent PSKS operated Kay's Kloset, a women's apparel store.²⁷³ In 1991, Leegin embarked on selling belts under the brand name "Brighton,"²⁷⁴ which having expanded was sold across the USA in over 5000 retail establishments.²⁷⁵ Leegin alleged that with this particular brand small retailers treated customers better, provided customers more services and also ensured that the customer's shopping experience was more satisfactory compared to larger retailers.²⁷⁶ In 1997, Leegin implemented the "Brighton Retail Pricing and Promotion Policy," allowing Leegin to refuse to sell to retailers that discounted Brighton goods below the suggested price.²⁷⁷ The policy further contained an exception for products not selling well that the retailer did not plan on reordering.²⁷⁸ Leegin alleged that it adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy.²⁷⁹

In 1998, Leegin introduced a marketing strategy known as the "Heart Store Program".²⁸⁰ Upon the introduction of the programme, Kay's Kloset subscribed and became a "Heart Store".²⁸¹

²⁷² Kucuk U.S. and Timmermans H.J.P. (2012) 538

²⁷³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2.

²⁷⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2.

²⁷⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2. It mostly sold at small boutiques and speciality stores.

²⁷⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2.

²⁷⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2.

²⁷⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2.

²⁷⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007)2-3

²⁸⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3 this programme offered retailers incentives to become "Heart Stores", and in return, retailers pledged amongst other things to sell at Leegin's suggested price.

²⁸¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3.

The problem started after a Leegin employee visited Kay's Kloset and found the store unappealing.²⁸² After the visit, the parties then agreed that Kay's Kloset would not be a Heart Store beyond 1998.²⁸³ Despite losing the Heart Store status however, Kay's Kloset continued to increase its Brighton sales.²⁸⁴ Upon discovering that Kay's Kloset had been marking down Brighton's entire line, Leegin requested that it comply with its pricing policy.²⁸⁵ Kay's Kloset refused this request, and Leegin resorted to stop selling to Kay's Kloset, resulting to loss of revenue from sales on Kay's Kloset.²⁸⁶ As a result of such loss, PSKS instituted action against Leegin.²⁸⁷ PSKS alleged amongst other claims that Leegin had violated competition laws by entering into agreements with retailers to charge only those prices fixed by Leegin.²⁸⁸ At trial PSKS argued that the Heart Store Programme demonstrated that Leegin and its retailers had agreed to fix prices.²⁸⁹ In response, Leegin relied on the Colgate doctrine, arguing that it had established a unilateral pricing policy which was lawful under section 1 of the Sherman Act.²⁹⁰ The court *a quo* found in favour of PSKS awarding them \$1.2 million. Leegin then appealed the decision disputing that it had entered into vertical price fixing agreements with its retailers and further arguing that the rule of reason should have applied in scrutinising the price fixing agreements.²⁹¹ The appeal was rejected and the matter was then brought to the United States Supreme Court.²⁹²

²⁸² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3

²⁸³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3

²⁸⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3

²⁸⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3. In justifying its actions to mark down Brighton products, Kay's Kloset contended that it placed Brighton products on sale to compete with nearby retailers, who were also undercutting Leegin's suggested price.

²⁸⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 4.

²⁸⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 4.

²⁸⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 4. Leegin had planned to introduce expert testimony describing the pro-competitive effects of its pricing policy. The District Court relying on the *per se* rule established by *Dr Miles* excluded the testimony.

²⁸⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 4.

²⁹⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 4.

²⁹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 5.

²⁹² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 5

In delivering his judgement for the majority, Kennedy J reiterated section 1 of the Sherman Act, and stated that the section prohibits “(e)very contract, combination in the form of trust or otherwise or conspiracy, in restraint of trade or commerce among the several States.”²⁹³ The majority stated that whilst section 1 could be interpreted to proscribe all contracts, the Court has never taken a literal approach rather interpreting the section as outlawing only “unreasonable restraints.”²⁹⁴ The Court further went on to expressly state that the rule of reason is the accepted standard for testing whether a practice restrains trade in breach of section 1 of the Sherman Act.²⁹⁵ The Court however stated that the rule of reason does not govern all restraints, and further acknowledged that some restraints “are deemed unlawful *per se*.”²⁹⁶ It noted that the *per se* rule gives clear guidance for anti-competitive conduct such as horizontal agreements to fix prices and therefore had a role to play. However, the *per se* rule should be confined to only such agreements which are clearly anti-competitive.²⁹⁷ Consequently the court held 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.²⁹⁸ Having stated that the rule of reason is the required standard, the court further went on to say that “*a departure from the rule of reason standard must be based upon demonstrable economic effects rather than upon formalistic line drawing, as it was done in Dr Miles*”.²⁹⁹ The court then warned that courts should be cautious about putting dispositive weight on doctrines from antiquity but of slight

²⁹³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 5.

²⁹⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 5. In such pronouncement, the Supreme Court referred to *Board of Trade Chicago v United States* 246.U.S. 231 288 (1918), *Texaco Inc. v. Dagher* 547. U.S. 15. (2006) and *State Oil v Khan*, 522. U.S. 310 (1997).

²⁹⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 5.

²⁹⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 6. according to the Court, the *per se* rule, treating categories of restraints as necessarily illegal does away with the need to study the reasonableness of an individual restraint in light of the real market forces at work.

²⁹⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 6. As such agreements would always or almost always tend to restrict competition and decrease output.

²⁹⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 6.

²⁹⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 7.

relevance, as had been done with Dr Miles.³⁰⁰ The court stated that the reasons upon which Dr Miles relied upon did not justify a *per se* rule and as such, found it necessary to examine in the first instance the economic effects of vertical agreements to fix minimum resale prices.³⁰¹

In analysing its economic effects, the Court noted that minimum RPM could in theory have some procompetitive effects and that under a variety of market conditions it was unlikely to have anticompetitive effects.³⁰² Noting that there were few studies documenting the competitive effects of minimum RPM, such studies also cast doubt on whether this practice warrants a *per se* prohibition.³⁰³ The Court in its reasoning stated that the justifications for vertical price restraints are similar to those of other vertical restraints.³⁰⁴ In its justification the court stated that minimum RPM can stimulate inter-brand competition by reducing intra-brand competition.³⁰⁵ If therefore a manufacturer's use of vertical price restraint tends to eliminate intra-brand competition, such conduct will encourage retailers to invest in other services that aid the manufacture's position as against rival manufacturers.³⁰⁶ Resale price maintenance also has the potential to give consumers more options so that they can choose among low prices, low service brands, high prices, high service brands, and brands that fall in between.³⁰⁷ Therefore without vertical price restraints, the retail services that enhance inter-brand

³⁰⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9. This was after the Court had observed that the general restraint or alienation especially at the time when Justice Hughes in *Dr. Miles* used the term, tended to evoke policy concerns extraneous to the question that was paramount in this case. These policy concerns were usually associated with land, not chattels, the rule arose from restrictions removing real property from the stream of commerce for generations.

³⁰¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9. The Court did this in order to determine whether the *per se* rule was in any way appropriate for this case.

³⁰² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9.

³⁰³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9.

³⁰⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9.

³⁰⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 9. The promotion of inter-brand competition is important because the primary purpose of competition laws is to promote inter-brand competition.

³⁰⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11. Such services can either be tangible or intangible services or promotional efforts in aid of the manufactures' position in the market.

³⁰⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11.

competition might be lacking.³⁰⁸ This is because discounting retailers would have the opportunity to free-ride on retailers who furnish services and then capture some of the increased demand those services generate.³⁰⁹ In this regard minimum RPM eases the problem because it prevents discounters from undercutting the service provider.³¹⁰ The court further noted that minimum RPM can also increase inter-brand competition by facilitating market entry for new firms and brands in the market.³¹¹ The Court observed that in this way “new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labour that is often required in the distribution of products unknown to the consumer.”³¹² Furthermore the court stated that minimum RPM can increase inter-brand competition by encouraging retailer services that would not even be provided if free-riding occurred in the market.³¹³ This, the Court said, is because, in some cases, it may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer, outlining the different services that the retailer must perform.³¹⁴ In this way, the Court observed, offering a retailer a guaranteed margin together with a threat for termination may be the most efficient way to expand the manufacturer’s share.³¹⁵

The Supreme Court pointed out however, that whilst agreements setting minimum resale prices may have procompetitive justifications, these agreements may also have anticompetitive

³⁰⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11.

³⁰⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11. An example would be where one consumer decides to buy the product because they see it in a retail establishment that has a reputation for selling high quality merchandise. If the consumer then decides to buy the product from a retailer that discounts, because it has not spent capital providing services, the high service retailer will lose sales to the discounter forcing it to cut back its services to a level lower than consumers would otherwise prefer.

³¹⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11.

³¹¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11.

³¹² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11. According to the courts observation, new products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance, there is a procompetitive effect.

³¹³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³¹⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³¹⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

effects.³¹⁶ Minimum RPM could facilitate manufacturer cartels.³¹⁷ In this way, an unlawful cartel would seek to ascertain if individual manufacturers are indeed undercutting the cartel's fixed prices.³¹⁸ Through minimum RPM, cartels would be able to identify price-cutting manufacturers who benefit from the lower prices they offer.³¹⁹ Just as RPM can facilitate manufacturer cartels, it can also facilitate retailer cartel.³²⁰ In this instance, a group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with minimum RPM.³²¹ Resale price maintenance may also be abused by a powerful manufacturer or retailer.³²²

Despite the above mentioned risks of unlawful conduct, the court however held that it cannot be stated with any degree of confidence that resale price maintenance always leads to the restriction of competition.³²³ This is because such agreements can have either procompetitive or anticompetitive effects depending on the circumstances in which they are formed.³²⁴ The court further held that even though the empirical evidence on minimum RPM is limited it does not however suggest that efficient uses of the agreements are infrequent or hypothetical.³²⁵ Accordingly it was held that minimum RPM agreements did not warrant a *per se* prohibition.³²⁶

On the issue of administrative convenience, the court took notice of the fact that *per se* rules do tend to provide guidance to the business community, and also minimises the burden on

³¹⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12. This is because unlawful price fixing, designed solely for monopoly profits is always an ever present temptation in these cases.

³¹⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³¹⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³¹⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³²⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 12.

³²¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 13. . In this instance the court stated that the manufacturer does not establish the practice to stimulate services or to promote its brand, but to give inefficient retailers higher profits.

³²² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14.

³²³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14.

³²⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14.

³²⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14

³²⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14-15.

litigants and the judicial system.³²⁷ However, the court reasoned that the administrative convenience argument suggests that *per se* illegality is the rule rather than the exception.³²⁸ This according to the court is a misinterpretation of competition law.³²⁹ The Court made the following observation:

*“Per se rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct that the antitrust laws should encourage. They may also increase litigation costs by promoting frivolous suits against legitimate practices. The Court has thus explained that administrative “advantages are not sufficient in themselves to justify the creation of per se rules”. And has relegated their use to restraints that are manifestly anticompetitive. Were the Court now conclude that vertical price restraints should be per se illegal based on administrative costs, we would undermine, if not overrule, the traditional demanding standards for adopting per se rules. Any possible reduction in administrative costs cannot justify the Dr Miles rule”.*³³⁰

With regards to minimum RPM leading to higher prices, the court rejected the argument on the basis that the respondent had relied on pricing effects without showing the anticompetitive conduct.³³¹ The Court reasoned that competition laws are primarily designed to protect inter-brand competition, from which lower prices can later result.³³² The court further reasoned that this “higher prices” argument overlooks the fact that in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins.³³³ As such, the Court

³²⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 15.

³²⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 15.

³²⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 15.

³³⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 15.

³³¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 16.

³³² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 16.

³³³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 16. The court rightly observed that the difference between the price a manufacturer charges retailers and the price retailers charge consumers

observed that a manufacturer has no incentive to overcompensate retailers with unjustified margins.³³⁴ In this regard the retailers, and not the manufacturers, gain from higher retail prices.³³⁵

The Supreme Court did concede that minimum RPM did have economic dangers. And if the rule of reason were to apply to such vertical price restraints, courts would have to be more diligent in eliminating their anticompetitive uses from the market.³³⁶ In embarking in this enquiry, the number of manufactures that make use of the practice, the source of the restraint, whether the agreement was motivated by retailers or independent of retailer pressure and the market power of the relevant entity embarking on minimum resale price maintenance would all be relevant considerations.³³⁷

The court stated that the rule of reason is designed to eliminate anticompetitive transactions from markets and that this standard principle applied to vertical restraints in America.³³⁸ Accordingly, a party alleging injury from a vertical agreement setting minimum RPM would have the information and resources available to show the existence of the agreement, together with its scope of operation.³³⁹ As courts gain the much needed experience in considering the effects of the restraints by applying the rule of reason, they may establish the litigation structure to ensure that the rule discards anticompetitive conduct.³⁴⁰

The court then looked into the principle of *stare decisis*, and concluded that the principle was not significant in the case.³⁴¹ In its justification the court held as follows:

represents part of the manufacturers cost of distribution, which like any other cost, the manufacturer usually wants to minimize.

³³⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 16.

³³⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 16.

³³⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 17.

³³⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 13

³³⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19.

³³⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19.

³⁴⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19.

³⁴¹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19.

*“From the beginning the Court has treated the Sherman Act as a common law statute. And just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act’s prohibition on restraints of trade evolve to meet the dynamics of present economic conditions. The cases by cases adjudication contemplated by the rule of reason has implemented this common law approach...likewise the boundaries of per se illegality should not be immovable. For it would make no sense to create out of the single term, “restraint of trade”, a “chronologically schizoid” statute in which the rule of reason evolved with new circumstances and new wisdom, but a line of per se illegality remains forever fixed where it was”.*³⁴²

As such the court then concluded that the principle of stare decisis does not compel the continued adherence to the *per se* rule against vertical price restraints.³⁴³

The court after adjudicating on the issue before it, concluded that the rule of reason and not the *per se* rule is the appropriate standard to judge minimum RPM agreements.

3.3.1. Dissenting Opinion

Judge Breyer in his dissenting opinion greatly criticised the majority judgement, stating that the decision was based on insufficient grounds which did not warrant overturning such a well-established principle.³⁴⁴ He argued that the Sherman Act seeks to maintain a marketplace free of anticompetitive practices, more especially those enforced by private firms, and that competition law was enacted on the assumption that such a market place will tend to bring about competition and efficiency in the market.³⁴⁵

³⁴² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 20.

³⁴³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 20.

³⁴⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2 (Dissenting opinion)

³⁴⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2 (Dissenting opinion) such competition will lead to lower prices, better products and more efficient production processes that would benefit the consumers.

He did however point out that in some instances, the likely anticompetitive effect of a particular practice is so serious and the potential justification so few that courts resort to imposing a rule of *per se* unlawfulness.³⁴⁶ He further argued that competition laws should not accurately duplicate economists' views.³⁴⁷ He justified this statement as follows:

*"...law, unlike economics, is an administrative system, the effects of which depend on the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their client. And the fact that courts will often bring their own administrative judgement to bear, sometimes applying rules per se unlawfulness to business practices even when these practices sometimes produce benefits".*³⁴⁸

Breyer J, further pointed out relevant factors to be considered when overriding the principle of *stare decisis*, and concluded the *per se* rule against minimum RPM should not be done away with. He justified his statement on the premise that the *per se* rule has long been "embedded" in American competition law as it embodies a basic antitrust objective of providing consumers a choice about price, thus creating an easily administrable and enforceable "bright line" on minimum RPM.³⁴⁹ He then concluded that the majority decision, was nothing more than an instrument likely to raise prices at retailer level, and also bring considerable uncertainty on the treatment of minimum RPM as the lower courts seek to develop workable principles on the rule of reason approach to minimum RPM.³⁵⁰

³⁴⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 2 (Dissenting opinion)

³⁴⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3 (Dissenting opinion)

³⁴⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 3 (Dissenting opinion)

³⁴⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 22 (Dissenting opinion).

³⁵⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 23 (Dissenting opinion)

3.4. Comments and Criticisms post Leegin

As a result of the Leegin decision, the rule of reason is the current prevailing and accepted standard for assessing minimum RPM in America.³⁵¹ There are two interpretations of Leegin. For some this was a capstone decision, in which a divided supreme court finished work it began thirty year ago, which was to do away with *per se* prohibitions for all vertical restrictions.³⁵² Some scholars who are cognisant of the pro- and anti-competitive effects of minimum RPM, though welcoming the Leegin decision, advocate for a “quick look” approach, rather than a full blown rule of reason.³⁵³

The “quick look” approach was first adopted in *California Dental Association v. Federal Trade Commission*,³⁵⁴ and intended to be applied restraints that are or should not be *per se* lawful but are sufficiently anti-competitive on their face that they do not require a full blown rule of reason analysis.³⁵⁵ Under this enquiry, the court does not exclude submission of evidence in defense of a practice or agreement that in another field would be *per se* illegal.³⁵⁶ The court will screen the evidence to determine whether proffered pro-competitive effects are plausible, and if plausible then the analysis expands towards a full rule of reason.³⁵⁷ If however no plausible justification is presented, then the practice or agreement can be condemned without further

³⁵¹ Stucke ME (2009) Does the Rule of Reason Violate the Rule of Law University of California Davis Law Review Vol.42 1383.

³⁵² Grimes WS (2008-2009) The Pathway Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints, Antitrust Law Journal Vol.75 468. From this perspective Grimes argues that the Court eliminated barriers to potentially procompetitive vertical restraints and the vestigial remains of centuries old property law concepts with little bearing on modern marketing.

³⁵³ Meese AJ (2013) Assorted Anti-Leegin Canards: Why Resistance is Misguided and Futile Florida State University Law Review Vol.40 912.

³⁵⁴ No. 97-1625 (May 24, 1999).

³⁵⁵ No. 97-1625 (May 24, 1999) II

³⁵⁶ Starling KG (1999) Increasing the FTC’s Burden: Quick Look Versus Full Rule Of Reason Corporations Securities & Antitrust Practice Group Newsletter Vol.13 Issue 2 Summer 1999 available at <http://www.fed-soc.org/publications/detail/increasingthefcburden> (accessed 27 July 2015).

³⁵⁷ Starling KG (1999) Increasing the FTC’s Burden: Quick Look Versus Full Rule Of Reason Corporations Securities & Antitrust Practice Group Newsletter Vol.13 Issue 2 Summer 1999 available at <http://www.fed-soc.org/publications/detail/increasingthefcburden> (accessed 27 July 2015).

analysis.³⁵⁸ The plaintiff must have either a direct or indirect *prima facie* case and once that has been established, the defendant is allowed to rebut, the plaintiff's case.³⁵⁹ Such rebuttal would have to show, not only that the practice sought to address a real business (such as free-riding) but also that the problem generated measurable harm.³⁶⁰ Furthermore, they would also have to show that less restrictive means for addressing this problem were significantly more costly or less effective.³⁶¹ The quick look approach therefore presents an analytical compromise between the *per se* and rule of reason approaches, whilst making provision for an efficient method of managing anticompetitive acts that could otherwise become overly complex.³⁶² It must be pointed out that the quick look has been criticized as a pared down version of the rule of reason offering no novelty or clarity to the analysis.³⁶³ As a matter of fact, Courts have opted for a full rule of reason analysis instead of utilizing the quick look approach.

For commentators in favour of the *per se* prohibition, this decision was a great violation of the principle of *stare decisis*³⁶⁴ and an unwanted foray of judicial activism in direct conflict with legislative intent and based largely on unsupported economic policy premises.³⁶⁵ McMillian argues that the Court's decision to abandon the *per se* rule of Dr Miles represents a "wrong-

³⁵⁸ Starling KG (1999) Increasing the FTC's Burden: Quick Look Versus Full Rule Of Reason Corporations Securities & Antitrust Practice Group Newsletter Vol.13 Issue 2 Summer 1999 available at <http://www.fed-soc.org/publications/detail/increasingtheftcburden> (accessed 27 July 2015).

³⁵⁹ Tor A and Rinne WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason After Leegin University of Illinois Law Review No.3 862.

³⁶⁰ Tor A and Rinne WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason After Leegin University of Illinois Law Review Vol No.3 862.

³⁶¹ Tor A and Rinne WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason After Leegin University of Illinois Law Review Vol No.3 862.

³⁶² Van Cleynebreugel P (2011) Single Entity Test in US Antitrust and EU Competition Law 8 available at <http://ssrn.com/abstract=1889232> (accessed 23 July 2015).

³⁶³ McGuire N (2012) The Antitrust Narcotic: How the Rule of Reason is Lulling Vertical Enforcement to Sleep Loyola of Los Angeles Law Review Vol.45 1230-1231.

³⁶⁴ Grimes WS (2008-2009) The Pathway Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints Antitrust Law Journal Vol.75 468

³⁶⁵ Grimes WS (2008-2009) The Pathway Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints Antitrust Law Journal Vol.75 468 supporters of the *per se* prohibition, view this decision as opening the gates to higher prices on branded products, the loss of freedom of action for discounting retailers and a chaotic judicial administration.

headed” exercise of its judicial power.³⁶⁶ However this argument does not stand in light of changing economic circumstances and experience. As Justice O’Connor pointed out in *State Oil v Khan*³⁶⁷, *stare decisis* is not an “exonerable command in the area of competition law”.³⁶⁸ Furthermore some writers point out that the court in its theoretical analysis did not give clear guidelines on how to apply the rule of reason to minimum RPM.³⁶⁹ Although the Leegin case appears to have opened the door to minimum RPM issues, the rule of reason analytical approach adopted by the court does not provide a clear, unobstructed path to the adoption of such programmes by manufacturers.³⁷⁰ This case has left many questions unanswered, inclusive of the interpretation of the decision and the development of a workable structure for the application of the rule.³⁷¹ As a result, the state of Maryland has passed a “Leegin repealer” which effectively reaffirms the *per se* illegality of resale price maintenance under the State.³⁷² However some manufacturers have taken advantage of the judgement and have petitioned the Federal Trade Commission (FTC), to be released from consent orders prohibiting them from entering into resale price agreements.³⁷³ Some suppliers have already entered into minimum RPM agreements with their retailers, and have cut out their retailers for non-compliance.³⁷⁴ It is thus evident, that even though the rule of reason is now the standard in determining the

³⁶⁶ McMillian L (2008) The Proper Role of Courts: The Mistakes of the Supreme Court in Leegin Wisconsin Law Review 433.

³⁶⁷ *State Oil v Khan* 522 U.S. 3, 7 (1997).

³⁶⁸ 522 U.S. 3, 7 (1997) 20-21.

³⁶⁹ Romano SA (2010) Resale Price Maintenance for Beginners: Beware of the pitfalls The Antitrust Bulletin Vol.55 No.2 516.

³⁷⁰ Romano SA (2010) Resale Price Maintenance for Beginners: Beware of the pitfalls The Antitrust Bulletin Vol.55 No.2 516.

³⁷¹ Gundlach GT (2010) Overview of the Special Issues: Antitrust Analysis of Resale Price Maintenance After Leegin The Antitrust Bulletin Vol.55, No.2. 272-273.

³⁷² Maryland Antitrust Act Md.Code Ann.com.law §§ 11-204.

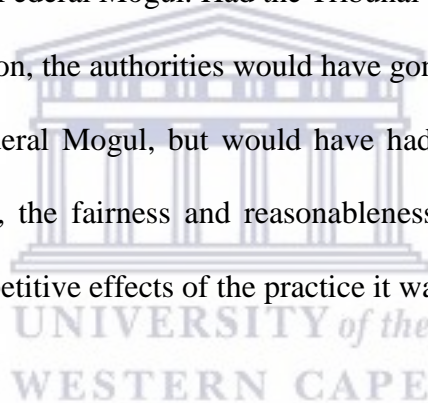
³⁷³ Lao M (2009) Resale Price Maintenance: A Reassessment of its Competitive harms and benefits 9 available at <http://ssrn.com/abstract=1434984> (accessed 23 March 2015).

³⁷⁴ Lao M (2009) Resale Price Maintenance: A Reassessment of its Competitive harms and benefits 9 available at <http://ssrn.com/abstract=1434984> (accessed 23 March 2015).

illegality of minimum RPM, the issue of whether it should be *per se* illegal or looked at under the rule of reason is seemingly still far from over even in the USA.

3.5. Conclusion

This Chapter has briefly looked at the minimum RPM in America, and as stated above the current standard for reviewing minimum RPM in America is the rule of reason. Unlike the South African position, for one to allege that there was an anti-competitive prohibited restraint for minimum RPM there must be an agreement and not a practice as required in South Africa? One wonders whether the competition Tribunal and Appeal Court would have come to a different decision had they engaged the Colgate doctrine and other economic efficiency for the practice of minimum RPM in Federal Mogul. Had the Tribunal and Appellant Court taken the above aspects into consideration, the authorities would have gone further than confining itself to the factual disputes in Federal Mogul, but would have had to look at the agreement or understanding in the practice, the fairness and reasonableness of the practices taking into account its pro- and anti-competitive effects of the practice it was faced with.



Chapter 4

THE TREATMENT OF MINIMUM RESALE PRICE MAINTENANCE IN THE EU.

4.1. Introduction

The earliest European Community competition controls were introduced in the Treaty of Paris which established the European Coal and Steel Community.³⁷⁵ This treaty promulgated specialised rules pertaining only to limited markets.³⁷⁶ The European Union competition law came into existence with the adoption of the Treaty of Rome in 1957 (referred hereunder as the EC Treaty), and established the European Economic Community (EEC) which has been in force since the 1st of January 1958.³⁷⁷ The main enforcement body is the European Commission (EC), which is empowered to investigate, adopt decisions, as well as impose fines and remedies.³⁷⁸ Parties not satisfied with EC decisions, may appeal to the European Court of Justice (ECJ), which also operates as a court of last resort.³⁷⁹ The spectacular development of the European Common Market and its emergence as an integrated economic mechanism, shaped in large measures by the forces of competition, has placed new importance on

³⁷⁵ Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951) Rodger BJ and MacCulloch A (2001) *Competition Law and Policy in the European Community and United Kingdom* 2nded Cavendish Publishing London 16.

³⁷⁶ Rodger BJ and MacCulloch A (2001) *Competition Law and Policy in the European Community and United Kingdom* 2nded Cavendish Publishing London 16.

³⁷⁷ Treaty establishing the European Economic Community (EEC) OJ C 25.3.1957. See also Geradin D and da Silva Pereira Neto (2012) For a Rigorous “Effects Based” Analysis of Vertical Restraints Adopted by Dominant Firms: An Analysis of the European Union and Brazilian Competition Law 17. Available at <http://ssrn.com/abstract=2173735> (accessed 25 March 2015). With a number of modifications to the EC Treaty, it is now called the Treaty of the Functioning of the European Union (TFEU) see also Fulda CH (1965) The First Antitrust Decisions of the Commission of the European Economic Community *Columbia Law Journal* Vol.65 No.4 625.

³⁷⁸ Geradin D and da Silva Pereira Neto (2012) For a Rigorous “Effects Based” Analysis of Vertical Restraints Adopted by Dominant Firms: An Analysis of the European Union and Brazilian Competition Law 17 Available at <http://ssrn.com/abstract=2173735> (accessed 25 March 2015). Despite the EC being the main enforcement body, EU member states’ national competition authorities may also enforce EC rules. The commission is also empowered issues policy documents, such as guidelines, and notices.

³⁷⁹ Geradin D and da Silva Pereira Neto (2012) For a Rigorous “Effects Based” Analysis of Vertical Restraints Adopted by Dominant Firms: An Analysis of the European Union and Brazilian Competition Law 17 available at <http://ssrn.com/abstract=2173735> (accessed 25 March 2015).

legislation and institutional apparatus designed to protect the competitive process against restraints and other measures or formations that tramped their effectiveness.³⁸⁰ This chapter will first look at the evolution of minimum RPM in the European Union, the treatment of minimum RPM, and will further make submissions on such treatment in relation to South Africa.

4.2. Evolution of minimum resale price maintenance in the EU

The discussion and prohibition of resale price maintenance in Europe shows similar shifts in main orientation, reflecting prevailing political views.³⁸¹ Minimum RPM at the European level is regulated in terms of Article 101 of the Treaty of the Functioning of the European Union, 2010 (TFEU).³⁸² Initially minimum RPM was dealt with under Article 85 of the EU Treaty (which eventually became Article 81 EC) together with Council Regulation No.17/62 EEC, which was concerned with multilateral behaviour of undertakings.³⁸³ Article 85 came into force through the implementation of Regulation 17 of the EC Treaty.³⁸⁴ The Article stated all agreements between undertakings and concerted practices which may affect trade between member states, and which have as their object and effect the prevention or restriction or distortion of competition within the common market shall be prohibited.³⁸⁵ Article 85 EU stated as follows:

“(1) the following shall be incompatible with the Common Market and prohibited are all agreements between enterprises, all decisions of associations of enterprises, all decisions of

³⁸⁰ Riesenfeld S.A. (1962) Antitrust Laws in the European Community California Law Review Vol.50 No.3 459.

³⁸¹ Kucuk U.S. and Timmermans H.J.P. (2012) 539.

³⁸² Kucuk U.S. and Timmermans H.J.P. (2012) 539.

³⁸³ Terhorst G (2000) The Reformation of the EC Competition Policy on Vertical Restraints Northwestern Journal of International Law & Business Vol.21 Issue 1 348.

³⁸⁴ European Union Regulation (EEC) No 17/62 of EC Treaty.it must be pointed out that this Regulation was replaced by Regulation (EC) No 1/2003. See also Fulda CH (1965) The First Antitrust Decisions of the Commission of the European Economic Community Columbia Law Journal Vol.65 No.4 625. Fulda argues that the coming into effect of Article 85, should for all practical purposes be regarded as the starting point of the European Community rules governing competition.

³⁸⁵ Kucuk U.S. and Timmermans H.J.P. (2012) 539.

associations of enterprises, and all concerted practices which are apt to affect adversely the commerce between member states and which have as their object or effect the prevention, restriction, or adulteration of competition within the Common Market and especially those which consist in:

- (a) Fixing directly or indirectly the purchase or sales or other conditions of transacting business;*
- (b) Limiting or controlling production, distribution, technical development, or investment;*
- (c) Dividing the markets or sources of supply;*
- (d) Applying unequal conditions for equivalent goods or services vis a vis other contracting parties, thereby inflicting upon them a competitive disadvantage;*
- (e) Conditioning the conclusion of contracts upon the acceptance by other contracting parties of additional goods and services, which neither by their nature nor by commercial usage, have any connection with the objects of these contracts.*

(2) the agreements or decisions prohibited according to this Article are void.

(3) however, the provisions of section (1) may be declared inapplicable to: any agreement or category of agreements between enterprises, any decisions of associations of enterprises, and any concerted practices or category of concerted practices, which contribute to the improvement of the production or distribution of commodities or to the promotion of technological or economic progress, while reserving an appropriate share of the resulting profit to the consumers and without:

(a) imposing on the enterprise involved any restrictions not indispensable for the attainment of these objectives, or

*(b) enabling such enterprise to eliminate competition in respect of a substantial portion of the commodities involved.”*³⁸⁶

From the above, it is evident that Article 85 EU has a two part structure, which contains a general prohibition and an exemption provision.³⁸⁷ In order to hold an agreement, decision or concerted practice in violation of Article 85(1) EU, the Commission must establish that:

1. A restriction of competition exists
2. Such restriction is appreciable, and
3. It affects trade between the member states³⁸⁸

Regulation 17/62, gave the Commission exclusive capability to award exemptions under Article 85(3) EU, and also set up a notification system to the Commission for agreements for which an exemption or negative clearance is sought.³⁸⁹ The coming into force of Regulation 17/62 gave rise to notifications in excess of 30 000 in the 1960s, which prompted the adoption of “block exemptions” in order to give legal certainty to companies with vertical agreements.³⁹⁰ Council Regulation No.19/65 EEC³⁹¹, which empowered the Commission to adopt “Block Exemptions” further contains lists of conditions which had to be fulfilled, the types of agreements covered, restrictive clauses which were exempted and clauses which could not be included.³⁹² Regulation 19/65 is further not applicable to categories of agreements involving

³⁸⁶ Article 85 of Treaty establishing the European Economic Community (EEC) OJ C 25.3.1957

³⁸⁷ Green Paper on Vertical Restraints in EC Competition Policy 28, available at <http://europa.eu.int/en/comm/dq04/dq4home.htm>. (accessed 24 November 2014)

³⁸⁸ Green Paper on Vertical Restraints in EC Competition Policy 28. Available at <http://europa.eu.int/en/comm/dq04/dq4home.htm> (accessed 24 November 2014)

³⁸⁹ Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary, available at <http://europa.eu.int/en/comm/dq04/dq4home.htm> (accessed 24 November 2014)

³⁹⁰ Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary, available at <http://europa.eu.int/en/comm/dq04/dq4home.htm> (accessed 24 November 2014). This decision was made in view of the fact that under the conditions laid down by Regulation 17/62, the Commission was not able to adopt many formal decisions, furthermore its capacity to close case by informal comfort letters was limited.

³⁹¹ OJ No.19, 6.3.1965.

³⁹² Article 1 of Council Regulation No.19/65/EEC OJ No.19, 6.3.1965.

exclusive distribution agreements and exclusive dealing agreements, and restrictions imposed in relation to the assignment of intellectual property rights.³⁹³

As a result of concerns that vertical restraints posed threats to market integration coupled with the ambiguous nature of their impact on competition, the Commission applied Article 85(1) EU relatively widely to vertical restraints.³⁹⁴ This was because the Commission felt that both intra-brand and inter-brand competition are equally important.³⁹⁵ Article 85(1) EU virtually applied automatically to minimum RPM agreements, as it is believed that by their very nature these agreements can only distort competition.³⁹⁶

According to Article 85 EU, vertical agreements that have either as their object or as their effect, the prevention, restriction or distortion of competition in the common market are prohibited.³⁹⁷ In EC law, resale price maintenance refers to agreements or concerted practices having as their direct or indirect object the establishment of a fixed or minimum price level to be observed by the buyer.³⁹⁸ Thus in the case of contractual agreements that expressly establish the resale price, the prohibition is definite.³⁹⁹ However the EU Commission is also cognisant of the fact that resale price maintenance can also be achieved through indirect means, for instance the fixing of the distribution margin or the maximum level of discount the distributor can grant from a prescribed price level.⁴⁰⁰

³⁹³ Article 1 of Council Regulation No.19/65/EEC OJ No.19, 6.3.1965.

³⁹⁴ Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary available at <http://europa.eu.int/en/comm/dq04/dq4home.htm>. (accessed 24 November 2014)

³⁹⁵ Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary available at <http://europa.eu.int/en/comm/dq04/dq4home.htm>. (accessed 24 November 2014)

³⁹⁶ Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary available at <http://europa.eu.int/en/comm/dq04/dq4home.htm>. (accessed 24 November 2014)

³⁹⁷ Raychaundhuri T (2011) Vertical Restraints in Competition Law: The Need to Strike the Balance Between Regulation and Competition NUJS Law Journal Vol.4. 616.

³⁹⁸ OECD Policy Roundtable, Resale Price Maintenance, 2008, DAF/COMP (2008) 37 available at <http://www.oecd.org/competition>. (accessed 12 June 2014)

³⁹⁹ OECD Policy Roundtable, Resale Price Maintenance, 2008, DAF/COMP (2008) 37 available at <http://www.oecd.org/competition>. (accessed 12 June 2014)

⁴⁰⁰ OECD Policy Roundtable, Resale Price Maintenance, 2008, DAF/COMP (2008) 37 available at <http://www.oecd.org/competition> (accessed 12 June 2014)

With the creation of a common market and preventing the re-segmentation of the market, as of paramount importance, the Commission and the ECJ formulated a strict application of Article 85(1) EU towards vertical restraints as a whole.⁴⁰¹ On whether Article 85(1) EU had been violated, a two stage analysis had to take place. Firstly the commission had to ascertain on whether a particular agreement did indeed fall within Article 85 EU, and secondly, if indeed the agreement falls within Article 85 EU, whether the agreement could be exempted under Article 85(3) EU.⁴⁰² If a vertical agreement was found to be falling within Article 85(1) EU, that agreement was deemed to be null and void.⁴⁰³ Article 85(1) EU could however be declared inapplicable and the agreement exempted where the criteria set out in Article 85(3) EU is satisfied.⁴⁰⁴ This approach to vertical restraints inclusive of minimum resale price maintenance was a formalistic approach which manifested itself in a different and more complex way.⁴⁰⁵

4.3. Minimum Resale Price Maintenance under Article 81

Entangled with the difficulties of substantive interpretation was the enforcement structure, which resulted from the ever growing EU business Community⁴⁰⁶ and local authorities lacking the relevant knowledge and expertise in competition law enforcement.⁴⁰⁷ Between 1962 and 2004, agreements could benefit from Article 85 EU, only if they were specifically exempted from Article 85(1) EU prohibition by virtue of either an individual exemption granted by the commission or a block exemption granted by EU Regulation to certain categories of

⁴⁰¹ Terhorst G (2000) The Reformation of the EC Competition Policy on Vertical Restraints Northwestern Journal of International Law and Business Vol.21 Issue.1 348.

⁴⁰² Terhorst G (2000) The Reformation of the EC Competition Policy on Vertical Restraints Northwestern Journal of International Law and Business Vol.21 Issue.1 348.

⁴⁰³ Article 81(2) EC.

⁴⁰⁴ Raychaundhuri T (2011) 616. In other words if the agreement contributes to improving the production or distribution of goods or to promoting technical or economic progress.

⁴⁰⁵ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789.

⁴⁰⁶ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789.

⁴⁰⁷ Qingchuan Z (2004) European Competition Policy Reform LBJ Journal of Public Affairs Vol.XVI 76.

agreements.⁴⁰⁸ This system of course brought about the distortion of the analysis of Article 85 EU, enticing the commission to adopt a broad “jurisdictional” interpretation of Article 85(1) EU.⁴⁰⁹ And so reserving to itself the exclusive right to conduct closer scrutiny of agreement at Article 85(3) EU.

Eventually the commission embarked on a mission to reform Article 85(1) EU and Article 85(3) EU, seeking to deal with the problem that too many agreements were being included under Article 85(1) EU and forcing these agreements into a “strait jacket” in order to satisfy the conditions of Article 85(3) EU.⁴¹⁰ First it reviewed the rules relating to vertical restraints, and at the end of 1999, vertical systems were reformed through:

1. The adoption of a new and more flexible block exemption regulation (BER), providing a safe harbour for broadly all vertical agreements concluded between parties not exceeding a specified market share of up to 30%, but not containing any hard-core vertical restraints.⁴¹¹
2. Secondly through, the publication of accompanying Guidelines explaining both operation of the block exemption and how agreements falling outside the block exemption should be analysed.⁴¹²

Eventually Article 81(1) EC came into effect replacing Article 85(1) of the EU Treaty. Article 81(1) EC prohibits all agreements that “directly or indirectly fix purchase or selling prices or

⁴⁰⁸ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789.

⁴⁰⁹ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789. Equating restraints on economic freedom and interferences with the single market objective of a restriction on competition.

⁴¹⁰ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789.

⁴¹¹ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789. These Regulations were enacted following the publication of a Green Paper, a follow up document, and considered debate on vertical agreements.

⁴¹² Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU – The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 789.

any other trading conditions and that limit or control production, market, technical development, or investment.⁴¹³ Article 81(3) EC gave an exception to agreements which contribute to the improvement of production of goods or the promotion of technical or economic progress.⁴¹⁴ On the 22nd of December 1999, the Commission adopted Regulation (EC) No.2790/99 on the application of Article 81(3).⁴¹⁵ Article 2(1) of Commission Regulation defined vertical agreements as:

*“Agreements or concerted practices entered into between two or more undertakings each of which operates, for the purposes of the agreement, at a different level of the production or distribution chain, and relating to the conditions”.*⁴¹⁶

Under the Regulations, an agreement could be eligible for exemption if it was in line with a set of categorically defined exemptions.⁴¹⁷ However Article 4 which operates as a block exemption stipulated that the “exemption provided for under the Regulations did not apply to agreements which directly or indirectly, in isolation or in combination with other factors under the control of the parties have as their object the setting of minimum resale prices.”⁴¹⁸ Thus under Article 81(1) EC, minimum RPM was prohibited and could not be exempted under Article 81(3) EC.

For an agreement to fall under Article 81(1) EC, the following must be satisfied. First the agreement must have had an appreciable effect on trade between Member States.⁴¹⁹ Secondly, the entities involved must be engaged in economic activity, regardless of their status or way of

⁴¹³ Ghosh S (2007) Vertical Restraints, Competition and the Rule of Reason Antitrust Law and Economics Vol.4 227.

⁴¹⁴ Article 81 of Treaty establishing the European Economic Community (EEC) OJ C 25.3.1957

⁴¹⁵ Commission Regulation (EC) No.2790/99 of 22 December 1999 OJ L, 29.12.1999. See also Terhorst G (2000) The Reformation of the EC Competition Policy on Vertical Restraints Northwestern Journal of International Law and Business Vol.21 Issue.1 344.

⁴¹⁶ Article 2 of Regulation 2790/99.

⁴¹⁷ Article 2 of Regulation 2790/99.

⁴¹⁸ Article 4 of Regulation 2790/99.

⁴¹⁹ Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach 3 available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

financing.⁴²⁰ Thirdly, there must be an existence of some form of collusion, which may either be in some form of an agreement, decision, or concerted practice.⁴²¹ Fourthly, the agreement in question must have its object or effect the restriction of competition.⁴²² Lastly, pursuant to the *de minimis doctrine*, any agreement could fall outside the scope of Article 81(1) EC if its effect on competition was not appreciable.⁴²³

The above changes heralded a more economic approach, both to the operation of the block exemptions and in the application of Article 81(1) EC to agreements falling outside the Article.⁴²⁴ It must be noted that the commission not only relinquished its exclusive right to rule on the compatibility of an agreement in terms of Article 81(1) EC, but further published general guidelines on the application of Article 81(3) EC.⁴²⁵ This brought about clarity to a new and more coherent economic framework for analysis of agreement under Article 81(1) and Article 81(3) EC.⁴²⁶ In particular, the Article Guidelines stated that in order to determine whether an agreement was restrictive of competition within the meaning of Article 81(1), account was to be taken of the likely impact of the agreement with its alleged restrictions.⁴²⁷ Article 81(3) was, in contrast, used to assess whether the restrictive effects of an agreement were outweighed by

⁴²⁰ Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach 3 available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

⁴²¹ Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach 3 available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

⁴²² Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach 3 available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

⁴²³ Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach 3 available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

⁴²⁴ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790.

⁴²⁵ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790.

⁴²⁶ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790. Furthermore the Guidelines explicitly set out that the object of Article 81 EC, should be competition and market integration as a means of enhancing consumer welfare.

⁴²⁷ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790.

potential positive economic effects.⁴²⁸ As a result of these changes, the commission gradually detached itself from its earlier more interventionist policy and moved towards the view that consumer welfare should be the benchmark against which agreements were tested and that a more economic and less rigid analysis of agreements under Article 81 are tested was warranted.⁴²⁹ It accepted that a narrower category of agreements fell within Article 81(1) EC and drew up a Block Exemption Regulation (BER) seeking to tighten and narrow the scope and interpretation of the individual elements of Article 81(3) EC.⁴³⁰

The commission's decision to modernise its approach to Article 81 EC was widely welcomed by many competition law scholars and academics. However it did not go about without any criticism. Some scholars were of the opinion that neither its views of how the objectives of Article 81(3) EC Guidelines were totally reconcilable with the jurisprudential position of the ECJ. Some argued that, even though Article 81(1) and its Regulations heralded a more economic approach, the Article still reflected the same intolerance of conduct that had been manifested in Article 85(1) EC.⁴³¹ Jones expressly states that the then modernised Article 81(1) EC may have aggravated the situation creating greater uncertainty over the issue of whether and if so, when agreements containing such restraints were likely to satisfy Article 81(3) EC conditions.⁴³²

⁴²⁸ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790. The weighting of the agreement is done by weighing the restrictive effects with any economic efficiency gains.

⁴²⁹ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 790.

⁴³⁰ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU-The Case of Hardcore Restraints The Antitrust Bulletin Vol.55. No.4 791.

⁴³¹ Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU – The Case of Hardcore Restraints The Antitrust Bulletin, Vol.55 No.4 792.

⁴³² Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU – The Case of Hardcore Restraints The Antitrust Bulletin Vol.55 No.4 793.

4.4. Article 101 TFEU

As a vertical restraint, minimum RPM falls under Article 101 of the TFEU, which has the purpose of controlling agreements and undertakings that might have adverse effects on competition in the European Union.⁴³³ Article 101 TFEU reads as follows:

“1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

- (a) Directly or indirectly fix purchase or selling prices or any other trading conditions;*
- (b) Limit or control production, markets, technical development, or investment;*
- (c) Share markets or sources of supply;*
- (d) Apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;*
- (e) Make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.”⁴³⁴*

4.5. Application and Interpretation of Article 101 to minimum resale price maintenance in the European Community

Article 101 TFEU, prohibits “all agreements between undertakings which may affect trade between member states and which have as their object or effect the prevention, restriction or

⁴³³ Ryman F *Resale Price Maintenance and Consumer Welfare* (unpublished JAEM03 Master Thesis, Lund University, spring 2014) 8. Available at <http://lup.lub.lu.se/student-papers/search/publications> (accessed 23 July 2015)

⁴³⁴ Article 101 TFEU.

distortion of competition within common market.”⁴³⁵ Such agreements are said to be null and void.⁴³⁶ Agreements presumed to constitute a restriction on competition which be subject to a penalty under Article 101(1) TFEU, if they are capable of affecting trade between Member states.⁴³⁷

Article 101(1) TFEU applies only to anti-competitive conduct engaged in by undertakings on their own initiative.⁴³⁸ In *GlaxoSmithkline v Commission*⁴³⁹ it was held that where a court has to decide whether Article 101(1) TFEU is applicable to a case, it is necessary to first evaluate the possible impact of national regulation.⁴⁴⁰ It must determine whether those regulations leave any scope for competition that might be prevented, restricted, or distorted by the autonomous conduct on the part of the undertakings.⁴⁴¹ Where it is evident, following the evaluation, that the regulations in question require that undertakings engage in anticompetitive conduct or eliminate any possibility competitive activity on their part, Article 101(1) TFEU will not apply.⁴⁴² If however, it is clear that these regulations do leave scope for competition that might be prevented, restricted or distorted on the part of undertakings, Article 101(1) TFEU will of course apply.⁴⁴³

The possibility of excluding particular anti-competitive conduct from the scope of that provision, on the grounds that it is required by national regulations has been applied restrictively by the European Community Courts (ECC).⁴⁴⁴ It is for this reason why Article 101(1) TFEU applies only to bilateral or multilateral conduct on the part of undertakings.⁴⁴⁵

⁴³⁵ *Case COMP/37.800/F3-Luxemburg Brewers (2002) 759 EC.*

⁴³⁶ *JCB Services v Commission –Case C-167/04* para 5.

⁴³⁷ *JCB Services v Commission –Case C-167/04* para 229

⁴³⁸ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴³⁹ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁴⁰ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁴¹ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁴² *GlaxoSmithkline v Commission Case T-168/01* para 5

⁴⁴³ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁴⁴ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁴⁵ *GlaxoSmithkline v Commission Case T-168/01* para 6.

Article 101 TFEU consists of three paragraphs. Article 101(1) TFEU sets out the general prohibition and precludes any form of collusion between undertakings which may have an adverse effect on undistorted competition within the internal market.⁴⁴⁶ Article 101(2) TFEU governs the legal consequences of any violation of prohibited in Article 101(1) TFEU and Article 101(3) TFEU provides for a legal exemption from the prohibition stipulated in Article 101(1) TFEU.⁴⁴⁷

4.5.1. Agreements

For the purposes of Article 101(1) TFEU, and minimum RPM, it is sufficient in order for an agreement to be established, that at least two undertakings have expressed their joint intention to conduct themselves on the market in a specific way.⁴⁴⁸ *GlaxoSmithkline v Commission*⁴⁴⁹, further, states that while it is essential that the decisions in which the Commission applies Article 101(1) TFEU show the existence of a joint intention to act on the market in a specific way, those decisions are not required to establish the existence of a joint intention to pursue an ant-competitive aim.⁴⁵⁰ It is for the Commission to prove the infringements which it finds by adducing precise and coherent evidence demonstrating convincingly the existence of the facts constituting those infringements.⁴⁵¹

The concept of “agreement” within the meaning of Article 101(1) TFEU, centres on the existence of a joint intention between at least two parties.⁴⁵² Consequently a decision of an

⁴⁴⁶ Lorenz M (2013) *An Introduction to European Union Competition Law* 1sted Cambridge University Press 63.

⁴⁴⁷ Lorenz M (2013) *An Introduction to European Union Competition Law* 1sted Cambridge University Press 63.

⁴⁴⁸ *GlaxoSmithkline v Commission Case T-168/01* para 6.

⁴⁴⁹ *GlaxoSmithkline v Commission Case T-168/01* para 5.

⁴⁵⁰ *GlaxoSmithkline v Commission Case T-168/01*

⁴⁵¹ *GlaxoSmithkline v Commission Case T-168/01*. Such evidence may consist of direct evidence, taking the form for example, of a written document or indirect evidence in the form of conduct. See also *SASOL CASE*, where the Court held that the Commission must prove the infringement, which it has found, and adduce evidence capable of demonstrating the requested legal standard the existence of the facts constituting an infringement.

⁴⁵² *Volkswagen AG v Commission of the European Community- Case T-208/01*. See also *Dresdner Bank AG and Others v Commission of the European Communities, joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP*.

undertaking which constitutes a unilateral conduct escapes the prohibition under Article 101(1) TFEU, unless it receives at least acquiescence of another undertaking.⁴⁵³ As stated in *Volkswagen AG v Commission of the European Community*⁴⁵⁴ the Commission cannot therefore hold that unilateral conduct on the part of manufacturer adopted in the context of the contractual relations which it maintains with its dealers, forms the basis of an agreement within the meaning of Article 101(1).⁴⁵⁵ This applies if the Commission does not establish the existence of an acquiescence (express or implied) on the part of the dealers in the attitude adopted by the manufacturer.⁴⁵⁶

If on examination of the risks however, leads to the conclusion that there is indeed an agreement between undertakings within the meaning of Article 101(1) TFEU, as regards the sale of goods to third parties.⁴⁵⁷ The fixing of the retail price of those goods constitutes a restriction of competition expressly provided for in Article 101(1) TFEU.⁴⁵⁸ This brings that agreement within the scope of the prohibition laid down in that provision, to the extent to which all other conditions for the application of that provision are satisfied.⁴⁵⁹ Namely that the agreement has its object or effect to restrict appreciably competition within the common market and is capable of affecting trade between Member states.⁴⁶⁰ In the case of contractual agreements between undertakings, the application of the Block Exemptions is precluded if such agreement contains a clause providing for the fixing of retail prices either maximum or minimum.⁴⁶¹ If an agreement does not however satisfy all the conditions provided for by an exemption regulation, but has its object or effect of restricting or distorting competition within the common market, it

⁴⁵³ *Volkswagen AG v Commission of the European Community- Case T-208/01* para 30-36.

⁴⁵⁴ *Volkswagen AG v Commission of the European Community- Case T-208/01* para 30-36.

⁴⁵⁵ *Volkswagen AG v Commission of the European Community- Case T-208/01* para 36.

⁴⁵⁶ *Volkswagen AG v Commission of the European Community- Case T-208/01* para 36.

⁴⁵⁷ *CEPSA Case C-279/06*.

⁴⁵⁸ *CEPSA Case C-279/06*.

⁴⁵⁹ *CEPSA Case C-279/06* para 42.

⁴⁶⁰ *CEPSA Case C-279/06* para 42.

⁴⁶¹ *CEPSA Case C-279/06* Para 64.

will be caught under Article 101(1) TFEU.⁴⁶² In that case and in the absence of individual exemption, pursuant to Article 101(3) TFEU. The price agreement would be automatically null and void.⁴⁶³

In the case of minimum RPM agreements, in relation to Article 101(1) TFEU prohibition, the nullity of the agreement is absolute.⁴⁶⁴ The absoluteness of such nullity is as stated in *CEPSA Case*⁴⁶⁵ capable of having a bearing on all the effects either past or future of the agreement concerned.⁴⁶⁶ The court did however point out that the automatic nullity of an agreement within the meaning of Article 101(2) TFEU, only applies to those parts of the agreement as whole if it appears that those parts are not severable from the agreement itself.⁴⁶⁷

4.5.2. Object or effect doctrine.

Agreements and concerted practices will only fall under Article 101(1) TFEU if they have as their object or effect the restriction of competition within the EU common market.⁴⁶⁸ The European Courts have emphasised that the requirements of “object or effect” in Article 101(1) TFEU are to be taken into account as alternative and not cumulative, and be read disjunctively.⁴⁶⁹ It is therefore imperative that the object of the agreement must first be established, and if the object is not clear on how the agreement or practice has restricted competition, then the effect of the agreement or practice can be scrutinised.⁴⁷⁰ This is stated in *Societe Technique Miniere v Maschinenbau Ulm*,⁴⁷¹ where the court made the following pronouncement:

⁴⁶² *CEPSA Case C-279/06* Para 72.

⁴⁶³ *CEPSA Case C-279/06* Para 72.

⁴⁶⁴ *CEPSA Case C-279/06* Para 74.

⁴⁶⁵ *CEPSA Case C-279/06* Para 74.

⁴⁶⁶ *CEPSA Case C-279/06* Para 74.

⁴⁶⁷ *CEPSA Case C-279/06* Para 78.

⁴⁶⁸ Van Bael and Bellis (2010) *Competition Law of the European Community* 5thed Kluwer Law International 53.

⁴⁶⁹ Lorenz M (2013) *An Introduction to European Union Competition Law* 1sted Cambridge University Press 92. See also Van Bael and Bellis (2010)53.

⁴⁷⁰ Lorenz M (2013) *An Introduction to European Union Competition Law* 1sted Cambridge University Press 92.

⁴⁷¹ *Case 56/65-Societe Technique Miniere v Maschinenbau Ulm [1966] ECR 235 ECJ (30 June 1966),*

*“the fact that these are not cumulative but alternative requirements indicated by the conjunction “or” leads first to the need to consider the precise purpose of the agreement in the economic context in which it is to be applied. This interference with competition referred to Article 101(1) must result from or some of the clauses of the agreement itself. Where however an analysis of the said clauses does not reveal the effect on competition to be sufficiently deterrent, the consequences of the agreement should then be considered and for it to be caught by the prohibition, it is then necessary to find that those factors are present which show that competition has in fact been prevented/restricted or distorted to an appreciable extent.”*⁴⁷²

a) restriction by object

There are some agreements or practices of which the anti-competitive effects can simply be determined from their objective.⁴⁷³ Restrictions of competition by object are those agreements or practices in which by their very nature have the potential of restricting competition.⁴⁷⁴ It must be noted that the word “object” in this context does not refer to the subjective intention of the parties when entering into an agreement, but the “objective meaning and purpose considered in the economic context in which it is to be applied.”⁴⁷⁵ A number of factors are taken into account in the assessment of whether an agreement includes restrictions by object. Such factors include the terms of the agreement, the context in which the agreement is applied and to the actual conduct and behaviour of the parties on the market.⁴⁷⁶

⁴⁷² *Case 56/65-Societe Technique Miniere v Maschinenbau Ulm [1966] ECR 235 ECJ (30 June 1966).*

⁴⁷³ Whish R (2009) Competition Law 6thed Oxford University Press 116.

⁴⁷⁴ Van Bael and Bellis (2010) Competition Law of the European Community 5thed Kluwer Law International 54. See also Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/ C 89/03) OJ C 89/3 28.3.2014 para 13-14

⁴⁷⁵ *Cases 29/83 and 30/83 Compagnie Royale Asturienne des Mines SA and Rheinzinc GmbH v Commission [1984] ECR 1679, [1985] 1 CMLR 688.* See also Whish R (2009) Competition Law 6thed Oxford University Press 116. *General Motors v Commission [2006] ECR I-3173*

⁴⁷⁶ *GlaxoSmithKline Services Unlimited v Commission and others Case T-168/01* para 22. See also Van Bael and Bellis (2010) Competition Law of the European Community 5th ed Kluwer Law International 54.

b) Restriction by effect

Where an agreement is not restrictive by object to competition, it is always necessary to consider its effects to competition.⁴⁷⁷ This is because an agreement may not be restrictive of competition by object but may nevertheless have the effect of restricting competition.⁴⁷⁸ For an agreement to affect competition, it must be capable of affecting competition to such an extent that negative effects on prices, output, innovation, or the variety or quality of goods and services can be expected on the relevant market with a reasonable degree of probability.⁴⁷⁹ Such analysis must be considered in the context in which it is to be applied. This was confirmed in *Societe Technique Miniere v Maschinenbau Ulm*, where the Court stated as follows:

*“in order to decide whether an agreement containing a clause ‘granting an exclusive right of sale’ is to be considered as prohibited by reason of its object or effect, it is appropriate to take into account in particular the nature and quantity, limited or otherwise of products covered by the agreement, the position and importance of the grantor and the concessionaire on the market for the products concerned, the isolated nature of the disputed agreement or, alternatively, its position in a series of agreements, the severity of the clauses intended to protect the exclusive dealership or, alternatively, the opportunities allowed for other commercial competitors in the same products by way of parallel re-exportation and importation.”*⁴⁸⁰

In *European Night Services v Commission*⁴⁸¹ the Court stated in general terms that account should be taken of the actual conditions in which the agreement functions, in particular the economic context in which the undertakings operate, the products or services covered by the

⁴⁷⁷ Rodger BJ and MacCulloch A (2001) *Competition Law and Policy in the European Community and United Kingdom* 2nd ed Cavendish Publishing Limited London 138.

⁴⁷⁸ Van Bael and Bellis (2010) *Competition Law of the European Community* 5th ed Kluwer Law International 54. See also Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/ C 89/03) OJ C 89/3 28.3.2014 para 15.

⁴⁷⁹ Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements (2014/ C 89/03) OJ C 89/3 28.3.2014 para 16. See also Van Bael and Bellis (2010) 57.

⁴⁸⁰ *Case 56/65-Societe Technique Miniere v Maschinenbau Ulm* [1966] ECR 235 ECJ (30 June 1966),

⁴⁸¹ *Case T-374/94 etc.* [1998] 5 CMLR 718

agreement and the actual structure of the market concerned.⁴⁸² Most importantly the effect on competition should be measured against the competition in the context in which it would occur in absence of the agreement in dispute.⁴⁸³ Consequently, as rightly pointed out by Van Bael and Bellis, in order to determine on whether there is a restriction of competition by effect, it is often necessary to define the relevant market and assess the parties' positions on the market.⁴⁸⁴ This is because, without a full analysis of the market in question it will be difficult to ascertain if the agreement in question has prevented, restricted or distorted competition.⁴⁸⁵ This position was confirmed in *Brasserie de Haecht v Wilkin*, where the court stated the following:

*“It would be pointless to consider an agreement, decision, or concerted practice by reason of its effects if those effects were to be taken distinct from the market in which they are seen to operate.”*⁴⁸⁶

In this regard the Commission must show that the agreement in question has actual or likely negative effects for the application of Article 101(3) TFEU.⁴⁸⁷ On the other hand the firm in question must also show that the agreement causes actual or likely positive effects, which then have to be weighed up against the negative effects.⁴⁸⁸ From the above discussion, it is evident that the distinction between agreements which are anti-competitive by object or effect lies at the very core of EU competition law.⁴⁸⁹

⁴⁸² *Case T-374/94 etc.* [1998] 5 CMLR 718 para 20

⁴⁸³ *Case T-374/94 etc.* [1998] 5 CMLR 718 para 20. See also *Case 56/65-Societe Technique Miniere v Maschinenbau Ulm* [1966] ECR 235 ECJ (30 June 1966 and *General Motors v Commission* [2006] ECR I-3173, paras 64-70.

⁴⁸⁴ Van Bael and Bellis (2010) *Competition Law of the European Community* 5thed Kluwer Law international 57.

⁴⁸⁵ Rodger BJ and MacCulloch A (2001) *Competition Law and Policy in the European Community and United Kingdom* 2nded Cavendish Publishing Limited, London.

⁴⁸⁶ *Case C-49/92P* [1999] ECR I-4125

⁴⁸⁷ OECD Policy Roundtable, *Resale Price Maintenance 2008* DAF/COMP (2008) 37 (10 September) 225 available at <http://www.oecd.org/competition> (accessed 08 November 2014)

⁴⁸⁸ OECD Policy Roundtable, *Resale Price Maintenance, 2008*, DAF/COMP (2008) 37 (10 September) 225 available at <http://www.oecd.org/competition> (accessed 08 November 2014)

⁴⁸⁹ Nagy CS (2013) *The Distinction Between Anti-competitive Object and Effect After Allianz: The End of Coherence in Competition Analysis?* *World Competition Law and Economics Review* Vol.36 No.4 Kluwer Law International BV the Netherlands 541.

4.5.3. Does the effects based approach amount to the rule of reason approach?

The European Courts have expressly stated in their judgements that the effects or object of restricting competition needs to be assessed in the economic context in which the agreement or practice takes place.⁴⁹⁰ On the other hand the rule of reason requires a decision maker to weigh the pro-competitive effects of an agreement or practice together with the anticompetitive effects of the agreement or practice in order to determine on whether the agreement prohibited in a particular provision.⁴⁹¹ Such analysis has raised the question of whether the effects based approach is similar to the rule of reason approach.

The European courts have expressly rejected the rule of reason approach in their cases. In *Metropole Television (M6) and Others v Commission*⁴⁹², the court held that whilst it is true that they favour a more flexible approach to the interpretation of the prohibition laid down in Article 101(1) TFEU, it does not however need to be interpreted as establishing the existence of the rule of reason to the EU competition Law.⁴⁹³ Rather they are “part of a broader trend in the case law according to which it is not necessary to hold, wholly abstractly and without drawing any distinction that any agreement restricting the freedom of action of one or more of the parties is necessary caught by the prohibition laid down in Article 101(1) TFEU.”⁴⁹⁴ The court further reasoned that assessing the applicability of Article 101(1) to an agreement implicitly requires a consideration of the other conditions in which it functions. The court was quick to point out however that this assessment does not mean that it is necessary to weigh the pro and anti-competitive effects of an agreement under Article 101(1).⁴⁹⁵

⁴⁹⁰ Van Bael and Bellis (2010) *Competition Law of the European Community* 5th ed Kluwer Law international 66.

⁴⁹¹ *Standard Oil Co. of New Jersey v United States*, 221 US 1 (1911) para 60.

⁴⁹² *Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 33.*

⁴⁹³ *Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 33 para 75.*

⁴⁹⁴ *Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 33 para 76.*

⁴⁹⁵ *Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR 33 para 77.*

In *O2 (Germany) GmbH & Co OHG (O2) v Commission*,⁴⁹⁶ the court conceded that in order to assess on whether an agreement is compatible with Article 101(1) it is necessary to always examine the economic and legal context in which the undertakings operate.⁴⁹⁷ However, the court also pointed out that such method of analysis does not amount to carrying out an assessment of the pro and anti-competitive effects of the agreement and therefore applying the rule of reason.⁴⁹⁸ The Commission also rejects the rule of reason in its Guidelines, and states as follows:

*“The application of the ancillary restraint concept must be distinguished from the application of the defence under Article 101(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and ant-competitive effects. Such balancing is reserved for Article 101(3) TFEU.”*⁴⁹⁹

From the above it would seem like the Commission and the European courts have vehemently explained that the effects based approach is definitely not the rule of reason. This is because, whilst both approached require the weighing of economic effects of an agreement, the effects based approach balances the pro- and anticompetitive economic effects of an agreement within the framework laid down under Article 101(3). Therefore even though there is a thin line between the two, the rule of reason is not the same as the effects based approach utilised in the European Community.

⁴⁹⁶ *Case T-328/03 [2006] ECR II-1231, [2006] 5CMLR 5.*

⁴⁹⁷ *Case T-328/03 [2006] ECR II-1231, [2006] 5CMLR 5 para 66.*

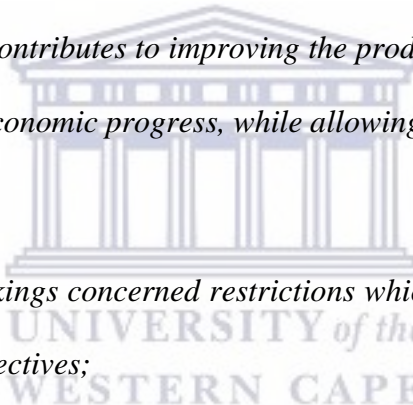
⁴⁹⁸ *Case T-328/03 [2006] ECR II-1231, [2006] 5CMLR 5 para 69.*

⁴⁹⁹ Commission Regulation (EU) No 330/2010

4.6. Article 101(3) and Commission Regulation (EU) No.330/2010

Article 101(3) provides a possible exemption provision for restrictive trade practices and agreements which are found to restrict competition by their object or effect.⁵⁰⁰ This article is aimed at ensuring that agreements and practices which may be found to have restrictive elements stipulated in Article 101(1) are not nullified when they generate superseding efficiency gains.⁵⁰¹ Such exemption system is administered pursuant to Council Regulations which are designed to lay down detailed rules for the application of Article 101(3), and also to simplify administrative exemption backlogs by competition authorities.⁵⁰² Article 101(3) accordingly stipulates that:

“the provisions of Article 101(1) TFEU may be declared inapplicable in the case of an agreement or practice which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the benefit, and which does not:

- 
- a) *Impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;*
 - b) *Afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*⁵⁰³

Exemptions under Article 101(3) may take one of two forms, namely Block Exemptions (applying Article 101(3) to categories of agreements) and individual exemptions. These agreements are presumed to fulfil the conditions laid down in Article 101(3), therefore relieving the parties to these agreements from the burden under Article 2 of Council Regulation

⁵⁰⁰Ezrachi A (2012) EU Competition Law: An Analytical Guide to the Leading Cases^{3rd}ed Hart Publishing Oxford 55.

⁵⁰¹ Van Bael and Bellis (2010) Competition Law of the European Community ^{5th}ed Kluwer Law international 70.

⁵⁰² Livingston D (1995) Competition Law and Practice FT Law & Tax London 50-51.

⁵⁰³ Article 101(3) TFEU. See also Ezrachi A (2012) EU Competition Law: An Analytical Guide to the Leading Cases ^{3rd}ed Hart Publishing Oxford 55.

(EC) 1/2003⁵⁰⁴, of establishing that the agreement satisfies the conditions of Article 101(3) TFEU.⁵⁰⁵ It may also take the form of individual exemption, whereby the party has to show that the agreement satisfies the cumulative conditions under Article 101(3) TFEU.⁵⁰⁶

For the regulation of vertical restraints under Article 101(3) Commission Regulation (EU) No.330/2010, came into effect on the 1st of June and introduced a category of Block Exemptions, which can be exempted under Article 101(3).⁵⁰⁷ Agreements that fall within these Block Exemptions do not need to be notified to competition authorities as they are valid without specific authorisation.⁵⁰⁸ In order to benefit from these block exemptions the agreement must qualify as a vertical agreement, and according to the Regulations a vertical agreement is:

“vertical agreement’ means an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and relating to the conditions under which the parties may purchase, sell or resell certain goods or services.”⁵⁰⁹

This definition covers supply and distribution agreements related to both goods and services, inclusive of intermediate as well as finished goods. An agreement can qualify as a vertical agreement even when each of the parties perform the same economic function.⁵¹⁰ The vertical agreement must to a certain extent contain a vertical restraint, the subject matter of the agreement must fall within the scope of the Regulation and not any other BER.⁵¹¹ Furthermore the individual market share of both the buyer and supplier in the agreement must not exceed

⁵⁰⁴ Council Regulation (EC) No. 1/2003 of 16 December 2002 OJ L1/1 4.1.2003.

⁵⁰⁵ Ezrachi A (2012) EU Competition Law: An Analytical Guide to the Leading Cases 3rded Hart Publishing Oxford pg55.

⁵⁰⁶ Ezrachi A (2012) EU Competition Law: An Analytical Guide to the Leading Cases 3rded Hart Publishing Oxford 55.

⁵⁰⁷ Commission Regulation (EU) No. 330/2010 of 20 April 2010 OJ L 102/1 23.4.2010.

⁵⁰⁸ Whish R (2009) Competition Law 6thed Oxford University Press London 164.

⁵⁰⁹ Article 1(a) of Regulation No.330/2010

⁵¹⁰ Van Bael and Bellis (2010) Competition Law of the European Community 5thed Kluwer Law International 186.

⁵¹¹ Article 2(5) Commission Regulation (EU) No. 330/2010 of 20 April 2010 OJ L 102/1 23.4.2010.

30% of the relevant market.⁵¹² However these regulations do not apply to vertical agreements between competitors, as such may need to be analysed under horizontal guidelines before they can be analysed under vertical guidelines.⁵¹³ In such a case the Regulations will only apply where the competitors enter into a non-reciprocal vertical agreements and the supplier is both the manufacturer and distributor whilst the buyer is a distributor and a not a competitor in the manufacturing level.⁵¹⁴ Or the supplier is a provider of services at several levels of the retail, while the buyer provides goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services.⁵¹⁵ It will also not apply to agreements whose primary objectives constitute intellectual property rights.⁵¹⁶

4.6.1. Hard-core restrictions Article 4 of Regulation 330/2010

The exemption provided for in Article 2 of Regulation No.330/2010 does not apply to vertical agreements which in combination or in isolation, directly or indirectly have as their object the restriction of the buyer's ability to determine the resale price (fixed or minimum resale price).⁵¹⁷ The parties to an agreement may set maximum or recommended resale price as long as it does not indirectly lead to a de facto minimum resale price.⁵¹⁸ These exemptions are not applicable to agreements having as their object the restriction of the territory into which or of

⁵¹² Article 2(1) and Article 3 of Regulation 330/2010

⁵¹³ Article 2(4) of Commission Regulation (EU) No 330/2010. See also Van Bael and Bellis (2010) Competition Law of the European Community 5thed Kluwer Law International 186.

⁵¹⁴ Article 2(4) (a).of Regulation No.330/2010.

⁵¹⁵ Article 2(4) (b) of Regulation No.330/2010.

⁵¹⁶ Article 2(3) of Regulation No.330/2010.

⁵¹⁷ Article 4 (a) of Regulation No.330/2010. See also Para 47 of Commission Notice Guidelines on Vertical Restraints, 2010.

⁵¹⁸ Para 48 of Commission Notice Guidelines on Vertical Restraints. These guidelines give a non-exhaustive list of indirect means that may lead to prohibited resale price. These include an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant rebates of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the to the resale price of competitors, threats, intimidation, warnings, penalties, delays or suspension of deliveries or contract terminations in relation to observance of a given price level.

the customers to whom the buyer may sell contract goods or services.⁵¹⁹ This also applies to indirect measures restricting the buyers' territory to sell contract goods or services.⁵²⁰ Selective distribution agreements and non-compete obligations.⁵²¹

4.6.2. Application of Article 101 and Commission Regulation (EU) No.330/2010 to minimum RPM

Article 101(1) TFEU and Commission Regulation (EU) No.330/2010, expressly states that agreements imposing minimum RPM are part of the hard-core restrictions which are not exempted regardless of whether they cover a small share of the market.⁵²² This implies that minimum RPM agreements will typically have severe difficulties in meeting the criteria in Article 101(3) TFEU.⁵²³ The practice of setting a minimum resale price is generally regarded as having the object of restricting competition.⁵²⁴ As stated above, restriction by object means that minimum RPM in its very nature has the potential of restricting competition.⁵²⁵ As a hard-core restraint, it is presumed that minimum RPM has a very high potential of negative effects in competition law that it is not necessary for the purposes of applying Article 101(1) TFEU, to demonstrate any actual effects on the market.⁵²⁶

However, the EU Commission Vertical Guidelines do state that despite the hard-core nature of minimum RPM, undertakings may still plead efficiency gains under Article 101(3) TFEU.⁵²⁷

Even though the Guidelines are not binding to competition authorities, there may still be a

⁵¹⁹ Article 4(b).of Commission Regulation (EU) No. 330/2010.

⁵²⁰ Commission Notice Guidelines on Vertical Restraints, see also Lorenzo M (2013) An Introduction to EU Competition Law Cambridge University Press 165. Indirect measures include the refusal or reduction of bonuses or discounts, reduction of supplied volumes or threat of contract termination.

⁵²¹ Article 4 and Article 5 of Regulation No.330/2010.

⁵²² Article 4 (a) of Regulation No.330/2010.

⁵²³ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishers UK 442

⁵²⁴ Ezrachi A (2012) EU Competition Law: An Analytical Guide to the Leading Cases³rd ed Hart Publishing Oxford 125.

⁵²⁵ Guidelines on the Application of Article 101 of the Treaty of the Functioning of the European Union to technology transfer agreement O J C 89/3 28.3.2014 para 10-11.

⁵²⁶ Guidelines on the Application of Article 101 of the Treaty of the Functioning of the European Union to technology transfer agreement O J C 89/3 28.3.2014 para 10-11.

⁵²⁷ Commission Vertical Guidelines paras 223-229.

possibility for certain minimum RPM agreements to escape the prohibition of Article 101(1) under 101(3) TFEU.⁵²⁸ In order to get such exemption, the minimum RPM agreement would need to contribute to improving the production or distribution of goods or to promote technical or economic progress, at the same time allowing consumers a fair share of the resulting benefit.⁵²⁹ The agreement may not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives and, they may also not afford the possibility of elimination competition in respect of a substantial part of the products in question.⁵³⁰ The criteria set out in Article 101(3) TFEU has to be satisfied in a cumulative manner and the burden of proof lies with the undertaking claiming pro-competitive gains.⁵³¹

Comments

As has been shown above, EU competition law has consistently considered minimum RPM as a hard core restraint.⁵³² What is striking however, is the seemingly conflicting nature of policy decisions, where on one hand, the Guidelines of the TFEU envisages an analysis that reflects consumer welfare with like price outputs of the particular restraint, while on the other hand minimum RPM is condemned as a hard core restraint.⁵³³ To make matters worse, the courts have been adamant to hold that such agreements by definition restrict competition, and thus do not require further analysis on whether they fall under Article 101(1) TFEU or not.⁵³⁴ Furthermore, the mere fact that there is no single case in which the Commission has exempted

⁵²⁸ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishers UK 441.

⁵²⁹ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishers UK 442.

⁵³⁰ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishers UK 441.

⁵³¹ Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishers UK 441.

⁵³² Gulati B (2012) Minimum Resale Price Maintenance Agreements-The Dilemma Continues The Competition Law Review Vol.8 Issue 2 133.

⁵³³ Gulati B (2012) Minimum Resale Price Maintenance Agreements-The Dilemma Continues The Competition Law Review Vol.8 Issue 2 133.

⁵³⁴ *Case COMP/37.975PO/Yamaha* para 94.

RPM, is further proof that the Commission's approach the RPM is closer to a per se illegality.⁵³⁵

This paper submits that the exemption of hard-core restraints and the application of an effects bases analysis will lead to a better treatment of minimum RPM in the European Community.⁵³⁶

Conclusion

This chapter has given an overview of the evolution and treatment of minimum RPM in the European Community. Minimum RPM is assumed as having the object of restricting competition, and thus prohibited by Article 101(1) TFEU. As seen above minimum RPM does not benefit from Article 101(3) TFEU and Commission Regulation (EU) 330/2010, as it has the object to restrict competition. In comparison with South Africa, one could argue that such standard of regulation is similar to the South African standard form minimum RPM, as South Africa has an exemption provision in section 10. Section 10 allows a firm or undertaking to apply to the commission for an exemption if that agreement or practice meets the requirements under section 10(3)⁵³⁷ or does not constitute a prohibited practice in terms of the Act.⁵³⁸ However this provision expressly states that such exemption does not apply if a restricted practice or agreement is prohibited under the Act.⁵³⁹ Similarly just as minimum RPM is considered a hard core restraint in the EU and does not benefit from the block exemptions, so does minimum RPM in South Africa as it is prohibited under section 5(2) of Act 89 of 1998. Unlike the South African position, the EU, object based approach to minimum RPM does not

⁵³⁵ Verras N (2009) Resale Price Maintenance in EU Competition Law: Thoughts in Relation to the Vertical Restraints Review Procedure The Columbia Journal of European Law Online Vol.16 39. Available at http://cjel.net/online/16_Verras/ (accessed 24 July 2015).

⁵³⁶ Verras N (2009) Resale Price Maintenance in EU Competition Law: Thoughts in Relation to the Vertical Restraints Review Procedure The Columbia Journal of European Law Online Vol.16 40. Available at http://cjel.net/online/16_Verras/ (accessed 24 July 2015).

⁵³⁷ Section 10(3) of Act 89 of 1998 states that the competition commission may grant an exemption in terms of section 10(2)(a) only if any restriction imposed on the firms concerned by the agreement or practice concerned is required to attain an objective of maintenance or promotion of exports, the promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, change in productive capacity necessary to stop decline in industry, or the economic stability of any industry designated by the Minister after consulting the Minister responsible for that industry.

⁵³⁸ Section 10 (2) of Act 89 of 1998.

⁵³⁹ Section 10(2) (b) (ii) of Act 89 of 1998.

imply that there is a per se prohibition to minimum RPM. This is because Article 101(3) TFEU may in some instances apply to minimum RPM agreements.⁵⁴⁰ As such it is always possible, and might happen in future for a firm to come forward with substantiated evidentiary facts that the minimum resale price maintenance agreement will bring about efficiencies.⁵⁴¹



⁵⁴⁰ OECD Policy Roundtable on Resale Price Maintenance, 2008, DAF/COMP (2008) 37 available at <http://www.oecd.org/competition> 225 (accessed 08 November 2014).

⁵⁴¹ OECD Policy Roundtable on Resale Price Maintenance, 2008, DAF/COMP (2008) 37 available at <http://www.oecd.org/competition> 225 (accessed 08 November 2014).

Chapter 5

CONCLUSION

As has been shown above, an important goal for competition law is to protect inter-brand competition in the market place insofar as it promotes consumer welfare. The question that one has to ponder about is why then is minimum RPM, which mainly restricts intra-brand competition, viewed with such great suspicion in many competition law jurisdictions. Of course, as stated above, minimum RPM has pro-competitive gains and anticompetitive effects. As has been observed, minimum RPM is a very useful tool in stimulating inter-brand competition, by reducing intra-brand competition.⁵⁴² It has the potential to give consumers more options so that they can choose among low prices, low services brands, high service brands and brands that fall in-between.⁵⁴³ Thus without vertical restraints, the retail service might be underprovided.⁵⁴⁴ This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate.⁵⁴⁵ Minimum RPM can also facilitate market entry for new firms and brands and also encourage retailer service.⁵⁴⁶ However, even with the procompetitive effects of minimum RPM, one must be wary that there may also be anticompetitive effects. Minimum RPM may facilitate manufacture and retailer cartel, to the detriment of consumers.⁵⁴⁷ It can result in high prices, and foreclosure especially of non-dominant firms.⁵⁴⁸

It should however be noted that there is a scarcity of evidence in support of the pro- and anti-competitive effects of minimum RPM in the market economy, which is why the majority in *Leegin* concluded that per se rule without any tangible evidence, is in such a case, not

⁵⁴² *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 10.

⁵⁴³ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 10.

⁵⁴⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 10.

⁵⁴⁵ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 10.

⁵⁴⁶ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 10.

⁵⁴⁷ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 11-13.

⁵⁴⁸ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 14.

appropriate.⁵⁴⁹ The per se rule is appropriate only after the courts have had considerable amount of experience on minimum RPM issues.⁵⁵⁰

The way forward for South Africa

A great deal of literature has been written on minimum RPM and its economics, however very little has been written about its application and management by its regulatory structures.⁵⁵¹ In the case of South Africa, we must be mindful not to import foreign policies, with regards to minimum RPM, with little or no understanding of the market process and competition policy in general.⁵⁵² As stated in Federal Mogul, we must always be cognisant of the differences and similarities between the South African economy and other economies.⁵⁵³ Not doing so promotes unpredictable and precarious business conditions consequently bringing about cynicism about the rule of law and the value of economic and political decentralization to the public and business community.⁵⁵⁴

South African Competition Authorities currently favour a wide interpretation of the per se prohibition to minimum RPM.⁵⁵⁵ This of course as pointed out by Sutherland and Kemp saves administrative time and convenience for the courts in ascertaining on whether there is an actual agreement in such a case.⁵⁵⁶ It is submitted that such a stand will, in the long run, distort our competition law on minimum RPM, because the outright prohibition thereof is not necessarily in line with the main objectives of competition law. It further overlooks the fact that in some instances, there may be some pro-competitive effects for the imposition of minimum RPM.

⁵⁴⁹ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19-20.

⁵⁵⁰ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) 19-20.

⁵⁵¹ Fels A (2010) A Model of Antitrust Regulatory Strategy Loyola University Chicago Law Journal Vol. 41 489.

⁵⁵² Kovacic E (1997) Getting Started: Creating New Competition Policy in Transition Economies Brook Journal International Law Vol.23 405.

⁵⁵³ Lake R (2011) Developing a Methodology for Assessing Restraints Within Dual-Distribution Systems in Competition Law Complaints in South Africa South African Mercantile Law Journal Vol.23 173.

⁵⁵⁴ Kovacic E (1997) Getting Started: Creating New Competition Policy in Transition Economies Brook Journal International Law Vol.23 405

⁵⁵⁵ Sutherland and Kemp (2000) 6-51.

⁵⁵⁶ Sutherland and Kemp (2000) 6-51.

Having such caution in mind, the question therefore is what then would be a fair approach to minimum RPM in South African Competition Law? Should we then use the EU or US position in minimum RPM? If relying on the US position, it would mean that we do away with the per se rule for the rule of reason prohibition. However we must be mindful of the fact that, bringing in a rule of reason would mean deciding each case on a case-by case basis, taking into account the economic effects of that resale practice in the market. It then becomes of paramount importance that guidelines on the application of the rule of reason in the case of minimum RPM are clearly set out by the courts or the Competition Act.

The EU position, with its effects-based approach, seems to be a better fit for South Africa. Notwithstanding this approach, minimum RPM is still in practice dealt with as a per se prohibition in the EU. The courts have also shown some reluctance in taking a quick look approach to the economic effects of minimum RPM in the EU.

It is submitted that we should not merely follow the US position of adopting the rule of reason as it would place an undue administrative burden on local competition authorities. The effects-based approach seems like a better option, however following the EU position would still render minimum RPM anti-competitive by object and effect. It is with such difficulties, that this paper proposes a narrow interpretation to minimum resale price maintenance. With such interpretation, an actual agreement or acquiescence must be required. The competition authorities must then take a “quick look” at the economic effects of that agreement. If they do find that an agreement or acquiescence was indeed present, and such conduct may or will lead to anti economic effects, such agreement may then be declared illegal per se. in such analysis, the plaintiff must ensure that they have a prima facie case, and the burden will then have to place on the defendant to prove that the agreement or practice will bring about efficiency gains and was also necessary and only remedy available in such circumstances.

BIBLIOGRAPHY

EU Treaties:

Treaty on the Functioning of the European Union (Consolidated version)-OJ C 326 (2012).

Treaty on the European Union OJ C 191, 29.7.1992.

Treaty establishing the European Coal and Steel Community (Paris, 18 April 1951)

Treaty establishing the European Economic Community (EEC) OJ 25.3.1957.

EU Commission Regulations:

Commission Regulation (EU) No.330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices OJ L102/1 23.4.2010.

Commission Regulation (EC) No.2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices.

Council Regulation No.17/62 EEC: First Regulation implementing Articles 85 and 86 of the Treaty OJ 013, 21/02/1962.

Regulation No.19/65/EEC of the Council of 2 March 1965 on the application of Article 83 (3) of the Treaty to certain categories of agreements and concerted practices OJ No.19, 6.3.1965.

EU Non- binding legislation:

Commission Notice Guidelines on Vertical Restraints OJ C 291, 13.10.2000.

Siphiwe Katlego Mdluli (3171375)

Commission Notice Guidelines on the Application of Article 101 of the Treaty of the Functioning of the European Union to technology transfer agreement (2014/C 89/03) OJ C 89/3 28.3.2014.

Guidelines on the Explanation of the Block Exemption Communiqué on Vertical Agreements
No: 2002/2 J C 89 28.3.2014.

South African Legislation:

Board of Trade and Industries Act 19 of 1944

Competition Act 89 of 1998.

Consumer Goods Pricing Act 89 Stat.801.

General Notice 372 GG 2374 of 28 April 1969

General Notice 801 Government Gazette 10211 of 2 May 1986.

Maintenance and Promotion of Competition Act 96 of 1979.

The Regulation of Monopolistic Conditions Act 24 of 1955.

Undue Restraints of Trade Act No.59 of 1949

Unlawful Determination of Prices Act 24 of 1931

USA Legislation:

McGuire-Keogh Act, 66. Stat. 631 (1952).

Miller-Tydings Fair Trade Act 50 Stat.693 (1937).

The Sherman Antitrust Act, July 2, 1890, ch.647, 26 Stat 209, 15 U.S.C. 1-7.

CASES

EU Case Law:

Brasserie de Haecht v Wilkin Case C-49/92P [1999] ECR I-4125.

Case 29/83 and Compagnie Royale Asturienne des Mines SA [1984] ECR 1679

Case 30/83 Rheinzinc GmbH v Commission, [1985] 1 CMLR 688

Case C-279/06 CEPSA

Case COMP/37.800/F3-Luxemburg Brewers (2002) 759 EC.

Case COMP/37.975PO/Yamaha

Case 56/65-Societe Technique Miniere v Maschinenbau Ulm [1966] ECR 235 ECJ (30 June 1966),

Comp/39125-Carglass.

Dresdner Bank AG and Others v Commission of the European Communities, joined cases T-44/02 OP, T-54/02 OP, T-56/02 OP, T-60/02 OP and T-61/02 OP.

European Night Services v Commission Case T-374 etc [1998] 5 CMLR 718.

General Motors v Commission [2006] ECR I-3173

GlaxoSmithkline v Commission- Case T-168/01

JCB Services v Commission –Case C-167/04

Metropole Television (M6) and Others v Commission Case T-112/99 [2001] ECR II-2459, [2001] 5 CMLR.

O2 (Germany) GmbH & Co OHG (O2) v Commission Case T-328/03 [2006] ECR II-1231, [2006] 5CMLR 5.

Siphiwe Katlego Mdluli (3171375)

Volkswagen AG v Commission of the European Community- Case T-208/01.

South African Cases:

Competition Commission of South Africa v Federal Mogul and Others, Case No.08/CR/Mar01.

Federal Mogul Aftermarket Southern Africa (PTY) Limited v The Competition Commission and Another, Case No. 33/CAC/Sep03.

S v South African Philips (Pty) Ltd and Others 1977 (1) SA 446 (C)

USA Cases:

Board of Trade Chicago v United States 246.U.S. 231 288 (1918).

California Dental Association v. Federal Trade Commission No.97-1625 (May 24, 1999).

Continental T.V. Inc v GTE Sylvania Inc, 433 U.S. 36, 49 ,1977.

Dr Miles Medical Co. v John D. Park and Sons Co, 220 US 373.

Eli Lilly & Co v Schwegmann Bros (1953) 346 U.S. 856.

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 127 S. Ct. 2705 (2007).

Monsanto Co v Spray-Rite Service Corp Monsanto v Spray-Rite Service Corp 104 SCt 1464 (1984)

Old Dear-born Distributing Corp (1936) 299.U.S. 183

Russell Stover Candies Inc. vs Federal Trade Commission 718F. 2d.256.

Schwegmann Bros vs. Calvert Distillers Comp (1951). 341. U.S. 384

Standard Oil Co. of New Jersey v United States, 221 US 1 (1911)

Siphiwe Katlego Mdluli (3171375)

State Oil v Khan, 522. U.S. 310 (1997).

Texaco Inc. v. Dagher 547. U.S. 15. (2006).

US v Colgate Co, 250 U.S. 300 1919

United States v General Motor Corp 384 U.S. (1966).

United States vs Park Davis &Co (1960) 362 U.S. 29

United States vs Arnold Schwinn &Co (1967) 388 U.S. 365

Books:

Brassey M et al (2002) Competition Law 1st Ed Juta Law.

Colino SM (2010) Vertical Agreements and Competition Law: A Comparative Study of the EU and US Regimes Hart Publishing Oxford and Portland Oregon.

Dabbah MM (2010) International and Comparative Competition Law Cambridge University Press New York.

Ezrachi A et al (2012) Research Handbook on International Competition Law Edward Elgar Publishing Ltd Cheltenham UK.

Hylton K.N (2010) Antitrust Law and Economics Edward Elgar Publishing.

Lewis D (2012) Enforcing Competition Rules in South Africa: Thieves at the Dinner Table International Development Centre Edward Elgar Publishing.

Livingston D (1995) Competition Law and Practice FT Law &Tax London.

Lorenz M (2013) An Introduction to European Union Competition Law 1st ed, Cambridge University Press.

Siphiwe Katlego Mdluli (3171375)

Moodaliyar K and Roberts S (2012) *The Development of Competition Law and Economics in South Africa* Human Sciences Research Council Cape Town South Africa.

Rodger BJ and MacCulloch A (2001) *Competition Law and Policy in the European Community and United Kingdom* 2nd ed Cavendish Publishing London.

Sutherland P and Kemp K (2000) *Competition Law of South Africa* LexisNexis Butterworths.

Van Bael and Bellis (2010) *Competition Law of the European Community* 5th ed, Kluwer Law International.

Whish R (2009) *Competition Law* 6th ed Oxford University Press.



Articles:

Albert JB (2012) Adding Uncertainty to the Virtual Shopping Cart: Antitrust Regulation of Internet Minimum Advertised Price Policies Fordham Law Review Vol.80.

Aronstam P (1977) Resale Price Maintenance South African Law Journal Issue 94

Cho SE (2013) Reports on Korean Law: A Comparative Analysis on Resale Price Maintenance; Korean Supreme Court's Current Standpoint on Minimum Resale Price Maintenance In Light of Leegin Creative Leather Korea University Law Review.

Devlin F (2009) Resale Price Maintenance and Leegin: Opening Kay's Closet Opened the Lid on Pandora's Box in Global Competition Law Houston Journal of International Law Vol.31.

Fels A (2010) A Model of Antitrust Regulatory Strategy Loyola University Chicago Law Journal Vol.41.

Fulda CH (1965) The First Antitrust Decisions of the Commission of the European Economic Community Columbia Law Journal Vol.65, No.4.

Ghosh S (2007) Vertical Restraints Competition and the Rule of Reason Antitrust Law and Economics Vol.4.

Gulati B (2012) Minimum Resale Price Maintenance Agreements: Economic and Commercial Justifications Manchester Journal of International Economic Law Vol.9, Issue 1.

Gundlachi GT et al (2011) Resale Price Maintenance and Freeriding: Insights from Multichannel Research Academy of Marketing Science Review.

Grimes WS (2008-2009) The Pathway Forward After Leegin: Seeking Consensus Reform of the Antitrust Law of Vertical Restraints Antitrust Law Journal Vol.75.

Siphiwe Katlego Mdluli (3171375)

Hartzenberg T (2006) Competition Policy and Practice in South Africa: Promoting Competition for Development Symposium on Competition Law and Policy in Developing Countries *Northwestern Journal of International Law and Business*, Vol.26, Issue 3.

Hovenkamp H (1985) Antitrust Policy After Chicago *Michigan Law Review* Vol.84 N.o.2.

Ippolito P M (1991) Resale Price Maintenance: Empirical Evidence from Litigation *The Journal of Law and Economics* Vol.34 No.2.

Jones A (2010) The Journey Towards an Effects Based Approach Under Article 101 TFEU- The Case of Hardcore Restraints *The Antitrust Bulletin* Vol.55. No.4.

Kovacic E (1997) Getting Started: Creating New Competition Policy in Transition Economies *Brook Journal International Law* Vol.23.

Kucuk U.S. and Timmermans H.J.P. (2012) Resale Price Maintenance: The U.S. and E.U. Perspectives *Journal of Retailing and Consumer Services* Vol 19.

Lake R (2011) Developing a Methodology for Assessing Restraints Within Dual-Distribution Systems in Competition Law Complaints in South Africa *South African Mercantile Law Journal* Vol.23.

Mcguire N (2012) The Antitrust Narcotic: How the Rule of Reason is Lulling Vertical Enforcement to Sleep *Loyola of Los Angeles Law Review* Vol.45.

McMillian L (2008) The Proper Role of Courts: The Mistakes of the Supreme Court in *Leegin Wisconsin Law Review*.

Nagy CS (2013) The Distinction Between Anti-competitive Object and Effect After Allianz: The End of Coherence in Competition Analysis? *World Competition Law and Economics Review* Vol.36. No.4. Kluwer Law International BV The Netherlands.

Siphiwe Katlego Mdluli (3171375)

Meese AJ (2013) Assorted Anti-Leegin Canards: Why Resistance is Misguided and Futile
Florida State University Law Review Vol.40.

Mouton DJ (1969) Resale Price Maintenance in the Republic of South Africa The Antitrust
Bulletin.

Qingchuan Z (2004) European Competition Policy Reform LBJ Journal of Public Affairs
Vol.XVI.

Raychaudhuri T (2011) Vertical Restraints in Competition Law: The Need to Strike the
Balance Between Regulation and Competition NUJS Law Review Vol.4.

Reindt AP (2010) Resale Price Maintenance and Article 101: Developing a More Sensible
Analytical Approach Fordham International Law Journal Vol.33.

Riesenfeld S.A. (1962) Antitrust Laws in the European Community California Law Review
Vol.50. No.3.

Romano SA (2010) Resale Price Maintenance for Beginners: Beware of the pitfalls The
Antitrust Bulletin Vol.55. No.2.

Smith A (1994) The Treatment of Collective Resale Price Maintenance in South Africa South
African Mercantile Law Journal.

Stucke ME (2009) Does the Rule of Reason Violate the Rule of Law University of California
Davis Law Review Vol.42.

Terhorst G (2000) The Reformation of the EC Competition Policy on Vertical Restraints
Northwestern Journal of International Law and Business Vol.21.

Tor A and Rinner WJ (2011) Behavioural Antitrust: A New Approach to the Rule of Reason
After Leegin University of Illinois Law Review.

Internet Sources:

Dini M (2004) Recent Developments in Restrictive Practices Cases Investigated by the Competition Commission available at <http://www.bowman.co.za/News-Blog/Blog/recent-developments-in-restrictive-practices-cases-investigated-by-the-competition-commission> (accessed 15 November 2014)

Geradin D and da Silva Pereira Neto (2012) For a Rigorous “Effects Based” Analysis of Vertical Restraints Adopted by Dominant Firms: An Analysis of the European Union and Brazilian Competition Law available at <http://ssrn.com/abstract=2173735> (accessed 25 March 2015).

Jacobs ME (2012) Legal Treatment of Vertical Restraints: Some Lessons from The On-going International Debates A Research Paper for the Fiscalia Nacional Economica available at <http://ssrn.com/abstract=2169113> (accessed 5 June 2015).

Lao M (2009) Resale Price Maintenance: A Reassessment of its Competitive harms and benefits available at <http://ssrn.com/abstract=1434984> (accessed 23 March 2015).

McKay A and Smith DA (2014) The Empirical Effects of Minimum Resale Price, Kilts Booth Marketing Series, Paper No.1-009 available at <http://ssrn.com/abstract=2513533> (accessed 23 June 2015)

Roberts S The Role of Competition Policy in the Economic Development: The South African Experience Trade and Industrial Policy Strategies (TIPS) Working Paper 8 (2004) available at <http://www.tips.org.za./mode/385> (accessed 22 November 2014)

Starling KG (1999) Increasing the FTC’s Burden: Quick Look Versus Full Rule Of Reason Corporations Securities & Antitrust Practice Group Newsletter Vol.13 Issue 2 Summer 1999

Siphiwe Katlego Mdluli (3171375)

available at <http://www.fed-soc.org/publications/detail/increasingtheftburden> (accessed 27 July 2015).

Van Doorn F () Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach available at <http://ssrn.com/abstract=1501070> (accessed 11 February 2015)

Van Cleynenbreugel P (2011) Single Entity Test in US Antitrust and EU Competition Law available at <http://ssrn.com/abstract=1889232> (accessed 23 July 2015).

Verras N (2009) Resale Price Maintenance in EU Competition Law: Thoughts in Relation to the Vertical Restraints Review Procedure, The Columbia Journal of European Law Online, Vol.16. Available at http://cjel.net/online/16_Verras/ (accessed 24 July 2015).

<http://www.compcom.co.za/about/> (accessed 14 August 2015)

Theses:

Barbora J (2012) *The law of vertical territorial and price restraints in the EU and in the USA: a critical analysis of vertical territorial and price restraints-an argument against legalisation* (PhD thesis, Glasgow University, 2012) available at <http://theses.gla.ac.uk/id/eprint/3313> (accessed 7 February 2015).

Ryman F *Resale Price Maintenance and Consumer Welfare* (unpublished JAEM03 Master Thesis, Lund University, spring 2014) available at <http://lup.lub.lu.se/student-papers/search/publications> (accessed 23 July 2015)

Siphiwe Katlego Mdluli (3171375)

Policy and research papers:

Green Paper on Vertical Restraints in EC Competition Policy, Executive Summary available at <http://europa.eu.int/en/comm/dg04/dg4home.htm> (accessed 24 November 2014)

NBER Working Paper Series Exclusionary Minimum Resale Price Maintenance Working Paper 16564 available at <http://www.nber.org/papers/w16564> (accessed 23 June 2015)

OECD Peer Review: Competition Law and Policy in South Africa May 2003 available at <http://www.oecd.org> (accessed 22 October 2014).

OECD Policy Roundtable on Resale Price Maintenance, 2008, DAF/COMP (2008) available at <http://www.oecd.org/competition> (accessed 08 November 2014).

Parikshith N Final Report Competition Commission of India-Demystifying the Rule of Per Se and Rule of Reason in the Indian Context 2011 available at <http://www.cci.gov.in/images/media/researchreports> (accessed 23 July 2015)

