LIDC Congress 2010

Report for the Congress

Question A

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

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1 Introduction – the aim and structure of this report

The aim of this international report ("**the Report**") is to examine "which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?" The basis for assessment is national reports drafted by thirteen national reporters, of which ten from the European Union ("**EU**"). I would like to thank the national groups and the national reporters for their comprehensive and high-quality work.[2] Needless to say, any failure to correctly perceive and present the information in the national reports is mine alone.

Austrian Report - *Astrid Ablasser-Neuhuber, Gerhard Fussenegger,* bpv Huegel
Belgian Report - *Elise Provost,* University of Liège
Brazilian Report – *Paulo Parente Marques Mendes,* Di Blasi, Parente, Vaz e Dias & Associados
Czech Report - *Vlastislav Kusák*, Law Office Štros Kusák
French Report – *Mathilde Boudou, Muriel Chagny, Emmanuel Durand, Nizar Lajneff, Erwann Mingam, Charles-Louis Saumon, Guillaume Taillandier,* and *Juliette Vanard*
German Report – *Daniela Seeliger and Michael Baron,* Linklaters LLP
Hungarian Report – *Zoltán Marosi,* Oppenheim
Italian Report – *Elisa Teti*, Rucellai&Raffaelli
Japanese Report – *Jun Takahashi*, Miyakezaka Sogo Law Offices
Swedish Report – *Robert Moldén*, The Swedish Competition Authority and University of Lund
Swiss Report - *Anna-Antonina Skoczylas*, Swiss Competition Commission
UK Report - *Bruce Kilpatrick,* Addleshaw Goddard

The main focus of the report is various kinds of resale price maintenance ("**RPM**"), which refers to agreements between a seller and a buyer setting limits on the price at which the buyer may resell the products purchased. Typically the agreement is between a manufacturer and retailers and concerns the price at which they may sell to final consumers. Emphasis has been given to illustrate national case-law with examples from the national reports. As may be seen from the conclusions the report suggests proposals for the future treatment of RPM.

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[2] Gratitude is also expressed towards law student Oscar Jansson who has assisted in the drafting of this report. The national reports are published at: http://www.ligue.org/congres.php.

The basis for the national reports is a questionnaire.[3] The questionnaire dealt with the anti-competitive effects as well as the pro-competitive effects of RPM and which kind of efficiencies that are accepted and not in the various jurisdictions and whether the specifics of vertical restraints are sufficiently taken into regard. There were also questions regarding the sanctions imposed. Since I am a competition lawyer in private practise I have tried to make the Report as pragmatic as possible for those assessing vertical agreements.

The Report is structured as follows. The conclusions to be discussed at the LIDC Congress are presented in Section 2. Section 3 introduces the concept of RPM. Since the majority of national reports are based on the EU legal system a brief overview is given to the EU competition rules on vertical restraints in Section 4. For those familiar with the EU rules this Section may be disregarded. Thereafter the rules on vertical restraints in the thirteen reporting countries are briefly presented in Section 5. In the following Section the rules on resale price maintenance are analysed more in detail as to the rules for assessment of RPM under national law (Section 6), the anti-competitive effects of RPM (Section 7) and the pro-competitive effects of RPM (Section 8). In the following Section, Section 9 the sanctions issued for RPM in the reporting countries are dealt with and the next Section, Section 10, consists of an assessment of the approach towards RPM in the reporting countries. In the last Section, Section 11, an analysis of the Commission's approach in the Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices ("**the new VRBE**")[4] is presented. It is also analysed whether further changes are required.

Although the report focuses chiefly on the developments at the European level since the large majority of the national reporters reporters are from EU countries,Ihope that it will provide food for reflection also for law makers and stake holder in countries not belonging to the EU.

2 Conclusions

On the basis of the national reports and the analysis above the following proposal is submitted for discussion by the LIDC Congress.

1. Safe harbours are important for undertakings dealing with distribution of products. Considering the recent more tolerable approach towards resale price maintenance in Europe as well as in the US the following safe-harbours are proposed.

    i) Maximum prices and recommended prices should be permissible, at least when the supplier has a market share below 30 percent.
    ii) RPM should be permissible in case the parties both have a market share below 15 percent.
    iii) When assessing maximum prices and recommended prices the overall context of the agreement should be analysed in order to ensure that the acts of the supplier does not lead to a de facto fixed or minimum retail price. In such case the possible efficiencies allowing for an exemption should be assessed.
    iv) Short-term low price campaigns with fixed prices shall always be permissible regardless of the parties' market shares.
    v) Minimum and fixed retail prices shall still be able to qualify for an exemption if efficiencies may be proved such as
        - Introduction of a new product or a supplier entering a new market;
        - Pre-sales services.

[3] See: http://www.ligue.org/congres.php?lg=en&txtt=18

[4] Commission Regulation 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Official Journal L 102, 23.4.2010, p.1-7.

3 Introduction – Resale Price Maintenance

The European Commission defines resale price maintenance as follows: (point 48 of its Vertical Restraints Guidelines ("**the 2010 Guidelines**"[5]) "...agreements or concerted practices having as their *direct or indirect* object the *establishment of a fixed or minimum resale price* or a fixed or minimum price level to be observed by the buyer. In the case of contractual provisions or concerted practices that directly establish the resale price, the restriction is clear cut. However, RPM can also be achieved through *indirect means*. Examples of the latter are *an agreement fixing the distribution margin, fixing the maximum level of discount the distributor can grant from a prescribed price level, making the grant of rebates or reimbursement of promotional costs by the supplier subject to the observance of a given price level, linking the prescribed resale price to the resale prices of competitors, threats, intimidation, warnings, penalties, delay or suspension of deliveries or contract terminations in relation to observance of a given price level*. Direct or indirect means of achieving price fixing can be made more effective when combined with *measures to identify price-cutting distributors*, such as the implementation of a price monitoring system, or the obligation on retailers to report other members of the distribution network that deviate from the standard price level. Similarly, direct or indirect price fixing can be made more effective when combined with *measures which may reduce the buyer's incentive to lower the resale price*, such as the supplier printing a recommended resale price on the product or the supplier obliging the buyer to apply a most-favoured-customer clause. *The same indirect means and the same 'supportive' measures can be used to make maximum or recommended prices work as RPM*. However, the use of a particular supportive measure or the provision of a list of recommended prices or maximum prices by the supplier to the buyer is not considered in itself as leading to RPM" (emphasis added).

Discussions regarding RPM have been analogized to religious differences: many beliefs, little fact to support them.[6] As Gippini-Fournier puts it "[t]here are many 'possible theorems' explaining to varying degree of persuasiveness, that RPM may be used for good or evil. In turn, what is 'good' and what is 'evil' is also informed by prior beliefs about the role of antitrust law, and philosophical positions."[7]

As will be further developed below (Section 6.1) under EU law RPM has been treated as a so-called hard-core restraint for decades.

The European Commission ("**the Commission**") did in 1999 release a new block exemption for vertical restraints, replacing several specific block exemptions for certain kinds of vertical agreements, Regulation 2790/1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices ("**the 1999 VBRE**"). The new approach was founded on a sounder economic base than the previous regulations. The straight-jacketing of individual provisions (in the form of black and white lists) in an agreement was exchanged with a few hardcore-prohibitions and otherwise unlimited possibilities for the parties to choose the provisions in their agreement. Among the hardcore-prohibitions RPM appeared although maximum prices and recommended prices were permissible.

[5] *Commission notice - Guidelines on Vertical Restraints*, OJ 2010/C 130/1.

[6] P. J. Harbour, *Consumer Benefits and Harms from Resale Price Maintenance: Sorting the Beneficial Sheep from the Antitrust Goats?* (Opening Remarks, Resale Price Maintenance Workshop, February 17, 2009) (available at http://www.ftc.gov/speeches/harbour/090217rpmwksp.pdf) (hereafter, Harbour, Consumer Benefits), at 6.

[7] See Gippini-Gournier, Eric, *Resale Price Maintenance in the EU: in statu quo ante bellum?*, Fordham Corp. L. Inst - 36th Annual Conference on International Antitrust Law and Policy, 2009 (B. Hawk ed., 2010) (also http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1476443), p. 32, citing D. P. O'Brien, The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorems, in The Pros and Cons of Vertical Restraints 40, Konkurrensverket (2008), at 82, concedes at the end of a thorough review of the economic literature that his views on the appropriate interpretation of the law are "based largely on a Hippocratic philosophy of nonintervention absent good evidence that intervention will have benefits". See also J. Cooper, L. Froeb, D. O'Brien and M. Vita, A Comparative Study of United States and European Union Approaches to Vertical Policy, 13 George Mason Law Review 289 (2005) (arguing that differences between EU and US enforcement postures toward vertical restraints can be explained by different priors and loss functions).

The question about the economic rationale to prohibit RPM has always been debated by both legal practitioners and scholars and economists and with the *Leegin* ruling[8] in 2007 by the United States ("**US**") Supreme Court discussions of the prohibition on RPM flourished. The *Leegin* decision overturned the long standing precedent, *Dr. Miles*[9], from 1919 that treated RPM as a *per se* violation of U.S antitrust rules, in favour of a rule of reason analysis. How RPM will be treated by the US courts under the rule of reason remains to be seen. Botteman and Kuilwijk claims that "some commentators have suggested that, given the fact that defendants often succeed in lower courts when restraints are examined under the rule of reason, *Leegin*, would cause minimum RPM to be treated as, in effect *per se* legal in many situations."[10] The precise implications of the *Leegin* ruling has yet to be defined.

After a decade of application of the 1999 VRBE a new draft block exemption was published for public review in autumn 2009, which led to numerous submissions from interested parties.[11] The new VRBE[12] which was published 20 April 2010 entered into force 1 June 2010. The new block exemption regulation mirrors a shift in the European Commission's view on RPM as will be developed below (Section 4.6). The question is whether the Commission went sufficiently far in its new approach and how should national competition authorities and courts in Europe and the rest of the world deal with the issue? This is a suitable subject for discussion at the Annual Congress.

4 The EU Legal framework as regards vertical restraints

4.1 The prohibition in Article 101(1) TFEU

In order to provide an understanding for the various national legal systems in the EU – and compare these with non EU-countries covered by this Report (Brazil, Japan and Switzerland) – it is important to understand how RPM so far has been treated under EU law by the Commission and the Community Courts and what novelties the 2010 VRBE and the 2010 Guidelines introduces.

The main legal provision on a European level concerning vertical agreements is Article 101(1) of the Treaty of the Functioning of the European Union (**"the TFEU"**) (previously Article 81(1) EC[13]) which prohibits anti-competitive agreements, including both cartels and vertical restraints. It provides that "*...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*" are prohibited. An example of a prohibited restraint are practices which "*directly or indirectly fix purchase or selling prices [...]*".

It may be noted that Article 102 TFEU (previously Article 82 EC[14]) is applicable in abuse of dominance-cases but this provision will not be further dealt with within the scope of this Report.

If an agreement is found to have an anti-competitive intent there is no need to assess its actual effects.[15] Thus, a restriction by object falls *per se* under the Article 101 (1) TFEU prohibition. But this

[8] *Leegin Creative Leather Products, Inc. v. PSKS*, Inc., 127 S. Ct. 2705 (2007).
[9] *Dr. Miles Medical Co. v. John D. Park & Sons Co*., 220 US 373 (1911).
[10] See Botteman & Kuilwijk, citing Marina Lao, *Free Riding: An Overstated, and Unconvincing, Explanation For Resale Price Maintenance, in How the Chicago School Overshot the Mark: the Effect of Conservative Economic Analysis on U.S. Antitrust*, Oxford University Press (Robert Pitofsky, ed.) (2008); John B. Kirkwood, *Rethinking Antitrust Policy Toward RPM*. Antitrust Bull., 2010; Seattle University School of Law Legal Research Paper 10:05, available at SSRN: http://ssrn.com/abstract=1559377.
[11] See Commission webpage, http://ec.europa.eu/competition/consultations/2009_vertical_agreements/index.html.
[12] Commission Regulation No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 102 p. 1.
[13] Article 101 TFEU (effective from 1 December 2009) was formerly Article 81 in the Treaty of Amsterdam (effective from 1 May 1999) and before that Article 85 (effective from 1 January 1958) in the Rome Treaty. The text has not changed.
[14] Article 102 TFEU was formerly Article 82 in the Treaty of Amsterdam and before that Article 86 in the Rome Treaty. The text has not changed.
[15] C-209/07, *Beef Industry* 20 November 2008, para 16.

does not prejudge the assessment of its pro-competitive features under Article 101(3) TFEU. Gippini-Fourrnier claims that "The case law clearly rejects the application of a 'rule of reason' within Article 81(1) [now Article 101(1) TFEU] and indicates that the structure of Article 81 [now Article 101 TFEU] requires that balancing of anti- and pro-competitive aspects be conducted exclusively under Article 81(3) [now Article 101(3) TFEU]."[16]

4.2 The possibility of an individual exemption under Article 101(3) TFEU

An agreement can be granted an individual exemption from Article 101(1) TFEU if the agreement meets the four cumulative criteria in Article 101(3) TFEU (previously Article 81(3) EC);[17]

1) it contributes to improving the production or distribution of goods or to promoting technical or economic progress;
2) it allows consumers a fair share of the resulting benefit;
3) it does not impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; and
4) it does not afford those undertakings the possibility of eliminating competition in respect of a substantial part of the products in questions.

Following the introduction of the 1999 VBRE the obligation to notify vertical restraints was abolished in the EU. Until 2004 the Commission was the sole authority within the EU that could grant exemptions under Article 101(3) TFEU. However, following the modernisation regime the system of notifications for exemptions and negative clearance was abolished since the Commission wanted to focus more resources on fighting cartels. Instead Regulation 1/2003[18] provides that national competition authorities and courts have the power to issue exemptions. At the same time most national competition authorities in Europe abolished the notification systems under their national competition legislations. This has resulted in a limited number of decisions from both the Commission and national competition authorities as of 1999. In my view this has lead to reduced legal certainty since the parties to the agreement themselves have to assess whether the conditions for exemptions are fulfilled but may not get this confirmed until the agreement is questioned by a competition authority or in a civil litigation or arbitration proceeding.

Under the 1999 VRBE it was understood that it was not possible with individual exemptions for RPM, which was however not in line with the ECJ's prior approach (see Section 4.7 below).[19] The possibility of exemptions will be further developed under Section 5.2 below.

4.3 Nullity according to Article 101(2) TFEU

If an agreement does not meet the conditions for exemption the agreement is declared null and void, according to Article 101(2) TFEU.

The consequence of an agreement being declared null and void is according to the Court of Justice of the European Union (formerly the European Court of Justice) ("**the ECJ**"), that "[*a]ccording to the settled case-law of the Court, the automatic nullity of an agreement within the meaning of Article 81(2) EC only applies to those parts of the agreement affected by the prohibition laid down in Article 81(1) EC or to the agreement as a whole if it appears that those parts are not severable from the agreement itself (see, in particular, Case 56/65 LTM [1966] ECR 235, at 250, and Delimitis, cited above, paragraph 40*).

[16] See Gippini-Fournier p. 17, citing Case T-65/98 *Van den Bergh Foods v. Commission*, [2003] ECR II-4653, paras. 106-107; Case C-235/92 P *Montecatini v Commission* [1999] ECR I-4539, para. 133; Case 161/84 *Pronuptia* [1986] ECR 353, para. 24; Case T-17/93 *Matra Hachette v Commission* [1994] ECR II-595, para. 48, and Joined Cases T-374/94, T-375/94, T-384/94 and T-388/94 *European Night Services and Others v Commission* [1998] ECR II-3141, para. 136. See also e.g. Case T-112/99 *Métropole Télévision (M6) v Commission* [2001] ECR II-2459, para. 76-79.

[17] See Subsection 4.7 for references for application in RPM-cases.

[18] Council Reuglation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ 2003 L 1 p. 1.

[19] Faull, Jonathan & Nikpay, Ali, *The EC Law of Competition*, 2nd ed.[2007], para. 9.81.

If those parts are severable from the agreement, the consequences, for all other parts of the agreement or for other obligations flowing from it, of the nullity are not a matter for Community law. It is therefore for the referring court to determine, in accordance with the national law applicable, the extent and consequences, for the contractual relation as a whole, of the nullity of certain contractual clauses under Article 81(2) EC (see, inter alia, Case 10/86 VAG France [1986] ECR 4071, paragraphs 14 and 15; Cabour, cited above, paragraph 51, and Joined Cases C-376/05 and C-377/05 Brünsteiner and Autohaus Hilgert [2006] ECR I-11383, paragraph 48)."[20]

4.4 Appreciability - the *De Minimis Notice*

For an agreement to be prohibited under Article 101(1) TFEU it needs to have an appreciable effect. The Commission has exempted certain agreements which are not considered to have an appreciable effect under its *De Minimis Notice*,[21] regarding agreements of minor importance which do not appreciably restrict competition. The Commission regards agreements between parties who are not competitors and that each does not exceed a 15 percent market share on any of the relevant markets affected by the agreement as agreements of minor importance.[22] There is one exception from the general rule, namely if in a relevant market competition is restricted by the cumulative effect[23] of agreements for the sale of goods or services entered into by different suppliers or distributors the market share thresholds are reduced to five percent.[24] RPM is however considered a so-called blacklisted provision for which the de minimis exemption is not applicable, despite the parties' market shares. Nevertheless, maximum prices and recommended prices are permissible. RPM is defined as "*...*"*the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties*".[25]

4.5 The 1999 VRBE

As stated above the Commission issued the 1999 VRBE in 1999 applicable to all kinds of vertical agreements. A block exemption essentially creates a safe harbour for competition law challenge for a category of agreements whose pro-competitive benefits are presumed and considered to typically outweigh their potential anti-competitive effects. A block exemption regulation may under exceptional circumstances be withdrawn for an individual agreement or for a category of agreements, although only for the future and without any other negative consequences for the parties.[26]

The VRBE exempted from the application of Article 101(1) EC agreements that were in accordance with the VRBE, the so called safe harbour. The Commission also issued Guidelines for the application of the 1999 VRBE.[27] The 1999 VRBE applied a market share limit of 30% for the suppliers in order to be applicable (unless it was question of an exclusive purchasing agreement for the whole EU where the market share of the buyer should instead be taken into regard).[28] The 1999 VRBE listed two hard-core provisions in vertical agreements for which the block exemption was not applicable. However, that an agreement was not covered by the VRBE did not mean that the agreement was illegal but an individual assessment under Article 101(3) TFEU had to be carried out. Article 4 of the 1999 VRBE stated that *"[t]he exemption [...] shall not apply to vertical agreements which, directly or indirectly, in isolation or in combination with other factors under the control of the parties, have as their object*

[20] See e.g. Case C-279/06, CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL, para 78-79.
[21] Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (de minimis), OJ C 368, 22.12.2001, p.13-15.
[22] Ibid, para. 7(b).
[23] "A cumulative foreclosure effect is unlikely to exist if less than 30 % of the relevant market is covered by parallel (networks of) agreements having similar effects", ibid, para. 8.
[24] Ibid, para 8.
[25] Ibid, para. 11(2)(a).
[26] 1999 VBRE, article 6 for the Commission and article 7 for the National Competition Authorities.
[27] Guidelines on Vertical Restraints (2000/C 291/01), Official Journal C 291, 13.10.2000, p. 1-44.
[28] VRBE, Article 3(1).

[...]" and then listed provisions which were considered anti-competitive by object. Amongst the black-listed clauses were territorial protection and, as relevant for this Report; RPM (but permitting maximum and recommended prices). Article 4 defined RPM as "*the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier's imposing a maximum sale price or recommending a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties*".[29] This is the exact same wording as in the Commission's *De Minimis* Notice.

4.6 The 2010 Vertical Restraints Block Exemption – Regulation 330/2010

After approximately ten years under the 1999 VRBE regime it expired 31 May 2010. Shortly before that the Commission issued the new VRBE regarding vertical agreements which entered into force 1 June 2010. It may be noted that the majority of the national reports were submitted prior to the issuing of the new VRBE.

A transitional period is provided for in Article 9 of Regulation 330/2010: The prohibition laid down in Article 101(1) of the Treaty shall not apply during the period from 1 June 2010 to 31 May 2011 in respect of agreements already in force on 31 May 2010 which do not satisfy the conditions for exemption provided for in this Regulation but which, on 31 May 2010, satisfied the conditions for exemption provided for in Regulation (EC) No 2790/1999").

A new approach by the Commission is that the new VRBE opens up for individual exemptions for RPM. This does not follow from the VRBE but the 2010 Guidelines. In point 223 of the Guidelines it is stated that "*Where an agreement includes RPM, that agreement is presumed to restrict competition and thus to fall within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled.*" In which situations such efficiencies may be claimed will be further developed under Section 8.2 below.

It shall be stressed that the Commission proposes to reverse the order in the burden of proof: first it is for the undertaking claiming the benefit of Article 101(3) TFEU to prove that it satisfies the exemption criteria, and then it is for the authority/regulator to prove that negative effects remain more important.

Although it may appear new for the Commission in the light of its past decisional practice it shall be noted that the ECJ in its case law (as stated below in Section 4.7) recognise that individual exemption is possible.

4.7 EU case law on RPM

Since the Commission over the years has not had as a main priority to enforce vertical restraints there is a limited amount of cases from the European Courts on RPM. Below some of the major cases are mentioned. It may be noted that most of them are references for preliminary rulings from national courts.

The ECJ held in *Pronuptia*[30] regarding bridal wear that recommended resale prices do not in themselves infringe Article 101 TFEU unless there is actual collusion on the application of these recommended prices. The court stated that "although provisions which impair the franchisee's freedom to determine his own prices are restrictive of competition, that is not the case where the

[29] VRBE, Article 4(a).
[30] Case 161/84 *Pronuptia de Paris GMBH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

franchisor simply provides franchisees with price guidelines, so long as there is no concerted practice between the franchisor and the franchisees or between the franchisees themselves for the actual application of such prices. It is for the national court to determine whether that is indeed the case."[31]

In *Binon*,[32] the leading EU case on RPM from 1985 the Court stated in a reference for a preliminary ruling regarding a contract for sales of newspapers and periodicals that "provision which fix the prices to be observed in contracts with third parties constitute, of themselves, a restriction on competition within the meaning of Article 81(1)."

It however opened up for a possibility for exemption (para. 46):

"*if, in so far as the distribution of newspapers and periodicals is concerned, the fixing of the retail price by publishers constitutes the sole means of supporting the financial burden resulting from the taking back of unsold copies and if the latter practice constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, the Commission must take account of those factors when examining an agreement for the purposes of article 85 (3) [now Article 101(3) TFEU]*."

The Court confirmed this holding a few years later in *Erauw-Jacquery*[33] regarding a licensing contract for plant seeds but nuanced it by underlining that a RPM agreement falls under Article 81(1) [now Article 101 TFEU] only if it appreciably affects trade between Member States. Relevant factors in this regard are "whether it forms part of a cluster of similar agreements", "the licensor's market share" and "the ability of the [licensees] to export the product."

During the 1990's the Commission and subsequently the Court examined RPM in the book publishing sector, but mainly as horizontal agreements.[34]

In two recent judgments (references for preliminary rulings) from the ECJ, *CEPSA v LV Tobar* (judgment of 11 September 2008)[35], and *Pedro v Total* (judgment of 2 April 2009)[36] the Court held that it is necessary to value all the contractual obligations and the behaviour of the parties also when they agree on a maximum resale price or a recommended resale price in order to determine if such a practise does not amount to minimum RPM. That was however up to the respective referring national court to assess.

It may be noted that the Commission has been very reluctant to grant individual exemptions to RPM.[37]

5 National Legal Frameworks

5.1 The provisions prohibiting anti-competitive agreements

Unsurprisingly most of the countries in the European Union are heavily influenced by the prohibition against anti-competitive agreements in Article 101(1) TFEU, the nullity provision in Article 101(2) TFEU and the possibility to obtain an individual exemption under Article 101(3) TFEU. The National Reporters in countries that are members of the EU report that their respective legislations are identical

[31] Ibid, para. 25.
[32] Case 234/83 *Binon* [1985] ECR 2015, para. 44.
[33] Case 25/87, *Erauw-Jacquery, [1988] ECR 1919, paras 12 and 17-19.*
[34] See Gippini-Gournier for an overview, p. 24-25 and footnotes 94-96-
[35] Case C-279/06 *CEPSA Estaciones de Servicio SA v LV Tobar e Hijos SL*, OJ C 285, 08.11.2008, p. 4.
[36] Case C-260/07 *Pedro IV Servicios SL v Total Espãna SA*, OJ C 141, 20.06.2009, p.3.
[37] Gippini-Fournier cites (p. 25): Deutche Philips, O.J. L 293/40 (1973), sections II.2.(b) and (c) finding resale price maintenance scheme for products « reimported » into Germany contrary to Article 81(1) [now Article 101 TFEU ; Article 81(3) [now Article 101(3) TFEU not applicable because the obligations were not notified] ; GERO-fabriek, O.J. L 16/8 (1977), sections II(a) 4 and II(b) (finding resale price maintenance schemes 'clearly contrary to the prohibition in Article 81(1) and rejecting the application for exemption.

or almost identical to the provisions in Article 101 TFEU (though without the Common Market reference) however, in some countries there are some deviations.

The below description of the various national frameworks is summarised in a table in Section 5.4.

The Austrian,[38] Hungarian,[39] Italian,[40] Swedish[41] and Belgian[42] legislations are literal translations of Article 101(1) TFEU. In the UK the phrase "of goods" (in Article 101(3)) TFEU has been omitted to make the legislation[43] consistent with the practice of the Commission which makes it clear that improvements in production or distribution in relation to services may also benefit from an exemption.[44] Worth noticing is that historically in the UK, vertical agreements (other than price fixing) were excluded from the ambit of Section 2(1) Competition Act 1998 (the UK's equivalent of Article 101(1) TFEU) because they were regarded as unlikely to distort competition. However, since Modernisation [45] this exemption has been revoked.

The French system is divided into two sets of rules. Anti-trust rules on the one hand[46] require proof of existence of an anticompetitive agreement, which, if established, will be held to be anti-competitive by object. The French legislation on restrictive practices also contains specific behaviours that are prohibited per se, such as imposing a minimum resale price, even absent any agreement (Article L.442-5 of the French Commercial Code).[47]

The German competition law[48] has been amended for the seventh time to align it to EU-rules.[49] In Luxembourg the current competition law was introduced in 2004[50]. A draft bill is pending before the Luxembourg Parliament with amendments to the Competition Act.[51]

As regards the non-EU countries, in Brazil, antitrust violations are regulated in the Competition Act.[52] There is a lot of debate about different interpretations but they can be summarized as any practice that has as its effect the lessening of competition.[53] Article 21 of the Competition Act contains a non-exhaustive list over different types of practices which usually are regarded as being anti-competitive. In Japan Article 19 of the Anti Monopoly Law (AMA) applies to vertical agreements. Definitions of unfair practices are defined in 2-9 AMA. The basis for Swiss legislation[54] is the same as in the EU.

5.2 National Vertical Block Exemptions

Sweden[55] and Germany[56] have implemented the VRBE in national legislation, but without the Common Market reference.

Belgian law on the other hand provides for three possibilities of block exemptions.[57] Firstly, under national competition law,[58] agreements that meet the criteria set out in the European VBRE are

[38] Kartellgesetz 2005 [KartG], § 1.
[39] Act LVII of 1996 on the Unfair Restrictive Market Practices [HCA], Article 11, 17.
[40] Law 287/90, Italian Antitrust Law [IAL], Article 2.
[41] Konkurrenslagen (2008:579).
[42] Law on the protection of economic competition [LPCE], Article 2.
[43] Competition Act 1998 [Competition Act], Section 2(1).
[44] UK report, p. 1.
[45] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.
[46] Commercial Code, Article L-420-1.
[47] French Law on restrictive practices, essentially enshrined in Articles L.440-1 to 443-3 of the French Commercial Code.
[48] Gesetz gegen Wettbewerbsbeschränkungen [GWB], Section 1.
[49] German report, p. 2.
[50] The law of 17 May 2004 [Competition Act], Article 3 and 4.
[51] Luxembourgian report, p. 3.
[52] Law no. 8,884/1994, Article 20-21.
[53] Brazilian report, p. 1.
[54] Federal Act on Cartels and other Restraints of Competition [CartA], Article 4, 5.
[55] Swedish report, p. 4.
[56] Expressly stated in Section 2 (2) GWB.
[57] Article 5. L'interdiction de l'article 2, § 1er.
[58] Article 5 of the LPCE.

exempted.[59] Secondly, the scope of the VRBE is extended to factual settings where trade or competition on the Common Market is not affected. Finally, national block exemption regulations can be adopted. No national regulation has been adopted yet and it can be said that under Belgian competition law, vertical agreements are subject to a legal regime similar to the one in the EU.

A similar regime applies in the UK. In the UK, Section 10 of the Competition Act provides that an agreement is exempted from the Chapter I prohibition (equivalent of Article 101 TFEU) if it is covered by a finding of inapplicability by the European Commission or an EU block exemption regulation, or would be covered by an EU block exemption regulation if the agreement had an effect on trade between EU Member States.[60] As a result, Section 10 has the effect of exempting vertical agreements from the application of the Chapter I prohibition where those agreements fall within the terms of the VRBE. Agreements falling within the VRBE will be exempt from the application of both Article 101(1) TFEU and the Chapter I prohibition. The OFT has regard to the European Commission's Guidelines on Vertical Restraints[61] in its assessment of vertical agreements in relation to both Article 101 and the Chapter I prohibition.

In France certain categories of agreements or certain agreements can be exempted from the application of competition rules by means of a decree adopted after the French Competition Authority's opinion.[62] Hungarian law contains, similarly to EU law, a vertical block exemption regulation ("the **HBER**").[63] The structure of the HBER is similar to the VRBE but with some deviations from the European model.[64]

In Austria there are neither explicit national rules in place nor any precedents regarding Vertical Restraints Block Exemptions, but according to legal literature the EU VRBE applies "de facto" to Austrian law.[65] The same rational applies for the Guidelines, which can be taken as reference.[66]

The Luxembourgian Competition Council (the national competition authority) has not released any communications on specific subjects in regard to vertical agreements.

As to the non-EU countries in Switzerland de facto binding communications inspired by the European block exemption regulation have been issued.[67] Enforcement in Brazil is rare when the parties have a market share lower than 20% though this should not be regarded as a block exemption according to the national reporter.[68]

5.3 Is an agreement required for a RPM to exist?

European competition law is not only applicable to agreements (both written and oral) but also to so-called concerted practices. The ECJ defines it as a "*form of co-ordination between undertakings which, without having reached the stage where an agreement properly so called has been concluded, knowingly substitutes practical co-operation between them for the risks of competition.*"[69] This co-ordination could be either direct or indirect.[70] The conditions which have to be fulfilled to establish

[59] See, Article 3(2) Council Regulation N°1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty. Article 5 LPCE also states that the national provisions cannot be enforced when an individual exemption has been granted by the Commission.
[60] Where an agreement would be covered by an EU block exemption regulation if it had an effect on trade between Member States the OFT has the power to impose conditions on the parallel exemption or cancel the exemption if the agreement has effects in the United Kingdom, or a part of it, which are incompatible with the conditions in section 9(1) of the Competition Act. (footnote 8, UK report).
[61] *Commission notice - Guidelines on Vertical Restraints*, OJ 2010/C 130/1.
[62] Article L. 420-4-II Commercial Code.
[63] Government Decree 55/2002. (III. 26.) on the exemption from cartel prohibition of certain groups of vertical agreements.
[64] "The HBER for example contains specific definitions for "active sales" and "passive sales": although this may entail more legal certainty in this respect for undertakings, this can also imply a certain rigidity in the application of the HBER (especially with the development of new technologies, like the Internet).", Hungarian report, p. 5.
[65] Reidlinger/Hartung, p. 85.
[66] Petsche/Urlesberger, § 1 KartG, para 22.
[67] Communication on the Cartel Law Treatment of Vertical Restraints 2nd revision, July 2, 2007, see also Swiss report, p. 2.
[68] See Brazilian report p. 1-2.
[69] Case 48/69 *ICI Ltd v European Commission* [1972] ECR 1969, para. 64.
[70] Joined Cases 40 to 48, 50, 54 to 56, 111, 113 and 114/73, *Suiker Unie v Commission* [1975] ECR 1663, para. 174.

the existence of an agreement within the meaning of Article 101 TFEU is a "concurrence of wills" (i.e. where a group of undertakings adhere to a common plan that limits, or is likely to limit, their commercial freedom by determining the lines of the mutual action, or abstention from action).[71]

It is not however, necessary to establish a joint intention to pursue an anti-competitive aim. Equally, the form in which the parties' intention to behave on the market is expressed is irrelevant, so that an agreement does not have to be in writing and there is no requirement that it be legally binding or contain any kind of enforcement mechanism. An agreement may also be express or implied from the conduct of the parties (for example discussion of future price intentions).[72]

Almost all[73] of the EU Member States extends the term agreement to cover concerted practices.

Different types of acts by the supplier such as punishments (e.g. sanctions as refusal to supply) or remunerations (e.g. bonus schemes for adherence to recommended prices) to encourage the buyer to apply the recommended price as a fixed price is, or is thought to be, illegal in all the reporting countries. In Germany several cases have been decided where considerable fines were imposed when a supplier had exerted pressure through a temporary refusal to supply in order to fix the recommended prices.[74] The UK reporter underlines that conduct which in practice amounts to a fixed RPM will be treated as such and be presumed to be anti-competitive.[75] In Sweden only one judgment on vertical restraint case has been issued by the Market Court, where printed recommended prices on paperbacks were deemed as anti-competitive due to the fact that it required an active act by the buyer to be able to change prices from the ones printed on the books.[76]

As to the non-EU countries, in Switzerland price recommendations addressed by producers or suppliers to resellers or distributors may also constitute an unlawful agreement according to Article 5 Para. 4 CartA. However, in the practice of the national Competition Authority, the Swiss Competition Commission (ComCo) not all agreements taking the form of price recommendations are automatically caught by the presumption of Article 5 para. 4 CartA, but only those which are unlawful according to Cipher 15(3) of the Revised Communication, namely whether:

a) the price recommendations are not publicly available, but addressed to the sole attention of resellers or buyers;
b) they are combined with pressure or incentives;
c) they are not explicitly declared as being non-binding;
d) the price level in Switzerland is significantly higher than in the neighbouring countries;
e) the majority of sellers and distributors comply with them.

According to Cipher 15(3) of the Revised Communication, price recommendations addressed by producers or suppliers to resellers or distributors shall be assessed on *a case-by-case basis* in order to determine whether they constitute an unlawful agreement according to Article 5 Para. 1 CartA.

[71] Case T-41/96, *Bayer AG v. Commission* [2000] ECR II-3383, para. 69, affirmed on appeal Cases C-2 & 3/01 P. [2004] ECR I-23.
[72] Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II-2035, para. 54.
[73] The Hungarian and Luxembourgian reports do not mention both or any of these.
[74] Some of the cases are however not official, German report, p. 5.
[75] UK report, p. 15.
[76] See Swedish report p. 7, referring to case MD 2002 :5.

5.4 Table over National Legislations

The below table provides an overview of the respective national legislations.

Country	Prohibition on anti-competitive agreements mirroring Article 101(1) TFEU	Block Exemptions	Guidelines	Prohibition on direct RPM	Prohibition on indirect RPM	Minimum prices	Fixed Prices	Recommended prices	Maximum prices	Exceptions for prohibition for certain products	De Minimis / provision threshold for vertical restraints
EU	Article 101(1) TFEU	VRBE	Yes	Yes	Yes	Prohibited	Prohibited	Allowed[6]	Allowed[6]	No	Yes, 15%, not applicable to hard-core restrictions as fixed or minimum prices.
Austria	Yes, 1 § KartG	The EU VRBE might be applicable[1]	The EU Guidelines might be taken as reference[1]	Yes	Yes	Prohibited	Prohibited	Allowed[6]	Allowed	No prohibition on books, music, notes and cartographic products, magazines, newspapers[77]	Yes, EU (in Common Market cases) and national (Bagatellkartell-Ausnahme), 5% in all of Austria or 25% on a regional market, national De Minimis also covering hard core provisions.
Belgium	Yes, Article 2 LPCE	Possibility to have national and EU VRBEs (with or without common market reference)	NM	Yes	Yes	Prohibited[8]	Prohibited[8]	Allowed[8]	Allowed[8]	No	No, the EU de minmis is however a good source to interpret what "appreciable effect" on competition is (as in national law)
Czech Rep.	Yes, art 3 of the Act	NM	NM	Yes	Yes	Prohibited	Prohibited	Allowed	Allowed	No	Yes (national), 15% (each of the parties)[2]
France	Yes, Article L-420-1 and L-441 Commercial Code	References are made to the EU VRBE	References to the EU's Guidelines	Yes	Yes	Prohibited	Prohibited	Allowed	Allowed	Yes. For instance, by law, books are required to carry a "consumer price", to which retailers cannot apply a discount higher than 5% [3]	Yes EU, 15%, not applicable with hard-core restrictions
Germany	Yes, Section I GWB	EU	A legal assessment regarding vertical agreements is pending.	Yes	Yes	Prohibited	Prohibited	Allowed[6]	Allowed	Sorting, labelling or packaging of agricultural products, no prohibition on books or magazines.[5]	No. In general, the Commission's de minimis notice is applicable according to German law. But it does not apply in cases of RPM as they are considered to be hardcore restrictions. It does not apply either to Recommended prices or Maximum prices insofar as they do not restrict competition (article 101 par. 1 TFEU). Other cases of vertical restrictions concerning prices which are not hardcore are hardly conceivable, no relevant cases exist in German practice.,
Hungary	Yes, art 11 HCA	National BER (based on EU but with specific national provisions)	References to the EU's Guidelines	Yes	Yes	Prohibited	Prohibited	Allowed[6]	Allowed	No	Yes, aggregated[4] market share of 10%, applicable to hard core restrictions
Italy	Yes, art 2 IAL	EU	No	Yes	Case-by-case analysis[9]	Prohibited	Prohibited	Allowed	Allowed	No	Yes, uses the de minimis from EU (but not binding)[10]
Luxembourg	NM, law of 17 May 2004 on competition	No	References to the EU's Guidelines	Yes	Yes	NM	NM	NM	NM	No	No

(For footnotes, see next page).

[77] KartG, § 2 (2) (2)

Country	Prohibition on anti-competitive agreements mirroring Article 101(1) TFEU provision	Block Exemptions	Guidelines	Prohibition on direct RPM	Prohibition on indirect RPM	Minimum prices	Fixed Prices	Recommended prices	Maximum prices	Exceptions for prohibition	De Minimis / provision threshold
Sweden	Yes, Chapter 2 Article 1 of the Swedish Competition Act	Implements the EU VRBE through national legisaltion	References to the EU's Guidelines	Yes	Yes	Prohibited	Prohibited	Allowed[6]	Allowed	No	Yes, national copy of EU's
UK	Yes, Section 2(1) of the Competition Act 1998	EU	References to the EU's Guidelines and general guidance in Competition Law Guides released by the OFT (OFT 419)	Yes	Yes	Prohibited	Prohibited	Allowed[6] Except that recommending prices or notifying a price is not permitted in respect of : camcorders, cold food storage equipment, dishwashers, hi-fi-systems, televisions, tumble dryers, video cassette recorders or washing machines	Allowed	No	National law only prohibits agreements or concerted practices which have as their object or effect an appreciable restriction of competition in the UK. The OFT is likely to consider that an agreement/concerted practice is not appreciable when it is covered by the European Commission's Notice on Agreements of Minor Importance.
NON-EU											
Brazil	No, Article 20 of Law no 8,884/1994	NM	There are guidelines from CADE	No	No	Allowed[7]	Allowed[7]	Allowed[7]	Allowed[7]	No	Not explicit rule, but will not investigate if both parties are under 20% market share
Japan	Yes, Article 19 Anti Monopoly Law	No	Yes, concerning distribution system and business practices under the Anti Monopoly Law	Yes	NM	NM	Prohibited	Allowed[6]	NM	No RPM-prohibition on newspapers, music-CDs	No
Switzerland	Yes, CartA, but based on principle of abuse	Yes, Communication on the Cartel Law Treatment of Vertical Restraints[11]	Yes, Communication on the Cartel Law Treatment of Vertical Restraints[11]	Yes	Not clear	Prohibited	Prohibited	Case-by-case analysis	Allowed	No	The national Guidelines has a minimum market share of 15% of affected markets to indicate significant impediment (and therefore be unlawful), for certain restrictions the safe-line is well below 15%.

NM = Not Mentioned in the National Report.
NC = Not Clear from the National report.
1) According to legal opinion, no explicit rule.
2) Not applicable to hard-core cartels.
3) French report, page 4.
4) The calculation of aggregated market share is not clear from HCA practice, see Hungarian report, page 6.
5) Section 28 (2) GWB exempts vertical price fixing relating to the sorting, labelling or packaging of agricultural products from the cartel prohibition of Section 1 GWB. Section 30 (1) GWB contains an exception from the prohibition to fix resale prices with regard to newspapers and magazines and comparable products. In addition, the German law on fixed prices of books (Buchpreisbindungsgesetz) contains a specific exception, allowing for RPM in the case of books, music notes and cartographic products. This regime has no equivalent in EU law, but is closely adapted to the requirements of the EU law, as defined by the European Court of Justice in the decision concerning the German and Austrian book price restrictions (IP/02/461 of 22 March 2002, 'Commission accepts undertaking in competition proceeding regarding German book price fixing'.).
6) As long as they do not amount to a fixed or minimum sale price as a result of threats from, or incentives offered by, any of the parties.
7) As long as there are reasonable justifications from the perspective of competition policy (Brazilian report, p. 2).
9) The Italian reporter gives a good overview on p. 8-11 gives a through report about direct/indirect prohibition.
10) Market share under 1% has been exempted from enforcement in a franchising agreement, p. 15-16.
11) The Communication is based on the European VRBE and Guidelines.
12) One isolated legal opinion that the threshold does not apply to vertical agreements, see Austrian report, p. 2.

6 Assessment of RPM under national law

6.1 Application of a Per se, rule of reason or presumed illegality approach

According to EU Law fixed prices[78] and minimum prices[79] are per se violations although they may be subject to individual exemptions under Article 101(3) TFEU. In all EU Member States the per se rule (with the slim possibility of an individual exemption)[80] is the general rule in relation to the hardcore restraints in the VRBE (see table supra for the national scenarios, but usually minimum and fixed prices are treated as per se illegal).

It follows from the national reports that there are exceptions in the application of the general rule. For example, the Belgian reporter gives an example where, in one case, the Court of Appeal of Brussels analyzed a price management in its actual context before concluding its illegality instead of as a per se prohibition. In Hungary a slightly different approach appeared in the HCO's practice in the case Büki.[81] The national competition authority, the Hungarian Competition Office (HCO) examined certain clauses in exclusive distribution agreements of energy drinks, which included RPM. Quite uniquely, the resale price was not set uniformly for each distributor by the producer, rather the producers and the distributors individually agreed on different levels of prices, depending on the market circumstances of the various distributors. Although the HCO established that the case concerned RPM, the HCO stated that as opposed to horizontal price-fixing (which is regarded as a hard-core infringement), the assessment and evaluation of RPM "is a more complex task due to the potential efficiency reasons". Noting the differentiation in the resale prices, the HCO found that the producer "did not intend to establish/influence a uniform resale price on the market". Although the HCO stated that even such differentiated RPM may be anti-competitive (as it could have the effect of excluding competitors), in the actual case, the HCO did not find any such effects and thus terminated its proceedings. The HCO did not even reach the second step (the assessment of the conditions for exemption), and merely found a lack of infringement of Article 11 (Article 101(1) TEFU) of the HCA. It is not clear whether this is an exception or if this is a new general rule. Example of an exemption can be seen in the Hungarian report[82] (only one case is known to the reporter).

In France, agreements containing minimum price provisions are considered hardcore restrictions of competition and can therefore not benefit from block exemption regulations. They can, however, and theoretically at least, be exempted on an individual basis. The French law on restrictive practices also considers per se unlawful to impose a minimum resale price (even absent any agreement) and to sell goods to consumers at a loss.[83] In practice, in France,[84] Belgium[85] and possibly Germany[86] it does not seem to be possible to ever exempt resale price maintenance.

In the non-EU countries, Brazilian[87] law applies a rule of reason approach and the Swiss law is based on the principle of abuse and usually do not have a presumption of illegality but there is a presumption of elimination of effective competition concerning RPM.[88] In Japan a similar position exists, there is a presumption of illegality for provisions stipulating RPM. However restrictions may be lawful if there is "some rationality".

[78] Article 101(1)(a) TFEU, Case 243/83 *SA Binon & Cie v SA Agence et Messageries de la Presse* [1985] ECR 201, Article 4(a) VRBE and Guidelines, para. 47.
[79] Case 27/87 *SPRL Louis Erauw-Jacquery v La Hesbignonne* SC [1988] ECR 1919, Article 4(a) VRBE and Guidelines, para. 47.
[80] No possibilty for exemption under Japanese law, Japanese report, p. 1.
[81] Decided in 2008, No. Vj-164/2006, Hungarian report, p. 5-6.
[82] Hungarian report, p. 8-9.
[83] Article L. 442-2 to L. 442-5 Commercial Code. A dominant company selling goods below costs may also, in certain circumstances, be found to abuse its dominant position.
[84] Minimum price provisions only, French report, p. 10.
[85] Belgian report, p. 11-12.
[86] German report, p. 8.
[87] Brazilian report, p. 1.
[88] Swiss report, p. 1, 4.

6.2 Exchange of information about prices in vertical agreements

In the EU, Austria[89] and Belgium[90] no specific rules exist about information exchange in vertical agreements, though there is case-law in Austria where in horizontal cases exchanges of non-public information might be prohibited.[91] In Belgium[92] there are some interesting judgments. In the two *BHP Billiton Diamonds* cases, the Court of Appeal of Antwerp stated for instance that exchanges of information on prices amounted to vertical price fixing when, by virtue of retaliation mechanisms, the supplier enjoyed *de facto* control over the retailers' prices.[93] In the *Chanel/Makro* case, the Court of Appeal of Mons followed a similar reasoning in relation to exchanges of information on retailers' advertisement expenditures (which might have included price-related information). The Court implicitly held that a contractual provision requiring retailers to submit advertisement activities to the supplier's *ex ante* approval did not infringe the LPCE, unless, in practice, it allowed the later to control the former's pricing policy.[94]

In France the exchange of price information is possible in certain situations to improve distribution of the products.[95] In Hungary it is considered that the parties have a legal interest to share information as long as *the object or the effect of the information exchange system is to reduce risks being inherent in the behaviour of competitors.*[96] Based on the Hungarian competition authority's earlier cases (though no one has been found to infringe national law yet) the national reporter believes that the effects would be assessed on a case-by-case basis where the HCO could take the following factors into account
(i) the nature and details of the exchanged information; (ii) the "age" of the data (past, present, future data); (iii) the frequency of the data exchange; (iv) the structure of the market (e.g. number of market players).[97] In Italy exchange of information might be deemed to constitute an agreement, but all circumstances in the case have to be assessed.[98]

As to the German reporters the exchange of information in vertical relationships is a crucial point and in practice - at least in Germany - of utmost importance.

In Germany no specific rules exist in that respect. In practice, the FCO has in several decisions argued that the exchange of information between the supplier and the retailer on the retailer's resale prices is an element and/or an indication of an agreement or at least a concerted practice of fixing the retailer's resale prices. Even more critical is an exchange of information between a supplier and a retailer on the resale prices of other retailers. In these cases the effect may also amount to a horizontal coordination of different retailers on the resale price ("Hub and Spoke").

A communication of the German FCO dated 13 April 2010 enumerates different examples of information exchanges which are deemed to be hardcore restrictions or at least critical if these practices are combined with other elements or systematically applied. The communication confirms that recommended prices and the provision of a list of recommended prices by the supplier in itself do not constitute an agreement of price fixing. But a single contact after that between supplier and retailer may already suffice to prove a price fixing agreement or concerted practice. Furthermore, the supervision of resale prices by the supplier or the retailers in itself does not constitute a horizontal coordination. But they may indicate a prohibited agreement or concerted practice, in particular if they are combined with other measures which all together sum up to an agreement or concerted practice.

[89] Austrian report, p. 5.
[90] Belgian report, p. 8 and see also 4.2 infra regarding unilateral practices in Belgium.
[91] Case 16 Ok 12/06 and see Austrian report, p. 4.
[92] See p. 8-9 pf the Belgian report.
[93] Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV; Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV.
[94] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro.
[95] Decision 06-D-22, *NGK Spark Plugs* and the French report, p. 7.
[96] Position Statement of the Competition Council of the HCO No. 11.16 and Hungarian report, p. 10.
[97] Vj-73/2001 (Holcim).
[98] German report, p. 4.

This is indeed a very restrictive interpretation of the FCO of what is RPM or a similar action. On the other hand, the FCO's assessment and the examples given in the communication correspond largely to European standards. So they may be of interest for industry even outside Germany.

There is no case law from the non-EU countries mentioned in the respective reports.

6.3 Unilateral practices/recommendations

If a vertical practice is genuinely unilateral and it is not possible to show there was "tacit acquiescence" so as to give rise to an agreement or concerted practice, then Article 101 TFEU will not apply.[99]

According to EU case law it should be noted that it is however possible to establish a concerted practice where pricing or other market sensitive information is disclosed unilaterally by one party to another in circumstances where that information is at the very least accepted by the recipient or the recipient does not express any reservations or objections.[100] Similarly, the mere receipt of information concerning competitors' future pricing intentions may be sufficient to give rise to concerted practise.[101] In *Aalborg Portland,*[102] the ECJ stated than an undertaking which receives information by participating in meetings without manifestly opposing the anti-competitive agreements concluded will be taken to have participated in a concerted practice unless that undertaking puts forward evidence to establish that it had indicated its opposition to the anti-competitive arrangements to its competitors.[103] The ECJ recently held in *T-Mobile that* one single meeting may be enough to constitute a concerted practise.[104]

Where an undertaking participating in concerted arrangements remains active on the market, there is a presumption that it will take account of the information exchanged with its competitors. The EU courts have re-stated this principle in a number of judgments.[105] The General Court (the former Court of First Instance) did in *JCB* consider recommendations given by JCB as not binding although they were "strongly indicative".[106]

The same rationale applies in France, Germany, Italy, Sweden, the UK and Hungary. Vertical unilateral practices relating to prices entered into by an undertaking which holds a dominant position on a relevant market may be subject to the national equivalent of Article 102 TFEU, which prohibits abuse of a dominant position, in all EU Member States.[107] The French Competition Authority found that imposing a minimum resale price could constitute an abuse of a dominant position.[108]

German law contains a specific provision[109] that prohibits undertakings to threaten other undertakings with disadvantages or to impose disadvantages on them or to promise or grant other undertakings advantages in order to induce them to a behaviour that according to cartel law (e.g. Article 101 TFEU) could not legally be subject of a contractual commitment. Accordingly, the unilateral use of pressure or incentives aiming at enforcing vertical price fixing can constitute a cartel law violation, if the object is to lead the addressee to a behaviour that, if agreed in a contract, would infringe Article 101 TFEU. The national provision is according to the national reporters of great importance in the context of RPM as an infringement constitutes a cartel law violation even in cases in which an agreement or a

[99] See *Bayer v Commission* [2000] ECR II-3383, paras. 69-71.
[100] Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II 2035 and Cases T-25/95 etc *Cimenteries CBR SA v Commission* [2000] ECR II-491 at paragraph 1849, referred to in CAT Toys, paragraph 154.
[101] Cases T-202/98, T-204/98 and T-207/98 *Tate & Lyle plc v Commission* [2001] ECR II 2035 at paragraph 54.
[102] Cases C-204/00P, 205/00P,211/00P, 213/00P,217/00P and 219/*00P Aalborg Portland A/S v European Commission* [2004] ECR I-123.
[103] Ibid, at paragraph 81 ff.
[104] Case C-8/08, T-Mobile Netherlands BV et al v Raad van besturrr van de Nederlandse Mededingingsautoriteit, judgment of 4 June 2009.
[105] Case C- 49/92 P Commission v Anic Partecipazioni [1999] ECR I- 4125 and Case C- 199/92 P Hüls v Commission [1999] ECR I- 4287, Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van der Nederlandse Mededingingsautoriteit (4 July 2009)
[106] *JCB Service v Commission* [2004] ECR II-49.
[107] Hungary, Luxembourg and Austria do not respond in this part but do not give any reference to the contrary.
[108] Decision 05-D-32, Royal Canin.
[109] Section 21 (2) GWB.

concerted practice do not exist or cannot be proved by the competition authority. And indeed, in several recent decisions the Federal Cartel Office has either directly based its decision against suppliers in the context of RPM on this German provision or at least mentioned it as subsidiary in cases in which the FCO considered an agreement or concerted practice as proven.

In Hungary a few borderline cases have appeared where a unilateral practice evolved into a concurrence of wills.[110] The basis in Hungary for whether recommendations are legal can be quoted from a decision from 1999 that the supplier "may recommend resale prices to the retailer legally if the retailer may decide independently whether or not he takes such recommendation into account".[111] Recommendations must in Hungary be free of any "compelling tactics" as threats and harassment-like notices. The Italian report includes references to a few cases.[112]

Austrian law actually goes a bit further and prohibits certain purely unilateral conducts such as recommendations under the equivalent of Article 101 TFEU.[113]

The UK Competition Appeal Tribunal, in its judgment in *Replica Kit*, relying on EU jurisprudence stated that "*[e]ven where participation in a meeting is limited to the mere receipt of information about the future conduct of a competitor, the law presumes that the recipient of the information cannot fail to take that information into account when determining its own future policy on the market*."[114]

A peculiarity in the UK is the Restriction on Agreements and Conduct (Specified Domestic Electrical Goods) Order 1998/1271 where recommendations or notifying a price is prohibited for certain types of household equipment (see the table supra).

In Japan RPM do not require an agreement to constitute an infringement on the prohibition on RPM.[115] In Brazil no clear precedents can be found on how to treat recommendations (the latest decision was made in 1992 and it did not consider price suggestions as an infringement of competition law).

In the practice of the Swiss Competition Authority the following cases are considered as unlawful as regards recommendations:

- the price recommendations are not publicly available, but addressed to the sole attention of resellers or buyers;
- they are combined with pressure or incentives;
- they are not explicitly declared as being non-binding;
- the price level in Switzerland is significantly higher than in the neighbouring countries;
- the majority of sellers and distributors comply with them.[116]

6.3.1 "Hub and spoke" arrangements – the UK experience

One area of particular interest regarding exchange of information in UK competition law currently is the approach that the national competition authority, the Office of Fair Trading (OFT), and UK courts have been taking in respect of exchanges of commercially sensitive information between competitors via a mutual intermediary (so-called "hub and spoke" arrangements).[117] This approach can be seen in two cases from 2003 relating to sales of, respectively, replica football kit (*Replica Kit*), and toys and

[110] Hungarian report, p. 11.
[111] Vj-147/1999 (EURO-Elzett).
[112] Italian report, p. 12-14.
[113] "According to [§ 1 (1) KartG], recommendations are only admissible if it has been expressly stated that the recommendation is non-binding and no economic or social pressure has been exercised.", Austrian report, p. 4.
[114] CAT *Replica Kit*, at 873, UK report, p. 12.
[115] Japanese report, p. 3.
[116] Swiss report, p. 5.
[117] The entire Subsection is a quote from the UK report.

games (*Toys*). Both OFT decisions (OFT *Replica Kit*[118] and OFT *Toys*[119]) were appealed to the Competition Appeal Tribunal ("**CAT**"), whose decisions (CAT *Replica Kit*[120] and CAT *Toys*[121]) were subsequently appealed to the Court of Appeal and largely upheld (in a combined judgment (CA *Replica Kit and Toys*[122]).

Replica Kit – OFT and CAT

In OFT *Replica Kit*, the OFT found that Umbro had entered into vertical agreements with a number of downstream retailers to fix the retail price of certain replica football kits. The OFT found a number of agreements or concerted practices, one of which concerned the relationship between: (i) JJB Sports PLC (**JJB**), the largest sports retailer in the UK; (ii) Umbro, the manufacturer of England and Manchester United replica kit at the relevant time; and (iii) Sports Soccer, another retailer of replica kit. In particular, the OFT found that:

- JJB had put pressure on Umbro (as supplier) to take action in response to aggressive discounting by its retail competitor, Sports Soccer.
- During conversations with Umbro, JJB gave an assurance or, at least, an indication that it would not price below the recommended retail price (RRP) of £39.99 during the Euro 2000 tournament, in circumstances in which it was obvious that this information would or might be passed on to Sports Soccer, so as to help Umbro persuade Sports Soccer not to discount below RRP.
- Umbro did in fact pass this information on to Sports Soccer.
- Sports Soccer agreed to (and did in fact) raise its prices in reliance on this information.
- Umbro also told JJB of this, thereby making it clear to JJB that it would be able to maintain its prices at RRP, which JJB did.

The CAT and the Court of Appeal agreed with the OFT that this sequence of events amounted to a concerted practice to which JJB was a party, as well as Umbro and Sports Soccer, whereby the two retailers coordinated their conduct on the market in such a way as to knowingly substitute practical cooperation between them for the risks of competition. The concerted practice had the object of restricting competition and in particular of fixing the retail sale price of England replica football shirts, and therefore constituted a breach of the Chapter I prohibition.

When the OFT's decision was appealed to the CAT, the CAT relied on the fact that, in the context of concerted practices, European case law prohibits both direct and indirect contact between undertakings so that it did not make any difference that in *Replica Kit* the reciprocal contact had taken place through the intermediary of Umbro.[123] The CAT considered that an indirect concerted practice would exist in circumstances where:

- Retailer A disclosed its future (retail) pricing intentions to Supplier B;
- it was reasonably foreseeable that Supplier B might make use of that information to influence market conditions; and
- Supplier B passed that pricing information on to a competing retailer C.

Toys – OFT and CAT

In OFT *Toys*, the OFT found that Hasbro, a leading global manufacturer of toys and games and one of the largest toys and games suppliers in the UK, had entered into vertical agreements with Argos and Littlewoods, two major high street catalogue-based retailers in the UK, to fix the price of certain Hasbro toys and games at Hasbro's recommended retail price (**RRP**). The infringement consisted of two vertical bilateral agreements – one between Hasbro and Argos and the other between Hasbro and

[118] Case CA98/06 [2003] OFT (OFT *Replica Kit).*
[119] Case CA98/02 [2003] (OFT *Toys).*
[120] *JJB Sports plc v OFT and AllSports Ltd v OFT* [2004] CAT 17 (CAT *Replica Kit*).
[121] *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24 (CAT *Toys*).
[122] Combined judgment: *Argos Limited and (2) Littlewoods Limited and OFT and JJB Sports plc and OFT*, [2006] EWCA Civ 1318 (CA *Replica Kit and Toys*).
[123] CAT *Replica Kit*, paragraph 657.

Littlewoods – to fix prices for certain Hasbro products at Hasbro's RRPs and a trilateral agreement, with a horizontal component, between Hasbro, Argos and Littlewoods to the same effect.[124]

Upon appeal, the CAT applied the same formula in its assessment of evidence of indirect exchanges of future pricing intentions by competing toy retailers in *Toys.*[125] It upheld the OFT's finding that, in addition to there being two bilateral agreements between Hasbro and each of the retailers to sell the relevant Hasbro products at Hasbro's RRPs, there was also a trilateral concerted practice between Hasbro, Argos and Littlewoods.

Court of Appeal

The Court of Appeal considered the *Replica Kit* and *Toys* appeals at the same time and concurred with the CAT's view that indirect concerted practices existed in both cases. However, the Court of Appeal suggested that, when establishing whether a concerted practice existed, the CAT' "*may have gone too far*" if it intended that its test would extend to cases in which Retailer A did not, in fact, foresee that that Supplier B would make use of its pricing information to influence market conditions or in which Retailer C did not, in fact, appreciate that Retailer A's pricing information was being passed to it with Retailer A's concurrence.[126] In doing so, it distinguished bilateral discussions between a supplier and distributor on actual or likely retail prices and profit margins from discussions that stray into intended prices and agreements on future prices. The CAT in the earlier appeal had recorded that price information exchanged in the form of a retailer revealing its future pricing intentions to its supplier will rarely be "legitimate" otherwise RPM could be reintroduced by the back door.[127] However, the Court of Appeal recognised the necessity of bilateral pricing discussions between supplier and retailer. It considered that such discussions are unobjectionable so long as the pricing information is not provided in order to be shared.[128]

The Court of Appeal went on to set out a slightly modified formulation of the CAT's framework, which it regarded as consistent with European law and sufficient to dispose of the appeals in the *Toys* appeal.[129] That modified framework states that if:

- Retailer A discloses to supplier B its future pricing intentions in circumstances where A may be taken to intend that B will make use of that information to influence market conditions by passing that information to other retailers (of whom C is or may be one);
- B does, in fact, pass that information to C in circumstances where C may be taken to know the circumstances in which the information was disclosed by A to B; and
- C does, in fact, use the information in determining its own future pricing intentions

then A, B and C are all to be regarded as parties to a concerted practice having as its object the restriction or distortion of competition.

The Court of Appeal went on to state that the case will be stronger where there is reciprocity in the sense that C discloses to supplier B its future pricing intentions in circumstances where C may be taken to intend that B will make use of that information to influence market conditions by passing that information to (amongst others) A, and B does so.

It is worth noting that, the Court of Appeal considered that the CAT may have gone too far in finding that price information exchanged in the form of a retailer revealing its future pricing intentions to its

[124] The infringement arose because Hasbro had sought to persuade retailers to retail Hasbro products at Hasbro's RRPs, The participation of both Argos and Littlewoods was essential to the success of the initiative. However, Argos, which was generally regarded as the price-setter, would have been unlikely to agree to the scheme unless it had reassurance that in doing so, its catalogue prices would not be undercut by Littlewoods. Therefore, if the scheme were to succeed, it was necessary for Hasbro to be in a position to reassure Argos that Littlewoods would also be committed to follow the same prices. As a result, two separate sets of discussions took place between Hasbro's sales team and the relevant buyers for Argos, on the one hand, and between Hasbro's sales team and the relevant buyers for Littlewoods, on the other. There was no evidence of direct contact between Argos and Littlewoods. Nevertheless, following those discussions, there was a price similarity in those retailers' catalogues in relation to the products subject to the pricing initiative.

[125] CAT *Toys*, paragraph 779.

[126] CAT *Replica Kit*, paragraph 91.

[127] CAT *Replica Kit* , paragraph 660.

[128] CAT *Toys and Replica Kit*, paragraphs 99 and 106.

[129] CAT *Toys*, paragraph 141.

supplier will rarely be "legitimate". The Court of Appeal recognised that bilateral pricing discussions between supplier and retailer are unobjectionable so long as the pricing information is not provided in order to be shared. In that respect, the Court of Appeal accepted that it is legitimate for a supplier and a retailer to exchange future pricing information in certain circumstances.[130]

7 Anti-competitive effects of resale price maintenance

7.1 Does an anti-competitive effect need to be established or does it suffice with an anti-competitive object/intent?

When an anti-competitive conduct is considered anti-competitive by object there is no need to consider any effects of the conduct in the EU and its Member States as well as Switzerland. The Belgian reporter notes that beyond anti-competitive conduct by object the assessment is made on a case-by-case basis.[131] The French Competition Authority stated in Cons. Conc., no 07-D-04 of 24 January 2007, that an assessment of the effects is not *"necessary for the characterisation of an anticompetitive practice"*. The French Competition Authority actually only uses an assessment of the anticompetitive effects of the practice while evaluating the sanction; *"their consideration being only useful to evaluate the amount of the sanction"*.[132]

In Germany the most important effect is a potential increase in prices, or a reduction of output. But all other possible negative effects which may cause harm to consumers or industry must be considered likewise.

In Brazil there is no difference on the anticompetitive effects required for a conduct to be found an infringement between horizontal and vertical cases. The same "lessening of competition" effect is required, regardless of the conduct being reviewed. An assessment of the severity and gravity of the infringement usually takes into account the type of the conduct (cartel or otherwise), the markets involved, the turnover of the violators etc.[133]

7.2 Anti-competitive effects

There is no comprehensive overview of the anti-competitive effects of RPM in any of the national reports but in the UK report. In the UK, national competition law which, as noted, largely mirrors Articles 101 and 102 TFEU, does not delineate the possible effects of different types of vertical practice. However OFT 419 (the OFT's Guidance on Vertical Agreements), which largely follows the economic logic of the VRBE and the associated Guidelines on Vertical Restraints,[134] identifies market foreclosure and competition dampening as possible anti-competitive effects of vertical restraints.[135]

In point 224 of the 2010 Guidelines the Commission identifies seven ways in which it considers that RPM may restrict competition.

i) Firstly, RPM may facilitate *collusion between suppliers* by enhancing price transparency on the market, thereby making it easier to detect whether a supplier deviates from the collusive equilibrium by cutting its price. RPM also *undermines the incentive for the supplier to cut its price to its distributors*, as the fixed resale price will prevent it from benefiting from expanded sales. Such a negative effect is particularly plausible where the market is prone to collusive outcomes, for instance if the manufacturers form a tight oligopoly, and a significant part of the market is covered by RPM agreements.

ii) Second, by eliminating intra-brand price competition, RPM may also facilitate *collusion between the buyers*, that is, at the distribution level. Strong or well organised distributors may be

[130] Point 6.1 in the UK report.
[131] Belgian report, p. 9.
[132] Cons. conc., n° 07-D-04, cited above; see also for example, Cons. conc., no 05-D-32 of 22 June 2005, see French report, p. 9-10.
[133] Brazilian report, p. 4.
[134] Supra, footnote 9.
[135] For a thorough overview of the effects see the UK report, p. 12-13.

able to force or convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. The resulting loss of price competition seems especially problematic when the RPM is inspired by the buyers, whose collective horizontal interests can be expected to work out negatively for consumers.
iii) Third, RPM may more generally *soften competition between manufacturers and/or between retailers, in particular when manufacturers use the same distributors to distribute their products and RPM is applied by all or many of them*.
iv) Fourth, the immediate effect of RPM will be that all or certain distributors are prevented from lowering their sales price for that particular brand. In other words, the direct effect of RPM is a *price increase*.
v) Fifth, RPM may *lower the pressure on the margin of the manufacturer, in particular where the manufacturer has a commitment problem*, that is, where it has an interest in lowering the price charged to subsequent distributors. In such a situation, the manufacturer may prefer to agree to RPM, so as to help it to commit not to lower the price for subsequent distributors and to reduce the pressure on its own margin.
vi) Sixth, RPM may be *implemented by a manufacturer with market power to foreclose smaller rivals*. The increased margin that RPM may offer distributors, may entice the latter to favour the particular brand over rival brands when advising customers, even where such advice is not in the interest of these customers, or not to sell these rival brands at all.
vii) Lastly, RPM *may reduce dynamism and innovation at the distribution level*. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices.

There is not room for an analysis of the above anti-competitive effects in this Report but it may be noted that these anti-competitive effects identified by the Commission are criticised by e.g. Botteman & Kuilwijk.[136] For an in-depth review of anti-competitive effects for RPM from a US perspective see p. 12-14 in the *Leegin* judgment.

7.3 Are inter- and/or intra-brand effects taken into regard?

Inter-brand competition is the competition amongst manufacturers selling different brands of the same type of products whereas intra-brand competition is competition amongst retailers selling the same brand. The question is thus whether both inter- and/or intra-brand effects are taken into regard in the authorities' and courts' assessment?

The ECJ stated in *Consten/Grundig* that although inter-brand competition is more noticeable than intra-brand competition neither can escape the prohibition in Article 85 [now Article 101 TFEU].[137]

The European Commission considers that the changes stemming from the elimination of intra-brand competition may lead to the lessening of downward pressure on prices that might affect inter-brand competition.[138]

It follows from the reports from Italy, Luxembourg, Austria, the Czech Republic, Sweden, France and Germany that the different national competition acts do not in practice differentiate between inter-brand and intra-brand effects.[139] In Hungary however a difference can be clearly detected. E.g. in one case[140] the National Competition Authority, the Hungarian Competition Office (HCO), examined an exclusive distribution agreement of wedding dresses. The HCO found that there was strong competition between wedding dress brands (inter-brand competition). The HCO also examined any potential intra-brand effects and found that no appreciable effects on competition could be found,

[136] Botteman, Yves & Kuilwijk, Kees J., *(Minimum Resale Price Maintenance Under the New Guidelines: A Critique and A Suggestion*, The CPI Antitrust Journal June 2010 (1), p. 4-5.
[137] Joined cases C-56 and 58/64 *Grundig/Consten* [1966] ECR 299, para. 342.
[138] Guidelines, para 112.
[139] See Section 3.2 of the respective reports.
[140] Vj-9/2008.

especially due to the geographic separation of retailers.[141] Also, in its decision in case *Castrol Hungária*[142] the HCO examined the vertical agreements of Castrol Hungária for the distribution of lubricants, which contained minimum price and exclusivity clauses for a term exceeding five years. Even though the HCO established the infringement, it did not impose any fine on Castrol Hungária stating that although the relevant clauses could have been capable of restricting inter-brand competition, they in fact did not have such anti-competitive effect on the relevant market to an extent that would necessitate the imposition of fines. The HCO took into consideration that fixing resale prices may have significant effect on intra-brand competition which is in line with the European Commission's view on the matter.[143] One of the reasons intra-brand competition is especially affected, according to the HCO, is when the product price is an important factor for customers when choosing among merchants (the statement was made in relation to determining the amount of fine in a case initiated for the examination of an RPM agreement on the market of navigation devices).[144] Regarding another RPM agreement on the market for navigation devices, the HCO took into account that the continuous and significant changes on the relevant market – being typical in technology-related markets – may be capable of alleviating the effects of the RPM thereby also showing that that inter-brand competition is capable of easing any restrictions of intra-brand competition.[145]

Belgian courts have of late issued some rulings where they entirely leave aside the question whether a particular practice restricts inter and/or intra brand competition. Those rulings view as automatically unlawful any restriction on the retailer's freedom to set its price, regardless of its effects. The *Frost Invest/Elvier* judgment brings a good illustration of this. The Court of Appeal of Antwerp stated in this case that price fixing practices infringed the essence of competition, as a result of which they should be prohibited.[146] As far as the Council's decision is concerned, most of the discussion seem related to the *intra* brand effects of resale price maintenance The Council stated in particular that such practices:[147]

- force consumers to pay prices that are not related to the costs incurred by the distributors;
- can lead to a price increase;
- can lead to the protection of less productive companies;
- deprive consumers of the possibility to buy the product at a lower price and to compare products on the basis of prices and it deprives distributors from granting reductions to consumers.

It shall be noted that the Council adopted such a position in a specific case as the Laroy Duvo case is actually the sole truly case rendered on that topic.In *Laroy-Duvo* the Court of Brussels noted that consumers were captive and the increased prices harmed them.[148] Had consumers not been captive, and thus able to easily switch to a rival supplier, the resale price maintenance practice – even though it led to a price increase *intra* brand – would not have been deemed anticompetitive.[149]

As to the non-EU countries the Brazilian authorities' precedents tend to take into consideration only effects of the conduct on inter-brand competition. Intra-brand effects may be considered for an assessment of the conduct, but to a much lesser extent than inter-brand effects.[150]

The Swiss Competition Commission is reported to be eager to rigorously enforce the prohibition of RPM as it is *presumed* to eliminate competition. The Commission now maintains in Cipher 10 of the Revised Communication that it shall no longer be possible to rebut this presumption by proving only

[141] Vj-9/2008, paras 18 and 34.
[142] Vj-7/2008.
[143] Communication on the Application of the Community Competition Rules to Vertical Restraints, OJ 1998 C365/3, p. 10-11 and repeated in the Guidelines (though more concentrated), para. 112.
[144] Vj-26/2006, para 300.
[145] Vj-166/2006, para 173, see Subsection 6.4 for a more extensive summary.
[146] See for instance, Hof Van Beroep te Antwerpen, 27 October 2008, Frost Invest NV/ Evlier BVBA.
[147] See, Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco.
[148] Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.
[149] It ought to be noted that besides the *Laroy-Duvo/Aniserco* case, no inter-brand aspects were assessed. In particular, the risk of collusion stemming from resale price maintenance practices has not been considered to our knowledge.
[150] See p. 4 in the Brazilian report.

residual inter-brand-competition between several distribution systems. By way of consequence, the Revised Communication also requires proof of intra-brand competition.[151] Therefore, with this new approach Swiss practice seems to be more restrictive regarding vertical agreements than European practice according to the Swiss Reporter. It becomes even more rigid than the competition laws' provisions governing horizontal hard-core agreements,[152] where the presumption of elimination of competition may be rebutted, for instance by showing inter-brand or service competition.

In Japan the national competition authority considers not only intra-brand competition but also inter-brand competition although there is no specific provision in the Competition Act.[153]

8 Pro-competitive effects of RPM

8.1 Introduction

Pro-competitive effects of RPM are in some cases regarded by the national authorities. I will here examine in what cases which types of effects are considered. Before doing that it is interesting to review which efficiencies the Commission has identified in the 2010 Guidelines.

6.2 Pro-competitive effects identified by the Commission in the 2010 Guidelines. The Commission provides in point 223 that:

> [U]ndertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled. It then falls to the Commission to effectively assess the likely negative effects on competition and consumers before deciding whether the conditions of Article 101(3) are fulfilled.
>
> In point 225 the Commission identifies three situations where RPM may not only restrict competition but may also, in particular where it is supplier driven, lead to efficiencies, which will be assessed under Article 101(3) TFEU.
>
> *Introduction of a new product (two years)*
>
> i) Most notably, where *a manufacturer introduces a new product*, RPM may be helpful during the introductory period of expanding demand to induce distributors to better take into account the manufacturer's interest to promote the product. RPM may provide the distributors with the means to increase sales efforts and if the distributors on this market are under competitive pressure this may induce them to expand overall demand for the product and make the launch of the product a success, also for the benefit of consumers[154].
>
> I think this is a positive way of enhancing distribution of new products. In particular where it is question of a well established brand that wants to expand to a new market but this is also true for new products. In this context it is interesting to note what was expressed by the majority in Leegin:
>
> "[N]ew manufacturers and manufactures entering new markets can use the restriction 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 [...] reliance on a retailer's reputation will decline as the manufacturer's brand becomes better

[151] Swiss report, p. 7.
[152] Article 5 para. 3 CartA.
[153] Japanese report, p. 4.
[154] This assumes that it is not practical for the supplier to impose on all buyers by contract effective promotion requirements, see also paragraph 107 point (a).

known, so that [RPM] may be particularly important as a competitive device for new entrants. 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 precompetitive effect."[155]

Short term low price campaigns (2-6 weeks)

ii) Similarly, fixed resale prices, and not just maximum resale prices, may be necessary to organise in a franchise system or similar distribution system applying a uniform distribution format a coordinated *short term low price campaign* (2 to 6 weeks in most cases) which will also benefit the consumers.

In my view short-term low price campaigns should be permissible regardless of the market shares of the parties since the incentive is to lower the price for the consumer.

Pre-sales services

iii) In some situations, the extra margin provided by RPM may allow retailers to provide (additional) *pre-sales services, in particular in case of experience or complex product*s. If enough customers take advantage of such services to make their choice but then purchase at a lower price with retailers that do not provide such services (and hence do not incur these costs), high-service retailers may reduce or eliminate these services that enhance the demand for the supplier's product. RPM may help to prevent such free-riding at the distribution level. The parties will have to convincingly demonstrate that the RPM agreement can be expected to not only provide the means but also the incentive to overcome possible free riding between retailers on these services and that the pre-sales services overall benefit consumers as part of the demonstration that all the conditions of Article 101(3) are fulfilled.

It may be presumed that this justification to a large extent refers to the difference in pre-sales services provided by so-called bricks-and-mortar shops and sales over the Internet. My view is that this is a reasonable exemption possibility.

Also the problem of free-riding dicounting retailers was highlighted as one of the rationales for RPM by the US Supreme Court in *Leegin*.[156]

The Commission also provides (points 226-229 of the 2010 Guidelines) guidance for the assessment of maximum or recommended prices above the market share threshold and for cases of withdrawal of the block exemption.

"*The possible competition risk of maximum and recommended prices is that they will work as a focal point for the resellers and might be followed by most or all of them and/or that maximum or recommended prices may soften competition or facilitate collusion between suppliers.*

An important factor for assessing possible anti-competitive effects of maximum or recommended resale prices is the market position of the supplier. The stronger the market position of the supplier, the higher the risk that a maximum resale price or a recommended resale price leads to a more or less uniform application of that price level by the resellers, because they may use it as a focal point. They may find it difficult to deviate from what they perceive to be the preferred resale price proposed by such an important supplier on the market.

Where appreciable anti-competitive effects are established for maximum or recommended resale prices, the question of a possible exemption under Article 101(3) arises. For maximum resale prices, the efficiency described in paragraph (107)(f) (avoiding double marginalisation), may be particularly

[155]Leegin (supra at 6) (citing Continental T.V., Inc. v GTE Sylvania Inc., 433 U.S. 36 (1977), at 55, and Marvel & McCafferty, *Resale Price Maintenance and Quality Certification*, 15 Rand J. Econ. 346, at 349, internal quotes and citations omitted.

[156] Leegin (supra at 6), p. 10-11.

relevant. A maximum resale price may also help to ensure that the brand in question competes more forcefully with other brands, including own label products, distributed by the same distributor."

For an in-depth review of pro-competitive effects for RPM from a US perspective see p. 9-12 in the *Leegin* judgment.[157]

8.2 Pro-competitive effects in national case law

8.2.1 Are there examples of exemptions due to pro-competitive effects?

Firstly it shall be mentioned that due to the European post-modernisation regime, which means that the legal exemption applies automatically without a decision being required as of 2004, very few cases are decided by courts and authorities. Thus it is difficult to find recent judgments and cases from most Member States. In addition enforcement activities against vertical restraints have been few or none in some countries.

Austria, Luxembourg and Brazil have no case-law yet on the subject. In the reports from Austria, Hungary, the UK, Italy and Belgium[158] the slim possibility for an exemption according to the national equivalent of Article 101(3) TFEU is mentioned.[159] As said in Subsection 5.2 in a few countries (notably Belgium and Germany) exceptions regarding resale price maintenance have so far not seemed to be possible. In France minimum price fixing is not able to be exempted. Regarding other forms of resale price maintenance no arguments that have been invoked have been accepted and quite a few different types have been tested.[160] Possible pro-competitive effects are however mentioned in the report. Historically in Germany no exemptions have been issued. However, in 2003 the German Federal Court of Justice (BGH) held that restrictions of retailers' pricing freedom that are limited to a short period of time (in the case at hand: six weeks) and that are not appreciable do not constitute an unlawful RPM. Further the BGH mentioned that price incentives for the consumer resulting from sales-promotional actions would usually lead to an at least temporary increase in sales from which the dealers would benefit[161]. In Hungary the competition authority has accepted "numerous practical

[157] Leegin (supra at 6).

[158] The Belgian Competition Authority have only in three cases known to the reporter actually issued decisions regarding prices in vertical agreements (the reporter calls this "particularly weak", p. 1).

[159] See Subsection 1.1 in the respective national reports.

[160] The following arguments have been rejected by the Competition Authority:
Justifications relating to *maintenance of competitiveness, prevention of overproduction crisis or the fixing of a "fair price" for consumers*: the Competition Council rejects these arguments, considering that on the contrary, price fixing has disturbed the market and that the "fair price" is the one established on a competitive market (Cons. Conc., n° 05-D-55 of 12 October 2005, Lavanda Essential oils production Sector);
The *"concern of guaranteeing a sufficient and constant quality of the services performed"* by the members of the network has not been recognised by the Council either, observing, in particular, that it was not proven that *"the anticompetitive effects have been reduced to what is strictly necessary to ensure good functioning of the network"* (Cons. Conc., n° 00-D-75 of 6 February 2001, distance flower transmission sector);
The argument according to which imposing prices to franchisees is a *"way of disclosing a low cost price policy"*: according to the Council, the price fixing practice went above what was strictly necessary to reach this objective (Cons. Conc., n° 94-D-60 of 13 December 1994, washing sector);
Justification relating to the *maintenance of local shop* as well as training and information of retailers in country areas is rejected in the absence of evidence that these objectives could not have been obtained without the practices (Cons. Conc., n° 92-D-38 of 9 June 1992, GITEM).
Uncertainty relating to *parity of currencies* have not been considered as admissible justification, other means being available to solve this difficulty (Cons. conc., n° 07-D-06, 28 February 2007, games consoles and video games sector).
Necessities peculiar to *luxury products and brand image* do not constitute an admissible justification according to the Competition Authority (Cons. conc., n° 06-D-04 of 13 March 2006 relating to practices carried out in the luxury perfumery sector).
The argument founded on the suppression of the double margin has been submitted to the Competition Council and has been carefully examined. According to this theory, vertical integration or agreements that recreate the conditions of vertical integration, eliminate the combined margins collected by autonomous operators along the vertical channel, as compared to the upstream price. Relying on economic literature, the Competition Council replied that *"double margin elimination can compensate the negative effect of the reduction of competition only under very particular circumstances (weak competition between producers on the upstream market and between distributors on the downstream market, strong negotiation power of producers towards distributors), that are not characterised in the toy sector"*. Moreover, the Council observed that the undertakings prosecuted did not show by practical facts, elimination of the double margin and that, on the contrary, the arguments developed by the parties *"suggest that the structure of the market and the methods of competition do not naturally encourage a strong inefficiency of double margin"*, whereas, according to the Council, negative effects of reduction of intrabrand and interbrand competition kept taking place in this context (Cons. conc., n° 07-D-50, 20 December 2007, toy sector). – all French report, p. 10-11.

161 See p. 7 in the German report, referring to BGH, decision of 8 April 2003, KZR 3/02 « 1Riegel extra ».

justifications and pro-competitive aspects in the last few years regarding the vertical restraints, especially when assessing various forms of RPM."[162] In the UK in a few cases pro-competitive effects have historically been accepted for RPM. Firstly, regarding books (Net Book Agreement ("**NBA**")) where retailers were prevented from selling books at less than the publishers' recommended retail price. The justifications were: (i) that the production and distribution of books necessitated different treatment from other goods (to mitigate the risks associated with the lengthy pre-sale process, through predictable retail volumes); and (ii) that books were so important to national culture and had such a particular social and educational role to play that they should be protected from the rigours of competition law. The Book Publishers abandoned (after changes in the industry) the NBA in 1995 and it was formally dismantled by the Restrictive Practices Court in 1997.[163]

A report by the OFT on the impact of the end of the NBA on overall productivity in book retailing and publishing suggests that, contrary to some expectations, total book sales volumes have increased, the number of titles published has increased and there has been an increase in retail diversity (new "bricks and mortar" entry and on-line sales to consumers (Amazon)).[164] The study suggests these developments would have been slower had RPM remained in place, leading to the conclusion that the NBA had negative inter-firm effects. One surprising finding, however, was that intra-firm efficiency did not improve over the same period. The study suggests that this was partly because a lot of efficiency improvement had already occurred prior to the removal of RPM, when the NBA was already breaking down. Nonetheless, the overall conclusion of the report is that the NBA caused competitive harm by preventing downstream entry and was not needed for maintaining sales volume or diversity.[165]

The second case in the UK was *Medicines*[166] where the Restrictive Practices Court found in 1970 that RPM was necessary to ensure that chemist shops were not increasingly put out of business by supermarkets to the consequent detriment to the public. It was also concerned that full-line wholesalers, who stocked the less popular and less profitable products, would be forced to reduce their delivery service to retail chemists. In 1999 the OFT applied to have the exemption in the *Medicines* case removed on grounds of a material change in the retailing of pharmaceuticals and of the circumstances found by the Court in 1970.[167] The OFT considered that the abolition of RPM was necessary to bring lower prices to the public on a significant range of branded medicaments through increased competition between retail outlets and the resulting pressure on manufacturers to lower production and distribution costs. The RPM arrangement in *Medicines* was the last remaining legally sanctioned RPM in the UK when it was finally overturned in 2001.[168]

As to the non-EU countries; in both Japan and Brazil justifications should be allowed regarding vertical practices and prices according to the national reporters but there have not been any cases about it in neither country yet.

8.2.2 What kinds of effects have been considered?

In Austria,[169] Italy,[170] Sweden[171] and Germany[172] all pro-competitive effects can potentially be recognised, as is the case under the EU rules. Germany recognises in particular that the introduction of new products might justify certain anti-competitive conducts, even hardcore for a limited time.[173]

[162] Fulfilled the equivalent of Article 101(3) TFEU, Hungarian report, p. 13 (with reference to answer under 1.1).
[163] Net Book Agreement 1957 (No. 4) [1998] ICR 753.
[164] An evaluation of the impact upon productivity of ending RPM on books (June 2008) at http://www.oft.gov.uk/shared_oft/economic_research/oft981.pdf.
[165] UK report, p. 15-16.
[166] In re Medicaments Reference (No. 2) [1970] 1 W.L.R. 1339.
[167] In re Medicaments and Related Classes of Goods (No 3) [2001] I.C.R. 306.
[168] UK report, p. 16.
[169] Austrian report, p. 7.
[170] Italian report, p. 19.
[171] Swedish report, p. 9.
[172] German report, p. 6-7.
[173] German report, p. 7.

The German Federal Court of Justice held in 2003 that both short time (under six weeks) restrictions of the retailers pricing freedom and price incentives following sales-promotional actions would be lawful.[174] This is not allowed in Hungary.[175] In Belgium the national competition authority ("the Council") and the Belgian courts have had to rule on the question whether vertical pricing practices improved the distribution of products. In this particular area, their decisional practice has acknowledged the existence of three types of pro-competitive effects: (i) enhancement of ancillary services; (ii) improvements of information on consumers' choices; and (iii) improvements in the promotion of the products.[176]

In the *Laroy-Duvo/Aniserco* case, the parties claimed that resale price maintenance provided retailers with incentives to offer enhanced pre-sale services to consumers. The Council however dismissed this claim, and found that resale price maintenance could not benefit consumers. The Court of Appeal ruled that consumers did not benefit from the alleged services as the product did not require such high-level retail services.[177] The ruling of the Court of Appeal thus implies that resale price maintenance may deliver acceptable servicing efficiencies to consumers, in relation to other types of products.

The two *BHP Billiton Diamonds* cases are also interesting here. In these cases the Appeal Court of Antwerp stated that the disclosure of information on retail prices was crucial to enable the supplier to assess the success of a product on the market.[178]

Finally, in the *Chanel/Makro* case, the Court of Appeal of Mons pointed out that the rule of prior approval of retailers' advertisements activities had been recognized by the European Commission as allowing the supplier and its distributors to efficiently coordinate their promotional efforts in the field of luxury goods.[179]

In Hungary, Article 17 of the Hungarian Competition Act (HCA) determines those pro-competitive effects that are recognized by the legislator, which could be referred to even in case of RPM agreements.[180] If the agreement *"contribute[s] to a more reasonable organisation of production or distribution, the promotion of technical or economic progress, or the improvement of competitiveness or of the protection of the environment"*. These possibilities are alternative, thus it suffices if the agreement complies with only one of them in order to be exempted; nevertheless, it is not sufficient if the effects emerge only subjectively for the participants, the pro-competitive effects have to be appreciable also on the market.

In a case concerning oversight over a distribution network the HCO did not accept as a legitimate purpose the exclusive control over the production, distribution and the whole resale level of the brand in a case where the contractual relations between a distributor and its 110 resellers were scrutinized. The HCO thus considered the contractual clause, which provided that the distributor can charge only the prices determined by the producer, to be restrictive of competition.[181] In the same case the HCO held that the determination of the price level in the resale network by the producer is in general restrictive of competition.

[174] BGH, decision of 8 April 2003, KZR 3/02 "1 Riegel extra".
[175] In case no. vj-57/2007 the HCO ruled against the Hungarian Bakery Association finding that setting minimum resale price in respect of a particular type of white bread vis-à-vis the bakeries amounted to illegal RPM.
[176] Belgian report, p. 12-13.
[177] See Raad voor de Mededinging, Beslissing, n°97-RPR-01, 25 March 1997, N.V. Laroy-Duvo / N.V. Aniserco; Het hof van beroep te Brussel, nr. 1998/3867, 1997/MR/3, 13 October 1998, NV Laroy-Duvo/De Belgische Staat.
[178] See, Hof Van Beroep te Antwerpen, n°2005/4491, 2004/AR/902, 30 June 2005, IDH Diamonds NV/ BHP Billiton Diamonds (Belgium) NV. See also Hof Van Beroep te Antwerpen, n°2005/4490, 2004/AR/759, 30 June 2005, Stelman I.D.D. NV/ BHP Billiton Diamonds (Belgium) NV.
[179] Cour d'appel de Mons, n°2004/2131, 2003/RG/137, 6 September 2004, Chanel SAS e.a. / S.A. Makro. See also Conseil de la concurrence, Décision n°2003-E/A-24 du 25 mars 2003, Diprolux S.A.
[180] Hungarian report, p. 17.
[181] Magyar Suzuki, Vj-176/1996.

In the very early and exceptional case *Kontavill Kontakta*,[182] in connection with the resale agreements for the sale of electricity spare parts, the HCO established that economic competition is not an aim but merely a tool for enforcing efficient economic activities serving the public interest and the final interests of the consumers. In this context, the Hungarian Competition Authority (HCO) regarded price competition between market operators as desirable only where such price competition does not force market operators to deteriorate the conditions of marketing (or those of the product's quality) to such an extent that is in turn harmful for the consumers. In case of luxury products, technically complex and widely diversified products, and in case of products that need a big inventory, the producer is interested in the distributor selling its products under appropriate conditions and proper standards. The HCO argued that in order to ensure that RPM is lawful the costs necessary for complying with the necessary standards set by the distributor can in fact serve the interests of consumers as RPM makes the financing of the higher level marketing service possible. RPM was thus in that specific case not regarded as restrictive of competition. The HCO thus argued that the agreement in fact enables wholesalers not to cut on important expenses (full range of products, conditions of serving the customers, storage, advertisements, and related services) that would deteriorate the quality of the service to the detriment of the consumers. In *Budapest Sör*[183] which related to the fixing of the resale price of beer, a different commercial context than the above mentioned case was present and the HCO also reached a different conclusion. In *Kontavill Kontakta*[184] the HCO also specifically referred to the high costs of after-sales services, when it provided an individual exemption to the RPM agreement. Finally, in the same case the HCO did also find that the desire to sell the products at the appropriate level was a reason to provide individual exemption to the given agreement despite the application of RPM.

In *Borsodi Sörgyár*[185] the HCO expressly took into account that the given agreement promoted "the supply of the given products" in general. The HCO also took into account that the agreement promoted the shortening of the deadlines of delivery. The earlier Hungarian Competition Act of 1990 enumerated the shortening of the deadlines of delivery as a specific benefit justifying an exemption.

In *Hungaropharma*,[186] the HCO examined the nation-wide distribution agreements concluded by Hungaropharma (one of the largest wholesalers of medicines in Hungary) and 490 pharmacies. The agreements included expressed RPM provisions and Hungaropharma required its prior approval for any individual promotion/discount by the pharmacies. When examining whether the given agreement may be exempted, the HCO stated that the latter clause is clearly restrictive of competition. At the same time, the HCO noted that such a restriction can be regarded as proportionate, provided that it does not relate to promotions/discounts in general, but rather to the period of the promotions organized by Hungaropharma itself.

In France the Competition Authority acknowledged that *"in certain sectors where services to customers (personalised advice for example) are particularly significant"* resale price maintenance could *"help to prevent parasite behaviour by which a distributor attracts consumers by offering low prices, by taking advantage of other distributors' investment and by destroying their incentives to maintain their service offers"*. The Authority specified again that these are the arguments that lead the American Supreme Court to render the *Leegin-judgment*.[187] The transfer from intra-brand competition on price towards competition on services could, in such way, justify the practice of minimum or imposed prices.[188]

[182] Vj-150/1995.
[183] Vj-133/1996.
[184] Vj-150/1995.
[185] Case Vj-52/1992.
[186] Case Vj-57/2008.
[187] See Subsection 8 for a summary of the consequences of Leegin.
[188] 5th "Entrée Libre" newsletter of the French Competition Authority, July 2009.

In the UK the OFT recognizes that vertical restraints may lead to anti-competitive effects if combined with market power, but that they may also produce economic benefits by promoting efficiencies, non-price competition and investment and innovation.[189]

In Luxembourg and Switzerland it can be assumed that the National Competition Authorities will consider the following criteria as recognized on grounds of economic efficiency:

- co-operation agreements relating to research and development
- specialization and rationalization agreements
- agreements granting exclusive rights to deal in certain goods or services
- agreements granting exclusive licences for intellectual property rights
- agreements with the purpose of improving the competitiveness of small and medium sized enterprises, in so far as they have only a limited effect on the market

In Brazil the competition authority will recognize all types of justification for the vertical practices. In Japan[190] on the other hand certain effects enhancing inter-brand competition are recognized:

i) maintaining image of high end or fashionable products and
ii) enabling retail shop to provide the value added service by preventing price sale cuts.

8.3 Do the authorities or the courts take into account pro-competitive effects?

The burden of proof in the EU,[191] Belgium, Luxembourg, the UK and France[192] is on the parties to prove that an agreement fulfils the equivalent of the criteria in Article 101(3) TFEU. In Austria, Germany, Sweden, Switzerland and the Czech Republic the authority will consider it ex officio (though in the Czech Republic, Germany and Sweden[193] in practise, the parties have to invoke it).[194]

In Brazil the authority is required to proceed with an automatic review of pro-competitive effects, but in practice the defendant advance economic evidence in support of their justifications of the practice. In Japan the interested party has the burden of proof for the pro-competitive effect that constitutes justification in the civil litigation.[195]

To summarize the different answers to the question as to whether the authorities or the courts sufficiently take into account pro-competitive effects? we have three main groups; i) Austria, France, Belgium, Sweden, Germany and Luxembourg that cannot answer the question, ii) the second group consist of France, Germany, Hungary and Switzerland that answers yes and iii) the last group is the UK, the Czech Republic, Brazil and Japan that answers no.

As evidenced by the short extracts below, taken from a selection of the answers: there seem to be a consensus among rapporteurs that national authorities do not take pro-competitive effects enough into consideration:

> Belgium: "In our opinion, the vast body of diverging literature on the effects of resale price maintenance calls into question the strong, stable *per se* prohibition rule that prevails in Belgium and elsewhere. In situations of economic uncertainty, a wise approach is to avoid using presumptive legal mechanisms (be they illegality or legality presumptions), on pain of multiplying Type I – false convictions – and Type II – false acquittals –enforcement errors. At best, those considerations plead in favour of a rule-of-reason approach to resale price maintenance."[196]

[189] OFT 419, paragraph 7.19.
[190] Japanese report, p. 4.
[191] See Regulation 1/2003, Article 2 and e.g. *Elevators and Escalators* O.J. C 75/19 (2008), paras. 590-592 where the Commission does not even get into a discussion as pro-competitive effect has not been invoked.
[192] See Section 4.5 in the national reports.
[193] For specifics, see Swedish report, p. 10.
[194] See Section 4.5 in the national reports.
[195] Case Chackeless.
[196] Belgian report, p. 15.

For Germany[197] the answer to the question as to whether the authorities or the courts take into account pro-competitive effects is clear: "In theory Yes, all pro-competitive effects have to be considered and weighed by the authority and the courts irrespective of the parties having invoked the exemption or not. But in accordance with the 1999 Commission Vertical Guidelines, very few (or even no) exemptions were accepted in cases of RPM as it was considered to be hardcore. That is why no precedents exist in German practice. In the above mentioned communication of 13 April 2010 the FCO has confirmed that exemptions may apply if the conditions are fulfilled. That principle is in line with the new approach of the Commission in the 2010 Vertical Guidelines. Up to now, the FCO has not indicated the conditions and possible examples of exemptions in cases of RPM."

Hungary: "In our opinion, the HCO gives basically a proper answer to the vertical pricing practices, and balanced in its individual decisions as described above that considerations related to the agreements, including the circumstances pointing to an exemption."[198]

The UK: "To the extent that RPM is to be regarded as a "hardcore" infringement for UK competition law purposes, it is arguable that potential pro-competitive effects are not sufficiently taken into account. There has been a reappraisal of the economic theory in this area, which recognises the need to take account of the benefits which may result from RPM in certain cases. There may be instances, for example where RPM is unobjectionable or even necessary. Treating all RPM in the same manner may lead to errors in the form of prohibiting activity that may be pro-competitive or allowing activity that is anti-competitive, both of which may lead to long-term harm."[199]

Brazil: "Competition authorities should adopt a more systematic review of pro-competitive justifications for vertical practices. Although authorities do take them into consideration during the decision making process, quantification and review of the justifications do not follow a thorough approach, which tends to render defendants in a worse position."[200]

Japan: "In my opinion, FTC does not sufficiently take into consideration the pro competitive effect although they are improving. However the reason might be that parties do not sufficiently argue or prove this point."[201]

9 Sanctions for resale price maintenance

9.1 Introduction

As is illustrated by the references to national case law below the sanctions for vertical restraints varies a lot between the reporting countries. In some countries no fines at all have been imposed whereas in others, as Italy, the amount of fines are in the range of 300 million EUR, which is more than the major fines imposed for a cartel infringement in several EU Member States. That vertical restraints are considered as less serious than cartel infringements must thus be reconsidered in this context, at least in relation to some countries. For a company the rules regarding RPM are not totally easy to grasp since it differs from country to country but it also has to be aware of that in certain countries it runs a lot higher risk than in others of getting economic sanctions for a potential breach of the rules. As will

[197] Comment from German reporters 24 August 2010.
[198] Hungarian report, p. 17.
[199] UK report, p. 19.
[200] Brazilian report, p. 6.
[201] Japanese report, p. 6.

be seen below it is mostly suppliers that run the risk of having to pay fines but in some situations fines have also been imposed on the retailers.

9.2 Forms of sanctions for unlawful vertical practices

Austria, Belgium, Germany, Hungary, Italy, Luxembourg, Sweden, the UK and the Czech Republic have administrative sanctions.[202] In line with the EU Regulation 1/2003 Article 23(2) Belgium, Italy, Hungary, Germany, Sweden, the UK and the Czech Republic have set the maximum amount to 10% of the annual turnover. Belgium also has the possibility for periodic penalties of up to 5% of an average daily turnover, which is also in line with EU Regulation 1/2003 Article 24(1)(a).

Few sanctions have been imposed and in practice the amounts of the fines have not increased over the years. A growing debate about possible criminalisation is present in Belgium. The government wants to introduce some form of criminal sanction for severe infringements.[203] This is not possible within the EU legal framework. For individuals German law stipulates a maximum fine of one million Euro.[204] In Germany, Luxembourg and Hungary as well as in EU law calculation of the turnover is made on the basis for the entire worldwide business or company group.[205]

Regarding the per se prohibitions in French law there are three types of administrative sanctions[206] and penal sanctions for individuals involved in the practice. The maximum amounts of fines are 10% of annual turnover for companies and 3 million Euros for individuals. The criteria for penal sanctions are very hard to fulfil but could result in prison time of up to four years (and a fine to up to 75 000 Euros). Regarding other restrictive practices the fine can be set to up to 2 million Euros or triple the amount wrongfully paid.

In the UK the Enterprise Act 2002 empowers the OFT to seek a court order disqualifying a director of a company that has been found to have infringed competition law from acting as a director of any company for up to 15 years.[207]

Worth noticing, in all countries that implement a system based on Article 101 TFEU the system also provides for the equivalent of Article 101(2) TFEU were agreements can be declared null and void if found in breach with the competition rules.

Japanese law stipulates a surcharge in the case of RPM violations.[208] Swiss law is in comparison much more like the EU member states. An enterprise that participates in an unlawful agreement or that behaves unlawfully will be required to pay a sanction of up to 10 per cent of its turnover in Switzerland within the previous three business years. The amount of the sanction is dependent on the duration and severity of the unlawful behaviour. The profit thereby achieved by the enterprise will also be taken into consideration. In Brazil, even though the fines may range for 1% to 30% of the company's turnover, CADE seems to be cautious about the absolute amount of the fines.[209]

9.3 Are the specifics of vertical relationships taken into consideration when determining fines?

As will be noted from most national reports, RPM has not been the subject of any heavy fines except in a few exceptional cases. Some competition authorities, as the Swedish and Luxembourg authority,

[202] See Section 5 of the national reports.
[203] Belgian report, p. 16.
[204] German report, p. 8-9.
[205] German report, p. 9, Luxembourgian report, p. 6, Hungarian report, p. 17 and Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003 (2006/C 210/02), Article 23(2) and Article 18 as well as Cases T-25/95 etc., *Cimaenteries CBR SA v. Commission* [2000] ECR II-491, paras. 5022-3.
[206] French report, p. 17.
[207] S 204 of the EA 2002 introduced new provisions into the Company Director Disqualification Act 1986 (CDDA) which sets out the circumstances in which a court may, or must disqualify an individual from acting as a director of a company.
[208] Japanese report, p. 7.
[209] Report for Brazil, p. 7.

have not taken action at all in order to try to impose fines in such contexts. The biggest European fine imposed was *DaimlerChrysler*[210] where the Belgian division of Mercedes-Benz had fixed margins and sent out ghost buyers to monitor sales margins which led to fines of 9.8 million Euros.

The Austrian reporters believes that the more limited anti-competitive effect that is the result of vertical relationships in comparison with horizontal should appear in the practice of the authority and the courts but no decisions have been taken yet regarding vertical relationships.[211]

According to the French Competition Authority, vertical practices do not bear the "*exceptional seriousness of horizontal cartels between competitors*" but some of them are still considered grave. Such is the case in particular for vertical practices of resale price fixing, which are "*serious by nature because their consequence is to confiscate, to the benefit of the authors of the infraction, the benefits which the consumer has the right to be expecting from intra-brand competition on the retail market*".[212] When the Competition Authority appreciates the seriousness of the breach to the economy, the Authority attaches specific importance, in cases of vertical cartels, to the degree of competition that subsists on the market.[213] The French Competition Authority also takes into account the market power or, on the contrary, the weakness of the companies. Hence, it has sometimes taken into consideration the imbalance of commercial relations and the situation of inequality in which small producers of toys are kept against leading distributors.[214] On the contrary, it has been considered that the practice of price fixing were all the more serious when they were applied by international companies or groups, or companies and groups detaining large market shares.[215] In certain cases, the competition authority only inflicts sanctions to the sole producer with a dominant role in comparison to distributors which had only contributed partially or punctually to the cartel of retail price fixing,[216] whereas in other case it sanctions not only the producer but also certain distributors.[217]

The German competition authority's guidelines reflect the less detrimental character of vertical infringements insofar as the basic amount of the fine is generally not set in the upper range of the margin.[218] However, the calculation of the fine depends on the context of the case. Therefore, in cases of exceptional circumstances even a restriction of intra-brand competition may constitute a severe violation of competition rules that is subject to extremely strict sanctions.

In Hungary[219] the former Notice on Fines applied lower scores concerning the degree of restricting competition for vertical restraints. However, the Former HCO Notice on Fines considered RPM as a more serious restriction within the realm of vertical restraints, and considered them as serious infringements similarly to less severe horizontal cartels.

9.4 Fines imposed in major cases

Below are the major fines reported by the national reporters. The highest fines, by far, have been imposed in Italy, Germany and Brazil.

[210] Case T-325/01 *DaimlerChrysler* [1985] ECR 2725.
[211] Austrian report, p. 4.
[212] Cons. Conc., n° 08-D-20 of October 1st 2008 relating to practices used by subsidiaries of the Compagnie Financière et de Participation Roullier.
[213] OECD, "Round table on resale price maintenance", September 10th 2009, p. 138.
[214] Cons. Conc. N° 07-D-50, December 20th 2007, toy distribution sector.
[215] Cons. Conc., n° 05-D-70 relating to practices on the market of selling of prerecorded video cassettes for children.
[216] E.g. Cons. Conc., n° 07-D-06, February 28th 2007, sector of games consoles and video games.
[217] E.g. Cons. Conc., n° 07-D-50, December 20th 2007, toy distribution sector.
[218] German report, p. 8-9.
[219] Hungarian report, p. 18.

Country	Maximum fine
EU	€9,8 million[220]
Austria*	-
Belgium	€6 200 / day to end practice[224]
Czech Rep.*	-
France	€45,4 million: largest individual fine €37 million.[227]

Country	Maximum fine
Germany	€120+96 million for two companies[221]
Hungary	€400 000[223]
Italy	€300 million[225]
Luxembourg*	-
Sweden*	-

Country	Maximum fine
UK	€25,14million[222]
Brazil	€132 million[226]
Japan*	-
Switzerland	€4.2 million[228]

The only cases regarding vertical prices known to the Belgian reporter concerns two cease and desist-decisions, of which one was connected with a fine.[229] In France a number of cases have been decided.[230] The largest fine imposed to date for vertical anticompetitive agreements was in the perfume and cosmetic sector (45,4 million Euros).[231] In Decision n° 07-D-50 of December 20th 2007 relating to the practices applied in the toy distribution sector the Competition Council fined five suppliers and three distributors 37 million Euros for having agreed with each other on sale prices for toys. These vertical cartels were often accompanied by "price policy" actions against "diverting" distributors so as to obtain a rapid realignment of toy prices. The Hungarian Competition Authority (HCO) has also decided in a number of cases concerning vertical price restrictions, and the Hungarian reporter concludes that, when the undertaking cooperated, did not affect a large portion of the market and removed the unlawful provision in the affected agreement the HCO did not impose a fine. In contrast, undertakings with RPM agreements and/or if they did not cooperate were heavily fined. As a general rule the upstream party was fined heavily and the downstream party not at all. As an exception the downstream party could be fined if it had actively contributed to the operation of the system. Other cases where no fines were imposed are when a RPM clause did not exist in practice and the company would remove it;[232] where permission had to be collected by the distributor to give discounts but because cooperation with the HCO and due to the fact that the parties interpreted the agreement differently; where a RPM clause was contrary to the parties' interest and the HCO already had imposed a fine on the company; and in a case where only 2% of the market was affected. In the two cases the HCO imposed fines *Navi-Gate*[233] and *Mitac-LPC*[234] the reasoning on how and calculation of fines was different. In the first case the Notice on Calculation on Fines was still in force[235] but not in the second one. The *Navi-Gate* case concerned distributors and retailers of satellite navigation systems. The RPM clause was deemed to be possible for it to significantly affect intra-brand competition especially if the consumers choose a product based on price. The HCO also took into account that due to the individual purchase system Navi-Gate was not only the supplier of its contracting parties but their competitor as well both on the wholesaler and the retail markets. The HCO considered the effect of the agreement on the market as low and accepted those statements

*Austria, Belgium, the Czech Republic, Luxembourg and Sweden as well as Japan do not report any major cases.
[220] Case T-325/01 *DaimlerChrysler* [1985] ECR 2725. The Commission has imposed even larger fines in a number of cases which have subsequently been annulled by the CFI. A majority of the RPM cases were preliminary rulings from the Court of Justice according to Article 267 TFEU and are referenced under relevant subsections.
[221] *RTL and Pro7Sat1*, see German report, p. 9-10.
[222] *Toys*, see the UK report, p. 21.
[223] *Mitac/LCP*, Vj-166/2006, see Hungarian report, p. 19-20.
[224] *Laroy-Duvo/Aniserco*, see Belgian report, p. 17-18.
[225] *Accordo Distributori ed Edercenti Cinema*, I/363, see Italian report, p. 24.
[226] *Case no. 08012.003805/2004-10*, see Brazilian report, p. 27, the fines amounted to 2% of turnover.
[227] *Decision no 07-D-50 (toy distribution))*, see French report, p. 20.
[228] *Hors-list drugs*, see Swiss report, p. 11-12.
[229] Belgian report, p. 17-18.
[230] For a full list see French report, p. 28-30.
[231] Decision n° 06-D-04 of 13 March 2006. Vertical agreements between suppliers of perfumes and cosmetics and three retailers regarding the prices for end-users. Total fines for 13 distributors and three retailers amounted to 45,4 millions euro.
[232] Castrol Hungária, Vj-7/2008.
[233] Vj-26/2006.
[234] Vj-166/2006.
[235] See Subsection 6.2.

which established that the RPM clauses were not enforced in practice. The HCO also took into consideration that Navi-Gate must have been aware of the relevant prohibition when it concluded the given agreements and the HCO did not accept the explanation according to which Navi-Gate merely applied those template contracts that the executive officer brought from its former employer. The HCO took into account as a mitigating factor that Navi-Gate amended the contested agreements during the competition proceedings. In accordance with the former HCO Notice on Fines the HCO determined the amount of fine by multiplying the scores given for the above factors the thousandth of the turnover realized during the infringement concerning the affected product. The HCO did not impose any fine on the other undertakings involved in the RPM taking into account the main function of the sanctioning (deterrent nature) and established that the RPM system was established by Navi-Gate and it was Navi-Gate who intended to put it in operation in practice. In the second case where the HCO imposed fines, *Mitac-LCP*, the Notice on Fines was not in place. Aggravating factors concerning the RPM was the serious nature of an RPM clause and that in was followed. Mitigating factors were active parallel imports and inter-brand competition. The HCO also fined two distributors for actively participating in control of the fixed prices.

The major UK-case was the combined *Toys and Replica Kit* where fines of €25,14 million respective €17.20 million were imposed.[236]

There are two major Swiss cases, *Hors-list drugs*[237] and *Gaba.*[238] The *Hors-list drugs* concerned the market of drugs against erectile dysfunction. The Competition Authority, the Competition Council, investigated the admissibility of price recommendations. In this case, the manufacturers recommended retail prices for the sales to end-consumers. Following an investigation opened in 2006 into prices charged for erectile dysfunction medication (multiple products), the council came to the conclusion that three companies had concluded unlawful vertical competition agreements that maintained a recommended public selling price. Considering that the price recommendations were followed by a large majority of drug stores and physicians, the council came to the conclusion that the publication and observance of the recommended retail prices for the medicines represented illegal vertical collusion between the producers and distributors and imposed sanctions. In *Gaba*[239] the council did in late 2009 imposed a fine on the manufacturer of Elmex toothpaste, Gaba International SA (a subsidiary of the US company Colgate-Palmolive), on account of the parallel export prohibition Gaba had imposed on its Austrian license holder, Gebro Pharma GmbH. The council found that this clause constituted an unlawful ban on parallel imports into Switzerland and foreclosed competition in Switzerland. The agreement between Gaba and Gebro included an export prohibition on Elmex products manufactured under license by Gebro (at least through September 2006). As a result, Swiss retail companies were prevented from buying Elmex products at lower prices in neighbouring markets. Later, a discount supermarket chain filed a complaint noting that it was being prevented from importing Elmex products from Austria, the council opened an investigation. As a result, the council fined Gaba for the ban on parallel imports. Gebro was fined a mere symbolic sum as they did not benefit from the ban.

As to Brazil, in July 2009, CADE issued a decision on case no. 08012.003805/2004-10 sanctioning the defendant in approximately R$ 352 million (EUR 132 million[240]), representing 2% of the company's turnover in the year of 2008. For purposes of imposing fines, CADE considers the gross turnover excluding taxes. This is the highest fine ever imposed by CADE in absolute figures, and the highest percentage for vertical restraints.

[236] See Subsection 3.5.1 for summaries of the cases and see UK report, p. 21, for division of fines.
[237] Decision of the ComCo of 2. November 2009 – Hors-list drugs.
[238] Decision of the ComCo of 30. Novemeber 2009 – Gaba.
[239] Decision of the ComCo of 30. Novemeber 2009 – Gaba.
[240] Considering the average exchange rate for July 2009.

10 Assessment - Does the national legislation take sufficient consideration to the specificity of vertical agreements when dealing with price-related practices?

As have been seen throughout this Report, various competition authorities and courts have very different approaches to RPM, both as regards the level of enforcement and the amount of fines, if any. The question is however, does the national legislation take sufficient consideration to the specificity of vertical agreements when dealing with price-related practices?

The problem in Belgium, according to the national reporter, is not the legislation but the enforcement which is rare and under-prioritized by the competition authority. And when vertical agreements are subject to enforcement the specificities of vertical practices are not taken into account. The lax enforcement gives legal uncertainty and might leave infringements unpunished. The Hungarian reporter finds that the national legislation is sufficiently flexible. The Hungarian reporter wants changes to align the national *de minimis notice* to the European market share cap and calculation of market shares.

In the first years following the reform of 2005 the German Federal Cartel Office (FCO) more or less continued its decision practice as under the former German law, in particular with respect to price fixing and price recommendations.[241] Meanwhile it has further developed its practice by generally adapting it to EU standards. Nevertheless, there seems to be a clear tendency of the FCO to extend the scope of the prohibition of price-related practices. In a recent decision the FCO regarded occasional telephone and e-mail contacts between employees of the supplier (producer) and its distributors in the context of recommended prices as qualifying for a price fixing agreement even though no price was explicitly agreed upon. Evidence of the alleged agreement was deduced from the fact that some of the distributors adapted their prices to the recommended sale price, albeit to a different extent. Further, the FCO held that the sheer fact that several telephone calls were made by the supplier to his distributors suffices to establish the exertion of pressure on the distributors, irrespective of the exact content of the telephone conversations. The FCO's extremely strict interpretation of the prohibition of price-related practices is likely to substantially impede economically reasonable distribution strategies. It may in particular hamper a selective distribution policy which is supported by recommended consumer prices. The FCO has not even accepted an exception in the case of health products (contact lenses) where normally qualified consulting services are required. In general, a supplier may find it extraordinarily difficult to implement a strategy of recommended prices since the mere fact that the recommended sale prices are respected by some of the distributors may already serve as proof of the existence of a price agreement. The German reporters report of a newspaper article[242] in which representatives from the industry sector in Germany are complaining about the legal uncertainty caused by the new practice of the FCO with regard to vertical price agreements and, in particular, price recommendations. According to the German reporters, the new FCO approach may even turn out to become a barrier to leniency applications because the undertakings concerned do not precisely know which practices will be accepted by the authority as legal and which ones will be regarded as hardcore restrictions that would nullify an existing leniency application. Even if cases as the above-mentioned ones may remain exceptional, a decision practice which would be more in line with sound economic theory might be advisable.[243]

The Hungarian Competition Office's (HCO) case-law on RPM (and other price-related vertical restraints) has been fairly consistent in the recent years. Specifically, in relation to RPM, the case-law appears to present a clear picture as to the application of the competition rules, however, the exact terminology that is used to describe RPM arrangements ("object", "presumption of effects", "obvious effects") could be more consistent in order to provide more legal certainty to market participants. The recent special case Büki (see Subsection 3.3) may signal a departure from this line of case law as a

[241] German report, p. 10-11.
[242] Frankfurter Allgemeine Zeitung of 27 April 2010.
[243] See German report, p. 10-11.

clear RPM practice was found to fall outside the scope of the prohibition of anti-competitive agreements based on a special "effects-based" analysis. At this stage it is unclear, however, if the HCO will consider this case as an "odd one out", or if it will try to accommodate this decision with its earlier case-law and will be able to distinguish this decision from its other RPM decisions.[244]

11 The Future of RPM

11.1 Introduction

The United States Supreme Court judgement *Leegin* that overturned the *Dr. Miles* decision changing the *per se*-prohibition on minimum resale prices and resale price maintenance to a *rule of reason*-analysis has sparked a debate about vertical restraints in Europe as well as vertical restraints in other jurisdictions. The debate is about the economics behind the cartel/anti-trust legislation and the competition authorities' enforcement policy regarding price restriction and resale price maintenance.

The European Commission's new Vertical Block Exemption Regulation[245] and especially its 2010 Guidelines[246] introduced a new approach regarding the assessment of RPM. The Commission opens up for an efficiency defence that can be invoked by an undertaking that has implemented a RPM in its distribution agreements.[247] The Commission list a number of pros and cons regarding RPM in the new Guidelines without further analysis.[248] The cons are described in a questioning way in Botteman & Kuilwijk[249] that are of the opinion that market share is the key element in a determination whether RPM is harmful. They suggest that the Guidelines' threshold should include RPM, but for market shares below 15% RPM would be lawful.[250]

The difficult burden of proof for suppliers in other situations than the ones listed by the Commission in point 225 of the Guidelines will most likely have a deterrent effect. The limited use of RPM will lead to the fact that there will still be no basis for the competition authorities to make appraisals about the effects of RPM.[251]

11.2 National Reporters' Observations

As previously stated the European Commission has opened the door to a reappraisal of RPM with its 2010 Guidelines. Most of the European national reporters consider that the authorities may become more receptive to a reassessment, but it remains to be seen to what extent the authorities would be prepared to analyse (and accept) the pro-competitive effects of RPM, rather than simply treating it as an object infringement, or to accept justifications in terms of the exemption criteria. In its revue the French Competition Authority wrote that "*in certain sectors /.../, recent economic works show that the resale prices maintenance by suppliers can help prevent behaviours of parasitism /.../. [The imposed resale prices] would continue to be presumed anti-competitive but companies would have the possibility of presenting economical arguments demonstrating their positive effects, the burden of proof resting upon them*"[252] This doctrinal inflexion by the French Competition Authority could reverberate on its decisional practice and allow for the justification of beneficial economical effects of vertical practices on prices to be pleaded. The Belgian reporter notes that the Belgian system does not exhibit any signs of evolution but puts forward the European Competition Network, the cases from

[244] See Hungarian report, p. 21.
[245] 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 [new VRBE].
[246] Guidelines on Vertical Restraints (2010/C 130/01) [new Guidelines].
[247] The New Guidelines, para. 223.
[248] The New Guidelines, para. 224.
[249] Botteman, Yves & Kuilwijk, Kees J., *(Minimum Resale Price Maintenance Under the New Guidelines: A Critique and A Suggestion*, The CPI Antitrust Journal June 2010 (1), p. 4-5.
[250] Ibid, p. 8, this is already the case in Hungary (though the market share cap is at 10%), see table of national law supra.
[251] See Botteman & Kuilwijk, p. 8.
[252] "Entrée Libre" n° 5 of July 2009.

the Commission/ECJ and the new legal framework (VRBE) as possibilities for evolution towards a more economical approach to RPM.

The German[253] reporter states on the contrary that there seems to be a clear tendency of the FCO to extend the scope of the prohibition of price-related practices (see Section 10 above).

The Hungarian Competition Authority has hired a chief economist and the economical based approach may entail a consideration of wider aspects of competition. A competition authority may therefore very well evaluate any restraints on price in a wider context, taking into account not only price-based competition, but also the importance of the quality of products, any supplementary (e.g. after-sales) services, product support, etc. for the consumer.[254] A final comment from Hungary is that it is expected that companies facing investigations in relation to vertical restraints will opt more and more to use the possibility of offering commitments to the HCO in order to avoid a finding of an infringement. This could place an increased responsibility on the HCO and will also provide the HCO with increased potential to influence the market behaviour of companies in specific cases. First, these commitment decisions are hardly subject to judicial review (the Hungarian civil procedural rules make it especially difficult for third parties to challenge such commitment decisions[255]), which provide the HCO with more leverage and room for negotiation in such proceedings. Second, this possibility may also allow the HCO to include and accept commitments which go beyond providing an actual and specific remedy for the given competition problem (typically the amendment of the restrictive contractual clauses for the future) and thus enable to HCO to engage in a special form of "market engineering" (e.g. a commitment whereby allegedly harmed consumers should be compensated, etc). The scope of commitments thus should be defined in a very careful and elaborate manner, taking into account all relevant legal aspects.

In the Italian report it is held that indeed, it can be useful to set a fixed or minimum resale price to limited discounted sales or resale at a loss carried out by large-scale or internet retailers as well as free-riding, so that a – at least temporary – RPM agreement can be necessary to give consumers a high quality image of a brand, even if it can entail a temporary final prices increase. In these cases, competition on elements other than prices (pre-sale and post-sale service quality, promotion, etc.), at both manufacturers' level and distributors' level, can be enhanced, ultimately increasing product's quality and choice.[256]

Moreover, a RPM can be an effective means in order to safeguard the existence of medium-sized and small-sized shops (e.g. traditional stores, boutiques) that is more and more threatened by the spread of department stores and e-shops. The new Commission position regarding RPM could help to effectively contrast the overwhelming power of large-scale retail trade and discounter that often hide several serious inefficiencies (e.g. poor services/assistance) under low prices.[257]

As the Competition Authority in Sweden only has intervened in one case against vertical pricing (the Reitan Case)[258] in the post-modernisation regime, the view of the Swedish reporter is that there was a significant transparency gap as to the priority policy of the Swedish Competition Authority during the first five years following the 2004 modernisation. This was unfortunate in view of the significant discretion actually enjoyed by the Swedish Competition Authority. Therefore, the adoption of the Authority's Priority Guidelines[259] in January 2010 will prove to be very helpful according to the reporter. The Priority Guidelines list three main factors of overriding importance when deciding whether to investigate a case:

[253] See German report p. 11.
[254] Hungarian report, p. 21.
[255] See Article 327 (1) of the Hungarian Code of Civil Procedure, which only makes it possible to initiate a judicial review for the following parties: (i) the undertaking concerned and (ii) third parties in respect of those parts of the decision, which specifically relate to them.
[256] Italian report, p. 25-26.
[257] Ibid.
[258] Decision of the Swedish Competition Authority in Case 994/2004 of 6 February 2006, *Reitan Servicehandel Sverige AB*, see Swedish report, p. 13-16.
[259] Konkurrensverkets policy för prioritering av konkurrens- och upphandlingsfrågor, 4 January 2010, dnr 475/2009.

(1) How serious – i.e. anti-competitive – is the problem;
(2) How important is it to obtain a legal precedent from the courts;
(3) Is there another authority or actor which is better placed to act in a given matter?

Before the adoption of the Priority Guidelines the de facto approach of the Swedish Competition Authority appears to have been almost automatically to give priority to combating horizontal cartels and to assign vertical restraints almost automatically such a low priority ranking that in practice only two cases of active intervention against vertical constraints took place over a six years period (which is clear from the national reports that this view is hardly unique). In contrast, the newly adopted Priority Policy appears to be more fine-tuned. In the view of the reporter, it in fact opens up for a considerable increase of enforcement activities against vertical restraints. It is therefore likely that we will see more active enforcement of vertical restraints by the Swedish Competition Authority over the next years. This means that companies – as well as their advisers – may be well advised to consider the risk of intervention by the Swedish Competition Authority when drafting or renewing their distribution agreements which may infringe Swedish or EU competition law.

The Swiss Competition Council will evaluate efficiency and conformity of its work on a regular basis in order to prevent errors in the application of the regulations and keep the enforcement incisive.

11.3 Concluding remarks

11.3.1 Increased legal certainty is required since different national approaches towards RPM creates legal uncertainty

As is well illustrated by the national reports the various national competition authorities have taken very different approaches regarding whether to take action against RPM (or as in the UK case against the "hub and spoke-arrangements"). Moreover the level of fines, when such have been imposed, varies substantially. This creates a lot of legal uncertainty for companies wanting to set up a distribution network in a new country since it has to make a thorough assessment as to whether RPM agreements are permissible and what the risks for non-compliance with the rules are. It has also been questioned whether RPM is in effect anti-competitive when the supplier does not have any market power.

I think it is positive that the Commission has identified at least three situations where RPM may be permissible; i.e. i) the launch of a new product; ii) a short-term low pricing campaign in a franchise or similar distribution system, and iii) the elimination of free-riding by some retailers on the provision on additional pre-sale services by other retailers of "experience" or "complex" goods.[260] However, there is a lack of guidance on other situations where efficiencies may be proved. Botteman & Kuilwijk points out that (p. 7) "...RPM may serve other legitimate purposes than enhance interbrand competition, particularly in markets with low concentration of suppliers and distributors, easy entry, or limited use of the RPM mechanism. Parties using RPM when market conditions do not suggest that appreciable anticompetitive effects are likely thus face significant uncertainty whether the Commission would challenge their RPM and , if so, how to defend against it."

This kind of approach which opens up for individual exemptions is in line with the US *Leegin*-judgment and the Commission's 2010 Guidelines. In addition several Member States have already before the 2010 Guidelines opened up for efficiency defences for RPM. In those Member States were efficiency defences so far have not been accepted account should be taken of the 2010 Guidelines.

In my view safe harbours are important for undertakings dealing with distribution of products. Considering the recent more tolerate approach towards resale price maintenance in Europe as well as in the US the below safe-harbours are proposed.

[260] 2010 Guinelies, point 225.

11.3.2 Maximum prices and recommended prices should be permissible, at least when the supplier has a market share below 30 percent.

In the EU as well as in most EU Member States maximum prices and recommended prices are permissible, at least when the supplier has a market share below 30 percent. In my view the same approach should also be taken by other competition authorities through means of block exemptions or similar legal instruments in order to enhance legal certainty for practises which are not considered anti-competitive.

11.3.3 RPM should be permissible in case the parties both have a market share below 15 percent.

Some authors as Fredrik van Doorn[261] argue that the previous treatment of RPM as hard-core restriction is justified. "The current categorisation of minimum and fixed RPM as a restriction that has as its object the restriction of competition (i.e. a hardcore restriction) is justified. Excluding these controversial distribution agreements from the category of hardcore restrictions would yield a considerable increase in regulation costs, whereas the current standardised approach within Article 81 EC [now Article 101 TFEU] leaves sufficient room for arguments in a specific case that the instrument is, in fact not detrimental to consumer welfare."

I disagree with this approach. To take things even a step further could in my view be to apply the *De Minimis* exemption to RPM, thus, moving RPM from the black-listed clauses. Thus RPM would not be unlawful in case each party has a market share below 15 percent. The *De Minimis* Notice in its current form fully reflects the Commission's old hard-core approach towards RPM and thus does not reflect the new 2010 Guidelines. Such approach is suggested by Botteman & Kuilwijk.[262] This approach would take into consideration the fact that restraints affecting 15 percent or less of the market are unlikely to cause any anticompetitive effects. In addition the new approach by the Commission in the 2010 Guidelines should be applied by national competition authorities both in Europe and outside. It should also be possible to get exemptions for other kind of efficiencies.

11.3.4 The overall context of the agreement should be analysed

When assessing maximum prices and recommended prices the overall context of the agreement should be analysed in order to ensure that the acts of the supplier does not lead to a de facto fixed or minimum retail price as is practise within the EU. In such case the possible efficiencies allowing for an exemption should be assessed.

11.3.5 Short-term low price campaigns with fixed prices shall always be permissible regardless of the parties' market shares.

I consider that the possibility of imposing RPM for short-term low price campaigns should always be possible, regardless of the supplier's market share since low price campaigns cannot be but for the benefit of consumers.

11.3.6 Minimum and fixed retail prices shall be able to qualify for an exemption if efficiencies may be proved

As identified by the Commission individual exemptions should be available in cases where efficiencies may be proved. This should be the same situation in all jurisdictions. Examples identified by the Commission are introduction of a new product or a supplier entering a new market as well as pre-sales services. Hopefully case law from various jurisdictions will give us guidance on which other efficiencies that are acceptable.

[261] Frederik van Doorn, *Resale Price Maintenance in EC Competition Law: The Need For A Standardised approach, http://ssrn.com/abstract=1501070*, p. 1-2.
[262] Botteman & Kuilwijk p. 8.

11.3.7 The future debate

It is clear from the national reports that the debate about RPM will resume with continued intensity. The regulations are different in the respective countries although in most of the EU Member States the regulation mirrors to a large extent the EU regulation. Treating all RPM in the same manner may lead to errors in the form of prohibiting activity that may be pro-competitive or allowing activity that is anti-competitive, both of which may lead to long-term harm.[263] In my view I would however like to see a more harmonized approach in this area all over the world. This is important to make sure competition is not treated differently all over the world which will enable companies to easier set up distribution networks, which in turn will increase both price competition and product diversity to the benefit of consumers – which are the ultimate aims of competition policy in most jurisdictions.

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[263] UK report, p. 19.