1. Introduction

Antitrust is an interdisciplinary field that is best served by acknowledging that a deeper understanding of the issues will result by addressing the subject from several points of view.\(^1\)

( Oliver Eaton Williamson)

Resale price maintenance, vertical territorial restraints and other vertical restraints have the ability to restrict competition in a primarily vertical fashion. They involve arrangements on a vertical chain, such as bilateral agreements between a manufacturer and a retailer.\(^2\) In contrast with horizontal collusion, vertical agreements are common and essential in a market consisting of bilateral or even multilateral arrangements. Nevertheless, such arrangements can include restrictive aspects which can lessen competition, primarily, intrabrand competition. Based on the European Union (EU) approach, some forms of resale price maintenance and vertical territorial restraints have the potential to be the most restrictive forms of vertical restraints. Resale price maintenance (RPM) includes the practice of a seller and her buyers ‘agreeing’ that the latter will sell her product at, above or below a set price. Vertical territorial restraints (VTR), or vertical market allocation, include territorial arrangements between a seller and her buyers where the buyers are allowed to sell only within certain territories. Throughout this book, I use the abbreviations of RPM for vertical minimum price and vertical price fixing and VTR for absolute territorial restrictions and exclusive territories (thus focusing on the most serious forms of vertical territorial restraints and resale price maintenance) unless expressly stated otherwise.


\(^2\) In this book, I often use the terms ‘supplier’ and ‘buyer’ when describing RPM and VTR and their vertical nature, as well as terms commonly found in the US cases, such as ‘manufacturer’ and ‘retailers’, where ‘manufacturer’ is used in a broader sense in this book including not only manufacturers but also producers of raw materials, farmers and others.
Despite the fact that vertical restraints form part of potential anticompetitive practices in many competition/antitrust law regimes, including the EU regime and the regime of the United States of America (US), opinions on their potential anticompetitive effects differ. Indeed, RPM and VTR are controversial topics and their approaches differ in the EU and US.

In the US, the approach to RPM has come under criticism since the introduction of the US per se rule in 1911. This approach was gradually modified and in 2007 completely changed, with only a close majority in the case of Leegin. Leegin introduced the rule of reason to RPM, which opened a new and intensive debate on RPM not just in the US, but across the globe, including the EU, where the hard-core-restriction approach is present at the EU and partly the Member-State levels. This discussion reached its peak in 2010 with scholars agreeing that there was a lack of research in this area of competition/antitrust law calling for new comprehensive and empirical studies and, with regards to the new US approach based on the rule of reason, calling for clarity and change, most notably urging the courts to provide more detailed instructions and modify the rule of reason. Despite this emphasis on change and clarification, scholars do not agree on an exact solution.

---

3 Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373 (1911).
Furthermore, the dissention to the approach to RPM is also present among legislators within the US, with a number of US states applying the per se rule rather than the new rule of reason at the state level. Nevertheless, since Leegin, no significant change has been made to the US federal approach. I consider this situation to be alarming. The last few years show very little, if any, interest by US antitrust authorities in dealing with RPM and a lack of success in proving a violation of US antitrust law in private RPM cases. This indicates that at the federal level, the rule of reason could lead to the same situation as in the case of VTR: ignoring such behavior in practice and de facto legalizing resale price maintenance.

In the case of VTR, its development shows the US approach to be very benevolent and different from the EU approach, which is stricter, particularly when such territorial restriction is absolute. The obvious explanation for this difference lies in the protection of free and internal markets being the main objective of the EU. However, another more key explanation, although not as obvious, is an inconsistency and lack of extensive knowledge of the issue. Therefore, if there is a lack of comprehensive research in the field of VTR, the question arises as to how US antitrust policy can come to the final conclusion that VTR is not, or almost always not, anticompetitive? Or, in contrast, how can the EU state that such forms of vertical restraints are rather anticompetitive and almost as anticompetitive as RPM? Similarly, the question remains open as to whether the change in the US approach to RPM leads to the optimal approach.

These questions provide the principal reason for a comparable and simultaneous analysis of the two forms of vertical restraints, RPM and VTR, in two regimes, the US and the EU. Both regimes have a lengthy experience and are recognized worldwide as being well established. However, the EU regime establishes that vertical price fixing, minimum price fixing and some forms of vertical territorial restraints, such as restriction of passive sale, are ‘hard-core’ restraints and, thus, have a high potential for being anticompetitive. On the contrary, the US federal

approach assumes that RPM and VTR are rather procompetitive, in particular when introduced by the supplier. Moreover, the US approach to RPM changed only recently and without indisputable support. Thus, this approach is lacking in a mutual agreement that there is sufficient grounding for introducing the rule of reason in the form that it has been introduced and applied.

The differences in approaches and scholarly arguments together with the call for comprehensive research provide the basis behind writing this book. Thus, this book is centered on determining the optimal approach to RPM and VTR, which requires a holistic rather than one-issue focused view. Williamson’s quote at the start of this chapter reflects well the way this topic is addressed in this book and its content, with the focus being on studying the effects of RPM and VTR on competition and analyzing the existing approaches and their developments.

There are a number of ways to analyze the effects of RPM and VTR. In this book, I discuss the effects as they arise from EU and US cases, the nature of RPM and VTR based primarily on economic and marketing studies and economic theories and theoretical accounts and questions. The questions which accompany the above-discussed issues and which form the principal questions of this book are:

1. The overall, general question is whether and to what extent RPM and VTR restrict competition. This question involves a number of sub-questions, most notably:
   a. What is the nature of VTR and RPM?
   b. What do the theories and practices reveal with regards to the competitiveness and anticompetitiveness of RPM and VTR?
   c. Who and for what reasons introduces RPM and VTR?
2. What are the current US and EU approaches and how have they developed?
3. What approach and/or which policy model should apply to VTR and RPM, particularly in relation to the objective of competition/antitrust law and the nature of RPM and VTR?

The nature of these questions requires a holistic analysis of RPM and VTR in order to provide an overall and detailed understanding. This can be achieved by using legal, historical, economical, theoretical, empirical and other points of view. In that regard, every chapter plays an essential role and forms a part of a jigsaw leading to the book’s overall argument and finding, and revealing specific issues arising from different analytical methods and views utilized in different chapters. The argument made in this book is that tolerating RPM and VTR is not the right direction for
Introduction

effective competition/antitrust policies and law. Such a situation is simply a failure to tackle their consequences and to protect competition.

An introductory chapter, Chapter 2, sets vertical restraints, in particular RPM and VTR, within distributive systems explaining how RPM and VTR operate and how they can influence competition. In that context, I discuss the meaning of competition and argue that competition with regards to RPM and VTR must reflect the nature of their vertical and distribution settings. In this introductory section, I divide the approaches to competition in connection with RPM and VTR between two policy models to assist with determining the optimal approach. The first policy model is based on horizontal and interbrand competition, while the second model takes into consideration both horizontal and vertical relationships protecting all forms of competition, including intrabrand competition, and recognizing that even vertically related entities compete in order to obtain better profit and that these competitive tensions are based on bargaining rather than horizontal market power. Indeed, the second model goes as far as protecting vertical competition.

Chapters 3 and 4 contain analysis of the existing two policy and legal approaches, the US and EU, and their development. The current approaches are not only described but are studied from a broader context accompanied by analysis and summaries of important cases and also cases which illustrate arguments and developments of specific eras and potential counterarguments. Both chapters reveal two common issues of the EU and US approaches to RPM and VTR agreements: the proving of (1) an agreement,8 in particular, in a situation where RPM or VTR is forced by one party, and (2) the restriction of competition. Furthermore, the discussion on the US approach shows that the economic approach based on the rule of reason used for both VTR and RPM is rather overcomplicated leading to the de facto legalization of both forms of vertical restraints.

In Chapter 5, I discuss existing anticompetitive and procompetitive theories and economic effects and provide further explanations for the reasons for using RPM or VTR in practice. I analyse them in connection with the empirical studies and findings from previous chapters. I argue that not all so-called ‘procompetitive theories’ establish genuine pro-competitive explanations for using RPM or VTR and that the traditional anticompetitive theories are based on form (arising from the substance of the first policy model) rather than the analysis of economic effects of RPM and VTR. The essential question of how often the procompetitive theories...

8 Each regime involves different terminology. See, Chapters 3 and 4.
theories apply in practice was raised in the case of *Leegin* and is, in general, addressed in Chapter 5. In particular, the existing empirical studies and cases show that procompetitive theories are not as common as estimated by the Chicago School.9

Finally, in Chapter 6, I provide a different view for law and policy on the analysis of RPM and VTR. I argue that the procompetitive economic theories and the current US approach are outcome-based, which involve a number of issues and unanswered questions and do not fully reflect the objective of competition/antitrust law. A different, process-focused approach, which has its roots in a deontological account, can assist with addressing these issues and answering these questions. It is also better suited for the objective of competition/antitrust law, which is centered around the protection of the competitive process including the protection of free and fair competition. The process-focused approach supports the second policy model. Nevertheless, it also provides a limited scope for the procompetitive justifications utilized in the outcome approach.

By the end of reading this book, the reader should have a comprehensive understanding of this topic.10 Although the book is a research monograph that focuses on a detailed understanding of RPM and VTR, as well as their optimal approach and the issues arising from the current legal and economical approaches, practitioners dealing with VTR or RPM cases could find a number of chapters helpful, in particular, Chapters 3, 4 and 5. Indeed, I have tried to balance the academic research with a practical approach offering not only theories in this field but also explanations of how the law developed and is currently applied, including summaries and analyses of cases and the arguments that can be used regarding procompetitive or anticompetitive explanations for RPM and VTR.

---

9 The book is not based on an empirical study; it only refers to studies which are available. Therefore, I do not provide an exact frequency of utilizing particular procompetitive theories, but I address this question from the point of analysis of previous chapters, the available data and counterarguments to theories.

10 However, it is impossible to include every idea and every case. For instance, in Chapter 4, I focus on Brussels policy without comparing the approaches of individual Member States.