

Some comments on '*Is nothing Sacred?*'

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Disclaimer: The views expressed are personal and do not necessarily reflect those of the OFT

Post-Leegin, US consistent with EU?

- **Has Leegin taken US towards EU? That seems to assume:**
 - US has moved to a rule of reason, and it is too soon to know interpretations.
 - EU interpretation of 81(3) is sufficiently broad to allow RPM to be considered outside of a per-se framework.
- **Article 81(3) in hard core infringements is hardly ever accepted thus how likely is this? (6 RPM cases since 1999).**
- **Agree that there is room to interpret the law *in theory*, the real issue is whether there is an appetite to interpret the law *in reality*.**
 - There is little appetite for firms to push against it if by doing so they incur significant legal costs for only a small chance of change.
 - There is also the question of whether courts will uphold any new policies that move away from previous interpretations of the law.

Is RPM broken?

- **Is RPM broken?**
 - Maximum price (double marginalisation) is not object offense, only minimum and fixed RPM (free riding) are object.
 - Not so clear that minimum and fixed RPM are essential to achieve free riding efficiencies.
 - More guidance to take maximum prices more explicitly out of the hard-core infringements.
- **Paper asks for guidance**
 - Guidance would be helpful. Even a discussion of thinking tends to spark debate and clarify where an authority stands on a topic.
 - However when guidance does not adhere strictly to the existing case law, then it becomes more problematic.
 - In such situations a statement of how an authority prioritises cases may provide the guidance without cutting across the case law.

Object versus effects

- **Paper presents law and economics having different goals.**
 - Two extremes presented per-se with 100% certainty and rule of reason with very little certainty.
 - Breyer's statement that: "*in most matters it is more important that the applicable rule of law be settled than it be settled right*".
 - In dissenting decision Breyer bases much of his conclusion on the principle of *stare decisis* rather than belief of correct decision.
 - Not clear that this makes for a good judgement, see for example Microsoft judgement.
- **Are extremes only possibilities? In reality one can think of a continuum across these two extremes.**
 - Screens and the use of burden of proof can provide greater certainty than effects based, but still provide better results than a per-se approach.

OFT experience

- **In looking at understanding type I and type II errors it is helpful to look at (relatively limited) OFT experience:**
 - Limited evidence on beneficial RPMs, Removal of UK Book RPM suggests benefits overstated.
 - Several cases against RPM consistent with anticompetitive effects. (Replica Football Kits and Toys).
- **Suggests the cost of false negatives may be higher than false positives.**
- **Implies an ‘object’ starting point... *but* ... it is important that this presumption is rebuttable.**

Some thoughts for changes in RPM

- **RPM remains an object infringement (where minimum or fixed).**
- **However rebuttable on basis that the presumption of harm is incorrect given the market context.**
 - Thus based on the market there is no plausible theory of harm *and* there is a plausible theory of efficiencies
 - Moves the authorities away from bringing cases where there is no theory of harm, and there are efficiencies.
- **NCA must respond to this in the decision.**
 - Note: not a full effects case, but a debate on the rationale of the presumption of effects.

What are plausible theories of harm?

- **Upstream collusion - a facilitating practice**
- **Upstream protection of monopoly rents - a commitment story**
- **Downstream collusion - a facilitating practice**
- **Downstream protection of rents - entry deterrence**
- **Dampening of system competition via interlocking relations**

Key questions for theory of harm

- 1. Is there significant unilateral upstream market power?**
 - If not there is unlikely to be a theory of harm regarding protecting upstream market power.
- 2. Are there networks of RPM agreements involving a number of upstream suppliers who account for a significant share of the upstream market?**
 - If not there is unlikely to be a theory of harm regarding RPM facilitating upstream market coordination
- 3. Is the RPM agreement retailer instigated rather than instigated by the upstream supplier?**
 - If not, unlikely to be a plausible theory of harm from RPM facilitating downstream coordination or deliberately foreclosing downstream entry.