

Is nothing sacred?

Resale price maintenance and the EU policy review on vertical restraints

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'I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?...Economic discussion...can help provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate economists' (sometimes conflicting) views'



Breyer J.

US Supreme Court

2007



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Law

- prescriptive
- shapes future conduct
- clarity and simplicity prized
- data may be scarce
- must be administrable

Economics

- explanatory
- predicts the past
- precision and caveats
- presumptions always available
- essentially theoretical



'law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that means that courts will often bring their own administrative judgment to bear, sometimes applying rules of per se unlawfulness to business practices even when those practices sometimes produce benefits'



Breyer J.
US Supreme Court
2007



'an effects based analysis will not always require technical economic reasoning and evidence. Econometrics, for example, are a useful servant, but a terrible master'



Neelie Kroes

European Competition
Commissioner

2008



US Supreme Court: *Leegin*

- Since 1911 RPM treated as *per se* illegal
- In 2007 the Supreme Court said RPM should be subject to the “rule of reason”
- Judgment highly controversial (5 – 4)
- Impact remains uncertain
- Reflects specific characteristics of US law



Current EU policy on RPM

- Formalistic enforcement at the outset
- Formalism exacerbated by early block exemptions
- Influenced by single market imperative
- In 2000 approach significantly modernised
- RPM remains *de facto* prohibited



Article 81(1)

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

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;...



Article 81(3)

The provisions of paragraph 1 may, however, be declared inapplicable... [where such an arrangement]... contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

- (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;
- (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.



What room for manoeuvre?

- Article 81(1) interpreted as prohibiting RPM...
... but does it have to be?
- Article 81(3) may theoretically provide exemption...
... so might it do so in practice?
- Article 81 only applies to appreciable restrictions
... could RPM benefit from this rule?
- Role of the European Court of Justice



Note:

- In practice EU law has always provided a “rule of reason“ for RPM
- The 2004 “modernisation“ reform makes this a reality



Some other considerations

- Lessons from previous policy shifts
 - introduction of market share thresholds
 - Article 82 enforcement review
- *Stare decisis*
 - key factor in *Leegin*
 - impact at national level in EU
- International convergence
 - does EU/US divergence matter?



'The final formulation of policy will of course not only depend on the economics of vertical restraints. It will also and most importantly be determined by the choice of policy objectives, the effects on enforcement costs, the effects of legal certainty'



Luc Peepkorn

DG Comp

1998



Tack för uppmärksamheten!
Några frågor och kommentarer?



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