

The increase in “RPM” cases brought by competition authorities

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What is 'RPM'?

- Resale Price Maintenance is a vertical restraint on prices



Supplier x sets retail price
 p^{Ax}

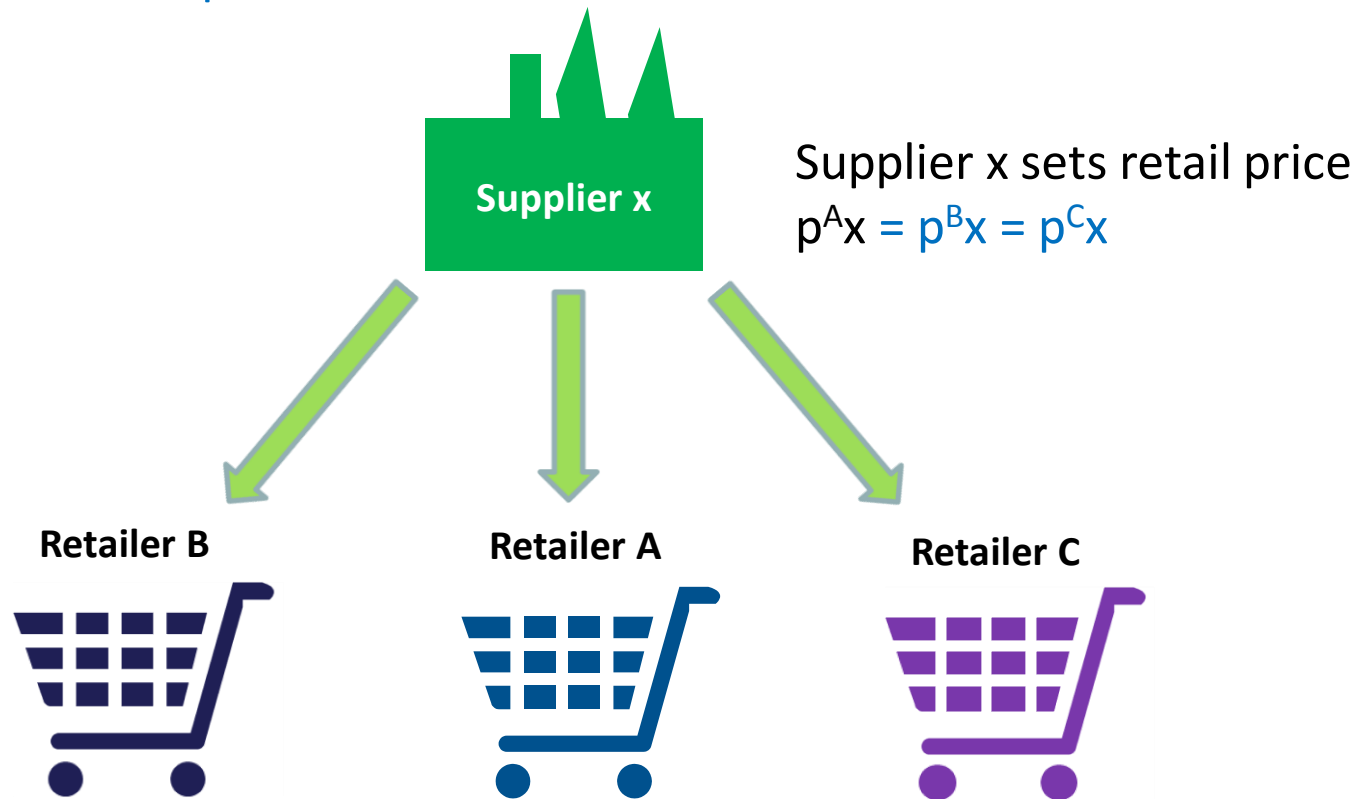


Retailer A



What is 'RPM'?

- Resale Price Maintenance is a vertical restraint on prices often with an implicit horizontal element!



RPM often seems to emerge with new retail business models



Why engage in RPM? Part 1: Anti-competitive rationales

- a) RPM to facilitate collusion downstream
- b) RPM to restrict entry or expansion downstream
- c) RPM to soften competition downstream
- d) RPM to facilitate collusion upstream
- e) RPM to restrict entry or expansion upstream
- f) RPM as a commitment device to protect monopoly rents upstream
- g) RPM to soften or eliminate competition both upstream and downstream

Why engage in RPM? Part 2: Pro-competitive rationales

- Well-established
- a) RPM to reduce free-riding at the retail level, e.g. on service
 - b) RPM to maintain retailers' margins to ensure that retailers are willing to stock and promote products
 - c) RPM to promote upstream competition between suppliers by providing quality certification (especially important for new products)
- More modern
- d) Benefits from RPM if upstream competition is more vigorous than downstream
 - e) Benefits from increased platform participation, in turn enhancing upstream competition
 - f) Benefits from RPM where upstream firms have better information on demand or marketing strategy

Evidence on RPM is less well established

- RPM strictly illegal for many years in most jurisdictions, so few examples where impact can be tested
 - Major problem for early studies in this area. These studies mostly show RPM to have positive effects, but major risk of skewed sample
- Not enough to show that prices increase with RPM, since this is consistent with several of pro-competitive stories (NB football kit in UK)
- Examples of books and OTC pharmaceuticals in UK mostly positive
- Law in US post-Leegin varies state-by-state, so potential for excellent natural experiment
- First post-Leegin paper (MacKay and Smith, 2013) finds overall negative impact of RPM ($p \uparrow$ and $q \uparrow \downarrow$). Potentially flawed, but watch this space!

Also less work done on indicators for harm from RPM, but....

- Bennett, Fletcher, Giovannetti and Stallibrass (2010) argue that RPM relatively unlikely to be overall harmful if:
 - No unilateral market power or concentration upstream
 - No unilateral market power or buyer power downstream
 - No network of RPM agreements involving a number of upstream suppliers who jointly account for a significant share of upstream market

- Fletcher and Hviid (2014) argue - in addition - that effects of RPM are more likely to be ambiguous (and therefore less appropriate to presume harmful) if:
 - RPM is strictly vertical, with no commitment by supplier to set same prices across retailers (e.g. – and now price parity has been removed - traders setting their own prices on Amazon Marketplace!)

In more detail – the literature on anti-competitive effects of RPM

| Anti-competitive effect | Horizontal element of RPM assumed? | Horizontal element of RPM required? | Upstream market power or downstream buyer power required? |
|---|---|--|--|
| a) RPM to facilitate collusion downstream | Yes | Yes | Yes – downstream buyer power |
| b) RPM to restrict entry or expansion downstream | Yes | Yes | Yes – downstream buyer power |
| c) RPM to soften competition downstream | No | No | Yes – downstream buyer power |
| d) RPM to facilitate collusion upstream | Yes | Not necessarily, but strengthens impact | Yes – upstream market power |
| e) RPM to restrict entry or expansion upstream | Yes | Probably | Yes – upstream market power |
| f) RPM as a commitment device to protect monopoly rents upstream | Yes | Yes | Yes – upstream market power |
| g) RPM to soften or eliminate competition both upstream and downstream | No – but results are ambiguous | No – but results are ambiguous | No – but effect increases with coverage of agreements |

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Establishing law/policy on RPM

- While the evidence on RPM is limited, the theory shows that RPM can have serious anti-competitive effects
- RPM can also have efficiency benefits, although these benefits can probably be achieved in alternative ways (if arguably less efficiently).
- Ideally we would always like to reach the right answer in competition cases...but this can be complicated and lawyers/businesses like clear rules
- In practice, choice is between:
 - Object/per se (ie presumption of harm)
 - Effects/rule of reason (ie presumption of no harm)
- In both cases, presumption seems hard to overturn, leading to polarised policy (where the truth lies on a spectrum). Plenty of type 1/type 2 errors.

Where are we on the law/policy?

- In **US**, at federal level, following the 2007 Supreme Court judgment in *Leegin*, RPM moved from being *per se* illegal to assessed on a rule of reason basis. However, many states have retained a *per se* illegal approach.
- In **EU**, recent review of verticals guidelines and block exemption left RPM as an *object* infringement (ie presumed harmful), albeit it was emphasised that this did not rule out rebuttal of this presumption under A101(3).
 - NB Hard to fit sensible screens within confines of block exemption
 - But few (no?) straight RPM cases in EU
- In **UK**, period of inactivity (based on view that RPM was broadly okay) followed by clearer thinking on prioritisation, based on Bennett et al (2010) paper.
 - Three recent/ongoing RPM cases in UK.

UK case on Hotel Online Booking (2014)

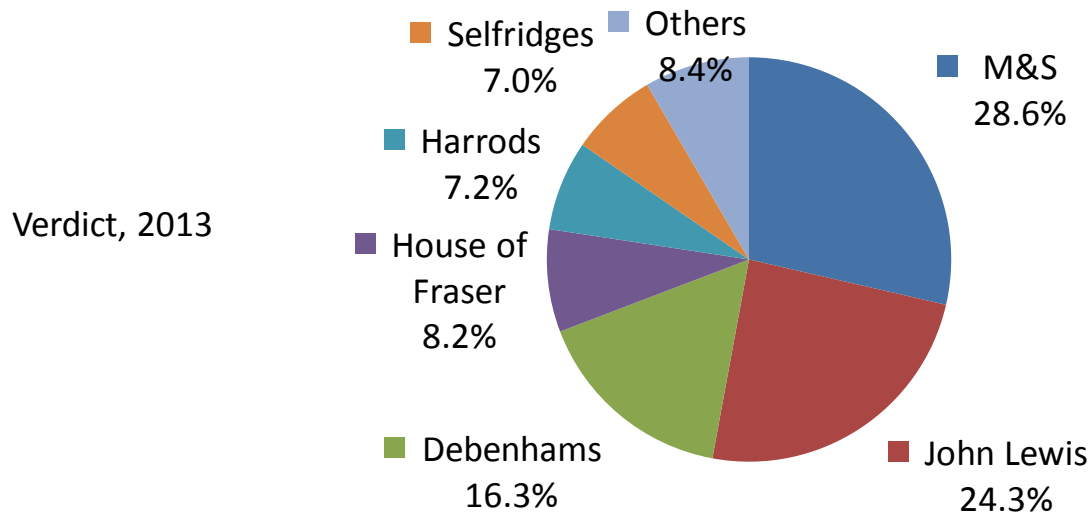
- Case related to RPM by hotels (specifically InterContinental Hotels Group) when selling through travel agency sites such as Expedia and Booking.com
- Commitments accepted Jan 2014.
- Case ostensibly about RPM, but really about retail price MFNs.
 - These required hotels to set identical prices on different travel turned RPM...
 - ...thus converting RPM which was potentially purely vertical into horizontal RPM.
- Interlocking agreements covered whole market.
- Concerns about reduced competition on fees charged by downstream travel agency sites and about barriers to entry/expansion for competitor sites.

UK case on Mobility Scooters (2013/14)

- Case related to RPM by hotels (specifically InterContinental Hotels Group) when selling through travel agency sites such as Expedia and Booking.com
- Two Decisions:
 - In Aug 2013, Roma found to have prohibited retailers from selling its scooters online and/or advertising their prices
 - In March 2014, Pride found to have prohibited retailers from advertising its scooters online at below RRP
- In both cases, concern was about preventing consumers from searching/shopping for mobility scooters online, thus limiting competition
- Roma and Pride amongst Top 3 suppliers (and concerns that behaviour was potentially wider?)

UK case on Sports bras (Ongoing)

- Case relates to RPM on sports bras by DB Apparel in Debenhams, John Lewis and House of Fraser
- Supplier only has 15% share, but RPM may not have been a one-off (i.e. could be a network). Also retailers big in department store market.



- OFT not specific about theory of harm, but presumably relates to downstream collusion

To conclude

- UK RPM cases seem to be broadly sensible and to pass prioritisation screens
- But is the law in the right place? Many people think not:
 - **Extreme view:** RPM should only be presumed harmful if we expect it to be harmful more than (say) 95% of the time.
 - **Measured view:** RPM should be assessed using structured screens, to minimise type 1 and type 2 errors. Ideal but difficult:
 - Hard to place into a formal legal setting
 - Issues around legal certainty
 - Prioritisation screens only semi-work, due to private actions
- Overall, perhaps we are in the best place! At least until we have better empirical evidence from the great US *post-Leegin* natural experiment!

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