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Developments Since *Leegin*?

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I. INTRODUCTION

Suspicious regarding the use of resale price maintenance (“RPM”) in vertical agreements, *i.e.*, agreements between a supplier and its distributors, have long existed in competition law. The European Commission (“Commission”) defines RPM as “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.”²

Until 2007, antitrust enforcers and scholars on both sides of the Atlantic appeared to share a broad consensus that RPM in vertical agreements constituted a serious restriction of competition that could never be justified. Indeed, one of the U.S. Supreme Court’s earliest decisions in the area of antitrust law, *Dr. Miles*,³ ruled that RPM was a *per se* violation of Section 1 of the Sherman Act. Similarly, the European Court of Justice (“Court of Justice”) and the Commission considered for decades that RPM constituted a restriction of competition “by object,” *i.e.*, a serious restriction of competition that would invariably infringe Article 101(1) of the Treaty on the Functioning of the European Union (“TFEU”)—the EU competition law provision corresponding to Section 1 of the Sherman Act. Thus, RPM was, in principle, not subject to any justification.⁴

This scenario changed in 2007 when the U.S. Supreme Court overruled *Dr. Miles*, holding in *Leegin*⁵ that RPM should no longer be considered a *per se* violation of antitrust law, but should

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² Commission notice - Guidelines on Vertical Restraints, Official Journal C 130, 19.05.2010, p. 1 (the “Guidelines on Vertical Restraints”), paragraphs 48 and 223. The practice of recommending a resale price to a reseller or requiring the reseller to respect a maximum resale price generally does not raise concerns under EU competition law, unless it appears that the recommended or suggested price works, in practice, as a focal point for the resellers and is followed by most or all of them, or unless the supplier has significant market power (Guidelines on Vertical Restraints, ¶¶ 226-229).

³ *Dr. Miles Medical Co. v John D. Park & Son Co.*, 220 US 393 (1911).

⁴ In EU competition law, any restriction of competition within the meaning of Article 101(1) TFEU, whether by “object” or “effect”, can theoretically escape the prohibition contained in that Article if it cumulatively satisfies the four conditions laid down in Article 101(3), *i.e.*, if such restriction: (i) produces efficiencies, (ii) the efficiencies are passed on the consumers, (iii) is proportionate to achieve the efficiencies, and (iv) does not completely eliminate competition. The burden of proof in demonstrating that these conditions are cumulatively satisfied is on the parties to the agreement containing the restriction. In reality, however, restrictions of competition by object are very unlikely to satisfy these conditions. The author is unaware of any case where the Commission or the European Courts, after qualifying an agreement as restricting competition by “object”, has subsequently held that such agreement escaped the prohibition of Article 101(1) TFEU because it satisfied all four conditions of Article 101(3) TFEU.

⁵ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007).

be subject to a “rule of reason” approach. *Leegin* triggered a heated debate on both sides of the Atlantic with respect to the treatment of RPM in vertical agreements.⁶

II. IMPACT OF LEEGIN IN THE COURT OF JUSTICE CASE LAW AND THE COMMISSION’S GUIDELINES ON VERTICAL RESTRAINTS

A key initial impact of *Leegin* in the EU is reflected in a 2008 judgment of the Court of Justice in the *CEPSA* case, where the Court held that:

[when] there is an agreement between undertakings within the meaning of Article [101 TFEU], as regards the sale of goods to third parties, **the fixing of the retail price of those goods constitutes a restriction of competition** expressly provided for in Article [101(1)(a) TFEU] which brings that agreement within the scope of the prohibition laid down in that provision **to the extent to which all the other conditions for the application of that provision are satisfied**, namely that that agreement **has as its object or effect to restrict appreciably competition** within the common market and is capable of **affecting trade** between Member States.⁷

The Court also held that:

If [a distributor is] required to charge the fixed or minimum sale price imposed by [a supplier], that contract [...] will be caught by the prohibition provided for in [101(1) TFEU] **only if its object or effect is to restrict appreciably competition** within the common market and it is capable of affecting trade between Member States.⁸

In the above passages, the Court of Justice clearly indicated that a vertical agreement containing a RPM obligation does not necessarily fall within the scope of Article 101(1) TFEU. This implicitly overruled the Court’s 1985 precedent in *Binon*, where it had previously held that RPM constituted, by its very nature, a restriction of competition pursuant to Article 101(1) TFEU.⁹ The Court affirmed this new approach to assessing RPM in its 2009 judgment in *Pedro IV Servicios*.¹⁰

⁶ Luc Peepkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 EUR.COMP. L.J. 201, 206-07 (2008); Frederik Van Doorn, *Resale Price Maintenance in EC Competition Law: The Need for a Standardised Approach* (November 6, 2009), available at SSRN: <http://ssrn.com/abstract=1501070>; Eric Gippini-Fournier, *Resale Price Maintenance in the EU: In Statu Quo Ante Bellum ?* (September 21, 2009), Fordham Corp. L. Inst - 36th Annual Conference on International Antitrust Law and Policy, 2009 (B. Hawk ed., 2010), available at SSRN: <http://ssrn.com/abstract=1476443>; Andrew I. Gavil, *Resale Price Maintenance in the Post-Leegin World: A Comparative Look at Recent Developments in the United States and European Union*; Yves Botteman & Kees J. Kuilwijk, *Minimum Resale Price Maintenance Under the New Guidelines: A critique and a Suggestion*, 6 (1) CPI ANTITRUST CHRON., (June 2010); Eugène Buttigieg, *Lingering Uncertainty over the Antitrust Approach to Resale Price Maintenance*, 1(5) J. EUR COMPETITION LAW & PRACTICE (2010); Christian Ewald, *The Economics of Resale Price Maintenance – Why Europe is Right not to Follow the USA on the Slippery Slope of Leegin*, 3(3) J. EUR COMPETITION LAW & PRACTICE (2012).

⁷ Case C-279/06 *CEPSA Estaciones de Servicio SA* [2008] ECR I-6681, ¶ 42, emphasis added.

⁸ *Id.*, ¶ 72, emphasis added.

⁹ See Case C-243/83 *Binon* [1985] ECR 201, ¶ 44, where the Court of Justice held that “provisions which fix the prices to be observed in contracts with third parties constitute, **of themselves, a restriction on competition** within the meaning of [Article 101 (1)] which refers to agreements which fix selling prices as an example of an agreement prohibited by the Treaty” (emphasis added).

¹⁰ Case C-260/07 *Pedro IV Servicios* [2009] ECR-2437, ¶ 82: “although the fixing of a retail price constitutes a restriction of competition expressly provided for in [Article 101 (1) (a)], it causes that agreement to be caught by the

The debate triggered by *Leegin* had a further major impact in the European Union with respect to the Commission's adoption of new Guidelines on Vertical Restraints in 2010, which replaced the former Guidelines on Vertical Restraints of 1999.¹¹ Indeed, in the Former Guidelines, the Commission merely stated that RPM was a "hardcore restraint" (i.e., if a vertical agreement contained such restraint, this would prevent such agreement from benefitting from the safe harbor granted by the Regulation on the block exemption of vertical restraints).¹²

By contrast, the new Guidelines on Vertical Restraints take a much closer look at RPM. On the one hand, the Commission confirms that RPM constitutes a hardcore restraint.¹³ The Commission goes even a step further: arguably in contradiction with the *CEPSA* judgment, it states that when a hardcore restraint is included in a vertical agreement "that agreement is presumed to fall within Article 101(1) [and it] is unlikely to fulfil the conditions of Article 101(3)."¹⁴

On the other hand, the Commission states that even with respect to hardcore restraints, "undertakings may demonstrate pro-competitive effects under Article 101(3) in an individual case."¹⁵ Specifically with respect to RPM, the Commission states "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)."¹⁶ The Commission even provides some examples of where such recognized efficiencies could arise.¹⁷

prohibition set out in that provision **only where all the other conditions for applying that provision are met**, that is to say, that the object or effect of the agreement is perceptibly to restrict competition within the common market and that it is capable of affecting trade between Member States" (emphasis added).

¹¹ Commission notice - Guidelines on Vertical Restraints, OJ C 291, 13.10.2000, pp. 1-44 ("Former Guidelines").

¹² Former Guidelines, ¶ 47.

¹³ Guidelines on Vertical Restraints, ¶ 48.

¹⁴ Guidelines on Vertical Restraints, ¶ 47.

¹⁵ Guidelines on Vertical Restraints, ¶ 48.

¹⁶ Guidelines on Vertical Restraints, ¶ 225.

¹⁷ Guidelines on Vertical Restraints, ¶ 225: "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. Similarly, fixed resale prices, and not just maximum resale prices, may be necessary to organize 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 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 products. If enough customers take advantage from 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."

III. NO SUBSTANTIAL CHANGE IN EU COMPETITION LAW ENFORCERS' APPROACH TO RPM

Following such a seemingly substantial shift in EU competition law's approach to RPM, the question arises as to how the treatment of RPM has evolved six years after *Leegin* and three years after the adoption of the new Guidelines on Vertical Restraints. To answer this question, it is necessary to examine the case law of the courts and competition authorities of the EU Member States. Indeed, following the decentralization of the application of EU competition law introduced by Regulation 1/2003,¹⁸ most cases of vertical restraints are now dealt with by national courts and national competition authorities. Since the adoption of the Guidelines on Vertical Restraints, no specific case of RPM in vertical agreements appears to have been addressed by either the Commission or EU Courts (i.e., the General Court and the Court of Justice).

A review of the EU Member States' national case law on RPM in the years following *Leegin* indicates that national competition authorities and courts in the EU still show a "uniform and hostile approach to RPM."¹⁹ This approach thus remains unswayed by the Commission's cautious steps towards the possibility of claiming efficiencies with respect to RPM, as set out in the 2010 Guidelines on Vertical Restraints.

Indeed, an informative report on the national case law of some EU Members States, published on October 3, 2010,²⁰ concluded that "in France, Belgium and possibly Germany it does not seem to be possible to ever exempt resale price maintenance,"²¹ and that, more generally, "national authorities do not take pro-competitive effects enough into consideration."²² In only one isolated decision of 2008, the Hungarian Competition Authority found that in that particular case, the RPM imposed by a producer upon its distributors of energy drinks did not infringe competition law.²³ The circumstances of the case, however, were very specific: "[q]uite uniquely, the resale price maintenance was not set uniformly for each distributor by the producer, rather the producer and the distributors individually agreed on different levels of process, depending on the market circumstances of the various distributors."²⁴ The Hungarian

¹⁸ See Council Regulation 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [now Articles 101 and 102 TFEU], OJ L 1 of 1.4.2003, p. 1. Regulation 1/2003 entered into force in May 2004 and replaced the centralized authorization system laid down by the former enforcement rules (according to which the Commission was the only body empowered to grant an Article 101(3) TFEU exemption with respect to an agreement that violated Article 101(1) TFEU) with a directly applicable exception system that renders the exemption rule of Article 101(3) TFEU directly applicable by national courts and competition authorities.

¹⁹ Nicolas Petit & Guillaume Taillandier, *Resale Price Maintenance: A synthesis of national case laws* (Foreword), e-Competitions Bulletin Resale Price Maintenance, Art. N° 32560 (27 September 2010).

²⁰ Elisabeth Eklund-Legnerfält, *Resale Price Maintenance: A synthesis of national case laws* (Reports), e-Competitions Bulletin Resale Price Maintenance, Art. N° 33276 (3 October 2010). The report covered the following EU jurisdictions: Austria, Belgium, Czech Republic, France, Germany, Hungary, Italy, Luxembourg, Sweden, and the United Kingdom.

²¹ *Id.* § 6.1.

²² *Id.* § 8.3.

²³ *Id.* § 6.1.

²⁴ *Id.*

Competition Authority further noted that, as opposed to horizontal price-fixing, the assessment and evaluation of RPM is a “more complex task due to the potential efficiency reasons.”²⁵

The hostile treatment of RPM under EU competition law appears to be largely unchanged in more recent years. Another review of national case law on RPM published on January 24, 2012, concluded that:

despite the existence of a generally broad consensus in economic thinking on the need for a more open-minded approach to RPM, the current treatment of RPM in EU competition law is and seems destined to remain very hostile, [and it] is highly unlikely that the EU competition law or the authorities that enforce it will move away from its instinctive dislike of RPM.²⁶

Reports on national case law over the past two years confirm that EU national authorities and courts continue to consider RPM as a restriction by object pursuant to Article 101(1) TFEU²⁷ and are reluctant to accept any efficiency defense under Article 101(3) TFEU.²⁸ For instance, in a case before the Polish Competition Authority, the investigated producer claimed that RPM was justified because it was used to launch a new product. This is one of the few examples of efficiency claims for RPM that are endorsed in the Commission’s Guidelines on Vertical Restraints. Nevertheless, the Polish Competition Authority rejected this argument on ground that “there are product launch methods that offered a viable alternative for the company and were at least just as effective and, importantly, not anticompetitive.”²⁹

²⁵ *Id.*

²⁶ Derek Ridyard, Resale Price Maintenance: An overview of EU and national case law, e-Competitions Bulletin Resale Price Maintenance, Art. N° 41915 (24 January 2012).

²⁷ Peter Mollgaard, The Danish Public Prosecutor for Serious and International Crime cracks down on resale price maintenance (Miele), e-Competitions Bulletin Resale Price Maintenance, Art. N° 56471 (18 July 2013); Alexandr Svetlicinii, The Bulgarian Competition Authority finds resale price maintenance practices on the sunflower oil market (Kaliakra), e-Competitions Bulletin Resale Price Maintenance, Art. N° 56473 (17 July 2013); Jacob Borum, The Danish Competition and Consumer Authority enters into a settlement with distributor of leisure weapons in a resale price maintenance case (HG Agencies), e-Competitions Bulletin Resale Price Maintenance, Art. N° 56485 (30 June 2013); Katarzyna Bojarojć, The Polish Competition Authority reminds franchisors that resale price maintenance is a hardcore violation of competition law (Sfinks Polska), e-Competitions Bulletin Resale Price Maintenance, Art. N° 55963 (25 June 2013); Jean-François Bellis, The French Court of Appeal upholds fine of € 1.34 M imposed on toy distributor for unlawful resale price maintenance (Kontiki), e-Competitions Bulletin Resale Price Maintenance, Art. N° 58180 (16 May 2013); Bruce Wardhaugh, The Irish Competition Authority obtains legally binding commitments against a distributor to cease resale price maintenance (BBS), e-Competitions Bulletin Resale Price Maintenance, Art. N° 51510 (18 December 2012); Antigoni Vafeidou, The Hellenic Competition Commission strikes down indirect attempt at RPM by French car manufacturer (Em. Psispsikas & SIA v. MAV A Emporoviomihaniki), e-Competitions Bulletin Resale Price Maintenance, Art. N° 50615 (20 November 2012); Paulina Igras, The Polish Office of Competition and Consumer Protection finds the agreements between IT software company and its distributors as breaching competition law on the basis of EC 330/2012 (Soneta), e-Competitions Bulletin Resale Price Maintenance, Art. N° 49862, (7 November 2012).

²⁸ Aleksander Stawicki, The Polish Competition Authority denies an individual exemption in the case of a RPM agreement concluded on the market for automotive lubricants (Orlen Oil), e-Competitions Bulletin Resale Price Maintenance, Art. N° 54857 (31 December 2012).

²⁹ *Id.*

As some authors have rightly observed,³⁰ the negative approach to RPM in the European Union is aggravated by the fact that the Commission deems that RPM is presumed to fall within Article 101(1) TFEU even when the parties to the agreement have very low market shares.³¹ Consequently, EU national competition authorities and courts are likely to find an infringement of competition law and to impose fines even when the parties to the agreement have market shares as low as 1 percent.

For instance, in a recent case brought against a producer of perfume products and its distributors, the Romanian Competition Authority held that RPM is a restriction by object and imposed an overall fine of approximately EUR 490,000 (of which EUR 400,000 only on the supplier), despite finding that the relevant markets were “strongly competitive and that the market shares of the investigated undertakings were below 1 per cent.”³²

IV. CONCLUSION

The above analysis reflects that, despite the intense economic and legal debate in the European Union that followed the 2007 U.S. Supreme Court decision in *Leegin*, the approach to RPM by EU competition law enforcers has not substantially changed.

Under the Commission’s Guidelines on Vertical Restraints, it is theoretically possible to claim that an agreement containing RPM produces efficiencies pursuant to Article 101(3) TFEU, and therefore does not fall within the prohibition of Article 101(1) TFEU. In practice, however, it will always be very difficult, if not almost impossible, to persuade a national competition authority or a national court that this is, in fact, the case. This is because RPM is still presumed by the Commission to fall within the scope of Article 101(1) TFEU, and is unlikely to satisfy the conditions of Article 101(3) TFEU.

The Commission’s approach seems inconsistent with the post-*Leegin* judgments of the Court of Justice in the *CEPSA* and *Pedro IV Servicios* cases, where the Court held that an agreement containing RPM does not necessarily fall within the scope of Article 101(1) TFEU. Without further guidance from the Court of Justice as to whether RPM should qualify as a restriction of competition by object or by effect, and in what circumstances it can escape the prohibition of Article 101(1) TFEU (either because it does not appreciably restrict competition or because it produces efficiencies pursuant to Article 101(3) TFEU), it is unlikely that the negative attitude of EU national competition authorities and national courts toward RPM will change in the foreseeable future.

³⁰ Yves Botteman & Kees J. Kuilwijk, *Minimum Resale Price Maintenance Under the New Guidelines: A critique and a Suggestion*, 6 (1) CPI ANTITRUST CHRON. 8 (June 2010).

³¹ Commission Notice on agreements of minor importance which do not appreciably restrict competition under Art. 81(1) of the Treaty establishing the European Community (now Art. 101(1) TFEU), OJ C/368 of. 22.12. 2001, p. 13 (“De Minimis Notice”). The Commission has recently launched a public consultation on a draft revised De Minimis Notice, which is available on the following website: http://ec.europa.eu/competition/consultations/2013_de_minimis_notice/de_minimis_notice_en.pdf. In the draft new Notice the Commission’s negative approach toward RPM remains unchanged (see paragraph 12 of the draft Notice).

³² Iustinian Captariu, The Romanian Competition Council investigates and imposes fines in a resale price-fixing case involving the distribution of perfume products (D & P Parfumum Case), e-Competitions Bulletin April 2012, Art. N° 45019 (27 December 2011).