

# Resale Price Maintenance and the Digital Age

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## I. Introduction

Agreements between direct competitors that place restrictions on pricing are generally understood to harm consumers and, as a result, are generally *per se* violations of antitrust laws.<sup>1</sup> By contrast, agreements between firms at different levels of a supply chain that place restrictions on pricing—called “vertical pricing agreements”—may, in theory, either benefit or harm consumers. As a result, they are generally treated differently by antitrust regulators.

There are a variety of vertical pricing agreements, each with its own particular setup and typical settings in which the agreement may be used. One form of vertical pricing agreement is resale price maintenance (RPM), an agreement “in which a manufacturer and a downstream distributor (retailer) agree to a minimum or maximum price the

retailer will charge to its customers (consumers).”<sup>2</sup> These agreements result from—and create—complex economic incentives, and have led to regulatory scrutiny, both across jurisdictions and over time. Another form of vertical pricing agreement, one which has increased in prominence with the rise of online retail, is the most-favored nation (MFN). Many online retail platforms allow manufacturers to set consumer-facing prices on the platform. In this context, the MFN agreement requires the manufacturer to ensure that retail prices on other platforms, potentially including those not directly set by the manufacturer, are no lower than the prices available on the platform with an MFN agreement.<sup>3</sup> Another related policy is minimum advertised price (MAP), which limits the prices a retailer may publish, but not necessarily the prices offered in negotiations or ultimately charged to consumers.<sup>4</sup>

In the fall of 2023, the American Bar Association Antitrust Law Section’s Pricing Conduct Committee convened a panel to discuss the economic and legal considerations of RPM and related vertical pricing agreements in the digital age. While RPM may require either minimum or maximum resale prices, the panel discussion focused on minimum resale price rules. Nathaniel Hipsman of Cornerstone Research moderated the discussion with participants Paul Grieco of Pennsylvania State University, Tara Kelly of Mason Hayes & Curran, Barbara Mahoney of Hagens Berman, and Schonette Walker of the Maryland Office of the Attorney General.<sup>5</sup> This article summarizes and synthesizes the panel’s discussion.

## II. Economics of RPM and Vertical Pricing Agreements

Throughout the discussion, Dr. Grieco—an academic economist with a specialty in industrial organization—explained the economics of vertical pricing agreements. He focused on the trade-offs of RPM policies, including why manufacturers might want to impose RPM, the circumstances in which such agreements may benefit or disadvantage consumers, and the effects of RPM policies on competition more broadly. He also described potential empirical techniques to assess the effects of RPM policies in certain circumstances. As the panel discussed recent developments in vertical pricing agreements used in digital commerce, Dr. Grieco explained how the principles developed in his discussion of RPM also apply to MFNs in these new settings.

Dr. Grieco highlighted a potential welfare trade-off between two aspects of the retail experience: purchase prices and retail services, such as a well-stocked showroom and access to trained salespeople. When retail services are not directly priced and instead are indirectly supported through retailers’ margin on sales, the market may not achieve the optimal balance between these two parts of consumers’ experience. To illustrate this, Dr.

Grieco described a potential “free rider” problem, where consumers freely partake of high-quality services at high-cost stores but switch to no-frills, low-cost stores for their purchases. Such a situation is not sustainable because the high-service store will close if it cannot support itself by selling products. While Dr. Grieco did not draw the distinction, it is important to note that this “free rider” problem can only arise with respect to services that are not tied to the purchase itself. For example, it would generally not be possible for consumers to partake of gift wrapping or flexible payment options unless they actually make their purchase at a store offering those services.

However, by adopting a minimum RPM policy, a manufacturer may be able to prevent the low-cost, no-frills retailer from undercutting high-service competitors. In turn, this might maintain the viability of the high-service store and the services it offers. Manufacturers benefit from these high-service outlets as these stores help to raise overall consumer demand for their products.

As a concrete example, Dr. Grieco described the market for pianos. Consumers value the opportunity to visit showrooms with skilled salespeople where they can experience pianos firsthand to evaluate the aesthetic, acoustic, and tactile characteristics of the instrument before making a purchase. However, showrooms and sales staff are expensive to maintain, and the prices they charge can be undercut by warehouses that simply store and deliver pianos. Without protecting the margins of showrooms, consumers who value them will have a worse shopping experience or forego purchases altogether. When consumers choose not to purchase a piano, the manufacturer suffers as well due to reduced sales volume.

Dr. Grieco emphasized that evaluating whether consumers are net better off requires considering how they value potentially enhanced services relative to potentially lower prices. Indeed, an RPM policy may affect consumers differentially depending on how they value the potential price-service tradeoff. Dr. Grieco described standard types of economic analyses that might be used to determine if RPM raises or lowers consumer welfare for a given market. These analyses included: defining the relevant markets, assessing market power for firms throughout the supply chain, and evaluating price sensitivities for both end customers and downstream firms. An important but challenging analysis specific to RPM cases is estimating how much consumers value the retail services discussed above. Dr. Grieco suggested that surveys or reviews of ordinary course business documents on competitive dynamics could be used to evaluate what services consumers value. Alternatively, Dr. Grieco suggested leveraging variation in the options available to consumers, such as evaluating responses to retailer entry and exit events or changes in regulations surrounding RPM in order to infer how consumers value retail services relative to low prices. In analyzing natural experiments, Dr. Grieco noted that when prices and quantities both change, output can be a key metric for evaluating RPM's

welfare effects. If prices and quantities both increase, this would suggest that consumers are better off, with improved services more than offsetting the expected tendency for consumers to buy less when prices increase. Dr. Grieco also noted that if there are no natural experiments to study, it might be necessary to build a structural economic model to understand the net effect of an RPM policy.

Dr. Grieco also described the more dynamic effects RPM can have, in addition to the “static” effects on price and retail services discussed above. As discussed above, one effect of RPM is that it encourages retailers to compete on service quality. However, while RPM can forestall a free-rider problem, it can also undermine incentives for retailers to develop or deploy cost-saving innovations when retailers cannot effectively attract customers by passing on the cost savings to consumers. Dr. Grieco also emphasized that while RPM may limit retailer discretion in setting prices it does not eliminate price competition for the products. When manufacturers have more direct control over prices charged to consumers – as when RPMs are in force – the manufacturer sets that price consistent with the competition it faces from the products offered by other manufacturers. Finally, Dr. Grieco noted that an alternative to RPM, which may be more attractive when RPM is restricted, is for manufacturers to vertically integrate into the retail sector and sell directly to consumers. Such a response by manufacturers may create a different set of effects on competition and, in turn, different costs and benefits for consumers.

In the discussion of MFN policies, Dr. Grieco pointed out that while MFNs are used in a different setting and have their own particular details, MFNs have similar economic effects to RPMs.<sup>6</sup> MFNs, like RPMs, may have the effect of creating uniform prices across retail outlets and may limit price competition for affected products across platforms. Dr. Grieco explained that the pro-competitive rationales for an MFN policy are like those for an RPM policy: incentivizing valuable retail services and avoiding free-riding that undermines those services. In the case of online retail in particular, Dr. Grieco pointed to price comparison tools, product search, robust reviews and ratings features, and quality testing and certification as examples of services embedded in online retail platforms that both manufacturers and consumers value in the retail experience, but which could be threatened by free riding. While MFNs may help to ensure the sustainability of high-service platforms, Dr. Grieco also noted that, unlike for manufacturers, a retailer may have an incentive to use an MFN policy to indirectly raise prices at other outlets and potentially divert sales to itself. Similar to Dr. Grieco’s observations about RPM policies, the net effect of MFNs may differ across consumers depending on customer-specific demand for the high-service of some platforms versus potentially lower purchase prices.

# III. Legal Treatment of Vertical Price Agreements in the United States

Ms. Mahoney and Ms. Walker discussed the legal treatment of vertical price agreements in the United States, at the federal and state levels, respectively. They provided historical context before focusing on recent cases covering major changes in the treatment of RPM policies, as well as issues arising from new vertical price agreement practices implemented in the digital economy. This section first reviews the panel's discussion of the legal principles in US law regarding RPM. Second, it discusses differences between state and federal laws including recent state enforcement actions. Third, it reviews the discussion about recent and ongoing cases where vertical pricing agreements are at issue.

## III.A. Legal Principles in the US

Ms. Mahoney provided an overview of the legal treatment of RPM in the United States. She explained that prior to 2007, US courts treated minimum RPM agreements, like horizontal price-fixing agreements, as *per se* illegal under the Sherman Act. One important caveat is that the *Colgate* doctrine allowed a firm to enforce pricing policies through unilateral action such as refusing to do business with downstream partners who will not abide by their pricing policy.<sup>7</sup> The idea is that a manufacturer could announce a minimum retail price and unilaterally enforce it by refusing to deal with retailers who undercut it, so long as they did not form an *agreement* with retailers. In its 2007 *Leegin Creative Leather Products Inc. v. PSKS Inc.* decision,<sup>8</sup> the US Supreme Court overturned the precedent on RPM by finding that there may be pro-competitive rationales for minimum RPM agreements. Since then, RPM has mostly been analyzed under the rule of reason. While a *per se* analysis only requires a challenger to show that the agreement has illegal characteristics, a rule of reason analysis is more difficult because it requires a challenger to show that anticompetitive harm outweighs potential pro-competitive benefits.

Ms. Mahoney also discussed closely related MAP policies, which are closely related to RPM. Unlike RPM, MAP only constrains prices that are posted and does not constrain prices actually charged. Ms. Mahoney highlighted that the legal treatment of these policies depends heavily on whether the policy imposes a strong constraint on transaction prices. Ms. Mahoney pointed to the analysis of the Ninth Circuit in a case involving MAP policies negotiated between retailer Guitar Center and various instrument manufacturers, where the court took a pragmatic approach in finding that MAP use was consistent with pro-competitive and parallel conduct behavior.<sup>9</sup> She explained that where there is room for negotiation and discounting, there may be less concern with a MAP policy. However, Ms. Mahoney suggested these conditions may be less likely to prevail in the digital arena —

both because prices for many online goods are posted on websites for customers to view before purchasing, and because there may be limited ability or willingness to negotiate prices with largely automated sales platforms.

### III.B. Differences Between State and Federal Laws

Ms. Walker discussed how, despite *Leegin's* effect on federal case law, some states have resisted the shift toward a more permissive handling of RPM.<sup>10</sup> In particular, her state, Maryland, is the only state to have passed a law that explicitly repeals *Leegin* and makes minimum RPM *per se* illegal under Maryland law. Under this state law, Maryland brought a suit against Johnson and Johnson (J&J) in 2016 after it tried to impose a minimum price for its contact lenses at retailers, including warehouse chain Costco.<sup>11</sup> Costco resisted, leading to negotiations; importantly, these negotiations allowed Maryland to argue that the parties had reached an agreement, which was not protected under *Colgate*. This case was settled, with Maryland imposing a \$50,000 penalty and accepting J&J's assurance it would not require a minimum retail price in the state.<sup>12</sup>

Ms. Walker emphasized the important role states play in antitrust enforcement and that states are paying attention to vertical price agreements. Maryland, with its *Leegin* repeal law, and some other jurisdictions, such as California, may have a lower bar for challenging RPM under state law than under federal law.<sup>13</sup> Ms. Walker noted that states may use their investigative powers to develop the facts of a case and that Maryland regularly and actively investigates RPM and related policies. She also noted that potentially anticompetitive practices in the broader online retail space have attracted attention from state enforcement agencies.

### III.C. Recent Case Challenges

Turning to more recent cases, while challenges to RPM in the United States have been less common post-*Leegin*, Ms. Mahoney noted that cases challenging RPMs continue to be filed. She pointed to the *Guitar Center* case,<sup>14</sup> challenges to RPMs between hotels and online travel agents, and actions challenging agreements between an online retail platform and its suppliers requiring minimum resale margins for the platform.<sup>15</sup> Ms. Mahoney noted that these cases have tried to frame RPM as a tool for a *horizontal* agreement among manufacturers or retailers or as a way for a dominant retailer to exercise its market power—in contrast to the pro-competitive rationales explained by Dr. Grieco and discussed above. However, the rule of reason and protection of unilateral conduct mean there is a high burden for finding that RPM policies violate federal antitrust law.

Ms. Mahoney also discussed recent cases in the United States related to MFN policies.<sup>16</sup> She pointed to the successful challenge of MFN agreements in the market for e-books, where these agreements appeared to be part of a broader strategy to raise prices.<sup>17</sup> MFN analysis has also been applied to credit card “anti-steering” rules that ban merchants from discriminating among credit cards that they choose to accept, and, more recently, lawsuits have been filed challenging a large online retailer’s use of these agreements with third-party sellers on its marketplace service.

#### IV. Legal Treatment of Vertical Price Agreements in the EU and UK

Ms. Kelly highlighted the differences between the legal treatment of RPM in the European Union and the United Kingdom, relative to the United States, pointing to recent cases that reaffirmed the generally stricter approach to such policies taken in those jurisdictions. She also discussed the changes in regulation of internet businesses ushered in by the new Digital Markets Act (DMA), emphasizing new restrictions on vertical price agreements for firms designated under this law.

First, Ms. Kelly contrasted the United States’ legal treatment of RPM and similar conduct with the treatment of these policies in the European Union. She explained that EU law treats RPM as a “serious” (or “hardcore”) business restriction, meaning such policies do not benefit from the safe harbors afforded to many other types of vertical agreements. Instead, an analysis of RPM under EU law may require a “by object” (Article 101) analysis, which involves evaluating the purpose of an agreement. While such analysis can consider a clear pro-competitive efficiency justification, it is not a balancing analysis as would be required under the United States’ rule of reason approach. Ms. Kelly cautioned that while there may be examples of RPM that could satisfy the requirements of EU law, the bar is very high.

Ms. Kelly noted that RPM enforcement is a priority both at the European Commission (the EU’s executive body) as well as among the national competition authorities in Europe. She focused on clarifications in EU law regarding RPM that emerged from a suit against brewer Super Bock. Super Bock had a practice of publishing recommended prices for its distributors covering most of Portugal, and if distributors failed to conform to these recommendations, then Super Bock would retaliate by withholding discounts or product supply.<sup>18</sup> The Portuguese competition authority secured a €24 million judgment (a record in Portugal), arguing that Super Bock’s conduct amounted to an illegal RPM agreement.<sup>19</sup> In 2023, this ruling was upheld on appeal, based on updated guidance from the European Court of Justice (ECJ) which clarified that: (i) an “agreement” for purposes of RPM only requires a “concurrence of wills,” and (ii) that a challenge to an RPM policy based on “by object” analysis also needs to consider potential harm to competition.

<sup>20</sup> Ms. Kelly highlighted that the ECJ ruling regarding the standard for the existence of an “agreement” confirms that the EU standard for an agreement is much looser than in US law, meaning “unilateral” conduct protected by the *Colgate* doctrine in the United States may not be safe under EU law. Ms. Kelly also pointed to recent actions by Irish and UK competition authorities signaling a renewed focus on RPM enforcement. For example, Ireland has recently provided its competition authority with enhanced fining powers and an expanded leniency program that includes RPM, signaling that RPM may be an enforcement priority. <sup>21</sup>

Second, Ms. Kelly explained the legal treatment of vertical pricing agreements under the provisions of the DMA, which came into force in May 2023. <sup>22</sup> She explained that the DMA allows the EU to designate important platforms or intermediators as gatekeepers, with the initial set of firms announced as Alphabet, Amazon, Apple, ByteDance, Meta, and Microsoft. <sup>23</sup> Such firms face strict standards to prevent them from exploiting a strong ‘gatekeeper’ position to the detriment of either business users or end users, after concerns about such behavior had been raised in earlier investigations of the now-designated firms. The gatekeeper designation specifically prohibits the use of MFNs and self-preferencing by these firms. Ms. Kelly explained that self-preferencing refers to situations where a company sells or promotes both its own and rivals’ products and favors its own products. For non-gatekeeper firms, Ms. Kelly noted that EU law is more permissive of MFN policies, especially for “narrow” MFN policies defined as those that impose restrictions only on the price a manufacturer offers on its own website in contrast to “wide” MFNs that apply to pricing on all venues.

## Endnotes

1. U.S. Department of Justice (2017) “Archived Antitrust Resource Manual: 1. Elements of the Offense”, available at <https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement> (“Per Se Rule: Price fixing, bid rigging, and market allocation are among the group of antitrust offenses that are considered ‘per se’ unreasonable restraints of trade. The courts have reasoned that these practices, which invariably have the effect of raising prices to consumers, have no legitimate justification and lack any redeeming competitive purpose and should, therefore, be considered unlawful without any further analysis of their reasonableness, economic justification, or other factors.”)
2. Elzinga, Kenneth, and Mills, David (2008), “The Economics of Resale Price Maintenance,” in Wayne D. Collins (ed.), *Issues in Competition Law and Policy Vol. II*, ABA Book Publishing, Chicago. For the classic treatment of RPM, see Yamey, Basil (1954), *The Economics of Resale Price Maintenance*, Sir Isaac Pitman & Sons, Ltd., London.
3. Baker, Jonathan B., and Chevalier, Judith A., “The Competitive Consequences of Most Favored National Provisions,” *Antitrust Magazine*, Vol. 27 No. 2 (2013)



4. Asker, John, and Bar Isaac, Heski (2020), “Vertical Information Restraints: Pro and Anticompetitive Impacts of Minimum Advertised Price Restrictions,” *Journal of Law and Economics*, Vol. 63 No. 1 111-148
5. Each panelist spoke in his or her individual capacity, and not on behalf of any institution or client. Any errors in summarizing the panelists’ statements are the author’s.
6. Akman, Pinar and Sokol, D. Daniel (2017), “Online RPM and MFN Under Antitrust Law and Economics,” *Review of Industrial Organization*, Vol. 50 No. 2 133-151.
7. The *Colgate* doctrine is based on the opinion in *United States v. Colgate & Co.*, 250 U.S. 300 (1919). The decision allowed Colgate to enforce a resale price policy under the threat of refusing to deal with non-compliant retailers. The earlier decision, *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), had established the precedent that RPMs arising from an agreement were *per se* illegal.
8. Opinion, *Leegin Creative Leather Prods. Inc. v. PSKS Inc.*, 551 U.S. 877 (2007), <https://supreme.justia.com/cases/federal/us/551/06-480/index.pdf>.
9. Opinion, *In re: Musical Instruments and Equipment Antitrust Litigation*, D.C. No. 3:09-md-02121LAB-DHB (2015), <https://cdn.ca9.uscourts.gov/datastore/opinions/2015/08/25/12-56674.pdf>.
10. An overview of RPM policies, by state, is given in *Resale Price Maintenance Under State Laws Chart*, Thomson Reuters Practice Law Checklist w-003-2956, available at <https://us.practicallaw.thomsonreuters.com/w-003-2956>.
11. Complaint, *State of Maryland v. Johnson & Johnson Vision Care Inc.*, File No. 03C16002271 (Balt. Cty. Cir. Ct. Feb. 29, 2016), [http://www.marylandattorneygeneral.gov/News%20Documents/JJVC\\_COMPLAINT.pdf](http://www.marylandattorneygeneral.gov/News%20Documents/JJVC_COMPLAINT.pdf).
12. Maryland Office of the Attorney General Press Release, “Attorney General Frosh Announces Settlement of Price-Fixing Lawsuit Against Johnson & Johnson Vision Care,” Inc., 2017, <https://www.marylandattorneygeneral.gov/press/2017/033017.pdf>.
13. For an overview of state law treatment of RPM, see Lindsay, Michael A., “Overview of State RPM,” *The Antitrust Source*, (Apr. 2017).
14. Opinion, *In re: Musical Instruments and Equipment Antitrust Litigation*, D.C. No. 3:09-md-02121LAB-DHB (2015), <https://cdn.ca9.uscourts.gov/datastore/opinions/2015/08/25/12-56674.pdf>.
15. For an economic analysis of regulatory changes in online hotel reservations, see: Ennis, Sean, et al. “Price-Parity Clauses for Hotel Room Booking: Empirical Evidence from Regulatory Change,” *Journal of Law and Economics*, Vol. 66 No. 2 309-331 (2023).
16. For a review of legal actions against MFNs, see: Baker, Jonathan B. and Morton, Fiona Scott. “Antitrust Enforcement Against Platform MFNs,” *The Yale Law Journal*, Vol. 127 No. 7 1742-2203 (2018).

17. For an economic analysis of pricing agreements in e-books, see: De los Santos, Babur, et al. “Agency Pricing and Bargaining: Evidence from the E-Book Market,” *Kelly School of Business Research Papers*
18. Levy, Victor, *The ECJ Super Bock judgment: What is the status of resale price maintenance under EU law?* (2023), <https://www.engage.hoganlovells.com/knowledgeservices/news/the-ecj-super-bock-judgment-what-is-the-status-of-resale-price-maintenance-under-eu-law>.
19. Bethan, John (2023), “Portuguese court upholds record RPM fine against Super Bock,” *Global Competition Review*, available at <https://globalcompetitionreview.com/article/portuguese-court-upholds-record-rpm-fine-against-super-bock>
20. Judgment of the Court (Case C-211/22, Super Bock Bebidas)  
<https://curia.europa.eu/juris/document/document.jsf?text=&docid=276335&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=1070898>.
21. The Irish competition authority has also released guidance for businesses on RPM. See *Resale Price Maintenance: What You Need to Know*, Competition and Consumer Protection Commission, <https://www.ccpc.ie/business/help-for-business/guidelines-for-business/resale-price-maintenance-what-you-need-to-know/>.
22. *Digital Markets Act: rules for digital gatekeepers to ensure open markets enter into force*, European Commission (Oct. 31, 2022), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_22\\_6423](https://ec.europa.eu/commission/presscorner/detail/en/ip_22_6423).
23. *Digital Markets Act: Commission Designates Six Gatekeepers*, European Commission, (Sept. 6, 2023), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_23\\_4328](https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328).

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