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Resale Price Maintenance and Article 101: Developing a More Sensible Analytical Approach

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Abstract

This essay examines how European competition law can move toward an improved analytical framework for resale price maintenance (“RPM”) cases consistent with the view of European competition law as a consumer welfare prescription. Before addressing RPM issues directly, Part I summarizes a few ground rules on the analytical framework in article 101 TFEU (“Treaty on the Functioning of the European Union”) cases in an economics-based competition regime. This Part should help avoid the circularity of the argument that a restraint such as RPM should be considered a “restriction by object” under article 101(1) TFEU because it is characterized as a “hardcore” violation in a Commission block exemption regulation, and conversely, it is classified as a “hardcore” violation because it is a “restriction by object.” This part should also help allay concerns that moving RPM out of the “hardcore” comfort zone would automatically convert RPM analysis into a morass of endless inquiries and steep evidentiary requirements where, in the end, a plaintiff or competition authority would almost invariably lose, even in cases where RPM is harmful.

RESALE PRICE MAINTENANCE AND ARTICLE 101: DEVELOPING A MORE SENSIBLE ANALYTICAL APPROACH

*Andreas P. Reindl**

INTRODUCTION

Only a few years ago, most observers would have predicted that the review of the vertical restraints block exemption¹ and accompanying guidelines² in Europe would be relatively uneventful. One could have expected that after the reforms in 1999,³ no major changes to the vertical restraints regime would be considered. In fact, most would have suspected that the set of firmly entrenched, form-based rules that declared certain distribution restraints, including resale price maintenance (“RPM”), to be a hardcore competition law violation would be grandfathered in without any thoughtful and robust debate about desirable adjustments, even as the European competition

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1. Commission Regulation on the Application of Article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, No. 2790/1999, 1999 O.J. L 336/21 [hereinafter 1999 Block Exemption on Vertical Agreements]; Commission Notice, 2000 O.J. C 291/1 [hereinafter 2000 Guidelines on Vertical Restraints].

2. Commission Notice, 2000 O.J. C 291/1 [hereinafter Guidelines on Vertical Restraints].

3. The block exemption on vertical agreements and its corresponding guidelines were regarded as a successful first step toward an economics-based evaluation of vertical restraints focused primarily on market power concerns, and away from the traditional, form-based and block exemption dependent approach that sought to micromanage how firms would use vertical restraints. *See, e.g.*, Derek Ridyard & Simon Bishop, *E.C. Vertical Restraints Guidelines: Effects Based or Per Se Policy?*, 23 *EUR. COMPETITION L. REV.* 35, 35–37 (2002) (observing that the European Commission (“Commission”) had started to move towards a more coherent policy on vertical restraints, but identifying areas in which further reforms would be necessary).

regime was otherwise determined to move toward a more economics-oriented approach.

The climate was substantially changed when a small producer of ladies' shoes, handbags, and other leather accessories decided to implement an RPM scheme for one of its product lines despite a clear rule declaring such a strategy per se unlawful under the U.S. antitrust laws. The controversial U.S. Supreme Court decision in *Leegin*, which overturned nearly 100 year-old precedent that had declared RPM to be per se illegal,⁴ was accompanied by a vigorous debate in the United States about the appropriate legal rules and analytical approaches concerning RPM. Following the *Leegin* decision, several courts already have grappled with the question of how to properly analyze RPM schemes that no longer conveniently fit into the per se unlawful pigeonhole.⁵

It was inevitable that these developments, which coincided with the review of the existing European vertical restraints regime, would trigger a policy discussion in Europe on how the existing vertical restraints regime could be improved so that competition law enforcement in RPM cases would better reflect the consumer welfare goals of European competition law.⁶ The broader debate encompasses a number of questions at the interface between legal rules and economic principles, including: which economic principles and empirical evidence best describe the beneficial and harmful effects of RPM; how analysis under article 101 TFEU ("Treaty on the Functioning of the European Union") (article 81 EC ("Treaty Establishing the European

4. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 907 (2007) The case overruled a long-standing U.S. Supreme Court decision from the turn of the century that held resale price maintenance ("RPM") to be a per se violation of section 1 of the Sherman Act. See *Dr. Miles Medical Co. v. John D. Park & Sons*, 220 U.S. 373 (1911).

5. See, e.g., *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 229–30 (3d Cir. 2008) (reversing a dismissal of an RPM complaint); *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2009-1 Trade Cas. (CCH) ¶ 76,592, 2009 WL 938561, at *8 (E.D. Tex. Apr. 6, 2009) (dismissing the action on remand from the U.S. Supreme Court for failing to identify a relevant market); *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575, 589 (E.D. Pa. 2008) (denying a motion to dismiss a complaint that included an alleged RPM scheme initiated by retailer).

6. See John Vickers, *Competition Law and Economics: a Mid-Atlantic Viewpoint*, 3 EUR. COMPETITION J. 1, 12 (2007) (remarking that the reversal of *Dr. Miles* should trigger a more serious debate of RPM also in Europe).

Community”))⁷ can consistently incorporate economic concepts; and how evidentiary requirements should be allocated between article 101(1) TFEU and article 101(3) TFEU and therefore between plaintiff (which may be a competition authority) and defendant.

This Essay examines how European competition law can move toward an improved analytical framework for RPM cases⁸ consistent with the view of European competition law as a consumer welfare prescription.⁹ Before addressing RPM issues directly, Part I summarizes a few ground rules on the analytical framework in article 101 TFEU cases in an economics-based competition regime. This Part should help avoid the circularity of the argument that a restraint such as RPM should be considered a “restriction by object” under article 101(1) TFEU because it is characterized as a “hardcore” violation in a Commission block exemption regulation, and, conversely, it is classified as a “hardcore” violation because it is a “restriction by

7. See Consolidated Version of the Treaty on the Functioning of the European Union art. 101, 2008 O.J. C 115/47, at 88–89 [hereinafter TFEU]; Consolidated Version of the Treaty Establishing the European Community art. 81, 2006 O.J. C 321 E/37, at 73 [hereinafter EC Treaty]. When the Treaty on the Functioning of the European Union (“TFEU”) entered into force on December 1, 2009, treaty provisions of the major European Union (“EU”) treaties were renumbered and article 81 of the Treaty Establishing the European Community (“EC”) became article 101 TFEU. This Essay will use the new numbering system to refer to the related provisions of EU competition law; references to article 81 will be maintained for legal instruments and other documents that predate the TFEU.

8. The initial version of the Essay was written while the review of the European vertical restraints regime was pending. Although the Commission ultimately decided to maintain the strict rules on RPM, the arguments developed in this Essay calling for a reform of the rules governing RPM remain valid.

9. It is widely recognized that consumer welfare is the principal goal of European competition law and the Essay assumes that this is the correct view. See, e.g., Philip Lowe, Director General, Eur. Comm’n Directorate General for Competition, Speech at the 13th International Conference on Competition and 14th European Competition Day: Consumer Welfare and Efficiency—New Guidelines and Principles of Competition Policy (Mar. 27, 2007), available at http://ec.europa.eu/competition/speeches/text/sp2007_02_en.pdf (emphasizing that the ultimate aim of European competition law enforcement is the protection of consumer welfare); see also Neelie Kroes, Eur. Comm’r for Competition Policy, Opening Address at Competition and Consumers in the 21st Century Conference: Consumer Welfare: More than a Slogan (Oct. 21, 2009), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/09/486&format=pdf> (suggesting that consumer welfare concerns are reflected in every aspect of the European Commission’s competition system). It should be recognized, however, that this view is not uniformly shared; for some, notions of “individual freedom,” “fairness,” and “structure of competition” remain important goals as well.

object.” This Part should also help allay concerns that moving RPM out of the “hardcore” comfort zone would automatically convert RPM analysis into a morass of endless inquiries and steep evidentiary requirements where, in the end, a plaintiff or competition authority would almost invariably lose, even in cases where RPM is harmful.

There is little doubt that the rules the European Commission (“Commission”) has decided to maintain for RPM¹⁰ are not aligned with the economic goals of European competition law. This in itself should be an uncontroversial conclusion that does not require further discussion. The main point of this Essay, however, is that the current rules on RPM are misguided because they are designed to make nearly impossible a meaningful, fact-based analysis in future cases that could reflect the serious debate concerning RPM and incorporate newer economic research. The rules unreasonably limit the ability of competition authorities and courts to gather the necessary experience and empirical evidence in RPM cases that is necessary to develop improved methods to analyze RPM cases and accurately distinguish between harmful and benign or beneficial cases of RPM.¹¹ The European competition regime is capable of utilizing a more nuanced analytical approach in RPM cases, consistent with the approach in other competition cases that raise almost identical competitive concerns, without losing the ability to prosecute harmful instances of RPM.

10. See Commission Regulation on the Application of Article 101(3) of the Treaty on the Functioning of the European Union to Categories of Vertical Agreements and Concerted Practices, No. 330/2010, art. 4(a), 2010 O.J. L 102/1, at 5 [hereinafter Block Exemption on Vertical Agreements] (characterizing RPM as a “hardcore” competition law violation); Commission Notice, 2010 O.J. C 130/1, at 12 [hereinafter Guidelines on Vertical Restraints] (discussing the Commission’s reasons for “hardcore” characterization of RPM).

11. See Ridyard & Bishop, *supra* note 3, at 37 (observing the importance of case law for the development of sound competition law norms); see also Daniel P. O’Brien, *The Antitrust Treatment of Vertical Restraints: Beyond the Possibility Theorem*, in *Konkurrensverket, in PROS AND CONS OF VERTICAL RESTRAINTS* 40, 43–44 (Arvid Fredenberg & Sten Nyberg eds., 2008) (describing how competition authority should seek to establish a prior belief about effects of business practices in light of empirical literature and update the belief in light of case based evidence).

I. *ECONOMICS-BASED FRAMEWORK FOR ARTICLE 101 ANALYSIS*

For many years there has been considerable debate over the correct analytical framework for restrictive agreements under article 101 TFEU (article 81 EC). Unfortunately, this is an area in which the European courts have not provided much leadership. Although some cases put market power concerns in the center of article 101(1) TFEU analysis,¹² overall the courts and advocates general have expressed many different, and sometimes inconsistent, views about the analytical framework contained in article 101. In particular, recent European case law on article 101 TFEU has become something like a Rorschach test where everyone can find some support for whatever view of article 101 TFEU one holds.¹³

The Commission's guidance has been uneven as well. The guidelines on the application of article 81(3) (article 101(3) TFEU), for example, envisage an analysis that reflects consumer welfare economics, connecting the concept of a "restriction of competition" with (likely) price and output effects of a particular

12. *See, e.g.*, *GlaxoSmithKline Servs. Unltd. v. Commission (GlaxoSmithKline I)*, Case T-168/01, [2006] E.C.R. II-2969, ¶¶ 109–12; *see also* *O2 (Germany) GmbH v. Commission*, Case T-328/03, [2006] E.C.R. II-1231, ¶¶ 66–69, 71–72, 116 (applying an article 101(1) TFEU (article 81(1) EC) analysis grounded in concepts of market power and consumer welfare). The European Court of Justice ("ECJ") reversed the Court of First Instance ("CFI") in *GlaxoSmithKline* on the issue of article 101(1) TFEU (article 81(1) EC) analysis and held that restraints on parallel trade in pharmaceutical products must be considered "restriction of competition by object" without further factual analysis. *GlaxoSmithKline Servs. Unltd. v. Commission (GlaxoSmithKline II)*, Joined Cases 501, 513, 515, 519/06, [2010] E.C.R. __, [2010] 4 C.M.L.R. 50, 131–32.

13. *Compare GlaxoSmithKline II*, [2010] 4 C.M.L.R. 50, 132 (suggesting that article 101(1) TFEU (article 81(1) EC) analysis is also concerned with "structure of the market" and harm to competition "as such"), *and* *T-Mobile Netherlands BV v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, Case C-8/08, [2009] E.C.R. 4529, ¶ 27 (stressing that "close regard must be paid . . . to [the] economic and legal context" when analyzing a restriction of competition under article 101(1) TFEU (article 81(1) EC) (citing *Competition Authority v. Beef Indus. Dev. Soc'y, Ltd.*, Case C-209/07, [2008] E.C.R. I-8637, ¶¶ 16, 21; *NV IAZ Int'l Belg. v. Commission*, Joined Cases 96–102, 104–05, 108, 110/82, [1983] E.C.R. 3369, ¶ 25)), *and GlaxoSmithKline I*, [2006] E.C.R. II-2969, ¶¶ 109–10 (same), *and O2 (Germany)*, [2006] E.C.R. II-1231, ¶ 66 (same (citing *Béguelin Import Co. v. S.A.G.L. Import Export*, Case 22/71, [1971] E.C.R. 949)), *with Métropole télévision (M6) v. Commission*, Case T-112/99, [2001] E.C.R. II-2459, ¶ 107–12 (emphasizing that "restriction [of competition]" in article 101(1) TFEU (article 81(1) EC) is an "objective" concept not directly linked to an analysis of the facts of a case).

restraint.¹⁴ Along the same lines, the new vertical agreements block exemption and accompanying guidelines continue to recognize market power as a key condition to determine whether vertical restraints are capable of harming consumer welfare.¹⁵ The same documents, however, continue to condemn a range of vertical restraints as “hardcore” violations based on a pure form-based approach and without explaining how these restraints invariably enable firms to increase their market power.¹⁶

This Part seeks to identify a few broad principles that should inform article 101 TFEU analysis in a competition regime that is focused on consumer welfare. It relies on the substantial recent scholarship and debate on the topic of proper article 101 TFEU analysis,¹⁷ although it will focus more than other contributions on the “restriction by object” analytical route, a seriously underdeveloped and largely untested concept in European

14. Commission Notice, 2004 O.J. C 101/97, at 98 [hereinafter Guidelines on Application of Article 81(3)] (explaining that the prohibition in article 81(1) EC (article 101(1) TFEU) focuses on whether an agreement likely has an appreciable adverse impact on price, output, product quality, product variety, and innovation). Consistent with these concepts, the guidelines also make the distinction between an “object”-based analysis and an “effect”-based analysis in light of whether certain restraints will almost invariably have the effect of reducing consumer welfare or require a case by case analysis to determine their effects. *Id.*, 2004 O.J. C 101/97, at 100–01.

15. See Block Exemption on Vertical Agreements, pmbl. ¶¶ 7–9, art. 8, 2010 O.J. L 102/1, at 2, 6; Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 4, 21.

16. The Commission’s alternative method for identifying a “restriction of competition,” which depends on whether the Commission thinks that an intrabrand restraint was “objectively necessary,” is also inconsistent with economic principles. See, e.g., Guidelines on Application of Article 81(3), 2004 O.J. C 101/97, at 99 (extending the notion of “restriction of competition” to intrabrand restraints that the Commission does not deem “objectively necessary”).

17. See Renato Nazzini, *Article 81 EC Between Time Present and Time Past: a Normative Critique of “Restriction of Competition” in EU Law*, 43 COMMON MKT. L. REV. 497, 504 (2006) (arguing that article 101(1) TFEU (article 81(1) EC) analysis must focus on harmful effects on allocative efficiency); see also Alison Jones, *Analysis of Agreements under U.S. and EC antitrust law—Convergence or Divergence*, 51 ANTITRUST BULL. 691, 770 (2006) (concluding that European case law supports the view that a “restriction of competition” requires actual or likely output and price effects); Beverley Robertson, *What Is a Restriction of Competition? The Implications of the CFI’s Judgment in O2 Germany and the Rule of Reason*, 28 EUR. COMPETITION L. REV. 252, 262 (2007) (suggesting that economic analysis of the effects of an agreement should occur under article 101(1) TFEU (article 81(1) EC)). This debate is not new; other authors have suggested an article 101 TFEU analysis consistent with economic principles for some time. See, e.g., Ian S. Forrester & Christopher Norall, *The Laicization of Community Law: Self-help and the Rule of Reason: How Competition Law Is and Could Be Applied*, 21 COMMON MKT. L. REV. 11, 38–40 (1984); Barry E. Hawk, *System Failure: Vertical Restraints and EC Competition Policy*, 32 COMMON MKT. L. REV. 973, 975 (1995).

competition law, and on principles common to a “restriction by object” analysis and a “restriction by effect” analysis under article 101(1) TFEU. This appears particularly relevant for a discussion of vertical restraints analysis in light of the characterization of RPM and certain other intrabrand restraints as “hardcore” restraints, the regulatory equivalent to “restriction by object,” in the vertical agreements block exemption and corresponding guidelines.¹⁸

A. *Concept of “Restriction of Competition” and Market Power Analysis*

Adhering to a consumer welfare standard means putting the concept of market power in the center of article 101(1) analysis.¹⁹ An allegation that an agreement “restricts competition” must be accompanied by a theory of harm that explains how the agreement facilitates the exercise of market power and leads to a market-wide increase in price or reduction in output,²⁰ compared with a no agreement counterfactual.²¹ Without a story connecting market power and competitive harm there can be no violation of article 101(1) TFEU (article 81(1) EC) and no burden can be imposed on the defendant to provide substantiated justifications. This is consistent with several judgments²² and the Commission’s guidelines on the application of article 81(3).²³

18. See *supra* note 10 (classifying RPM as a “hardcore” violation of competition law and outlining the underlying rationale for this classification).

19. See case law and literature cited *supra* notes 12, 17.

20. There can be alternative “harm scenarios,” like reduced choice or reduced innovation as a result of a restrictive agreement that increases market power, but, for purposes of this paper, price and output effects are used as proxies for consumer harm. Some have suggested that the inquiry under article 101(1) TFEU (article 81(1) EC) should focus on directly determining whether the agreement increases market power, rather than on price and output effects. See Vittorio Cerulli Irelli, *Article 81(1) EC: Some Remarks on the Notion of Restriction of Competition*, 20 EUR. BUS. L. REV. 287, 293 (2009). But it is unclear how market power could be measured directly.

21. This inquiry may in certain circumstances require at least a preliminary analysis into whether the agreement enables competition that would otherwise not exist. See, e.g., *O2 (Germany)*, [2006] E.C.R. II-1231, ¶¶ 114–15 (holding that the Commission should have considered the possibility that an agreement among competitors could have enabled a smaller rival to enter and compete as provider of mobile phone services); Nazzini, *supra* note 17, at 516–17 (suggesting that some balancing of positive and negative effects may be required under article 101(1) while acknowledging the difficulties of such a balancing exercise).

22. See, e.g., *Eur. Night Servs., Ltd. (EPS) v. Commission*, Joined Cases T-374–75, 384, 388/94, [1998] E.C.R. II-3141, ¶¶ 136–37 (remarking that there can be no finding of a restriction of competition without delineation of the relevant market and a story

Article 101 TFEU has only one concept of “restriction of competition,” regardless of whether the analysis is built around a “restriction by object” theory or its regulatory equivalent, the categorization as a “hardcore” restraint, or a “restriction by effect” theory.²⁴ A “restriction by object” analysis or “hardcore” categorization must reflect the same economic concepts as a fuller analysis of the facts of a specific case.

Firms can anticompetitively increase market power either directly, through an arrangement that facilitates coordination and reduces competition among rivals, or indirectly, by foreclosing rivals from the market. There are no other alternatives; explanations of why a restraint violates article 101(1) TFEU must fit into one of the two theories.²⁵ This is true also for all intrabrand restraints, including RPM; they typically can be found to restrict competition only if there is evidence that they facilitate collusion, although the possibility of exclusionary effects of RPM cannot be completely ruled out.²⁶

about market power); *see also* *O2 (Germany)*, [2006] E.C.R. II-1231, ¶ 79 (“[A]n examination in this respect was necessary not only for the purposes of granting an exemption but, prior to that, for the purposes of the economic analysis of the effects of the agreement on the competitive situation determining the applicability of Article 81 EC [article 101 TFEU].”).

23. Guidelines on Application of Article 81(3), 2004 O.J. C 101/08, at 99. The Commission has confirmed this interpretation of article 101 in the draft guidelines on horizontal agreements. *See* European Commission, Draft Guidelines on the Applicability of Article 101 on the Functioning of the European Union to Horizontal Co-operation Agreements, SEC(2010) 528/2, at 10, ¶¶ 25–26 (May 4, 2010) [hereinafter Draft Guidelines on Horizontal Agreements] (connecting the notion of “restriction of competition” with likely effects on price, output, and other parameters of competition).

24. Some authors who developed thoughtful approaches to article 101 TFEU (article 81(1) EC) analysis under an “effects”-based approach appeared to assume that object-based analysis is something completely different. *See* Okeoghene Odudu, *Interpreting Article 81(1): The Object Requirement Revisited*, 26 EUR. L. REV. 379, 379–90 (2001) (suggesting that “restriction by object” is not related to a presumption of harmful effects).

25. In this view, market power becomes not only an organizing principle to develop a theory of harm and organize relevant evidence, but also a *limiting principle* that imposes discipline on decision makers. One cannot use alternative standards such as “restriction of economic freedom,” “consumer choice,” or “structure of competition,” as substitutes when a consumer welfare standard would make it too difficult for agencies to win cases or because of intellectual laziness.

26. RPM could be used by a powerful supplier to foreclose rival products on the retail level by reinforcing an exclusive dealing arrangement. *See* *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 894 (2007); Timothy J. Brennan, *RPM as Exclusion: Did the U.S. Supreme Court Stumble Upon the Missing Theory of Harm*, 53 ANTITRUST BULL. 967, 974 (2008). Exclusionary effects of RPM are arguably a greater

B. “Object” and “Effect” Analysis Rely on Different Types of Evidence

The emphasis on market power as the yardstick in article 101(1) TFEU (article 81(1) EC) does not determine the nature and amount of evidence that must be presented in each case to satisfy a decision-maker that an agreement is in fact a restriction of competition. Such a decision must be evidence-based, but it will not be necessary in every case to obtain and evaluate case-specific evidence of actual or probable anticompetitive effects, based on a comparison with the counterfactual without the restrictive agreement.²⁷

If evidence from the same type of restraint, experience in case law, and consistent economic theory support the conclusion that a certain restraint will almost invariably enable firms to increase their market power and harm consumer welfare, an economics-based competition regime should maintain presumptions of unlawfulness and quickly condemn such restraints.²⁸ In other words, restraints that have already been “convicted in the court of consumer welfare”²⁹ can and should be considered potentially highly harmful without full analysis of their effects in a specific case. Experience, empirical findings, and consistent theory are critical to justify the use of a presumption, and cannot be replaced by judicial fiat or the strongly held beliefs of a government official. This approach is

and more realistic concern when powerful retailers instigate RPM schemes by their suppliers in order to exclude rival retailers or to raise their costs. *See, e.g.*, *Babyage.com, Inc. v. Toys “R” Us, Inc.* 558 F. Supp. 2d 575, 579 (E.D. Pa. 2008) (considering a case in which plaintiff retailers alleged an RPM scheme involving suppliers and a powerful retailer).

27. For a fuller analysis of the choice between strict rules and fuller examination of facts, see Arndt Christiansen & Wolfgang Kerber, *Competition Policy with Optimally Differentiated Rules Instead of “Per se Rules vs Rule of Reason”*, 2 J. COMP. L. & ECON. 215, 238–39 (2006) (identifying criteria that a competition regime should use to decide whether stricter rules or more flexible analytical approaches are appropriate). *See also* Ralph A. Winter, *Rejoinder to Froeb, O’Brien, and Vita’s Reply*, 2 COMPETITION POL’Y INT’L 196–97 (2006) (defending the position that case-by-case assessment of restraint is required where a restraint like RPM theoretically can have beneficial and harmful effects and rejecting the argument that a broader rule legitimizing RPM should be adopted).

28. *See, e.g.*, Timothy J. Muris, *The Rule of Reason After California Dental 7–8* (George Mason University School of Law, Working Paper No. 00-41, 2000), available at http://www.law.gmu.edu/assets/files/publications/working_papers/00-41.pdf (emphasizing the importance of experience with a particular practice for formulation of an appropriate analytical approach).

29. *Polygram Holding, Inc. v. Fed. Trade Comm’n*, 416 F.3d 29, 37 (D.C. Cir. 2005).

consistent with the “restriction by object” analytical route of article 101(1) TFEU, which is based on a presumption that a certain restraint has anticompetitive effects.³⁰

If the plaintiff relies on a “restriction by effect” analysis it must present case-specific evidence of actual or probable anticompetitive effects. Even in these cases, however, evidentiary requirements can be abbreviated so that a plaintiff can show that an agreement “restricts competition” with more limited, circumstantial evidence. As before, case experience and consistent economic theory will be required to justify such an abbreviated analysis, as they must be used to persuade the decision maker that the circumstantial evidence is a good proxy for competitive harm.³¹

The challenge for any antitrust regime is to identify the type of restrictions where shortcuts and presumptions can be used to establish likely harmful effects. As some commentators have called it, the challenge is to find the “optimal complexity” of rules that allows shortcuts and presumptions.³²

C. “Object” and “Effect” Analysis Do not Represent Radically Different Categories

In developing an analytical framework under article 101 TFEU (article 81 EC), one should be careful not to over analogize to U.S.-style analysis under section 1 of the Sherman Act.³³ But one valuable lesson from the U.S. experience is that attempts to pigeonhole all restraints into two distinct analytical modes will fail. There are just too many variations among the panoply of possible restraints. This makes the use of easy labels

30. See Guidelines on Application of Article 81(3), 2004 O.J. C 101/08, at 100. If presumptions or “object analysis” are used in this way, they do not represent a form-based approach; rather, they represent an effects-based approach with very limited case-specific evidence.

31. See discussion *infra* notes 38–42 and accompanying text (demonstrating that in certain information exchange cases, only certain proxies might be used as evidence of effects).

32. The initial categorization will depend primarily on the likelihood of harm caused by certain restrictions, the marginal benefits from introducing more differentiated rules, and increased compliance and enforcement costs that will result from more complex standards of assessment. See Christiansen & Kerber, *supra* note 27, at 239 (emphasizing the need to use economic principles to develop a set of differentiated competition rules).

33. See Sherman Antitrust Act § 1, 15. U.S.C. § 1 (2006).

impossible, and forces decision makers to assess evidentiary requirements in light of economic principles and the need to ensure reduced costs of compliance and enforcement.

Although labels may be convenient, the more accurate view is that the difference between “restriction by object” and “restriction by effect” does not reflect two entirely separate analytical standards. It would be incorrect to assume that article 101 TFEU has only two diametrically opposed analytical routes: one that is inflexible and never requires any scrutiny of the circumstances in which an agreement occurs, and another that always requires a full-blown analysis in which an elaborate examination of relevant markets, market power, and anticompetitive effects is required—a standard that plaintiffs invariably are unable to provide. Rather, these two approaches represent two poles at each end of a spectrum that cover more nuanced analytical approaches in between.

The Court of First Instance’s judgment in *GlaxoSmithKline I* is a good example that illustrates that there may be instances where some limited inquiry into the circumstances of a case might be required to determine whether a restraint should be considered under the “restriction by object” approach.³⁴ As the Commission’s Guidelines on Application of Article 81(3) also suggests, the plaintiff may have to provide some evidence to support its theory of harm in certain “restriction by object” cases before a decision maker can decide that the restraint presumably restricts competition.³⁵

On the other hand, it is not possible to determine generally for all “restriction by effect” cases how much of an inquiry into the facts will be required before a decision maker can determine that a restraint (likely) will have the effect of reducing output or

34. *GlaxoSmithKline I*, [2006] E.C.R. II-2969, ¶ 119 (concluding that an examination of circumstances of the agreement would be required before confirming that the agreement designed to limit parallel trade had the object of restricting competition). Although the ECJ reversed the CFI’s article 101(1) TFEU (article 81(1) EC) analysis in *GlaxoSmithKline*, it held only that the CFI’s analytical approach, which engaged in a limited factual analysis before presuming that an agreement restricted competition, was wrong in light of the facts of the case; the ECJ did not find that the CFI’s approach was inappropriate for purposes of article 101(1) TFEU analysis in general. See *GlaxoSmithKline II*, [2009] 4 C.M.L.R. 2, ¶¶ 55, 58.

35. See Guidelines on Application of Article 81(3), 2004 O.J. C 101/08, at 100 (confirming that in some “restrictions by object” cases a limited analysis of broader circumstances may be required).

increasing price. In certain circumstances, an examination of limited evidence and the plaintiff's theory of harm can support the finding of a restriction of competition, in particular where an agreement has already been implemented and there is some evidence of harmful effects. Article 101(1) TFEU (article 81(1) EC) analysis can incorporate more easily observable proxies to establish the likelihood of harmful effects, so long as experience suggests that they are legitimate and reasonably good predictors of anticompetitive effects. This point can be illustrated with European case law on information exchanges among competitors and the analytical framework that was used in various cases to condemn information exchanges as anticompetitive.³⁶

Information exchange cases serve as a good illustration in the debate on the proper analytical standards to evaluate RPM because the two areas raise very similar competitive concerns: the ability of rivals to exercise market power by more effectively coordinating their conduct and decreasing rivalry among them. There has been widespread discussion on whether information exchange cases should be analyzed under a "restriction by effect" or "restriction by object" approach. In the end, though, the analytical approach adopted in a specific case has little impact on evidentiary requirements or case outcomes. A good example is a recent OECD roundtable on information exchanges where member countries presented their enforcement experiences and seemingly adopted opposing positions concerning the appropriate analytical framework under article 101 TFEU.³⁷ The United Kingdom described its intervention in the *Independent School* case where private schools had engaged over many years in a regular, highly organized exchange of tuition information right around the time when the schools determined tuition rates for the coming school year.³⁸ The United Kingdom explained that under the specific circumstances of the case that it was justified

36. See, e.g., Stefano Grassani, *Oligopolies and 'Pure' Information Exchanges in the EU: New Crops Are Growing on the Soils Plowed by 'UK Tractors,'* in 2007 FORDHAM COMPETITION L. INST. 675, 682–83 (Barry E. Hawk ed., 2008) (providing an overview of European case law on information exchanges).

37. See Org. for Econ. Co-operation and Dev. [OECD], *Facilitating Practices in Oligopolies 2007*, at 17–157, OECD Doc. DAF/COMP(2008)24 (Sept. 5, 2008).

38. See *id.* at 148; see also Office of Fair Trading [OFT], *Exchange of Information on Future Fees by Certain Independent Fee-Paying Schools*, at 22, Decision No. CA98/05/2006 (Nov. 20, 2006) (U.K.) [hereinafter *OFT Independent School Decision*].

to rely on a “restriction by object” approach, thereby enabling it to condemn the practice without proof of actual harmful effect.³⁹ France, however, rejected the use of a “restriction by object” approach and insisted that it would always analyze information exchange cases under a “restriction by effect” approach.⁴⁰ It described how it had approached, among others, the *Paris Luxury Hotels* case in which a small number of top class luxury hotels engaged in an exchange of historic information on price and occupancy rates.⁴¹ France explained how it had used limited, circumstantial evidence on the regularity of meetings, market conditions, and the type of information exchanged to conclude that the scheme “likely” had the effect of restricting competition.⁴²

Despite the use of different labels, the approach in both jurisdictions was almost identical. In both cases, the competition authorities identified a number of relevant factors as indirect evidence that the investigated practices were harmful. Neither case attempted to assess or measure the actual effects of the information exchange by establishing a counterfactual without the information exchange.⁴³ The only difference between the two cases was that the U.K. case, despite the large number of participants in the information exchange agreement, had a more credible story about how the exchange of information could

39. OECD, *supra* note 37, at 103, 148 (written contribution by the United Kingdom providing a fuller account of *Independent School* case). Although the Office of Fair Trading’s (“OFT”) decision made no findings concerning the effects of the arrangement, there was apparently some evidence that the arrangement had resulted in higher tuition fees. *E.g.*, OFT *Independent School* Decision, *supra* note 38, at 113–14.

40. OECD, *supra* note 37, at 46, 148–49 (explaining that the French competition authority’s practice in information exchange cases reflected evidentiary standards consistent with a “restriction by effect” approach).

41. *See id.* at 43 (describing the decision of the Conseil de la concurrence, France’s competition authority, in the *Paris Luxury* case); *see also* Conseil de la concurrence [Competition Council], *Décision relative à des pratiques mises en œuvre sur le marché des palaces parisiens* [Decision on Practices Implemented in the Market for Luxury Hotels in Paris], no. 5-D-64 (Nov. 25, 2005) (Fr.).

42. *See* OECD, *supra* note 37, at 43–44.

43. For a U.S. case applying a similar approach to an information exchange arrangement, although during a preliminary stage of the case, *see* *Todd v. Exxon Corp.*, 275 F.3d 191, 191 (2d Cir. 2001) (reversing the dismissal of a complaint alleging an unlawful exchange of information arrangement because the plaintiff had provided a plausible definition of relevant market and a sufficient explanation of why market characteristics were conducive to a collusive outcome).

facilitate future coordination among rivals than the French case.⁴⁴

This view is also consistent with the approach that the European Court of Justice's (now the Court of Justice of the European Union) ("ECJ") endorsed in *U.K. Tractors*⁴⁵ and *T-Mobile Netherlands*.⁴⁶ *U.K. Tractors* was litigated under a "restriction by effect" theory, and the ECJ confirmed that a careful evaluation of the circumstances in which an information exchange occurred can be sufficient to establish a violation of article 101(1) TFEU and that evidence of actual anticompetitive effects was not always required.⁴⁷ In *T-Mobile Netherlands*, the ECJ decided that a "restriction by object" approach can be applied to certain information exchanges, but it nevertheless identified a number of circumstances that must be used to explain why the information exchange scheme presumably restricts competition, such as the market structure, number of competitors, and the nature of the information exchanged.⁴⁸ In *T-Mobile Netherlands*, the ECJ may have elevated the checklist approach too high and required too little in terms of a meaningful story that connects the relevant factors, but hopefully the requirement to develop a story will become clearer over time. This would also be more consistent with the ECJ's approach in recent merger cases.⁴⁹

44. See *Oligopolies and Competition Law*, in 2007 FORDHAM COMPETITION L. INST., *supra* note 36, at 769, 811 (statement by Damien Neven, Chief Economist of the Commission's Directorate General for Competition, questioning the strength of theory of harm in *Paris Luxury Hotel*).

45. *John Deere, Ltd. v. Commission*, Case C-7/95, [1998] E.C.R. I-3111, ¶ 76.

46. *T-Mobile Netherlands BV v. Raad van Bestuur van de Nederlandse Mededingingsautoriteit*, [2009] 5 C.M.L.R. 1701.

47. See *John Deere*, [1998] E.C.R. I-3111, ¶¶ 72–78, 90.

48. See *T-Mobile Netherlands*, [2009] 5 C.M.L.R. at 1740. This approach to analytical standards used in information exchanges is also consistent with the Commission's draft Horizontal Co-operation Guidelines. See Draft Guidelines on Horizontal Agreements, *supra* note 23, SEC(2010) 528/2, at 19, ¶¶ 68–70 (confirming that for certain exchanges of information, a restriction by object analysis may be appropriate after an analysis of a few, limited factors, whereas, for other information exchanges, a fuller analysis of market conditions and the information exchanged is necessary for a determination of whether the information exchange facilitates to coordinated exercise of market power).

49. The ECJ has warned against adopting a checklist approach to establish the risk of coordination among rivals, requiring instead that relevant criteria must be connected in a plausible story before they support a finding of a risk of coordination. See *Bertelsmann and Sony Corporation of America v. Impala*, Case C-413/06, [2008] E.C.R. I-4951, ¶¶ 125–26 (requiring an explanation on why standard criteria indicating the possibility of coordinated effects in merger cases are relevant in the context of a specific case).

D. *Focusing on Market Power Does not Introduce a Rule of Reason Analysis*

The article 101(1) TFEU (article 81(1) EC) analytical approach advocated herein is not a “rule of reason” analysis. More importantly, and more precisely, the discussion on how market power concerns fit into article 101(1) TFEU analysis does not benefit from arguments that this approach would introduce a “rule of reason” analysis into European competition law. One can argue in favor of an effects-based analysis in all article 101 TFEU cases along the lines suggested above and at the same time subscribe to the notion that European competition law does not use a “rule of reason” analysis.

References to the “rule of reason” are not helpful because the concept means different things to different people. A “rule of reason” approach can refer to the analysis of restrictive agreements identified by the U.S. Supreme Court in *Chicago Board of Trade* where essentially everything is considered relevant, and factors both supporting and opposing the finding of an unlawful agreement are examined without a clear analytical structure or sequence.⁵⁰ Article 101 TFEU does not, and should not, incorporate this type of rule of reason analysis. Courts in Europe are settled on this issue.⁵¹

For others, “rule of reason” analysis is an analytical framework that allows the defendant at some point in the analysis to bring efficiency justifications into the analysis.⁵² Article 101 TFEU has always had a “rule of reason” analysis in this narrow sense that defendants are not barred from raising justifications

50. *Bd. of Trade of the City of Chicago v. United States*, 246 U.S. 231, 238–39 (1918).

51. *See, e.g.*, *Métropole Télévision (M6) v. Commission*, Case T-112/99, [2001] E.C.R. II-2459, ¶¶ 72, 76, 107. It should be noted, though, that this approach also does not reflect the current analytical framework applied to restrictive agreements in U.S. antitrust law. *See, e.g.*, *Nat’l Coll. Athletic Assoc. v. Bd. of Regents of the Univ. of Okla.*, 468 U.S. 85, 103 (1984) (applying an abbreviated rule of reason analysis); *see also* *Polygram Holding, Inc. v. Fed. Trade Comm’n*, 416 F.3d 29, 34 (D.C. Cir. 2005) (same).

52. *See generally* Thomas G. Krattenmaker, *Per Se Violations in Antitrust Law: Confusing Offenses with Defenses*, 77 *GEO. L.J.* 165 (1988) (arguing that courts should abandon the notion of per se violations and focus instead on categorizing certain defenses as per se inadmissible). *See also* *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19–23 (1979) (rejecting the per se condemnation of horizontal agreement excluding price competition where the defendant presented strong and credible efficiency justifications).

for their conduct under article 101(3) TFEU.⁵³ This narrow view of what “rule of reason” means, however, says nothing about the structure of the analysis, the use of initial presumptions, nor the possibility of using a structured rule of reason analysis that reaches initial conclusions about the likely anticompetitive effects of an agreement based on a few proxies that shift the burden to provide justifications to the defendant. Accordingly, and as other commentators have already noted, Europe would be much better off if the debate about the proper analytical standards in article 101 TFEU stayed away from using the—unhelpful—“rule of reason” label.⁵⁴

II. *IDENTIFYING STEPS TOWARDS AN IMPROVED FRAMEWORK FOR RPM ANALYSIS UNDER ARTICLE 101 TFEU*

A. *Economics of RPM*

A useful analytical framework for RPM cannot be developed without regard to the economics of RPM. The economic assessment of RPM occurs on two levels: (1) as regards to the concepts and theory of RPM, there is little debate and widespread agreement; (2) as regards to the empirical evidence on the competitive effects of RPM, there is little agreement and significant debate even among mainstream economists.

On a conceptual level, the potential benefits and harm related to RPM are largely undisputed; newer research is emerging, but it does not appear to undermine the general consensus on core principles. On the positive side of the ledger, it is widely recognized that RPM strategies can be used to protect retail margins in order to better align incentives of suppliers and retailers so that the retailer will promote sales of the supplier’s products more effectively than without RPM; this will make the supplier a more effective competitor against rival brands and

53. See *Matra Hachette SA v. Commission*, Case T-17/93, [1994] E.C.R. II-595, 596–97. Certain justifications would not be legally cognizable, though, such as the attempt to make more money through naked price fixing. In such a case, article 101 TFEU (article 81 EC) comes close to a per se prohibition. See TFEU, *supra* note 7, art. 101, 2008 O.J. C. 115/47, at 88; EC Treaty, *supra* note 7, art. 81, 2006 O.J. C 321 E/37, at 73.

54. See, e.g., Richard Whish & Brenda Sufrin, *Article 85 and the Rule of Reason*, 7 Y.B. EUR. L. 1, 36 (1987).

stimulate interbrand competition.⁵⁵ Benefits of RPM can also include the inducement to provide product “quality certification,” to reduce free riding opportunities, and encourage retailers to invest in new products. On the negative side, RPM can be used to support collusion on the supplier level and the retailer level, or at least soften price competition among them. More recent literature has attempted to identify different conditions under which RPM can bring about these effects.⁵⁶

The probabilities assigned to these positive and negative outcomes, however, continue to be highly controversial among economists and other commentators,⁵⁷ as the frequency and magnitude of the effects of RPM remain largely unexplored. In other words, while there is agreement on what *can* happen if a supplier uses RPM, there is disagreement on how likely it is that something bad or good *will* happen.

Different opinions and beliefs on empirical issues largely explain why some economists are skeptical toward RPM while others are more relaxed. Many economists would concur with the statement that, “it is fair to say that no serious economist doubts the pros. The cons can be regarded as rare and hence the balance would be in favor of allowing RPM in many circumstances.”⁵⁸ Yet, many others would agree that “RPM is, if

55. See, e.g., Benjamin Klein, Competitive Resale Price Maintenance in the Absence of Free-Riding 5–6 (Apr. 3, 2009) (unpublished), available at <http://cdn.law.ucla.edu/sitecollectiondocuments/workshops%20and%20colloquia%202/klein,%20leow.pdf> (emphasizing that this rationale does not rely on free rider justifications); see also Matthew Bennett et al., *Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy*, in INTERNATIONAL ANTITRUST LAW & POLICY: FORDHAM COMPETITION LAW 2009, ch. 19 (Barry Hawk ed., 2010), reprinted in 33 FORDHAM INT’L L.J. 1278, 1288–90 (2010); OECD, Roundtable on Resale Price Maintenance 2008, at 23–30, OECD Doc. DAF/COMP(2008)37 (Sept. 10, 2009) (summarizing the procompetitive rationales for RPM).

56. See, e.g., OECD, *supra* note 55, at 30–36. Newer research seeking to identify additional circumstances in which RPM can have harmful, collusive effects appears to have gained support in particular among European economists. For an overview, see, for example, Bennett et al., *supra* note 55, at 1290–92. There is a question, however, whether the emerging research and the assumptions under which harmful effects of RPM are predicted to occur have been sufficiently tested in a rigorous debate, in order to provide guidance for the development of legal rules.

57. See, e.g., Margaret E. Slade, *The Effects of Vertical Restraints: An Evidence Based Approach*, in THE PROS AND CONS OF VERTICAL RESTRAINTS, *supra* note 11, at 12.

58. OECD, *supra* note 55, at 264 (paraphrasing professor of economics Howard Marvel).

anything, slightly closer to [per se illegality of a restraint] than [legality].”⁵⁹

Optimal legal rules and analytical approaches that ensure case outcomes that are consistent with economic goals cannot be shaped without an understanding of the empirical aspects of RPM, which can be obtained only through case experience and research that connects theory and empirical work.⁶⁰ In particular, strict rules—either declaring all RPM beneficial or all RPM anticompetitive—cannot be supported without some idea how the empirical questions should be answered because the presumptions that underlie strict rules lack critical support.⁶¹ Given the uncertainties in RPM economics, the only reasonable alternative is an approach that allows for some consideration of case-specific facts.⁶²

B. *Commission’s Re-Adopted Rules Concerning RPM*

According to the new block exemption on vertical restraints, RPM will continue to be considered a “hardcore” restraint, which usually cannot meet the criteria under article 101(3) TFEU (article 81 EC),⁶³ even though the corresponding guidelines appear to open the door a little to certain efficiency defenses related to market entry.⁶⁴ Thus, as much as this is possible under article 101 TFEU, the practice remains a per se infringement. At the very least, the public perception that RPM de facto is prohibited per se, which has been nurtured over many years by

59. Bennett et al., *supra* note 55, at 1287.

60. See, e.g., Michael Baye et al., *Economics at the FTC: The Google-DoubleClick Merger, Resale Price Maintenance, Mortgage Disclosures, and Credit Scoring in Auto Insurance*, 33 REV. INDUS. ORG. 211, 218 (2008) (emphasizing the importance of empirical evidence to develop a structured analysis in RPM cases).

61. See Christiansen & Kerber, *supra* note 27, at 238–39 (concluding that strict rules for RPM cannot be adopted in the absence of sufficient general empirical evidence about the effects of RPM).

62. See, e.g., Winter, *supra* note 27, at 197.

63. See Block Exemption on Vertical Agreements, No. 330/2010, art. 4(a), 2010 O.J. L 102/1, at 5; see also TFEU, *supra* note 7, art. 101(3), 2008 O.J. C 115/47, at 88–89; EC Treaty, *supra* note 7, art. 81(3), 2006 O.J. C 321 E, at 74.

64. See Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 44 (recognizing the potential efficiencies of RPM, although limited to new entry, coordinated low price campaigns, and the prevention of a large distributor from using a branded product as loss leader).

Commission practice and policy statements,⁶⁵ will continue to exist unless a body of case law emerges with a robust assessment of RPM efficiencies and realistic evidentiary thresholds.

As a result, the strict rules against RPM were grandfathered in while Europe moved toward a more consumer-welfare-oriented competition regime. Given the rich discussion on RPM in Europe since *Leegin*,⁶⁶ it is disappointing that the Commission, the institution with the principal responsibility for developing competition policy,⁶⁷ has decided to play it safe and maintain the existing legal framework for RPM with only marginal changes that will have little, if any, practical effect.

The Commission's justifications for the categorization of RPM as a "hardcore" violation, found in the new guidelines, do not meet the requirements in an economics-based competition regime identified above.⁶⁸ The guidelines offer only a short list of scenarios in which RPM *can* have harmful effects, focusing—with one exception—on horizontal effects on the supplier or retail level.⁶⁹ While this description of economic theory is uncontroversial, it is insufficient to support the proposed rules.

65. See discussion *supra* note 27 and accompanying text. The Commission has never recognized possible efficiencies in an RPM case. Moreover, Commission documents and public statements by Commission officials strongly suggested that efficiency defenses would not be recognized in RPM cases. See, e.g., 2000 Guidelines on Vertical Restraints, 2000 O.J. C 291/1, at 11 (stating categorically that exemptions for hard core restraints are unlikely); OECD, *supra* note 55, at 103 (summarizing statement by a Commission official that parties have never come up with convincing efficiency explanations); see also Jones, *supra* note 17, at 761 (concluding that RPM is "essentially prohibited per se"); Luc Peepkorn, *Resale Price Maintenance and its Alleged Efficiencies*, 4 EUR. COMPETITION J. 201, 203 (2008) (observing that "[i]t is also considered that RPM will not have positive effects or that, where efficiencies are likely to result, these will not be passed on to consumers and/or that RPM is not indispensable for creating these efficiencies").

66. See generally, e.g., THE PROS AND CONS OF VERTICAL RESTRAINTS, *supra* note 11.

67. See TFEU, *supra* note 7, art. 105, O.J. C 115/47, at 88–92; EC Treaty, *supra* note 7, art. 85, 2006 O.J. C 321 E, at 76.

68. See *supra* note 60 and accompanying text. The focus of this Essay is RPM. But similar concerns apply equally, and perhaps even more strongly, to the Commission's plan to maintain, and in some respects tighten, the rules on selective distribution regimes and in particular online distribution. Not only is the distinction between active and passive sales detached from economic principles, the entire set of rules on selective distribution is completely disconnected from the concept of market power. As in the case of the proposed RPM rules, the proposed approach to selective distribution might actually *harm* competition as it extends certain prohibitions to small firms that may benefit the most from more flexible rules that allow them to control the distribution of their products and compete more effectively with larger incumbents.

69. Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 21.

The guidelines do not attempt to explain how frequent the scenarios are in which RPM might have harmful effects compared to scenarios where the effects would be benign or pro-competitive, and also conveniently ignore any attempt to quantify the harmful effects of RPM. The guidelines do not, and cannot, rely on any case law experience that would support the proposed rules as no Commission or court decision appears to have ever included factual findings on the harmful effects of RPM.⁷⁰

The guidelines also attempt to justify the “hardcore” categorization of RPM in the block exemption regulation by arguing that RPM leads to higher prices and therefore is presumably unlawful.⁷¹ This argument is wrong on the facts and wrong on the law. First, RPM does not always lead to a price increase. A supplier implementing an RPM scheme seeks to protect a retailer’s margin; so it may be able to achieve that goal by lowering its wholesale price when its products are exposed to strong competition on the retail level.⁷² Second, and more importantly, even if a supplier’s distribution scheme leads to a higher price for its own product, this effect is not necessarily indicative of harm to consumer welfare. As other commentators have explained in greater detail, a supplier has no incentive to raise the margin for retailers, and therefore the distribution cost for its own products, unless it gets something in return that makes this strategy profitable.⁷³ Absent collusive effects that allow suppliers to jointly exercise market power, the benefit must come in the form of increased efforts by the retailer to sell the supplier’s products, compared to a situation of unrestricted retailer price competition. If so, an RPM scheme will increase output and benefit for at least some consumers.⁷⁴ A decision

70. Case experience with a fuller investigation of the effects of RPM could have come from national authorities.

71. Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 44.

72. See, e.g., OECD, *supra* note 55, at 267 (statement by the United States).

73. See, e.g., Frank Mathewson & Ralph Winter, *The Law and Economics of Resale Price Maintenance*, 13 REV. INDUS. ORG. 57, 67 (1998). If a supplier believed that it was profitable simply to raise retail prices (without any corresponding output enhancing benefit) it could raise wholesale prices so it could obtain all of the additional profits, rather than sharing them with the retailer.

74. If output and price increase, the effects on consumer welfare are ambiguous, and using consumer welfare as a standard to determine liability will be extremely difficult or impossible. See, e.g., Roger D. Blair, *The Demise of Dr. Miles: Some Troubling Consequences*, 53 ANTITRUST BULL. 133, 143–46 (2008) (explaining the possible effects of an RPM scheme that increases promotional efforts and output on consumer surplus).

maker observing higher prices as a result of RPM can conclude nothing about whether or not the RPM scheme produced gains in efficiency.⁷⁵ In other words, a higher price that results only from a vertical arrangement is not a useful proxy to discriminate between procompetitive effects and anticompetitive effects; more bluntly, “a price test is completely useless” for the development of a policy toward RPM.⁷⁶ It cannot support a presumption that RPM restricts competition.

The price explanation in the guidelines to categorize RPM as a “hardcore” violation is also arguably inconsistent with European law. In *Metro I* the ECJ held that a supplier’s unilateral, vertical strategy designed to increase promotional efforts at the retail level does not fall under article 101(1) TFEU (article 81(1) EC) even if it leads to higher retail prices for the supplier’s products.⁷⁷ The court accepted the link between higher retail margins and consumer benefits from increased promotional efforts and found it lawful for a supplier to unilaterally adopt strategies that might lead to higher retail prices.⁷⁸ In *Metro II* the ECJ complemented its earlier decision by highlighting that vertical strategies designed to increase promotional efforts and a product’s quality image will raise competition concerns only if

Thus, it may be preferable to use output effects as a standard to distinguish between lawful and unlawful RPM, even if output effects might not always accurately reflect effects on consumer welfare. *See id.* at 148; *see also* Howard P. Marvel, *Resale Price Maintenance and the Rule of Reason*, ANTITRUST SOURCE, June 2008, at 1, 2–3 (suggesting that the output test might be useful to distinguish good RPM practices from bad RPM practices).

75. *See* Marvel, *supra* note 74, at 3.

76. Blair, *supra* note 74, at 147; *see also* Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 895–97 (2007) (rejecting the argument that higher prices resulting from RPM justify quick condemnation of the practice).

77. *See* Metro SB-Großmarkte GmbH v. Commission (Metro I), Case 26/76, [1977] E.C.R. 1875, ¶ 21. The case also forecloses the argument that a “restriction on competition” in article 101(1) TFEU (article 81(1) EC) should be assessed in light of lessened consumer choice or of revealed preferences of some consumers for lower prices, as the court accepted that a supplier may avoid low price distribution channels for its products by imposing costly obligations on its retailers even though this strategy lessened consumer choice as some consumers certainly would have preferred to buy the supplier’s product in a discount store at the lower price. The case shows that a supplier strategy that focuses on improving the tradeoff between price and service/quality and denies certain consumers the opportunity to buy the supplier’s product at a lower price is lawful under article 101(1) TFEU.

78. *See id.* (confirming that a suppliers’ distribution strategies designed to eliminate discount distributors and therefore soften price competition for its own products fall outside article 101(1)).

they have recognizable horizontal effects such as softening competition among suppliers.⁷⁹ *Metro I* and *Metro II* rule out the notion that higher prices resulting from RPM support a “hardcore” classification.

The guidelines also do not attempt to explain why it would be too difficult and costly to design rules that reasonably distinguish between harmful RPM and cases where RPM creates efficiencies accurately. Even commentators who tend to be skeptical of some instances of RPM recognize that situations exist where RPM does create efficiencies,⁸⁰ which suggests that it would be desirable to develop analytical approaches that can reliably identify these situations. There is also no explanation for how an RPM strategy by a relatively small firm in a competitive market and without substantial market power (regardless of whether the small firm is a new entrant) can have any of the collusive effects that the guidelines mention, and why it would be so costly and difficult to use some market power screen to identify such situations.⁸¹

This is the greatest weakness of the Commission’s approach—although economic research and the limited empirical evidence available to date make it clear that it is impossible to assume that RPM schemes almost invariably harm consumer welfare,⁸² the “blacklisting” of RPM perpetuates a situation where RPM schemes will not be seriously examined. Given the institutional and procedural framework for article 101 TFEU enforcement in Europe,⁸³ it will never be necessary for a plaintiff or competition authority to gather and present facts required for a competitive effects assessment in RPM cases; in

79. See *Metro SB-Großmarkte GmbH v. Commission (Metro II)*, Case 75/84, [1986] E.C.R. 3021, ¶¶ 40–41.

80. See, e.g., OECD, *supra* note 55, at 278 (paraphrasing Bruno Jullien as opining that efficiencies associated with RPM will benefit consumers if upstream structures compete).

81. The proposed rules raise a series of other questions, including the justification for the sharp distinction between strategies that do not directly use price restraints to limit intrabrand competition, which are de facto lawful for firms below the market share threshold, and price restraints which are banned. They are both designed to accomplish the same thing, and sometimes “nonprice” restraints can provide more opportunity to exercise market power than RPM. The distinction between price and nonprice restraints is not as relevant as the Commission would suggest; it is too broad and too narrow as a basis upon which to categorize practices.

82. They equally do not suggest that RPM is almost invariably a good thing.

83. See Blair, *supra* note 72, at 149–50.

fact, it would be strategically unwise to include any assertions about competitive effects in a case or decision. This will inhibit a process where competition authorities and courts have the opportunity to better understand the effects of RPM and shape legal analysis accordingly, even though everyone agrees that there are realistic scenarios in which RPM cannot support collusive or exclusionary outcomes. Therefore, it will not be possible to develop criteria that can be applied to identify instances where the law should permit RPM.⁸⁴ Moreover, the Commission has in the past been so unreceptive to efficiency justifications that the characterization of RPM as a “hardcore” violation will be outcome determinative.⁸⁵

C. *Principles for an Improved Article 101 Analysis of RPM*

1. Structuring Article 101(1) Analysis Around Indicia of Harmful Effects of RPM

There is little doubt that a rule that would require every plaintiff in an RPM case to provide conclusive evidence on actual welfare effects would be unwise, as it would be very difficult and many times impossible to produce such evidence, even in cases where RPM most likely is harmful. It would also be unnecessarily costly, assuming that it is possible to identify criteria that reasonably accurately indicate in which situations an RPM scheme likely facilitates collusive outcomes.

The approach applied in many information exchange cases, however, could serve as a useful starting point on the route towards a better analytical framework for RPM. As described above, information exchange cases depend on collusive theories of harm like RPM cases.⁸⁶ In information exchange cases it has become an accepted approach to analyze a limited set of factors that, according to economic theory and experience, are considered reasonably good predictors of whether the practice can facilitate coordination and is therefore likely harmful; these

84. See O'Brien, *supra* note 11, at 43–44 (describing how competition authorities should seek to update prior beliefs about the effects of business practices in light of empirical evidence); Slade, *supra* note 57, at 28 (observing that empirical evidence on vertical restraints is scant and that more evidence should be gathered).

85. See Blair, *supra* note 72, at 149–50.

86. See discussion *supra* notes 36–42; see also Grassani, *supra* note 36, at 682–83.

factors must then be combined with a plausible explanation into a story/theory of harm to persuade a decision maker that article 101(1) TFEU (article 81(1) EC) was infringed.⁸⁷

The most interesting aspect of the debate concerning RPM is about whether a similar approach would work in RPM cases and whether it could be incorporated into a structured analysis.⁸⁸ Some agreement appears to be emerging on potentially useful criteria, although much more experience from actual cases will be required to determine whether these criteria are sufficient and workable.⁸⁹ The most obvious factor is the absence of market power. Where markets are competitive and the firm seeking to implement an RPM scheme has no market power, an RPM scheme cannot have anticompetitive effects. Another initial factor in the decision-making matrix could focus on whether the industry generally appears prone to collusion. Additional criteria to distinguish harmful from nonharmful RPM include, for example, the frequency of RPM in a given industry, the source of the restraint (supplier or retailer), and whether the supplier has some degree of market power. Largely along the same lines, Office of Fair Trading papers have suggested using market power, downstream/upstream market concentration, the source of RPM, and the frequency of use of RPM in an industry as initial screens in an RPM inquiry.⁹⁰ Similar criteria were applied when

87. How much evidence is required in these cases will depend on whether circumstances are more supportive or less supportive of the finding of harmful effects. For example, if the information exchange occurs in a highly concentrated industry and involves future pricing decisions, much less explanation should be expected from the plaintiff to establish why the information exchange facilitated coordination than when a plaintiff brings a case against an information exchange in a highly competitive industry with many players and the information that was exchanged was historic and excluded price.

88. See, e.g., Christine A. Varney, Assistant Attorney Gen., Antitrust Div., U.S. Dep't of Justice, *Antitrust Federalism: Enhancing Federal/State Cooperation* 4–14 (Oct. 7, 2009), available at <http://www.justice.gov/atr/public/speeches/250635.pdf> (discussing the structured rule of reason approach in RPM cases).

89. It may also be worthwhile exploring whether anything can be learned from the analysis of evidence in merger cases involving a coordinated effects theory. Roughly speaking, evidence concerning certain characteristics of the industry and evidence that show that coordination would likely increase as a result of a merger (whether or not it has occurred in the past) must be provided and explained in these cases.

90. See OECD, *supra* note 55, at 212 (submission by the United Kingdom). For example, if there is evidence that retailers have instigated an RPM scheme, the potential efficiencies usually associated with RPM fall away and it would be justified to directly require the defendant to provide justifications.

the U.S. Federal Trade Commission (“FTC”) examined a request by Nine West to review an existing consent decree prohibiting it from using RPM. After analyzing these factors in an abbreviated fashion, the FTC concluded that an RPM scheme implemented by Nine West could in principle not be harmful.⁹¹

Ultimately, the goal of European competition law must be to develop an analytical framework that incorporates these and perhaps other factors that reasonably predict the effects of RPM in an article 101(1) TFEU analysis, in order to give plaintiffs a reasonably clear roadmap on what they must produce to prevail in the article 101(1) TFEU part of a case.⁹² Whether such an approach is labeled “restriction by object,” where the plaintiff has to identify certain factors and provide a story of why these factors are relevant in the present case before the presumption sets in, or “restriction by effect,” where the plaintiff has to provide limited evidence under article 101(1) TFEU before the burden of proof shifts to the defendant under article 101(3) TFEU, is really secondary.⁹³ In either case, it is essential that moving toward such a framework is possible only by examining cases through experience to identify circumstances where RPM is not harmful as well as those likely to cause harm.

91. See *In re Nine West Group Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 16,144, 2008 WL 2061410 (Fed. Trade Comm’n May 6, 2008) (granting in part a petition to reopen and modify a previous order by the Federal Trade Commission in light of the *Leegin* decision), available at <http://www.ftc.gov/os/caselist/9810386/080506order.pdf>; see also *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 897–98 (2007) (referring to market concentration and market power, widespread use of RPM in the industry, and source of RPM as factors that should be reflected in analysis of RPM).

92. The Commission is working toward such a framework with respect to other practices that might facilitate collusive outcomes. In the draft guidelines on horizontal agreements’ section on information exchanges, the Commission discusses that a plaintiff has to explain how specific market conditions and the type of information exchanged can help competitors to coordinate their conduct. See Draft Guidelines on Horizontal Agreements, *supra* note 23, SEC(2010) 528/2, at 19–24, ¶¶ 68–87 (discussing a limited set of parameters that can be used to assess the likely effects of information exchanges). Because RPM and information exchanges typically involve the same theory of harm—they facilitate coordination among competitors—one would have expected that the analytical standards for RPM should be consistent with those proposed for information exchanges. This is not the case now, but eventually the European competition regime should move toward greater consistency in the evaluation of practices that facilitate coordination among competitors, using the experience in one area to develop better analytical standards in other areas such as RPM.

93. See discussion *supra* Part I.C.

An obvious concern could be that the approach suggested above includes too many factors that are unreasonably vague and uncertain to be practically workable, and using them in an analysis would do more harm than good, compared to the status quo. These concerns, however, are not justified. First, some of these criteria have already been quite effective in informing decisions in RPM cases. Although *Leegin* is a relatively recent case and the experience of lower courts in the United States has been limited, there have been several cases where courts made some or all of the above factors operative to decide that an RPM scheme either could not be harmful or raised serious enough concerns to merit a fuller investigation.⁹⁴ In *Leegin*, for example, the district court on remand dismissed the case because the plaintiff failed to provide evidence related to a relevant market and market power (the market power screen).⁹⁵ The district court in *Babyage* was sufficiently concerned about the source of an RPM scheme and the industry history to find a closer examination of RPM in the toy industry justified.⁹⁶ The FTC found several of these factors useful in a relatively short evaluation of Nine West's RPM scheme as well.⁹⁷

Second, European courts have already used the same criteria to determine whether certain arrangements are unlawful. Market power screens that include at least market definition and market share estimates are a standard element of article 101 cases where the restraint is not considered a "restriction by object."⁹⁸ Moreover, in *Metro II* the ECJ held that the lawfulness of so-called "selective distribution systems" may depend on the

94. See, e.g., *Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc.*, 530 F.3d 204, 225–26 (3d Cir. 2008); *Babyage.com v. Toys "R" Us*, 558 F. Supp. 2d 575, 583–84 (E.D. Pa. 2008).

95. *PSKS, Inc. v. Leegin Creative Leather Prods., Inc.*, 2009-1 Trade Cas. (CCH) ¶ 76,592, 2009 WL 938561, at *8 (E.D. Tex. Apr. 6, 2009).

96. *Babyage.com*, 558 F. Supp. 2d at 581–88 (refusing to dismiss complaint that included allegations of an unlawful RPM agreement).

97. See *In re Nine West Group Inc.*, 5 Trade Reg. Rep. (CCH) ¶ 16,144, 2008 WL 2061410 (Fed. Trade Comm'n May 6, 2008).

98. See, e.g., *O2 (Germany) GmbH v. Commission*, Case T-328/03, [2006] E.C.R. II-1231, ¶ 71; *Eur. Night Servs., Ltd. (EPS) v. Commission*, Joined Cases T-374–75, 384 & 388/94, [1998] E.C.R. II-3141, ¶¶ 136–37. Of course, they are standard in other enforcement areas also, as single firm conduct cases and merger cases require market definition and share estimates.

frequency with which the practice occurs in an industry,⁹⁹ which is similar to examining how widespread the use of RPM has become. The relatively vague tests formulated in *Metro I* and *Metro II* on when selective distribution “restricts competition” were, until 2004, the main source for firms to evaluate the lawfulness of so-called selective distribution systems.¹⁰⁰ While there has been some litigation since *Metro* that has helped to refine the rules on selective distribution,¹⁰¹ it does not appear that the *Metro* tests were unworkable for market participants.

One could also be concerned that relying too much on case experience to formulate analytical approaches to RPM might lead to incorrect results in Europe because of case selection bias. As for the foreseeable future, most enforcement in Europe will be public enforcement, so there could be a question as to whether competition authorities will disproportionately focus on cases where RPM likely has harmful effects. Using this type of empirical evidence therefore could result in unreasonably strict rules against RPM that would not be justified if a more objective case sample were used. These concerns, however, do not undermine the approach advocated in this Essay. First, when evaluating case law experience of competition authorities with a view toward formulating the appropriate analytical approach to RPM, it would be important to interpret and use available data correctly, and consider a possible selection bias rather than simply comparing the total numbers of good RPM cases and of bad RPM cases. Second, it would also be important to periodically obtain information about cases in which a competition authority saw no reason to prosecute an RPM case. This task would be facilitated by the fact that most competition

99. *Metro SB-Großmärkte GmbH v. Commission (Metro II)*, Case 75/84, [1986] E.C.R. 3021, at ¶ 40.

100. See, e.g., *Eur. Night Serus.*, [1998] E.C.R. II-3141, ¶ 119; *Groupement d'Achat Édouard Leclerc v. Commission (Yves Saint Laurent)*, Case T-19/92, [1996] E.C.R. II-1851, ¶¶ 19, 42–47, 60–82, 90–91, 103, 178–95.

101. See, e.g., *Yves Saint Laurent*, [1996] E.C.R. II-1851, ¶¶ 11–16 (identifying selection criteria that fall outside the scope of article 101(1) TFEU (article 81(1) EC)); *Metro SB-Großmärkte GmbH v. Cartier SA*, Case C-376/92, [1994] E.C.R. I-15, ¶ 29 (accepting that luxury watches can justify selective distribution system); *ETA Fabriques d'Ébauches v. SA DK Investment*, Case 31/85, [1985] E.C.R. 3933, ¶ 16 (expressing doubts on whether less prestigious watches justify selective distribution systems). The fact that the market place has learned to live with the European law on selective distribution does of course not mean that the law in this area is based on sound economic principles. See *supra* note 68 and accompanying text.

authorities in Europe cannot simply ignore complaints they reject, but have an obligation to provide reasons for why they declined to pursue the action. Thus, there could be a good sample of cases where a competition authority finds that RPM was harmless and must provide at least a limited assessment of the facts to justify this conclusion.

The more recent experience in Europe, although limited, also suggests that a representative sample of cases would emerge in a regime encouraging a fuller assessment in RPM cases than is currently required. The competition authorities in France and the United Kingdom, for example, have brought several cases against RPM schemes found to be harmful because they allegedly facilitated coordination on the supplier level.¹⁰² These types of cases can be used to identify factors that are indicative of harmful effects and to consider how these factors can be included in an analytical structure for RPM cases.¹⁰³ Conversely, there have been quite a few examples from European jurisdictions where competition authorities concluded that RPM cases brought to their attention did not raise competitive concerns. Most notably, the competition authority in the Netherlands investigated RPM cases where it quickly concluded that harm was unlikely.¹⁰⁴ A few other cases have been reported as well.¹⁰⁵ Here, again, a synthesis of these cases should provide useful guidance on developing criteria for evaluating RPM schemes more generally.

102. *See, e.g.*, Conseil de la concurrence, *Décision relative à des pratiques relevées dans le secteur de la parfumerie de luxe* [Decision on Practices Observed in the Market for Luxury Perfumes], no. 06-D-04 bis (Mar. 13, 2006) (Fr.) (concerning luxury perfumes); Conseil de la concurrence, *Décision relative à saisine de la SARL AVANTAGE à l'encontre de pratiques mises en œuvre dans le secteur des produits d'électronique grand public* [Decision on Referral of the SARL AVANTAGE Against Practices Implemented in the Sector of Consumer Electronic Products], no. 05-D-66 (Dec. 5, 2005) (Fr.) (involving brown goods); Conseil de la concurrence, *Décision relative à des pratiques mises en œuvre dans le secteur de la distribution de jouets* [Decision on Practices Implemented in the Distribution of Toys], no. 07-D-50 (Dec. 20, 2007) (Fr.) (regarding toys); OFT, *Decision: Price Fixing of Replica Football Kit*, No. CA98/06/2003 (Aug. 1, 2003) (U.K.) (involving an agreement on aspects of horizontal and vertical price fixing).

103. The U.K. study on book markets after binding book prices were prohibited also provides some insight, although its usefulness might be limited to suggesting that an industry-wide RPM scheme practiced by all suppliers has harmful effects. *See Bennett et al., supra* note 55, at 1294 (summarizing the OFT-commissioned research on the impact of the removal of RPM in books).

104. *See* OECD, *supra* note 55, at 178 (submission by the Netherlands).

105. *See id.* at 149–50, 187–88 (submissions by Hungary and Spain, respectively).

2. Widening Initially Available Defenses Beyond Article 101(3) Grounds

The Commission's approach to RPM analysis is also problematic with respect to article 101(3) TFEU (article 81(3) EC) efficiency justifications by defendants. First, the approach creates strange asymmetries between the requirements imposed on competition authorities and defendants: A defendant can avoid condemnation of an RPM scheme only by providing credible and substantiated evidence of efficiencies and by showing that these efficiencies cannot be achieved in any other form.¹⁰⁶ This limitation is the result of the analytical structure of article 101 TFEU. A finding that a particular restraint is considered a "restriction by object" prevents a defendant from rebutting the presumption by presenting evidence (under article 101(1) TFEU) that the specific agreement at hand has no anticompetitive effects and therefore does not "restrict competition." In other words, its initial defenses are limited to demonstrating efficiencies of the agreement under article 101(3) TFEU.¹⁰⁷ Given the ambiguities surrounding RPM, which in the eyes of many commentators will make it virtually impossible for many plaintiffs to win a case that requires a full blown analysis of harmful effects,¹⁰⁸ it appears unreasonable to expect a defendant to produce such strong, unambiguous evidence. This is true in

106. See TFEU, *supra* note 7, art. 101(3), 2008 O.J. C 115/47, at 88–89; EC Treaty, *supra* note 7, art. 81(3), 2006 O.J. C 321 E, at 74.

107. See *id.* In the interpretation of article 101 advocated in this Essay, presenting evidence of plausible efficiencies is the only way for the defendant to initially overcome the presumption of anticompetitive effects inherent in a "restriction by object" analysis. If the defendant succeeds in providing sufficient evidence of plausible efficiencies, the burden shifts back to the plaintiff (or competition authority) to prove that the restrictive effects outweigh efficiencies and that the agreement therefore overall is anticompetitive. If the analysis gets to this point it does require an assessment of the agreement's actual or likely effects, and the defendant arguably should be able to provide evidence that the agreement has no restrictive effects (even though the case analysis initially started as a "restriction by object" analysis). Articles 101(1) and 101(3) therefore determine the sequence in which evidence can be considered. This sequencing appears justified in a competition regime that seeks to minimize the sum of error costs and of enforcement/compliance costs. The Author would like to thank Miguel de la Mano of the Commission's Chief Economist Team for fruitful discussions of this issue.

108. See, e.g., Blair, *supra* note 74, at 150 (arguing that plaintiffs would lose RPM cases if the burden to prove harmful effects on consumer welfare was imposed on them); Robert Pitofsky, *Are Retailers Who Offer Discounts Really "Knaves"?: The Coming Challenge to the Dr. Miles Rule*, ANTITRUST, Spring 2006, at 61, 64 (observing that full rule of reason analysis would eventually lead to per se legality of RPM).

particular where the defendant must persuade a skeptical enforcement official who has never accepted any efficiency justification as credible and always believes that there exists a better, more efficient way in which a firm should organize its distribution system.¹⁰⁹ This approach suggests that the current analytical framework effects a de facto prohibition on RPM, which the new rules do not change even if they appear to widen the available range of defenses under article 101(3) TFEU.¹¹⁰

Second, the Commission's approach underestimates the role and value of experimentation on the supplier level. Although the Commission frequently points to the importance of protecting experimentation on the retail level, it conveniently overlooks that experimentation may play a much greater—and potentially more beneficial—role on the supplier level.¹¹¹ Especially in competitive markets, suppliers may have to constantly deal with rivals' new product developments, shifting consumer tastes, and changing retail structures.¹¹² In this situation, a supplier may have to constantly try to adjust distribution strategies in order to find more efficient means to promote the distribution of its own products and better reach consumers. Some strategies may turn out to be bad business decisions and be abandoned before much of a record exists. The greater the role of experiment, the greater the difficulty is for suppliers to produce the type of conclusive evidence of efficiencies that the Commission appears to expect. Ironically, the more competitive a market place is and/or the newer a supplier is in a given product line, the greater the need to experiment and the lesser the likelihood that much evidence on efficiencies will exist. The Commission's approach seems to punish firms in those situations the most, even though in their case it is the least likely that RPM can have any harmful effect.

109. See Blair, *supra* note 74, at 149–50. (discussing how allocating the burden of proof in RPM cases can be outcome-determinative).

110. See Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 44.

111. See, e.g., OECD, *supra* note 55, at 259.

112. See Gary B. Charness & Kay-Yut Chen, *Minimum Advertised-Price Policy Rules and Retailer Behavior: An Experiment By Hewlett-Packard*, INTERFACES, Sept.–Oct. 2002, at 62 (highlighting the “daunting task” faced by suppliers in designing distribution strategies with effective incentives for retailers); OECD, *supra* note 55, at 278 (U.S. delegate underscoring the importance of experimentation on supplier and retail levels).

The analytical approach outlined above, which would require a plaintiff to provide evidence that certain key factors exist in cases that typically suggest possible harm from an RPM scheme and an explanation why those factors are good proxies in the present case,¹¹³ broadens the scope of available defenses beyond those under article 101(3) TFEU. It would do so consistent with the analytical scheme in article 101. A firm could then not only try to prove efficiencies, but also present rebuttal evidence to attack the assumptions that were part of the plaintiff's or competition authority's article 101(1) TFEU story. This would enable the decision maker to assess the strength and credibility of the plaintiff's story. For example, a defendant could attempt to persuade a court that the plaintiff's stories about the defendant's market power or about the likely collusive effects do not hold in light of the facts of the case and therefore the plaintiff did not meet article 101(1) requirements.

D. *Competition Authority Prioritization as Alternative*

Some have also considered whether a prioritization approach would be a better alternative to changing the current "hardcore" characterization.¹¹⁴ Under a prioritization approach the legal framework remains unchanged, but the competition authorities can exercise discretion in choosing RPM cases based on whether they create sufficient risks of harm. This approach might be a step in the right direction as it seeks to use procedural devices to reach sound substantive outcomes (*i.e.*, decisions not to challenge RPM schemes that cannot be harmful). But, ultimately, this is not a persuasive solution, at least not in the long-term.

First, the approach is conceptually difficult to defend. It would result in a situation where competition authorities implicitly acknowledge that, in certain cases, enforcement against an RPM scheme cannot be justified on economic grounds, but rely on legal rules that reflect the contrary assumption of harm flowing invariably from RPM. The competition authority would

113. See discussion *supra* Part II.C.1.

114. See, *e.g.*, OECD, *supra* note 55, at 123, 177, 212 (delegates from Finland, the Netherlands, and the United Kingdom, respectively, explaining prioritization principles in RPM cases); see also Bennett et al., *supra* note 55, at 1295–99 (arguing for the use of prioritization in assessing RPM cases).

benefit from a presumption of unlawfulness of RPM, even though its own prioritization efforts recognize that the presumption is not well founded. Under such an approach the competition authority would never have to explain before a court why an RPM scheme it chose to prosecute was harmful in the first place and can almost never lose an RPM case. A cynic might conclude that the approach could be motivated primarily by the desire to make the lives of competition authorities as easy as possible; they would never have to do much to win an RPM case, and can always refer to the need to prioritize if they decide to drop an RPM case when enforcement action would be unreasonable.

More importantly, such an approach would be at odds with European efforts to promote more private litigation.¹¹⁵ Prioritization would be convenient and might work reasonably well for competition authorities, especially for those that have broad discretion in rejecting complaints, but cannot be applied by courts in private litigation. If the Commission's efforts to promote more private litigation are successful, inconsistencies in the system are inevitable. Courts would be required to apply rules that, according to the prioritization efforts of competition authorities, are not justified. If European competition law seeks a regime of consistent enforcement where the various pieces are developed coherently, prioritization is not a sound solution in the long-term.

CONCLUSION

The Commission's review of the vertical restraints regime has been a missed opportunity to confront developments in the RPM debate as well as the enforcement experience of national competition authorities and to help European competition law to develop analytical standards for RPM cases that are consistent with economic concepts. So long as a robust evaluation of RPM cases is prevented, there will be continuing questions about their legitimacy and the direction of European competition law.

115. *See, e.g.*, European Initiative on Damages Actions for Breach of Competition Rules, EUR. UNION NEWSLETTER (Int'l L. Office), Mar. 13, 2008, at 2-3; *see also* Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 4, 21

The most reasonable approach to RPM in the regulatory environment of the block exemption system would have been to put the practice in the article 5 category of restraints.¹¹⁶ Although not implemented in this review of the vertical restraints regime, this remains a desirable change in future reviews of the regime now adopted, assuming that the block exemption system will be maintained at all. Restraints under the article 5 regime do not benefit from the block exemption, but are not considered so inherently suspicious that they deserve a place in the lists of outcasts in article 4; as a result, they must be assessed on a case-by-case basis. Viewed very narrowly, it could be argued that such a change would not have much of any impact; after all, restraints listed in article 5 would still have to be analyzed individually and could still be condemned without much analysis.¹¹⁷ But in practice such a change would be highly significant. There is a good chance that national courts, competition authorities, and practitioners would consider the change from “hardcore” to “neutral” as a signal that RPM provisions should not be swiftly condemned and that individual assessment of RPM agreements are justified, thus encouraging the type of more honest assessment in RPM cases advocated in this Essay. At the same time, the approach would not immunize all RPM strategies against competition enforcements. This appears to be the only credible way to develop a better analytical approach to RPM that ensures outcomes consistent with the goal of consumer welfare, and it is the approach that is most consistent with the framework for article 101 TFEU (article 81 EC) analysis based on economic concepts.

This approach would also maximize the enormous advantage that Europe enjoys with its distributed enforcement system that comprises twenty-eight competition enforcers and twenty-seven national court systems. Designing a system that helps gather case experience, encourages some experiment and

116. See Guidelines on Vertical Restraints, 2010 O.J. C 130/1, at 16–17.

117. See, e.g., Eric Gippini-Fournier, *Resale Price Maintenance in the EU: in statu quo ante bellum*, in 2009 *FORDHAM COMPETITION L. INST.* (Barry E. Hawk ed. 2010) (arguing that a “reclassification” would be largely symbolic and of little practical significance as the difference between article 4 “hardcore” restraints and article 5 restraints becomes relevant only when an agreement contains other vertical restraints likely to fall under article 101(1) TFEU (article 81(1) EC)). As explained in the text, this argument is overly formalistic and underestimates the significant signal such a change would represent. *Id.*

testing of economic theories in RPM cases, and provides for information exchange mechanisms could in a relatively short time provide invaluable insight into how to improve the analysis of RPM.

Such a move might initially create some uncertainty and lead to some strange case outcomes, perhaps in some instances where competition law enforcement fails to identify instances of bad RPM. But the challenges would not be greater than in other competition law areas and could be managed well by the European competition regime.