



Universität St.Gallen

Legal Methodology in Antitrust Law

10,502,1.00 Comparative Legal Methods

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Agenda – Substantive Law and Procedure

Substantive Law

1. Resale Price Maintenance (RPM) - Overview
2. RPM in the United States
3. RPM in Switzerland
4. Comparison

Procedure

1. Overview
2. Consent Decrees in the United States
3. Consent Decrees in Switzerland
4. Comparison



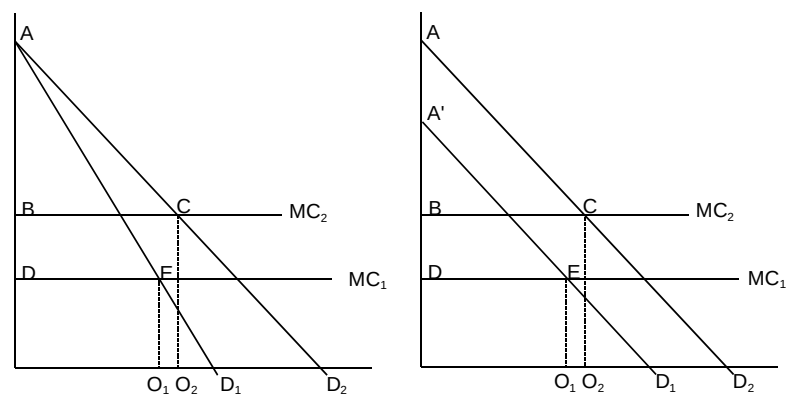
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Substantive Law

1. Resale Price Maintenance (RPM) - Overview
2. RPM in the United States
3. RPM in Europe/Switzerland
4. Comparison and Concluding Remarks

Substantive Law

RPM - Overview



Substantive Law

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RPM in the United States (1/5)

Statutory Legal Basis

Sherman Act of 1890, 15 U.S.C. § 1:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

McGuire Act (repealed 1975), 15 U.S.C. § 45(a)(2):

"Nothing contained in this section or in any of the Antitrust Acts shall render unlawful any contracts or agreements prescribing minimum or stipulated prices, . . . when contracts or agreements of that description are lawful as applied to intrastate transactions under any statute, law, or public policy now or hereafter in effect in any State"

RPM in the United States (2/5)

Dr. Miles Medical v. John D. Park & Sons, 220 U.S. 373 (1911)

Dr. Miles Medical manufactured medicines which were prepared in accordance with secret formulas. It devised a plan to govern directly the entire trade in the medicines it manufactured by imposing minimum prices on retailers. A wholesale drug concern refused to enter into Dr. Miles' required contract, and was charged with procuring medicines as "cut prices" by inducing those who had made the contracts to violate the restrictions. The court stated that agreements between dealers which had for their sole purpose the destruction of competition and the fixing of prices were injurious to the public interest and void. They were not saved by the advantages which the participants expected to derive from the enhanced price to the consumer.

RPM in the United States (3/5)

Dr. Miles Medical v. John D. Park & Sons, 220 U.S. 373 (1911)

- Agreement restrains interstate trade.
- Protection of the secret manufacturing process does not require RPM (Intellectual Property Defense).
- Public Interest does not allow extension of Monopoly of Production (Patent / Copyright / Control of resource etc.) to a Monopoly of trade / future sales (freedom of trade).
- Trade in Medicinal Products do not require special privilege.
- Restraints of "Right of Alienation" of Purchaser have generally been regarded as obnoxious to public policy (1628, Common Law for Land and Chattels).
- Restraint is analogue to price fixing among retailers and, therefore, unreasonable per se.

RPM in the United States (4/5)

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

The manufacturer Leegin instituted a retail pricing and promotion policy, refusing to sell to retailers that discounted its goods below suggested prices. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy, but the district court excluded the testimony, relying on the rule that it was per se illegal under the Sherman Act for a manufacturer to agree with its distributor to set the minimum price the distributor could charge for the manufacturer's goods (Dr. Miles Medical). The United States Supreme Court decided to overrule the per se rule and determined that vertical price restraints were to be judged according to the rule of reason.

RPM in the United States (5/5)

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

- Sherman Act was not interpreted literally (covering unreasonable restraints only)
- Standard test for restraints of trade is rule of reason.
- Per Se Rules are confined to restraints that almost always tend to restrict competition and restrict output.
- Administrative Convenience (study of reasonableness, clear guidance) alone does not justify Per Se Rule.
- Procompetitive justifications exist for RPM in economic theory.
- Other vertical restraints are governed by a rule of reason (Colgate / GTE Sylvania / Monsanto).
- Primary Purpose of the Antitrust Laws is to protect Interbrand Competition.
- Stare Decisis does not warrant retention of Dr. Miles.

Substantive Law

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RPM in Europe / Switzerland (1/3)

Statutory Legal Basis

Swiss Antitrust Law, Art. 5:

"(1) Agreements which substantially restrict competition on a market for goods or services and which are not justified by economic efficiency, as well as agreements which prevent competition on a market for goods and services, are illegal. ...
(4) Agreements between enterprises on different market levels regarding fixed or minimum prices ... are deemed to prevent competition."

Treaty establishing the European Community, Art. 81(1):

...

RPM in Europe / Switzerland (2/3)

Schweizerischer Buchhändler- und Buchverlegerverband v. Wettbewerbskommission, BGE 129 II 18 (2002)

Publishers in Switzerland and Germany have established a system of vertical agreements with book retailers, compelling them to sell books at prices fixed by publishers. Publishers refuse to sell books to retailers not participating in the price fixing scheme. Prices of 90 % of all books in German language are fixed.

The Swiss Supreme Court reversed the decision of the lower court (Rekurskommission), arguing that not all parameters of competition are affected by the agreement, remanding the case to the Competition Commission to carry out an efficiency analysis.

RPM in Europe / Switzerland (3/3)

Schweizerischer Buchhändler- und Buchverlegerverband v. Wettbewerbskommission, BGE 129 II 18 (2002)

- Law covers horizontal and vertical agreements (Art. 4).
- Price fixing for 90% of books severely restrains competition.
- Vertical Agreements facilitate horizontal cartel on level of the publishers and on level of the retailers.
- Agreement severely restricts competition when it concerns a relevant parameter of competition in the market and when the parties involved hold a significant market share.
- Statutory law does not ban (horizontal / vertical) price fixing per se.
- Presumption of price fixing removing competition may be rebutted by showing some remaining competitive activity (competition by quality, stock, etc.).
- Thus: Price fixing agreements open for rule of reason?

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Comparison

- US: Per se ban of horizontal agreements regarding price and territory; rule of reason for vertical restraints due to possible positive economic effect.
CH: Detrimental effect of price fixing and territorial restraints acknowledged (presumption), but general rule of reason.
- US: Flexible Interpretation of Sherman Act.
CH: Rather narrow statutory interpretation.
- US: Rule of reason includes all „relevant“ economic factors.
CH: Rule of reason involves economic (competition commission) and social factors (federal council).

Procedure

1. Overview on Consent Decrees
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Overview on Consent Decrees

- Consent Decrees ("einvernehmliche Regelung") are a way to close proceedings in antitrust violations with fast relief and low costs (80% of DOJ cases in US).
- Big case problem: Authorities / courts may not handle the economic analysis / vast amount of evidence.
- Problem of type I (false positives) and type II (false negatives) errors.
- Parties are under pressure to conclude consent decrees; have no time to delay closing until court renders judgment.
- Power shifted to competition authority. Right to judicial remedy is limited.
- Deviation from normal proceedings open consent decrees to possible political influence and corruption.

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Consent Decrees in the United States

Tunney Act, 15 U.S.C. § 16 (DOJ-Cases)

- Publication of consent decrees and competitive impact statement in Federal Register.
- comments by public to be filed within 60 days.
- Public interest determination by District Court.
- Approval / dismissal of consent decree by District Court (limited powers after Microsoft consent decree).

16 CFR §§ 2.31-2.34 and 3.25 (FTC-Cases)

- Consent Decrees are out on public record for comment.
- Consent Decrees do not need approval by ALJ.

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Consent Decrees in Switzerland

Swiss Antitrust Law, Art. 29:

"¹ If the Secretariat deems a restraint of competition to be illegal, it may suggest a consent decree as to the modality for the elimination of the restraint to the parties involved.

² The Settlement shall be in writing and is subject to the approval by the Competition Commission."

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Comparison

- US: Comment period / Approval by court increases transparency (and chance for decree in public interest?).
CH: Obscure procedure, consent decrees not published.
- CH / US: Huge discretion of authorities, "no" remedy against consent decree.
- CH / US: Possible lawsuits for damages etc. by third parties may challenge consent decree (?).
- CH / US: Procedural efficiency (costs, more cases with same resources) v. interest in a fair / substantively "correct" result.
- US: Transparency problem solved by Tunney Act?
-> Microsoft II: 32'329 public comments...