

BROAD RETAIL PRICE MFN CLAUSES: ARE THEY RPM “AT ITS WORST”?

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When Apple launched the iPad in 2010, its then CEO Steve Jobs was quizzed on camera about the price of e-Books to be sold through the device’s iBooks application. Why would someone buy a book from Apple for \$14.99 if the same book was offered for \$9.99 by Amazon? Steve Jobs’s response: “Well, that won’t be the case . . . The prices will be the same.”¹

How could he be so sure? It emerged that this was specified in a contractual condition between Apple and the book publishers, a form of Most Favored Nation (MFN) clause requiring that the publishers price their e-Books no higher on Apple’s eBook platform than they were priced on other online platforms. These clauses form a key component of the U.S. Department of Justice’s action against Apple and several publishers, which has recently been successful on appeal to the Second Circuit.² In commitments signed with the

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¹ See Kara Swisher, *BoomTown’s iPad Day with Walt Mossberg*, WALL ST. J.: ALL THINGS D (Jan. 28, 2010), allthingsd.com/20100128/boomtowns-apple-ipad-day-starring-walt-mossberg-plus-a-steve-jobs-cameo/.

² United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015) (*Apple e-Books*). Apple’s petition for certiorari to the U.S. Supreme Court asking to overturn this decision was denied. No. 15-565, 2016 WL854227 (U.S. Mar. 7, 2106).

European Commission in order to terminate its own *e-Books* case, Apple has also agreed to remove these terms from its contracts in the European Union.³

Such “Retail Price MFN clauses” can be distinguished from the more standard wholesale price MFN clauses and seem to be a relatively new phenomenon, at least within the experience of antitrust authorities. Since these clauses arise primarily in the context of online retail platforms, they are also sometimes known as “platform MFNs” or “platform parities.” The essence of the restriction involved is clear from the Apple *e-Books* case. In a context where it is the supplier, rather than the retailer, that sets final retail prices,⁴ a Retail Price MFN clause requires the supplier not to set retail prices any higher than the corresponding prices for that supplier’s goods when offered through, or by, any other retailer.⁵

Major Internet retailer Amazon dropped a similar “price parity” condition across Europe in the face of antitrust concerns.⁶ The clause in question lay within Amazon’s standard contract for traders selling through the company’s online retail platform, Amazon Marketplace. It prohibited a trader from selling a product for a lower price, including the delivery charge, on its own website or on another retail platform such as eBay or play.com. Amazon stated this rule was “critical to preserve fairness for Amazon customers” who expect to find low prices on Amazon Marketplace. The UK and German competition authorities, the Office of Fair Trading (OFT) and Bundeskartellamt, were not persuaded. They closed their investigations into the clause only after Amazon dropped it.⁷

³ Case COMP/AT.39847—E-Books, Comm’n Decision, 2012 O.J. (C 9288). The *e-Books* MFN story is not over. In the European Union, recent reports suggest that DG Comp is looking again at the issue of MFNs in the *e-Books* market, this time regarding Amazon’s MFN clauses with smaller publishers. See Joe Miller, *Amazon Accused of “Bullying” Smaller UK Publishers*, BBC NEWS (June 26, 2014); *EU: Amazon eBook Deal Complaints Spread*, CPI: COMPETITION POL’Y INT’L, EUROPE COLUMN (June 30, 2014).

⁴ Strictly, suppliers may set fixed or minimum retail prices.

⁵ While the restriction here is framed purely in terms of price, it should be noted that such clauses may also contain similar restrictions related to conditions of sale or product availability, possibly to counter obvious avoidance tactics that suppliers might otherwise employ. In this article, we focus purely on restrictions around retail prices. However, such non-price restrictions may be similar, or even identical, in effect as the price restrictions discussed here and thus many of the same points are likely to apply.

⁶ Matthew Ogborne, *Amazon Gets Aggressive with Price Parity*, THE LAST DROP OF INK (Feb. 16, 2012), lastdropofink.co.uk/market-places/amazon/amazon-gets-aggressive-with-price-parity/.

⁷ See Press Release, Office of Fair Trading, OFT Welcomes Amazon’s Decision to End Price Parity Policy (Aug. 29, 2013), webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/news-and-updates/press/2013/60-13; Press Release, Bundeskartellamt, Amazon Abandons Price Parity Clauses for Good (Nov. 26, 2013), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/26_11_2013_Amazon-Verfahrenseinstellung.html.

Interest in such clauses does not stop there. A number of European national competition authorities have taken action against such clauses in the context of online hotel booking platforms. In 2013, the Bundeskartellamt issued an infringement decision against HRS, an online booking portal in Germany, requiring it to delete its “best price” clauses.⁸ In the United Kingdom, the OFT accepted commitments from online travel agents Expedia and Booking.com in 2014 to alter their contracts to allow (limited) discounting of hotel rooms by rival platforms.⁹

While the OFT’s case against Expedia and Booking.com was formally framed as a retail price maintenance (RPM) case in respect of their agreements with hotels,¹⁰ it was motivated by a complaint by the small online travel agency Skoosh about MFN agreements between the larger online travel agents and hotels.¹¹ Skoosh complained that these agreements prevented it from offering additional discounts on hotel rooms sold through its website, which it would have funded by reducing its own commission.¹² Skoosh claimed that the clause acted as a barrier to entry and harmed Skoosh’s ability to build a presence in the market, to the detriment of competition and customers.¹³

More recently, and with an unprecedented level of inter-authority coordination, the competition authorities in France, Italy, and Sweden announced that they had accepted identical commitments from Booking.com in relation to its MFN clauses.¹⁴ The concern in these later cases appears to be less about the effect of such clauses in restricting entry (by players like Skoosh) and more

⁸ See Press Release, Bundeskartellamt, Online Hotel Portal HRS’s “Best Price” Clause Violates Competition Law—Proceedings Also Initiated Against Other Hotel Portals (Dec. 20, 2013), www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2013/20_12_2013_HRS.html.

⁹ Office of Fair Trading, Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents (Jan. 31, 2014), webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/ca-and-cartels/oft1514dec.pdf.

¹⁰ *Id.* ¶¶ 5.1–5.3.

¹¹ Simon Gompertz, *OFT Launches Investigation into Online Hotel Room Sales*, BBC News (Sept. 16, 2010), www.bbc.co.uk/news/business-11330463.

¹² *Id.*

¹³ See, e.g., Dorian Harris, *Open Letter to William Baer, Arnold & Porter LLP*, DORIAN’S BLOG (Aug. 8, 2012), dorian.skoosh.com/open-letter-to-william-baer-arnold-porter-llp. The UK Competition Appeal Tribunal quashed the OFT’s 2014 decision on procedural grounds and remitted it for reconsideration by the UK Competition and Markets Authority (CMA). The CMA has not yet made a revised decision. *Skyscanner Ltd. v. Competition & Markets Auth.*, [2014] CAT 16, No. 1226/2/12/14, www.cattribunal.org.uk/238-8651/Judgment.html.

¹⁴ See Press Release, Autorità Garante della Concorrenza e del Mercato, Commitments Offered by Booking.com: Closed the Investigation in Italy, France and Sweden (Apr. 21 2015), www.agcm.it/en/newsroom/press-releases/2207-i779-commitments-offered-by-bookingcom-closed-the-investigation-in-italy-france-and-sweden.html. Proceedings were also commenced against another hotel booking platform, Expedia.com. These proceedings are ongoing.

about their impact in limiting competition between platforms in terms of the commissions they charge.¹⁵

An important difference between the commitments taken in France, Italy, and Sweden and those in earlier German and UK cases is that the later cases distinguish “Broad” Retail Price MFNs from “Narrow” Retail Price MFNs, and only prohibit the former. Broad Retail Price MFNs require the suppliers to set prices for the retailer (or retail platform) in question that are no higher than those the supplier sets—or observes—through any other channel, including both competitor retailers or platforms and the supplier’s own vertically integrated websites.¹⁶ Narrow Retail Price MFNs require the supplier to set prices for the retailer (or retail platform) in question that are no higher than those the supplier offers through its own vertically integrated websites.

An earlier case, the market investigation by the UK Competition and Markets Authority (CMA) into private motor insurance, also highlights this distinction between Broad and Narrow Retail Price MFNs. The CMA banned Broad Retail Price MFNs in the context of private motor insurance sold through online price comparison websites (PCWs).¹⁷ However, the CMA allowed the continued use of Narrow Retail Price MFNs, primarily on the basis that these are far less likely to have substantial competitive impact in the whole market. Because Broad Retail Price MFNs restrict a supplier’s pricing choices across the market, they have the potential to impact competition market-wide. By contrast, Narrow Retail Price MFNs only restrict a supplier’s pricing on its own websites, and will not have any impact on competition between platforms (or PCWs). As such, so long as there is sufficient competition across platforms (or PCWs) in the market, the overall impact of the narrow variant of the clause is likely to be far more limited than that of the broad

¹⁵ The press release states that “by limiting significantly the scope of MFN clauses, OTAs (online travel agents) will be able to more effectively compete on the level of the commissions applied to hotels.” *Id.*

¹⁶ While most of the cases discussed above relate to markets where suppliers set prices across all retailers or platforms themselves, this is not necessary for a Broad Retail Price MFN clause to have an effect. These clauses can also be effective in a market with mixed business formats. If prices through other retailers or platforms are set independently, then the effect of the Broad Retail Price MFN clause is to require the supplier to match the best price, offered by any other retailer or platform. This possibility is considered by Foros, Kind, and Shaffer and discussed in Part II.C below. See Øystein Foros, Hans Jarle Kind & Greg Shaffer, *Turning the Page on Business Formats for Digital Platforms: Does Apple’s Agency Model Soften Competition?* (Ctr. for Econ. Studies & Ifo Inst., Working Paper No. 4362, Aug. 2013), papers.ssrn.com/sol3/papers.cfm?abstract_id=2317715.

¹⁷ See COMPETITION & MKTS. AUTH., PRIVATE MOTOR INSURANCE MARKET INVESTIGATION: FINAL REPORT (Sept. 24, 2014). PCWs are a form of online retail platform.

variant.¹⁸ For this reason, this article focuses on Broad Retail Price MFN clauses.

These clauses have started to concern competition agencies. A recent report by the International Competition Network (ICN) finds that around 80 percent of responding competition authorities indicate that the online use of RPM and price relationship agreements was either of concern or of increasing prevalence.¹⁹

So why do these clauses create such concern and how should they be treated within antitrust law? This article addresses these two important questions through a series of steps. First, we review the existing economic literature relating to these clauses. We find that the literature is new and still developing, but nevertheless useful. We review the key intuitions underlying findings from modeling work by Andre Boik and Kenneth S. Corts, and by Øystein Foros, Hans Jarle Kind, and Greg Shaffer.²⁰ This work identifies three potential anticompetitive effects arising from Broad Retail Price MFN clauses: (1) they may soften competition between retailers on the margin charged to suppliers; (2) they may restrict entry at the retailer level; and (3) in a market with asymmetric business formats where suppliers set some retail prices but other retailers set their own prices, the clauses may eliminate price competition at the retail level such that prices are set as if there were RPM across all retailers.

Second, we note that there is a close relationship between Broad Retail Price MFN clauses and more standard (fixed and minimum) RPM, on which there is a wider and more established economic literature and body of case law.²¹ This relationship may inform and further develop our understanding of

¹⁸ This rationale is set out clearly in the UK CMA market investigation into private motor insurance (PMI), which finds that “narrow MFN clauses between PCWs and PMI providers are unlikely to have the same impact on competition because they maintain the possibility of premiums varying on different PCWs. We recognised that narrow MFNs reduced the constraint on PCWs imposed by the PMI provider’s own website, but found that the constraint PMI providers’ own websites imposed on PCWs was small compared with the constraint from other PCWs. Overall, we found that if there were any anticompetitive effects from narrow MFNs, they were unlikely to be significant in the context of PMI.” *Id.* ¶ 60.

¹⁹ AUSTRAL. COMPETITION & CONSUMER COMM’N, INT’L COMPETITION NETWORK, ONLINE VERTICAL RESTRAINTS SPECIAL PROJECT REPORT 9 tbl. 1 (2015) (4% of respondents said that RPM “[i]s one of our top priorities,” 49% said that RPM “[i]s of concern,” and 34% said that RPM “[i]s not yet prevalent enough to be of concern but is increasing in prevalence;” responses for price relationship were 4%, 43%, and 38%, respectively).

²⁰ Andre Boik & Kenneth S. Corts, The Effects of Platform MFNs on Competition and Entry (June 3, 2014) (unpublished), editorialexpress.com/cgi-bin/conference/download.cgi?db_name=RES2015&paper_id=41; Foros, Kind & Shaffer, *supra* note 16.

²¹ Henceforth, any reference to RPM should be taken to relate to “fixed and/or minimum RPM” unless it is clearly stated otherwise. Maximum RPM is not relevant here. It raises far fewer concerns from an economics perspective and is treated differently under European law.

the economics of Broad Retail Price MFN clauses. We note that standard RPM effectively involves two distinct elements. There is the *vertical element*, whereby a supplier sets final retail prices. This is the inherent and explicit element of RPM. In principle, pure RPM involves only this vertical element. However, in practice, within both the economic literature and industry practice, RPM typically (if implicitly) also involves a *horizontal element*, whereby the supplier sets identical retail prices across all retailers (or retail platforms). It is this horizontal element that is closely related to Broad Retail Price MFN clauses. Absent Broad Retail Price MFN clauses, the RPM in the cases described above would have been purely vertical. Suppliers would have had the freedom to set different prices across different retail platforms. Broad Retail Price MFNs ensure that prices are identical across retail platforms, just as under the horizontal element of RPM.

This close similarity between Broad Retail Price MFNs and the horizontal element of standard RPM means that we can learn more about the former from the established economic literature on the latter. Much of this literature effectively combines both vertical and horizontal elements of RPM, as does much of the existing case law. The elements are, however, conceptually separate, and once we separate them out, it becomes clear that the horizontal element is at the heart of the more serious antitrust concerns relating to RPM. The vertical element is, on its own, of far less concern.

Our analysis of the RPM literature shows that, in addition to the adverse effects on competition identified in the existing literature on Broad Retail Price MFNs, these latter restrictions may produce a number of additional anticompetitive effects including (1) facilitating downstream collusion, (2) facilitating upstream collusion, (3) acting as a commitment device to protect monopoly rents upstream, and (4) restricting entry or expansion upstream.

Finally, we consider how Broad Retail Price MFNs should be treated within antitrust law. On the basis of our analysis of the RPM literature and case law, we find that many of the most serious antitrust concerns arising from RPM relate to its horizontal element. Given their similarity with this horizontal element of RPM, we argue that Broad Retail Price MFN clauses are equivalent to “RPM at its worst.”

We recognize that there is an ongoing policy debate about the appropriate legal treatment of RPM. Some jurisdictions—most notably the United States and Canada—have moved away from *per se* prohibition. Others—most notably the European Union and some U.S. states—continue to treat RPM as a hardcore infringement.²² It is beyond the scope of this article to opine on

²² Ironically, one of the few exceptions to the EU ban on RPM is for books, where some Member States still either permit or mandate RPM, some even in the case of e-Books. *See* Joost

where to draw the policy line on RPM. Our aim instead is to provide a comparative analysis of RPM and Broad Retail Price MFNs, with a view to ensure policy coherence.

This analysis suggests that a consistent legal approach would apply the same scrutiny to Broad Retail Price MFNs as to RPM. Within current European law, RPM is seen under Article 101 of the Treaty on the Functioning of the European Union (TEFU) as a hardcore restriction, or a restriction of competition “by object.” This essentially means it can be presumed harmful without the authority needing to demonstrate any anticompetitive effect. The burden of proof is on the alleged infringers to demonstrate that the RPM has efficiency benefits that satisfy the conditions in Article 101(3) TFEU.²³ A consistent approach in Europe would therefore also treat Broad Retail Price MFNs as hardcore restrictions, or restrictions of competition by object.

I. BROAD RETAIL PRICE MFN CLAUSES DEFINED

In a standard retail model, suppliers do not set final retail prices. Rather, they sell their products or services at wholesale prices to a downstream retailer and leave it up to the retailer to set final retail prices. The retailer is remunerated for its services by the difference between retail and wholesale prices. In some situations, however, suppliers set final retail prices and then pay the retailer directly for its services. This is a standard business model for online retail platforms, such as eBay or Amazon Marketplace, and for PCWs. It can also occur in an offline environment where suppliers sell through downstream agents, or more generally where suppliers engage in RPM.

Where suppliers set final retail prices, Broad Retail Price MFN clauses can restrict suppliers’ pricing freedom. Absent such clauses, suppliers would—in principle at least—be free to set different retail prices across different retailers or retail platforms. Such clauses require suppliers to set prices for the retailer or retail platform that are no less generous to consumers than those the supplier sets—or observes—through any other sales channel.

Perhaps surprisingly, a Broad Retail Price MFN clause can look attractive from a consumer’s perspective, as they often take the form of a “best price promise,” whereby a retailer or platform promises that consumers will not find cheaper prices anywhere else in the market. Some online platforms involved in the cases described above have made claims of exactly this sort.

Poort & Nico van Eijk, *Digital Fixation: The Law and Economics of a Fixed e-Book Price*, INT’L J. CULTURAL POL’Y (published online July 9, 2015).

²³ Consolidated Version of the Treaty on the Functioning of the European Union art. 101(3), 2012 O.J. (C 326) 47.

Best price promises are often offered unilaterally by retailers.²⁴ While consumers may view them favorably, such promises can raise competition concerns in their own right (although these are not addressed here).²⁵

In the case of Broad Retail Price MFN clauses, however, there is an additional element. A retailer or retail platform does not offer the best price promise unilaterally. It is enforced via explicit agreement with a third party, the upstream supplier. In theory, such clauses only specify the existence of a pricing inequality: retail prices set through the retailer that is party to the contract must be no higher than those offered through other retailers. In practice, however, suppliers may have reciprocal Broad Retail Price MFN arrangements with other retailers and retail platforms. In such a case, the combined effect of

²⁴ Consider, for example, the claim offered by one UK department store, John Lewis, that it will “never knowingly [be] undersold.” *See Never Knowingly Undersold*, JOHN LEWIS PARTNERSHIP, www.johnlewis.com/inspiration-and-advice/never-knowingly-undersold-policy (last visited Dec. 3, 2014).

²⁵ Best price promises are alternatively called “lowest price” or “price match” guarantees. *See* LEAR, OFFICE OF FAIR TRADING, CAN “FAIR” PRICES BE UNFAIR: A REVIEW OF PRICE RELATIONSHIP AGREEMENTS (Sept. 2012) (summarizing literature on best price promises); *see also* Ralph A. Winter, *Price-Matching and Meeting Competition Guarantees*, in 2 ABA SECTION OF ANTITRUST LAW, ISSUES IN COMPETITION LAW AND POLICY 1269 (W. Dale Collins ed., 2008). The link between price promises aimed at rivals’ prices and those aimed at suppliers’ prices has been explored by Hviid and Shaffer. *See* Morten Hviid & Greg Shaffer, *Matching Own Prices, Rivals’ Prices, or Both*, 58 J. INDUS. ECON. 479 (2010). A key insight from the “best price promise” literature is that efficiency benefits relating to price discrimination require prices, at equilibrium, to vary either within or across retailers. As price matching through the MFN contract is automatic, we can rule this out.

It is noteworthy that Broad Retail Price MFN clauses are formally identical to another type of price-relativity clause. Under this alternative price-relativity clause, it is retailers that set final retail prices—as in a standard retail-based system—but are required to set these prices such that the product covered by the clause is priced no higher than competing products. This is effectively the same constraint as the Broad Retail Price MFN, but “upside down.” While such clauses have rarely attracted antitrust scrutiny, they arose in the context of two UK cases. *See* MONOPOLIES & MERGERS COMM’N, FOREIGN PACKAGE HOLIDAYS: A REPORT ON THE SUPPLY IN THE U.K. OF TOUR OPERATORS’ SERVICES AND TRAVEL AGENTS’ SERVICES IN RELATION TO FOREIGN PACKAGE HOLIDAYS, 1997, Cm. 3813, ch. 2, at 6–52; *see also id.* ch. 5, at 110–46 (discussing market practices); *id.* ch. 7, at 173–216 (discussing views of the main parties); *Tobacco*, [2010] Case CE/2596-03 (OFT) (UK). Note that the OFT decision has since been overturned. *See* (1) Imperial Tobacco Group plc (2) Imperial Tobacco Limited v. OFT, [2011] CAT 41 (UK Competition Appeal Tribunal).

Broad Retail Price MFN clauses are also equivalent to an upside-down version of the non-discrimination provisions in American Express’s terms for U.S. merchants, which prohibit merchants that accept American Express cards from offering discounts or otherwise steering customers to use cards that are less expensive for the merchants to process. American Express’s provisions, which were successfully challenged by the U.S. Department of Justice, were recently upheld on appeal. *United States v. Am. Express Co.*, No. 15-1672, 2016 U.S. App. LEXIS 17502 (2d Cir. Sept. 26, 2016), *rev’d* 88 F. Supp. 3d 143 (E.D.N.Y. 2015).

these clauses is full pricing equality of the supplier's products across retailers and platforms.²⁶

It should be noted that there is nothing within a Broad Retail Price MFN clause that links the prices of different suppliers, only the prices across different retailers for a given supplier's products. This is true even where there are reciprocal agreements across different retailers, or where the clauses are adopted as standard across the industry, as appears to have been the case in the hotel online booking market. As such, these agreements have no direct restrictive effect on the relative prices charged across different suppliers.²⁷

II. ECONOMIC LITERATURE ON THE ANTICOMPETITIVE EFFECTS OF BROAD RETAIL PRICE MFN CLAUSES

The economic literature of Broad Retail Price MFN clauses is new and still developing. While there have been a number of contributions,²⁸ two articles (Boik and Corts, and Foros, Kind, and Shaffer) address the key potential anticompetitive effects so far identified.²⁹ First, the clauses can soften competition between retailers on the fees they charge to suppliers for their retail services. A retailer with a Broad Retail Price MFN will have an enhanced incentive to raise its fees to suppliers because it knows that it will not be

²⁶ Suppose a supplier is required to set a price for Retailer A no higher than the price for Retailer B and also required to set a price in Retailer B no higher than the price in Retailer A. Both inequality conditions can only be satisfied if prices are identical across the two retailers.

For simplicity, throughout the rest of this article, we will typically refer to upstream suppliers and downstream retailers. We use the term "retailer" to include online retail platforms as well as PCWs. In doing so, we recognize that many of the recent and current cases relate to PCWs, and that there is ongoing debate around whether it is appropriate to view such platforms as downstream retailers. The UK hotel online booking case (see *supra* note 9) was framed as RPM, on the basis that the hotel online booking platforms were effectively acting as retailers. Some, however, argue that they should be seen as upstream suppliers of distribution (or marketing or search services) or alternatively as genuine agents, at least from a competition law perspective. See Matthew Bennett, *Online Platforms: Retailers, Genuine Agents or None of the Above?*, CPI: COMPETITION POL'Y INT'L, EUROPE COLUMN (June 20, 2013) (discussing economics of online platforms and the application of genuine agency provisions). In our view, these issues, while of interest legally, are irrelevant to the economics of these clauses and we lose nothing substantive in using our simplified terminology.

²⁷ Such agreements may, however, have an indirect effect, as is discussed in Parts IV.B and IV.C below.

²⁸ See, e.g., Benjamin Edelman & Julian Wright, *Price Restrictions in Multi-sided Platforms: Practices and Responses*, COMPETITION POL'Y INT'L, Autumn 2014, Vol. 10, No. 2, at 86; Benjamin Edelman & Julian Wright, *Price Coherence and Excessive Intermediation*, 130 Q.J. ECON. 1283 (2015); Joshua S. Gans, *Mobile Application Pricing*, 24 INFO. ECON. & POL'Y 52 (2012); Justin P. Johnson, *The Agency Model and MFN Clauses* (Jan. 10, 2014) (unpublished), ssrn.com/abstract=2217849.

²⁹ Boik & Corts, *supra* note 20; Foros, Kind & Shaffer, *supra* note 16. Boik and Corts use the term "Platform MFNs," but, as discussed above, their results are not restricted to an online setting.

disadvantaged in terms of retail prices relative to other platforms. In equilibrium, these higher fees will lead to higher retail prices.

Second, Broad Retail Price MFNs can restrict entry at the retail level. Specifically, they can disadvantage potential retail competitors with low-end business models by eliminating such an entrant's ability to win customers away from the incumbent by offering lower prices and earning a smaller margin.

Third, in a market with asymmetric business formats where the supplier sets prices for some retailers but other retailers set their own prices, Broad Retail Price MFNs can eliminate price competition at the retail level and lead to prices being set as if there were RPM across all retailers. In this case, the supplier does not control all prices charged by retailers for its products, but is required to monitor and match any retailers that it does not control. This price-matching commitment can eliminate competition at the retail level by removing any incentive for the retailer that is potentially able to set its own prices to undercut its rival. This means that suppliers effectively set prices across all retailers, even those that formally have retail pricing freedom.

The findings and observations of Boik and Corts and of Foros, Kind, and Shaffer regarding these effects are discussed in more detail below.

A. BROAD RETAIL PRICE MFN CLAUSES CAN SOFTEN COMPETITION

To understand the softening of competition effect, it is first important to remember that we are in a market context where suppliers, and not retailers, set prices, and in which retailers are then paid a commission or fee for their services. This can be characterized as “effective RPM.”³⁰

Given this context, it is assumed that retailers set their fees first and suppliers then set their final retail prices, taking these fees into account.³¹ Absent Broad Retail Price MFN clauses, these suppliers would have the pricing freedom to set different retail prices across different retailers. This may seem slightly counterintuitive in a situation with effective RPM, but it is important to recall that RPM is intrinsically a vertical arrangement; it does not necessarily involve anything more than an upstream supplier setting a downstream retail price. There is nothing explicit within RPM that means that the supplier

³⁰ For present purposes, it is irrelevant whether it would be found to be “RPM” under the relevant competition law. In the European Union, this in turn depends on whether the retailer is found to be an “agent” of the supplier. See *Commission Notice—Guidelines on Vertical Restraints* ¶ 18, SEC (2010) 411 final (May 10, 2010) [hereinafter *European Guidelines on Vertical Restraints*]; *see also* Bennett, *supra* note 26.

³¹ For simplicity, Boik and Corts assume that this fee is a fixed charge per unit, but the general findings in these models should carry over to situations in which the fee is charged as a commission set proportional to retail price. Boik & Corts, *supra* note 20, at n.2; *see also* Johnson, *supra* note 28. Throughout this article, we use the terms “fee” and “commission” interchangeably.

cannot set different prices across retailers. Moreover, we expect a profit-maximizing supplier to do exactly this—set different prices across retailers when those retailers charge the supplier different fees.

The interesting question, however, is what does such supplier pricing freedom, or its absence, mean for retailers' fees? Consider Retailer A's perspective. With supplier pricing freedom, Retailer A will set its fees with consideration for how any increase will raise the retail prices at its stores or website, and thus reduce its sales. The mechanism underlying this sales effect is indirect. An increase in Retailer A's fees will increase the supplier's costs of selling through Retailer A, which will lead that supplier to increase the retail prices it sets for Retailer A. This will make Retailer A relatively less attractive than its competing retailers who have not increased their fees and will lead to Retailer A losing sales to competing retailers.

The power of this indirect mechanism to constrain prices will depend on a number of factors, such as the extent to which suppliers pass through fee increases as higher retail prices and the extent to which consumers switch between retailers on the basis of price. In general, however, this mechanism means that there typically will be at least some competitive constraint on the fees retailers charge.

What is the impact of Broad Retail Price MFN clauses in this context? Effectively, these clauses undermine the mechanism outlined above by restricting the extent to which suppliers can price differently across retailers. With such an MFN clause in place, Retailer A can raise its fee rate to the supplier knowing that there is no consequent risk of the supplier setting higher retail prices for Retailer A than for Retailer A's competitors. This means that Retailer A will expect to lose far fewer sales as a result of the fee rate increase, and this in turn greatly reduces (or even eliminates) the indirect competitive constraint on Retailer A's fee rates. As a result, we expect Broad Retail Price MFN clauses to lead to higher retailer fee rates, and consequently, higher retail prices.

More formally, within a theoretical model, the inclusion of a Broad Retail Price MFN clause means that suppliers no longer set prices through each retailer on the basis of that retailer's fees. Rather, they set prices across retailers based on average retailer fees. As Boik and Corts note, this produces two different effects.³² First, as Retailer A's fees increase, average retailer fees increase by a lesser amount. For example, in a symmetric two retailer model,

³² Boik & Corts, *supra* note 20, at 9. These effects would in fact occur even with perfect competition upstream between suppliers. As such, the existence of vigorous competition upstream—as might reasonably be assumed to exist between suppliers to platforms such as Amazon Marketplace—does not in itself imply that we can be sanguine about Broad Retail Price MFNs.

average fees will increase by half as much as Retailer A's own fees. This has the effect of reducing the supplier's pass-through rate relative to its own fees. Thus final retail prices charged through Retailer A increase by less than they would absent the Broad Retail Price MFN clauses. With a standard downward sloping demand curve, Retailer A will lose fewer sales due to price increases. As a result, Retailer A has a greater incentive to raise its fees with a Broad Retail Price MFN clause because it loses fewer sales by doing so. This result occurs even where there is no demand interaction (that is, no competition) between downstream retailers.

Second, as Retailer A raises its fee, average retailer fees increase. Because the supplier is required under the Broad Retail Price MFN clause to price the same across retailers, this increase in average retailer fees also increases the prices the supplier charges through competing retailers. This directly reduces the competitive constraint faced by Retailer A from competing retailers, again providing an incentive for Retailer A to set higher fees.

Why would suppliers ever sign off on such clauses? Retailers seem to get the upside in terms of higher retailer fee rates. This need not be the case however. Within these models, the suppliers may find Broad Retail Price MFN clauses to be profitable depending on the parameters used. If lump-sum transfers are possible, these can also be used by retailers to induce supplier participation. Moreover, even if suppliers are made worse off by the Broad Retail Price MFN clauses, they may be willing to accept such clauses to deal with the retailers in question. This is most likely to be the case when the latter have significant bargaining power relative to the suppliers, perhaps because they constitute an important route to market.

B. BROAD RETAIL PRICE MFN CLAUSES CAN RESTRICT ENTRY AT THE RETAILER LEVEL

The effect of Broad Retail Price MFN clauses on entry is more subtle. Boik and Corts consider a situation in which an incumbent faces an entrant that is somewhat less attractive to consumers (their term is "downward-differentiated").³³ For example, customers may be loyal to the existing player or the entrant may offer more of a "no-frills" service. This is modeled as the entrant gaining less demand than the incumbent would at comparable prices. The entrant may also have lower costs.

Boik and Corts find that the imposition of a Broad Retail Price MFN clause by an incumbent can deter entry by a potential competitor that is more strongly downward-differentiated. The Broad Retail Price MFN clause prevents a competitor from offering lower retail prices than the incumbent

³³ *Id.* at 15–19.

(through offering lower fees to suppliers) to win customers. This exacerbates the entrant's demand disadvantage. If the potential competitor's fixed costs are sufficiently high, the Broad Retail Price MFN will deter entry that would have otherwise occurred.

On the other hand, Broad Retail Price MFN clauses can encourage entry by retailers with less differentiated, higher-cost business models because of their potential to soften competition and increase retailer profits. Perhaps unsurprisingly, Boik and Corts also find that, where potential entrants are able to choose their business model, they will be more likely to choose a higher cost, less downward-differentiated business model where they face Broad Retail Price MFNs, thus limiting the extent of competition between business models.

C. IN A MARKET WITH ASYMMETRIC BUSINESS FORMATS, BROAD RETAIL PRICE MFN CLAUSES CAN ELIMINATE PRICE COMPETITION AT THE RETAIL LEVEL AND REPLICATE RPM

Foros, Kind, and Shaffer provide a further insight into the economics of Broad Retail Price MFN clauses in a paper inspired by the U.S. *e-Books* case.³⁴ Prior to Apple's entry into the market, Amazon had a strong position in retailing e-Books. At that time, Amazon employed a standard retail model whereby it paid upstream publishers a wholesale price for e-Books and then set retail prices itself. The book publishers were unhappy with Amazon's position in retail as well as the low prices at which Amazon had been retailing e-Books.³⁵ They were therefore pleased when Apple showed an interest in entering the market.³⁶ When Apple eventually did so, it was with an "agency model" whereby the upstream publishers, and not Apple, set final retail prices.

³⁴ Foros, Kind & Shaffer, *supra* note 16; United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).

³⁵ *Apple e-Books*, 791 F.3d at 299–300.

[T]op executives in the Big Six [publishers] saw Amazon's \$9.99 pricing strategy as a threat to their established way of doing business. . . . In the short term . . . Amazon's lower-priced ebooks would make it more difficult for them to sell hardcover copies of new releases. . . . Further down the road, the publishers feared that consumers would become accustomed to the uniform \$9.99 price point for these ebooks, permanently driving down the price they could charge for print versions of the books. Moreover, if Amazon became powerful enough, it could demand lower wholesale prices from the Big Six or allow authors to publish directly with Amazon, cutting out the publishers entirely.

Id.

³⁶ United States v. Apple, Inc., 952 F. Supp. 2d 638, 655 (S.D.N.Y. 2013) ("Apple's requests for meetings in New York was an exciting turn of events for the Publishers and prompted a flurry of telephone calls among them. They speculated about how they might turn Apple's entry into the e-book business to their advantage in their battle with Amazon.").

As discussed above, Apple also imposed a Broad Retail Price MFN clause on the publishers.³⁷

Foros, Kind, and Shaffer consider the impact of such a Retail Price MFN within a hypothetical mixed business format situation where publishers sell through Apple on an agency basis but continue to sell through Amazon on a wholesale price basis.³⁸ They find that the imposition by Apple of a Broad Retail Price MFN, if binding, would tend to raise final retail prices to the level that would be observed with adoption of the agency model across all retailers. That is, market prices would be set by suppliers as if there were RPM across all retailers.³⁹ The underlying driver for their finding is that any price reduction by Amazon would, under the MFN agreement, be immediately and automatically matched by the publishers on Apple's iBooks platform. The Broad Retail Price MFN therefore means that Amazon cannot hope to profit by such a price reduction.

In practice, Amazon switched to an agency model quickly after Apple, thereby giving up its pricing flexibility. In its recent judgment on the case, the Second Circuit affirmed the district court's finding that the publishers forced Amazon's change of approach.⁴⁰ Foros, Kind, and Shaffer argue that this need not have been the case given the existence of the Retail Price MFN. The combination of agency agreements between the publishers and Apple with a Broad Retail Price MFN is likely to lead to prices that are no different from industry-wide RPM, and thus the authors conclude that Amazon would have had nothing to gain from rejecting the agency model.⁴¹ In this case, Amazon would not have required any forcing by suppliers.

That said, as the Second Circuit emphasized, Broad Retail Price MFN clauses will also have enhanced the publishers' incentives to persuade Amazon to adopt the agency model, even if it had not otherwise wished to do so.⁴² If Amazon had—potentially perversely—reacted to Apple's entry by vigorous

³⁷ See *Apple e-Books*, 791 F.3d at 299–311 (providing background on the negotiations that underpinned the eventual acceptance by the “Big Six” publishers of the agency agreements and Retail Price MFN clauses).

³⁸ Foros, Kind & Shaffer, *supra* note 16, at 26–28.

³⁹ *Id.*

⁴⁰ See *Apple e-Books*, 791 F.3d at 309 (“The district court found that while Amazon was ‘opposed to adoption of the agency model and did not want to cede pricing authority to the Publishers,’ it knew that it could not prevail in this position against five of the Big Six.”); *see also id.* at 317 (“By the very act of signing a Contract with Apple containing an MFN Clause, then, each of the Publisher Defendants signaled a clear commitment to move against Amazon, thereby facilitating their collective action. As the district court explained, the MFNs ‘stiffened the spines’ of the Publisher Defendants.”).

⁴¹ See Foros, Kind & Shaffer, *supra* note 16, at 6 (“[T]he MFN can lead to uniform prices that resemble the same outcome that would arise under industry-wide adoption, making Amazon's decision a moot point[.]”).

⁴² See *Apple e-Books*, 791 F.3d at 317.

price cutting, the Broad Retail Price MFNs would have forced the publishers to match and thus potentially sell significant volumes below cost. Given that revenues were apparently intended to be split between the publishers and Apple on a 70:30 basis, the publishers would have borne the brunt of any continued price cutting by Amazon.⁴³

III. IMPLICATIONS OF EXISTING RPM LITERATURE AND CASE LAW FOR BROAD RETAIL PRICE MFNS

While the economic literature on the anticompetitive effects of Broad Retail Price MFNs is nascent, there is a close relationship between Broad Retail Price MFN clauses and more standard RPM. There is a wider and more established economic literature and body of case law on the competitive effects of RPM. If reviewed carefully, this wider literature can inform our understanding of the likely economics of Broad Retail Price MFN clauses.

One important link between Broad Retail Price MFNs and effective RPM is obvious: the former can only exist in the presence of the latter (i.e., where a supplier sets retail prices). Our key observation in this article, however, relates to another link. We note that standard RPM effectively involves two distinct elements. There is the *vertical element*, whereby a supplier sets final retail prices. This is the inherent and explicit element of RPM, and in principle pure RPM involves only this vertical element. However, in practice, within both the economic literature and industry practice, RPM typically (if implicitly) also involves a *horizontal element*, whereby the supplier sets identical retail prices across all retailers (or retail platforms).⁴⁴

The horizontal element of RPM is typically observed in actual RPM cases and, as we discuss below, it is also an implicit assumption in much of the economic literature.⁴⁵ This horizontal element of RPM is in turn closely related to Broad Retail Price MFN clauses. Consider some of the cases described above. In these cases, the RPM that would have existed absent the

As a sophisticated negotiator, Apple was fully aware that its proposed Contracts would entice a critical mass of publishers only if these publishers perceived an opportunity collectively to shift Amazon to agency. In fact, this was the very purpose of the MFN, which Apple's Saul devised as an elegant alternative to a provision that would have explicitly *required* the publishers to adopt an agency model with other retailers. As Cue put it, the MFN "force[d] the model" from wholesale to agency.

Id.

⁴³ *Id.* at 303.

⁴⁴ As noted above, it is important to recall that the horizontal element of RPM discussed here relates purely to the supplier setting identical prices across its retailers. There is nothing in this aspect that implies any sort of direct pricing link across different suppliers.

⁴⁵ In what follows, we simplify slightly by equating the horizontal element of RPM to setting an identical price across retailers. However, a variant, whereby fixed price relativities are preserved across retailers, would have the same effects.

Broad Retail Price MFN clauses would have been purely vertical, with suppliers having the pricing freedom to set different prices across different retail platforms.⁴⁶ A Broad Retail Price MFN clause limits supplier pricing freedom, and introduces a horizontal element, requiring the supplier to set the same (or no higher) price to be charged at the retail outlet. That is, in the cases described above, the Broad Retail Price MFN clauses ensured that prices were identical across retail platforms, just as under the horizontal element of RPM.

The close relationship between Broad Retail Price MFNs and the horizontal element of standard RPM means that we can potentially learn more about the former from the established economic literature on the latter. Much of this literature effectively combines both vertical and horizontal elements of RPM, as does much of the existing case law. The elements are, however, conceptually separate. Once separated, the horizontal element emerges as essential to several of the more serious antitrust concerns. The vertical element is of far less concern.

Perhaps surprisingly, the economic literature has given limited attention to the distinction between the vertical and horizontal elements of RPM. In many cases, the horizontal element is simply assumed without discussion or recognition. The literature on RPM distinguishes three broad groups of anticompetitive effects potentially attributable to RPM: (1) downstream effects, (2) upstream effects, and (3) effects at both levels. We assess the extent to which the findings in these papers depend on the assumed horizontal element of RPM for their identified anticompetitive effects. That is, we look at the extent to which the authors assume that suppliers will not only set prices, but that suppliers will set the same prices across retailers. We find that in much of the literature, the horizontal element of RPM is crucial, or at least likely to substantially exacerbate concerns.

The RPM literature allows us to go beyond the existing but limited scholarship on MFN clauses. Analogizing from the RPM literature, we identify a number of additional anticompetitive effects that Broad Retail Price MFNs may produce. Specifically, in addition to the concerns highlighted in the previous part, they may facilitate downstream collusion, facilitate upstream collusion, act as a commitment device to protect monopoly rents upstream, and may even restrict entry or expansion upstream.

⁴⁶ We might expect this to occur if, for example, these retail platform fees charged different commissions or fees.

A. ANTICOMPETITIVE EFFECTS IDENTIFIED IN THE ECONOMIC LITERATURE

While there is an extensive literature on the economics of RPM, seven key categories of potential anticompetitive harm emerge:⁴⁷

- (1) RPM may facilitate collusion downstream;
- (2) RPM may restrict entry or expansion downstream;
- (3) RPM may soften competition downstream;
- (4) RPM may facilitate collusion upstream;
- (5) RPM may restrict entry or expansion upstream;
- (6) RPM may act as a commitment device to protect monopoly rents upstream; and
- (7) RPM may soften or eliminate competition both upstream and downstream.

The first three relate primarily to competition at the downstream level, the next three relate primarily to competition at the upstream level, and the final one relates to competition more generally across the system, both upstream and downstream. We group them in this way in the discussion below.

1. Anticompetitive Effects of RPM at the Downstream Level

There are three potential anticompetitive effects of RPM at the downstream level: (1) to facilitate collusion downstream, (2) to restrict downstream entry, and (3) to soften downstream competition. Where these effects provide the anticompetitive rationale for the RPM, we expect to observe retailers instigating it rather than suppliers, as the former typically stand to gain more from the anticompetitive effect. We find that the horizontal element of RPM is crucial for the first two categories of anticompetitive effect, but not the third.

a. RPM to Facilitate Collusion Downstream

RPM agreements can be a powerful means to achieve indirect downstream collusion. Retailers can delegate to common suppliers the roles of setting col-

⁴⁷ Matthew Bennett, Amelia Fletcher, Emanuele Giovannetti & David Stallibrass, *Resale Price Maintenance: Explaining the Controversy, and Small Steps Towards a More Nuanced Policy*, 33 FORDHAM INT'L L.J. 1278 (2010) (summarizing several categories of potential competitive harm related to RPM agreements). The remaining type—RPM to restrict entry upstream—was first identified in Howard P. Marvel & Stephen McCafferty, *The Welfare Effects of Resale Price Maintenance*, 28 J.L. & ECON. 363 (1985). However, the idea has only recently been developed further and modeled. See John Asker & Heski Bar-Isaac, *Raising Retailers' Profits: On Vertical Practices and the Exclusion of Rivals*, 104 AM. ECON. REV. 672 (2014). The economic literature in this area continues to develop. While the discussion below reflects current understanding, additional anticompetitive effects of RPM may be identified in the future.

lusive prices, monitoring adherence to these prices, and even punishing cheating. This theory of harm does not appear to have been modeled formally, perhaps because it is too obvious. However, it is well recognized in the literature.⁴⁸ Any such collusion is likely to be of particular concern for antitrust authorities. While the vertical element of RPM is clearly required, it is the horizontal element of RPM that drives the collusive outcome. If suppliers retained flexibility to set different retail prices for different retailers, it is far from clear that the retailers would be capable of colluding.

b. RPM to Restrict Entry or Expansion Downstream

RPM may benefit downstream incumbent firms by making it harder for entrants or smaller rivals to steal business by undercutting them, thereby restricting their ability to gain share in the market. For example, RPM could potentially restrict the growth of new business models, such as no frills bricks-and-mortar outlets or low-cost Internet retailers, if the entrants must charge the same price as incumbent retailers. This theory of harm also does not appear to have been modeled formally. It is, however, well recognized as a theory of harm and highlighted as a key concern arising from RPM in the European Commission Guidelines on Vertical Restraints.⁴⁹ The horizontal element of RPM is clearly crucial for this effect.

c. RPM to Soften Competition Downstream

Greg Shaffer shows that RPM may increase prices when retailers have buyer power.⁵⁰ His model assumes two differentiated retailers, each with limited shelf space. There is perfect competition between manufacturers, which compete to get their products onto these shelves. Absent RPM, manufacturers would compete on wholesale price to get onto the shelves, which drives down

⁴⁸ See generally THOMAS R. OVERSTREET, JR., BUREAU OF ECON., FED. TRADE COMM’N, RESALE PRICE MAINTENANCE: ECONOMIC THEORIES AND EMPIRICAL EVIDENCE 13 (1983) (early discussion of existing literature). This potential anticompetitive effect is also set out in the European Commission’s Guidelines on Vertical Restraints:

[B]y eliminating intra-brand price competition, RPM may also facilitate collusion between the buyers, i.e., at the distribution level. Strong or well organized distributors may be able to force/convince one or more suppliers to fix their resale price above the competitive level and thereby help them to reach or stabilise a collusive equilibrium. *European Guidelines on Vertical Restraints*, *supra* note 30, ¶ 224.

⁴⁹ RPM may reduce dynamism and innovation at the distribution level. By preventing price competition between different distributors, RPM may prevent more efficient retailers from entering the market and/or acquiring sufficient scale with low prices. It also may prevent or hinder the entry and expansion of distribution formats based on low prices, such as price discounters.

Id. This effect is also very similar to the entry restriction story described above for Retail Price MFNs by Boik and Corts, *supra* note 20, which also requires pricing equality across retailers.

⁵⁰ Greg Shaffer, *Slotting Allowances and Resale Price Maintenance: A Comparison of Facilitating Practices*, 22 RAND J. ECON. 120 (1991).

wholesale prices. Competition in the downstream market means that retailers pass the lower wholesale prices on to consumers.

With RPM, retailers allocate shelf space to the manufacturers that offer them the highest total profits, taking wholesale and retail prices into account. Shaffer shows no overall effect if RPM is adopted by both retailers. If just one retailer adopts RPM, however, it works as a commitment device for that retailer not to compete by lowering prices in response to the pricing of the other retailer. Overall, prices rise.⁵¹

This is an interesting finding in the current context, as it specifically relates to the vertical element of RPM. Indeed, the result disappears if there is a horizontal element to the RPM. However, the model relates to fairly specific circumstances, and no case appears to have raised antitrust concerns of this sort to date.

2. Anticompetitive Effects of RPM at the Upstream Level

There are three potential anticompetitive effects of RPM at the upstream level: (1) to facilitate collusion, (2) to restrict entry or expansion, and (3) to act as a commitment device to protect monopoly rents upstream. Where the anticompetitive effects of RPM are primarily upstream, and where these effects provide the anticompetitive rationale for the RPM, we expect to observe upstream firms, rather than retailers, instigating RPM. In the first two categories, the vertical element of RPM drives the effect, but the horizontal element also plays an important role. In the third category, the horizontal element is crucial for the anticompetitive effect.

a. RPM to Facilitate Collusion Upstream

For collusion between firms to be stable, deviations from the collusive agreement must be observed and punished. Otherwise, each firm will have an incentive to cheat on the agreement. Consider a situation in which upstream firms wish to collude. If these upstream firms negotiate contracts with retailers privately, they are not able to observe each other's wholesale prices directly. Since changes in retail prices are typically imperfect signals of changes in wholesale prices, it may be hard to spot deviations from a collusive agreement. Thus collusion is more difficult to sustain.

Bruno Jullien and Patrick Rey show that upstream firms can use RPM to facilitate upstream collusion since it brings the publicly observable element of

⁵¹ Foros, Kind, and Shaffer find similar results in a variant of this model, in which there are several manufacturers, each using its own dedicated retailer network. In this model, prices will be higher if a subset of retailers adopts RPM, but not if they all do. Øystein Foros, Hans Jarle Kind & Greg Shaffer, *Resale Price Maintenance and Restrictions on Dominant Firm and Industry-Wide Adoption*, 29 INT'L J. INDUS. ORG. 179, 183 (2011).

price—the final retail price—under the control of the upstream firms.⁵² This makes it easier for the upstream firms to detect deviations from the collusive agreement. For simplicity, their paper assumes that the likelihood of detecting deviations rises to 100 percent under RPM. This improved detection rate makes collusion substantially easier to sustain.

However, Jullien and Rey also assume identical retailers and prices across retailers. As such, their paper implicitly incorporates both the vertical and horizontal elements of RPM. This raises the question of whether their result would still hold absent the horizontal element (i.e., if suppliers had the pricing freedom to set different retail prices across different retailers).

In our view, the probability of detection is unlikely to be 100 percent in such a situation since it is typically harder to detect deviations from a variety of retailer-specific prices than on a single marketwide price.⁵³ This does not mean that the effect identified by Jullien and Rey would not exist without the horizontal element of RPM. If upstream firms are intent on colluding, they can always choose to set uniform prices across the market to facilitate this strategy. It does highlight, however, that RPM can have two distinct effects on the ease of detecting deviations from a collusive agreement, and therefore on the ability to sustain such an agreement. The vertical element of RPM—the fact that upstream firms control retail prices—can help. However, we might expect the horizontal element of RPM—whereby the supplier sets identical prices across retailers—to significantly strengthen this effect. Thus, overall we would still expect the horizontal element of RPM to facilitate upstream collusion.

b. RPM to Restrict Entry or Expansion Upstream

A second theory of competitive injury that has gained attention recently is that RPM may restrict entry or expansion by upstream rivals. As shown by John Asker and Heski Bar-Isaac, RPM allows incumbent manufacturers with market power to align retailer incentives with their own to deter entry or expansion by smaller rivals.⁵⁴ So long as they can preserve their market position, incumbent manufacturers have supernormal profit that they share with retailers by setting retail and wholesale prices to give retailers a supernormal margin. If, however, a retailer decides to stock a rival product and thereby

⁵² Bruno Jullien & Patrick Rey, *Resale Price Maintenance and Collusion*, 38 RAND J. ECON 983 (2007).

⁵³ There may be another reason why it is harder for upstream firms to collude in these circumstances. Where optimal collusion would entail different prices across retailers, this would likely require far more extensive contacts between upstream firms, which in turn involves running greater antitrust risk.

⁵⁴ See Asker & Bar-Isaac, *supra* note 47.

facilitates the expansion of that rival, the manufacturer's profits will be reduced, which will be reflected in a lower retail margin.

Asker and Bar-Isaac assume, for simplicity, that all retailers are identical and charge the same price. Thus, the horizontal element of RPM is implicit to their model. In our view, however, it is probable that the horizontal element of RPM would be required for this result, even in a more sophisticated model. It is important for the result that all retailers have incentives to exclude entry, and it is not obvious that it would be possible to ensure that each retailer had supernormal profit if prices were set differently in different retailers. Thus, it seems unlikely that purely vertical RPM would have this anticompetitive effect.

c. RPM as a Commitment Device to Protect Monopoly Rents Upstream

RPM may address a well-known monopoly commitment problem, originally identified by Oliver Hart and Jean Tirole and first considered in relation to RPM by Daniel P. O'Brien and Greg Shaffer.⁵⁵ In the O'Brien and Shaffer model, a monopoly supplier sells to a number of differentiated downstream retailers. The first retailer is willing to pay more for the product if it does not face any competition. However, the upstream monopolist cannot credibly commit to this because, *ex post*, supplying a second retailer would be profitable at the margin. This reduces the payment that the first retailer is willing to make. The overall effect is that, absent a commitment device, the upstream firm is unable to extract the full rent associated with its market power because it is unable to commit to not cutting prices on later contracts.

O'Brien and Shaffer show that RPM can solve this problem by allowing the upstream firm to commit to the monopoly price and extract its full monopoly rents. Patrick Rey and Thibaud Vergé find the same result under different conditions.⁵⁶ Here, it is specifically the horizontal element of RPM that drives the effect, at least in the case of minimum RPM. As O'Brien and Shaffer highlight, the effect relies upon minimum RPM, implying uniform prices across retailers. If suppliers were able to set prices at different levels across retailers (as would be feasible under the purely vertical element of RPM) then the monopoly commitment problem would not be solved.

⁵⁵ Oliver Hart & Jean Tirole, *Vertical Integration and Market Foreclosure*, BROOKINGS PAPERS ON ECON. ACTIVITY: MICROECONOMICS 205 (1990); Daniel P. O'Brien & Greg Shaffer, *Vertical Control with Bilateral Contracts*, 23 RAND J. ECON. 299 (1992).

⁵⁶ Patrick Rey & Thibaud Vergé, *Bilateral Control with Vertical Contracts*, 35 RAND J. ECON. 728 (2004).

The result is confirmed using different modeling assumptions in a recent paper by Tommy Staahl Gabrielsen and Bjørn Olav Johansen.⁵⁷ Their paper assumes that retailers gain to some extent from their own sales effort. In this model, there is no harm associated with purely bilateral vertical RPM agreements, but customer harm arises when the RPM has a horizontal element.

3. RPM to Soften or Eliminate Competition Both Upstream and Downstream

Three models consider the effects of RPM at both the upstream and downstream levels. In contrast with the majority of papers described above, these models rely purely on the vertical element of RPM for their findings of anti-competitive effect. However, it is also worth noting that at least two of the three models have somewhat ambiguous effects, with RPM potentially having a positive effect.

Paul Dobson and Michael Waterson show that, in a bargaining framework, RPM can reduce retailers' incentives to negotiate wholesale prices by restricting downstream competition.⁵⁸ When retailers are able to price freely, their success within a competitive downstream market depends heavily on the wholesale prices they face. Lower wholesale prices allow them to win business from their retail competitors by passing on (to a greater or lesser extent) any reduction in wholesale prices in the form of lower retail prices. This competitive dynamic provides retailers with a strong incentive to bargain hard on wholesale prices.

RPM upsets this process. If retailers cannot set their own retail prices they have less ability to win new business by achieving lower wholesale prices. This reduces their incentives to bargain on wholesale prices, which softens competition at the upstream level. The overall result is higher wholesale prices and higher retail prices to the detriment of consumers. However, RPM has ambiguous implications in this model. As might be expected, the anticom-

⁵⁷ Tommy Staahl Gabrielsen & Bjørn Olav Johansen, *Resale Price Maintenance with Secret Contracts and Retail Service Externalities*, AM. ECON. J.: MICROECONOMICS (forthcoming) (Aug. 5, 2015 pre-publication version available at www.nipe.eeg.uminho.pt/Uploads/Semin%C3%A1rio%202015/Secret%20RPM%2005-08-2015.pdf).

⁵⁸ Paul P. Dobson & Michael Waterson, *The Competition Effects of Industry-Wide Vertical Price Fixing in Bilateral Oligopoly*, 25 INT'L J. INDUS. ORG. 935, 935–62 (2007). Shaffer finds similar results, albeit in a somewhat different modeling framework. See GREG SHAFFER, OFFICE OF FAIR TRADING, ANTI-COMPETITIVE EFFECTS OF RPM (RESALE PRICE MAINTENANCE) AGREEMENTS IN FRAGMENTED MARKETS 34–42 (2013), webarchive.nationalarchives.gov.uk/20140402142426/http://www.oft.gov.uk/shared_oft/research/RPM.pdf. Shaffer extends the model of O'Brien and Shaffer to a multi-supplier context and allows for a more even distribution of bargaining power between upstream firms. See O'Brien & Shaffer, *supra* note 55. Unlike Dobson and Waterson, *supra*, Shaffer's extended model allows for non-linear wholesale contracts (that is, there can be a fixed fee payment as well as a wholesale price). It also assumes that each retailer deals with just one upstream firm.

petitive effect of RPM is strongest where retailers have most of the bargaining power and would, absent RPM, compete vigorously in the retail market. If, by contrast, suppliers have most of the bargaining power and are relatively differentiated, this effect is reduced and RPM may even lower prices.⁵⁹

Foros, Kind, and Shaffer derive a similar result in a context where retailers receive a share of the retail price rather than paying a wholesale price per unit.⁶⁰ They find that RPM tends to raise prices if there is less substitution between upstream suppliers than there is between downstream retailers, but that it otherwise lowers prices. The authors explain that “[t]ransferring control of retail pricing to the level where the degree of competition is lower brings prices closer to the ones that maximize industry profit.”⁶¹ This result is driven entirely by the vertical element of RPM.⁶²

Finally, Patrick Rey and Thibaud Vergé show that RPM can soften, and potentially eliminate, effective competition—at the interbrand level between suppliers as well as at the intrabrand level between retailers—if used jointly with franchise fees.⁶³ This model is based on a system of “common agency” whereby the products of all upstream suppliers are stocked by all downstream retailers. This model again does not require that each supplier set the same prices across all of its retailers. However, and unlike the other models discussed in this subpart, all the bargaining power is assumed to sit with the manufacturers, which make take-it-or-leave-it offers to the retailers.

While the assumption of manufacturers’ bargaining power is not crucial for the findings in the Rey and Vergé model,⁶⁴ it should be noted that the model has multiple equilibria, some of which may be more competitive than the situation absent RPM. Where upstream firms have all the bargaining power, it is not unreasonable to assume that they would opt for the monopoly equilibrium, under which all competition is eliminated. However, given that upstream and downstream firms may have differing preferences over these various possible equilibria, it becomes more ambiguous which (if any) equilibrium would emerge if downstream firms were to have some bargaining power. Certainly, we may not observe the monopoly equilibrium in this circumstance.

⁵⁹ In this model the positive effect derives from the role of RPM in removing an element of double marginalization. As such, maximum RPM may also achieve a positive effect without the need for minimum RPM.

⁶⁰ Foros, Kind & Shaffer, *supra* note 16, at 14.

⁶¹ *Id.* at 14.

⁶² This ambiguity result is arguably stronger than that in the Dobson and Waterson model because the positive effect cannot simply be achieved through maximum RPM.

⁶³ Patrick Rey & Thibaud Vergé, *Resale Price Maintenance and Interlocking Relationships*, 58 J. INDUS. ECON. 928 (2010).

⁶⁴ See SHAFFER, *supra* note 58, at 105.

B. SUMMARY OF FINDINGS FROM THE ECONOMIC LITERATURE

Table 1 below summarizes the key results from the literature reviewed above. It reveals that the horizontal element of RPM drives anticompetitive harm in most cases and, in particular, in those relating to the more serious concerns of collusion and foreclosure. The purely vertical element of RPM is, in itself, far less likely to be harmful, and thus does not constitute RPM at its worst.

TABLE 1
SUMMARY OF FINDINGS FROM LITERATURE:
THE ROLE OF THE HORIZONTAL ELEMENT OF RPM

Anticompetitive Effect	Horizontal Element of RPM Assumed?	Horizontal Element of RPM Required?
RPM to facilitate collusion downstream	Yes	Yes
RPM to restrict entry or expansion downstream	Yes	Yes
RPM to soften competition downstream	No	No
RPM to facilitate collusion upstream	Yes	Yes
RPM to restrict entry or expansion upstream	Yes	Probably
RPM as a commitment device to protect monopoly rents upstream	Yes	Yes
RPM to soften or eliminate competition both upstream and downstream	No—but competitive effects are ambiguous (at least with retailer bargaining power)	No—but competitive effects are ambiguous (at least with retailer bargaining power)

This analysis informs that of Broad Retail Price MFNs due to their close relationship with the horizontal element of RPM. The nascent literature on Broad Retail Price MFNs already addresses their potential to (1) soften competition on retailer commissions, (2) restrict entry into downstream retail, and (3) eliminate downstream retailer competition. The RPM literature, and in particular that based upon the horizontal aspect of RPM, supports these early findings, but suggests further areas of concern. Specifically, it indicates that Broad Retail Price MFNs may (4) facilitate collusion downstream, (5) facilitate collusion upstream, and (6) act as a commitment device to protect monop-

oly rents upstream. They may potentially also (7) act to restrict entry or expansion upstream.

C. THE HORIZONTAL ELEMENT OF RPM IN UK CASE LAW

The existing case law on RPM also ignores the distinction between the vertical and horizontal elements of RPM. Yet decisions typically rely on an implicit assumption that the RPM at issue incorporates both elements. Indeed, many (if not all) RPM cases involve evidence of one or more retailers complaining to their supplier when they observe other retailers undercutting their prices.

Emanuele Giovannetti and David Stallibrass analyze the likely theory of harm in three UK RPM cases.⁶⁵ First, they review the OFT's case against RPM in the UK book market. From 1901 until 1997, the Net Book Agreement (NBA) allowed publishers to set the retail prices of books. Any retailer that deviated from the agreement could be refused a future supply of books. The agreement was dropped in the face of investigation by the OFT. Giovannetti and Stallibrass draw on earlier work by Catherine Ball, Stephen Davies, Matthew Olczak, and Christopher Wilson, which reviews the consequences of removing RPM from this market. This work finds that removing the NBA allowed the development of new low-price business models, such as sales of books through supermarkets and the Internet, expanding availability and range, and probably also total book sales.⁶⁶ On the basis of this finding, Giovannetti and Stallibrass conclude that the key anticompetitive effect of the NBA was restricting downstream entry of new business models. The horizontal element of RPM was key to this effect.

Second, Giovannetti and Stallibrass examine the OFT's *Hasbro/Argos/Littlewoods* case from 2003.⁶⁷ The OFT found that Hasbro, one of the largest toys and games suppliers in the United Kingdom, had entered into vertical agreements with Argos and Littlewoods, the two largest catalog-based retail chains, to fix the price of certain Hasbro toys and games at the recommended retail price. Prior to these agreements, there had been very strong competition between Argos and Littlewoods, which also had substantial buyer power vis-

⁶⁵ See Emanuele Giovannetti & David Stallibrass, *Three Cases in Search of a Theory: Resale Price Maintenance in the UK*, 2009 EUR. COMPETITION J. 641. Because RPM is an infringement of EU and UK competition law by object, the OFT is not required to provide any analysis of likely anticompetitive effects within its work. Giovannetti and Stallibrass therefore review the facts of the cases rather than any legal conclusions of the OFT in order to identify the likely occurring harm.

⁶⁶ CATHERINE BALL, STEPHEN DAVIES, MATTHEW OLCAZAK & CHRISTOPHER WILSON, OFFICE OF FAIR TRADING, *AN EVALUATION OF THE IMPACT UPON PRODUCTIVITY OF ENDING RESALE PRICE MAINTENANCE ON BOOKS* 8–11 (2008).

⁶⁷ Argos Ltd & Littlewoods Ltd v. OFT, [2014] CAT 24 (U.K. Competition Appeal Trib.).

à-vis Hasbro because they were collectively its primary distribution channel. This case seems to have been a clear case of RPM facilitating downstream collusion, and indeed the UK Competition Appeal Tribunal, when reviewing the OFT's decision on appeal, stated that a finding of horizontal tripartite concerted practice (effectively, horizontal collusion facilitated through a third party) would also have been sustainable based on the facts of the case.⁶⁸ The horizontal element of RPM was intrinsic to this finding.

Third, Giovannetti and Stallibrass review the OFT's 2003 case on replica football kits (soccer uniforms). Umbro, a manufacturer of replica football kits, had agreements with downstream retailers to fix the price of England, Manchester United, Chelsea, and Nottingham Forest replica kits at the same retail price. The decision found that the network of agreements constituted a horizontal concerted practice between the retailers, a theory that was endorsed and expanded by the UK Competition Appeal Tribunal (and the Court of Appeal). The decision did not, however, include any clear theory of harm. Giovannetti and Stallibrass suggest four alternative explanations. They speculate that it might have been difficult for the OFT to identify which theory of harm it was most likely to prove on the basis of the evidence provided. What seems clear, however, is that the horizontal element of RPM would have been crucial for any of them.

As these cases elucidate, the horizontal element of RPM plays a very important role in antitrust cases. The problem is not usually that the supplier sets downstream prices, or even that it sets downstream prices across a variety of different retailers, but rather that it sets these downstream prices at the same level across retailers.

D. AN ANALOGY FROM THE U.S. *e-BOOKS* CASE

The UK RPM cases described above involve RPM with both vertical and horizontal elements. The U.S. *e-Books* case is different in that each RPM agreement between the publishers and Apple was purely vertical. The associated Broad Retail Price MFN provided the horizontal element. In that context, it is interesting to review the most recent *e-Books* decision⁶⁹ to see which elements of the harm are caused by the vertical RPM and which by the horizontal Retail Price MFN.

While it is in practice difficult to separate these effects, the judgment seems to conclude that vertical RPM helped publishers collude to set higher prices for e-Books sold through Apple. However, the horizontal MFN was crucial because it provided publishers with the incentive to force Amazon into the

⁶⁸ *Id.* ¶ 790.

⁶⁹ United States v. Apple, Inc., 791 F.3d 290 (2d Cir. 2015).

RPM agreement too, thus reducing Amazon's ability to compete against Apple. One might infer from the judgment that, absent the horizontal MFN, the purely vertical RPM arrangement between the publishers and Apple may well have had a more limited anticompetitive effect.

IV. EFFICIENCY BENEFITS AND PROCOMPETITIVE EFFECTS OF RPM

Above we focused on the potential anticompetitive effects of RPM. As shown, it is the horizontal element often associated with RPM that is crucial for many of the more anticompetitive effects of RPM—not the vertical element intrinsic to pure RPM. This is true both in theory and in actual antitrust cases.

As the economic literature makes clear, however, RPM may also have a number of efficiency benefits and procompetitive effects. In this part, we highlight that, while many of the most well recognized of these benefits also depend on the horizontal element of RPM, there is an important set of additional potential benefits that can arise from the purely vertical element of RPM.

A. EFFICIENCY BENEFITS AND THE HORIZONTAL ELEMENT OF RPM

We do not endeavor here to provide a comprehensive description of all the potential efficiency benefits of RPM. Instead, we focus on the most well recognized:

- (1) RPM reduces free riding at the retail level on such aspects as service provision.⁷⁰
- (2) RPM maintains retailers' margins to ensure the existence of a network of retailers that are willing to stock and promote products.⁷¹
- (3) RPM maintains retailers' incentives to provide quality certification, which in turn promotes interbrand competition.⁷²

As with the economic literature on anticompetitive effects of RPM, the papers underlying the potential efficiency benefits outlined above effectively as-

⁷⁰ See, e.g., Lester G. Telser, *Why Should Manufacturers Want Fair Trade?*, 3 J.L. & ECON. 86 (1960).

⁷¹ See, e.g., Raymond Deneckere, Howard P. Marvel & James Peck, *Demand Uncertainty, Inventories, and Resale Price Maintenance*, 111 Q.J. ECON. 885 (1996). This can in turn facilitate product entry: guaranteeing that future retailers will charge the same as "pioneer" retailers can facilitate initial entry of a good. See Martin K. Perry & Robert Porter, *Can Resale Price Maintenance and Franchise Fees Correct Sub-Optimal Levels of Retail Service?*, 8 INT'L J. INDUS. ORG. 115 (1990).

⁷² See, e.g., Howard P. Marvel & Stephen McCafferty, *Resale Price Maintenance and Quality Certification*, 15 RAND J. ECON. 346 (1984).

sume that RPM comprises both vertical and horizontal elements, although once again this assumption is not typically made explicit. Given the nature of the efficiency benefits listed above, this is not surprising. For example, it is not clear how purely vertical RPM could overcome free-rider problems at the retail level or protect retailers' margins; the horizontal element of RPM seems key. That is, these benefits are not only driven by the supplier setting retail prices, but also by its setting them at the same level across different retailers.

Given that Retail Price MFNs work in a very similar way to the horizontal element of RPM, we might therefore expect some of the potential efficiency benefits to be relevant in the case of Retail Price MFNs. It is noteworthy that, in the investigation into private motor insurance, the CMA considered whether Retail Price MFNs might be justified by free-rider effects.⁷³ The CMA was even sympathetic to this argument for Narrow Retail Price MFNs.⁷⁴ The free-rider concern here is that, absent a Retail Price MFN, insurers would be able to win new customers for their own vertically integrated sites by listing on the PCW and then encouraging customers to switch back to their own site to make the sale. Free riding on the PCW's investment in winning customers could lessen that PCW's incentives to invest going forward to the detriment of suppliers, PCWs, and customers.⁷⁵ The CMA also considered whether free-rider concerns might justify Broad Retail Price MFNs. However, it concluded that significant incremental benefits beyond those from Narrow Retail Price MFNs were not likely, while Broad Retail Price MFNs substantially increased the likelihood of anticompetitive effects.

⁷³ See COMPETITION & MARKETS AUTH., PRIVATE MOTOR INSURANCE MARKET INVESTIGATION: FINAL REPORT 169–74 (Sept. 24, 2014) [hereinafter CMA, PRIVATE MOTOR INSURANCE REPORT].

⁷⁴ The CMA considered that there could be ways other than the Narrow Retail Price MFN to overcome free-riding concerns. However, it did not need to reach a final conclusion on whether these alternatives were realistic because it did not find the narrow retail price MFNs to have a significant anticompetitive effect. The CMA also considered the free-riding argument in respect of the incremental need for Broad Retail Price MFNs (over and above narrow ones), but did not find it persuasive in that case. The potential for platforms to use Broad Retail Price MFNs to ameliorate free-rider problems has been modeled more formally in a paper by Chengsi Wang and Julian Wright. See Chengsi Wang & Julian Wright, Search Platforms: Showrooming and Price Coherence (June 10, 2015) (unpublished), www.cresse.info/uploadfiles/2015_pa1_p1.pdf.

⁷⁵ The CMA also considered a second potential efficiency benefit arising from Retail Price MFNs. This related to their role in preserving the “credibility” of the PCWs as truly representing the prices available in the market. The concern was that if consumers did not have confidence that PCWs were comparing a truly representative set of prices, then consumers might stop using them altogether, leading to increased search costs for consumers, reduced searches, and higher prices overall. A survey carried out for the CMA investigation found that a quarter of those who have bought insurance through a PCW stated that the “accuracy” of the prices was a key factor. The CMA concluded that Narrow Retail Price MFNs were a legitimate tool used by PCWs to engender consumer trust in their service offering. They did not, however, consider Broad Retail Price MFNs to provide sufficient incremental benefit in terms of such credibility to justify their use. See CMA, PRIVATE MOTOR INSURANCE REPORT, *supra* note 73, at 166–76.

B. EFFICIENCY BENEFITS, PROCOMPETITIVE EFFECTS, AND THE PURELY VERTICAL ELEMENT OF RPM

While the efficiency benefits discussed above rely on the horizontal element of RPM, there are a number of less commonly discussed, and even novel, potential efficiency benefits and procompetitive effects that arise from the purely vertical element of RPM.⁷⁶

1. Benefits from RPM If Upstream Competition Is More Vigorous than Downstream. As discussed above, Foros, Kind, and Shaffer find that RPM tends to reduce prices if competition upstream is more vigorous than downstream. It puts price setting in the hands of the actors that have the greatest incentives to compete aggressively.⁷⁷

This may be highly relevant in the case of online retail platforms, and especially PCWs, which are specifically designed to facilitate shopping around, thus driving vigorous upstream competition. By contrast, consumers may do relatively less shopping around between online retail platforms and PCWs than they do using them, perhaps assuming that prices will not vary substantially between them.⁷⁸ Some consumers may even equate such platforms with advertising that provides a useful window on the “true prices” set by suppliers, which they expect to be identical everywhere.⁷⁹

⁷⁶ The reduction or elimination of double marginalization is often cited as an efficiency benefit of RPM. While it is true that this benefit only requires the vertical element of RPM, it is also important to note that the elimination of double marginalization can be achieved through maximum RPM, which is not generally viewed as a concern by economists, and which is not a focus in this article. There is no incremental benefit from fixed or minimum RPM in reducing double marginalization. *See MICHAEL A. SALINGER & ALEXANDER ELBITTAR, WHITE PAPER ON VERTICAL RESTRAINTS 12 (REG'L COMPETITION CTR. FOR LATIN AM. 2013)* (discussing the roles of maximum and minimum RPM).

⁷⁷ Foros, Kind & Shaffer, *supra* note 16, at 14.

⁷⁸ We are not aware of empirical research into consumers’ perceptions of the relative prices on Internet retail platforms and PCWs, but there is some evidence that consumers do shop around between (as opposed to within) such platforms, albeit not on a large scale. For example, a consumer survey carried out by IFF Research on behalf of the UK Competition Commission in the context of its now completed private motor insurance market investigation found that 24% of consumers check two or more PCWs before purchase, and that this figure rose to 46% amongst 17 to 34 year olds. *See COMPETITION & MARKETS AUTH., PRIVATE MOTOR INSURANCE MARKET INVESTIGATION, CUSTOMER SURVEY TABLES 6 (2013)*, assets.digital.cabinet-office.gov.uk/media/5329dee940f0b60a760002be/130816_customer_survey_tables.pdf.

⁷⁹ Johnson provides an additional argument for why it may be better for upstream suppliers to set prices when there is limited downstream competition due to customer switching costs across retail platforms. Under a standard retail model, retail platforms will seek to exploit customer switching costs by offering low initial prices to win customers and then subsequently raising prices once they are “locked in.” This raises overall retail mark-ups and creates consumer harm. By contrast, under an agency model, suppliers compete directly on an ongoing basis, and there is no harm from consumer lock-in. Justin P. Johnson, *The Agency and Wholesale Models in Electronic Content Markets* (Mar. 15, 2013) (unpublished), papers.ssrn.com/sol3/papers.cfm?abstract_id=2126808. In our view, however, this is a special case of the more general double-marginalization argument. Just as in the general case, it seems to us that the benefit identified by Johnson

2. Benefits from Enhanced Upstream Competition Through Increased Platform Participation. It could be argued that competition is, on balance, increased by RPM. Participation on platforms increases the degree of competition between suppliers because consumer search becomes easier, but suppliers may not be willing to participate in such platforms absent price protection through RPM. Thus, RPM may enhance competition between suppliers by providing an incentive for their increased platform participation. This effect is especially likely where suppliers have alternative routes to market on which they have full control over prices (e.g., their own websites). We are not aware of any academic papers that model this platform participation effect, but we expect the supplier participation decision to be at least partly driven by how many extra customers it feels it would gain access to through participating in the platform.⁸⁰

3. Benefits from RPM Where Upstream Firms Have Better Information on Demand or Marketing Strategy. Andrei Hagiu and Julian Wright examine the relative benefits of an online platform being a reseller (which sets prices itself) versus a marketplace (suppliers set prices) in a context where suppliers and resellers may both have private information about the optimal level of marketing for each product.⁸¹ They find that the marketplace approach (which is equivalent to vertical RPM) should be preferred when upstream suppliers have more private information. The reselling approach should be preferred when downstream retailers have the greater degree of private information. While their paper looks at the effect of private information on marketing strategy, the same argument could apply to private information about product demand, which affects optimal pricing.⁸² This may explain why traders on

could be achieved through maximum RPM only. There would seem to be no additional benefit to be gained from fixed for minimum RPM.

⁸⁰ In the context of its investigation into private motor insurance, the CMA has considered the linked question of how insurers optimize their choice of sales channels. *See, e.g.*, CMA, PRIVATE MOTOR INSURANCE REPORT, *supra* note 73, at A8(1)-1 to A8(1)-42.

⁸¹ Andrei Hagiu & Julian Wright, *Marketplace or Reseller?*, 61 MGMT. SCI. 184 (2015).

⁸² There is an analogy here to category management, which involves a retailer allowing a given upstream firm to choose the price range and shelf positioning for a particular category of product within the store. While there is recognition that category management can be anticompetitive, there are also a number of efficiency rationales for it, which have led antitrust authorities to take a relatively hands-off approach thus far. One such rationale is that the upstream firm knows more than the individual retailer about customer demand for the product, not least because it sees sales across retailers. This can lead the upstream supplier to set prices more efficiently. *See* Joshua D. Wright, *Antitrust Analysis of Category Management*: Conwood v. United States Tobacco Co., 17 SUP. CT. ECON. REV. 311, 318 (2009). We are not aware of any papers that explicitly model this point. The key existing papers on delegation of price setting under asymmetric information about demand make the contrary assumption that retailers know more about demand than suppliers. *See* Esther Gal-Or, *Optimal Franchising in Oligopolistic Markets with Uncertain Demand*, 9 INT'L J. INDUS. ORG. 343 (1991); Tatsuhiko Narui & Dongjoon Lee, *Resale Price Maintenance Versus Delegation, Under Asymmetric Information*, 81 MANCHESTER SCH. 401 (2013). However, the informed-supplier theory in the category management literature

Amazon Marketplace, rather than Amazon Marketplace itself, set retail prices. Amazon Marketplace is not in a good position to set such prices for the myriad limited-demand products that are sold on its platform. The benefits of suppliers controlling prices directly may also be substantial where the optimal pricing structure is relatively complex, as with the yield management pricing used in the airline sector, for instance.

The strength of the efficiencies identified above derive from the purely vertical element of RPM. They also depend on the facts of the specific market. However, these efficiencies may be powerful arguments for vertical-only RPM in certain cases.

V. POLICY ANALYSIS

This article highlights that many of the potential anticompetitive effects and efficiency benefits of Broad Retail Price MFNs can be identified by examining the literature on RPM, given the close relationship between the former and the implicit horizontal element of the latter. In this part, we take the same approach to considering policy implications. That is, we consider the appropriate policy for Broad Retail Price MFNs by reference to the existing policy on RPM.⁸³

There is in fact an ongoing policy debate about the appropriate legal treatment of RPM itself. In the United States, RPM was a *per se* violation until the *Leegin* case.⁸⁴ While the rule of reason now applies to RPM in the federal courts, many still believe that there should be a strong presumption that RPM is harmful, and indeed a substantial number of U.S. states have legislated against it.⁸⁵

In Europe, the Commission has resisted calls to alter its policy on RPM, which continues to be a hardcore restriction under Article 101 TFEU, or a restriction of competition “by object.” This essentially means it can be presumed harmful without the authority needing to demonstrate any anticompetitive effect. The burden of proof is on the alleged infringers to demonstrate that the RPM has efficiency benefits that satisfy the conditions for exemption

appears plausible, and fits with the conclusions about private information on optimal marketing levels in Hagiu and Wright. Hagiu & Wright, *supra* note 81.

⁸³ In contrast with RPM, there is currently no general guidance from competition authorities on how Broad Retail Price MFN clauses should be viewed under the law. Indeed, such clauses are not considered explicitly at all within the otherwise highly comprehensive European Commission Guidelines on Vertical Restraints. *European Guidelines on Vertical Restraints*, *supra* note 30.

⁸⁴ *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

⁸⁵ See Michael A. Lindsay, *Overview of State RPM*, ANTITRUST SOURCE (Oct. 2014), www.americanbar.org/content/dam/aba/publishing/antitrust_source/lindsay_chart.authcheckdam.pdf.

under Article 101(3) TFEU.⁸⁶ While the European Commission's Guidelines do not state it explicitly, the current EU policy stance on RPM appears to be based on the view that many of the efficiency benefits of RPM can be achieved through other vertical restraints that are less likely than RPM to harm competition. That is, RPM is not indispensable for achieving such benefits.⁸⁷

However, good policy design balances likely anticompetitive and procompetitive effects.⁸⁸ It is noteworthy that the policy debate on RPM has not distinguished between the explicit vertical and implicit horizontal elements of RPM in considering this balance. Table 2 below addresses this gap by summarizing the findings above in relation to the relative pros and cons of the vertical and horizontal elements of RPM separately.

Many of the more serious anticompetitive effects attributed to RPM in the literature and case law depend on the horizontal element of RPM. The most recognized efficiency benefits of RPM require the horizontal element, too, but these may be achievable through other less restrictive vertical restraints. By contrast, the vertical element of RPM is unlikely to produce substantial anticompetitive concerns and may—on its own—give rise to some additional and potentially significant efficiency benefits. It is less obvious that these latter benefits could be achieved using other vertical restraints.

Table 2 shows that the overall effects of the horizontal element of RPM are either equal to or worse than those of RPM as a whole. In other words, RPM that has a horizontal element is RPM at its worst.⁸⁹ Given this finding, it may

⁸⁶ In their 2011 paper on RPM, Matthew Bennett, Amelia Fletcher, Emanuele Giovannetti, and David Stallibrass find that the ideal policy approach to RPM is likely to lie somewhere between these two extremes, noting that cases might most usefully be prioritized where the likely anticompetitive effects of RPM are most likely to outweigh its potential efficiency benefits. This in turn occurs when there is significant market power upstream, significant buyer power downstream, or a network of RPM agreements covering a substantial share of the market. *See* Bennett et al., *supra* note 47, at 1297–98.

⁸⁷ *European Guidelines on Vertical Restraints*, *supra* note 30, ¶ 109 (“There is a large measure of substitutability between the different vertical restraints. This means that the same inefficiency problem can be solved by different vertical restraints. . . . This is important as the negative effects on competition may differ between the various vertical restraints. This plays a role when indispensability is discussed under Article 101(3).”).

⁸⁸ *See* Bennett et al., *supra* note 47, at 1282–87 (discussing how economics can inform an appropriate policy line between “presumed legality” and “presumed illegality” for potentially anticompetitive restrictions such as RPM).

⁸⁹ More formally, while it is not possible to weigh the positive and negative effects of the different elements of RPM in a fully mathematical way, the overall impact of RPM equates to the procompetitive effects minus the anticompetitive effects. This is set out in the equation below, but replacing N with N*, where the latter represents the efficiency benefits for which RPM is indispensable (i.e., effects that cannot effectively and efficiently be achieved through other less restrictive vertical restraints):

$$\text{Overall impact of RPM} = (M + N^*) - (K + L) \text{ or, by rewriting slightly, } (M - K) + (N^* - L).$$

TABLE 2
POTENTIAL EFFECTS OF RPM

	Vertical Element of RPM Only	Vertical plus Horizontal Elements of RPM
Anticompetitive Effects	K: Substantial harm relatively unlikely	L: A wide-ranging set of potentially serious anticompetitive effects
Procompetitive Effects and Efficiency Benefits	M: Untested but potentially significant benefits	N: Well-understood benefits, but may be achievable through other vertical restraints

seem reasonable to treat the purely vertical element of RPM more leniently than the standard form, which has a horizontal element. However, it can be difficult in practice to identify whether a specific instance of RPM incorporates a horizontal element. As such, there may be merit in treating all forms of RPM the same under the law. Nevertheless, we advocate that authorities should be more willing to allow RPM when it only has a vertical element. Under EU law, this would involve an individual exemption under Article 101(3).

Our focus in this article, however, is the appropriate policy towards Broad Retail Price MFNs, given that they are closely analogous to the horizontal element of RPM, or RPM at its worst.⁹⁰ On the basis of the table above, it seems that Broad Retail Price MFNs are no less likely than RPM to produce anticompetitive effects that exceed the procompetitive benefits.

The negative policy presumption around RPM in the European Union and in many U.S. states suggests that this overall equation is negative. However, the impact of the vertical element of RPM alone (i.e., M – K) is unlikely to be significantly negative given the discussion above. As such, the incremental impact of the horizontal element of RPM (i.e., N* – L), in a situation where there is already vertical RPM, appears to drive the expectation that RPM will have a negative impact overall. That is, this horizontal element represents RPM at its worst.

⁹⁰ An additional argument potentially supports this finding. As is highlighted in Bennett et al., many of the more significant anticompetitive effects arise when retailers have buyer power and especially if retailers instigate the RPM. *See* Bennett et al., *supra* note 47, at 1297. Retailers typically institute Retail Price MFNs, which is another reason to view them as mimicking the worst of RPM.

VII. POLICY CONCLUSIONS

The appropriate policy line for RPM is beyond the scope of this article. Our aim instead is to provide a comparative analysis of RPM and Broad Retail Price MFNs to ensure policy coherence between the two forms of restriction. Our analysis shows that a consistent legal approach would not treat Broad Retail Price MFNs any more leniently than RPM. In Europe, this means that Broad Retail Price MFNs should constitute hardcore restrictions, or restrictions of competition by object.

This conclusion is important because inconsistent policy across comparable types of restrictions can lead to flawed and arguably distortionary competition decisions. The OFT's commitments decision in the Hotel Online Booking case demonstrates this.⁹¹ This case was run as an RPM case, the core identified concern being that hotels set prices and that platforms were unable to offer discounts. However, the case was initiated and motivated by a new entrant platform, Skoosh, which was primarily concerned about the horizontal Broad Retail Price MFN clauses, not the vertical RPM. These MFN clauses were imposed as standard terms by the incumbent platforms, and prevented hotels from setting their prices any lower through Skoosh than through these incumbents.

Why did the UK competition authorities pursue the case under an RPM theory instead of going after the MFN clause directly? Once convinced that a case has economic merit, competition authorities will typically employ a format that is most likely to succeed, often on the quickest timescale. The fact that RPM is a hardcore restriction in Europe, whereas Broad Retail Price MFN clauses are not, meant that the OFT could have expected a quicker and more successful outcome through focusing on the RPM element of the behavior. Doing so, however, may have distorted the enforcement approach, not least because the purely vertical element of the RPM may not in itself have been especially problematic from an economics perspective.

In conclusion, we consider that it would be helpful to have greater policy clarity on the likely treatment of Broad Retail Price MFNs by antitrust authorities. In developing such policy, we would also urge antitrust authorities to bear in mind the parallels between Broad Retail Price MFNs and the horizontal element of RPM. On this basis, we argue that Broad Retail Price MFNs should not be treated any less leniently under the law than is RPM.

⁹¹ Office of Fair Trading, Hotel Online Booking: Decision to Accept Commitments to Remove Certain Discounting Restrictions for Online Travel Agents (Jan. 31, 2014).