

Price Maintenance: The View from Canada

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In 2009, Canada's price maintenance rule underwent a major change. The previous longstanding criminal provision prohibiting price maintenance was replaced by a civil regime having the effect of allowing suppliers to set resale prices for their products, provided their conduct does not lead to an adverse effect on competition. This legislative change followed in the footsteps of the 2007 decision of the United States Supreme Court in *Leegin Creative Leather Products*¹ and brought Canada's treatment of vertical price restraints into line with modern economic thinking, which recognizes that resale price maintenance has the potential to create both pro- and anti-competitive effects.

Resale Price Maintenance

Resale price maintenance, or RPM, is a practice whereby a manufacturer or other supplier controls the price at which a downstream firm (typically a distributor or retailer) sells the manufacturer's product. Prices are influenced by imposing either a price floor (minimum resale price maintenance) or a price ceiling (maximum resale price maintenance). The supplier ensures compliance by penalizing the downstream party for any deviance from the supplier's pricing policy. For instance, if a reseller refuses to maintain prices, the supplier would stop doing business with it.

Maximum resale price maintenance usually raises less competition concerns. Indeed, under Canadian competition law, maximum prices have always been lawful.

Economists have long recognized that there are circumstances in which RPM offers efficiency benefits and may therefore be pro-competitive. One such benefit is when a retailer provides services that enhance the value of the manufacturer's products. Without RPM, there is a risk that consumers will "free ride" on the services provided by one retailer, while making their actual purchases from a third-party "deep discount" retailer. This possibility discourages the full-service retailer from investing in services to consumers in connection with the product, thereby leading to an overall lessening of service levels associated with the product.

Similarly, when one retailer invests heavily to "open up" a new market, it does not want a second retailer to come along and undercut its prices, while benefiting from the first retailer's initial investment. For high-end brands, the establishment of a minimum retail price counters the threat of discounting, which can cheapen the image of the brand in the eyes of consumers. Consumers expect luxury goods to come with a certain level of service. The economics of their business model dictate that discount retailers may not be capable of providing that level of service.

On the other hand, RPM can also facilitate collusion between retailers. Pressure for price maintenance often comes not only from suppliers, but also from competitors of a discounting retailer who apply pressure on their supplier to discourage competing retailers from dropping the prices at which they sell the supplier's products. If the pressure has its desired effect, the retailers who refuse to discount are protected from competition and ultimately consumers pay higher prices.

In light of the conflicting results of this analysis, many commentators have concluded that RPM cannot be deemed either purely pro-competitive or purely anti-competitive. They therefore oppose treating