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ESSAY

Resale Price Maintenance: A Cross–Jurisdictional Analysis of Law in India and the EU

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This paper examines the legal position in Competition Law with respect to Resale Price Management rules, considering the question of whether they constitute a vertical restraint under the Indian Competition Act. It adopts a comparative perspective, juxtaposing the Indian position against the position of the European Union position. It disentangles the ambiguities and inconsistencies in Indian law on the issue. Interpreting Indian law, the authors conclude that while there are indicators as to when a set of rules shall be considered violative of the Competition Act, these are not as comprehensive as the multi-source guidelines the EU draws from. Indian law considers the market power of the parties which enter a Resale Price Agreement, although the threshold for when the market power makes the Resale Price Agreement anti-competitive is unclear. The EU, on the other hand, considers Resale Price Agreements presumptively anti-competitive, with the burden being on the parties to explain their conduct to rebut the presumption. In light of the dearth of precise guidance in India, the authors welcome section 64B of the draft Competition (Amendment) Bill, which would allow guidance notes from the CCI to be released from time to time. In the meantime, the CCI's orders indicate the market thresholds at which the parties to a Resale Price Agreement fall foul of the Indian Competition Act.

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I. Introduction

Competition law across jurisdictions recognizes two types of agreements to be anti-competitive viz. horizontal and vertical. While horizontal agreements relate to agreements between enterprises or persons dealing in similar or identical goods or provision of services, vertical agreements are between enterprises or persons at different levels of production or distribution chain operating in different markets. As such, while horizontal agreements are typically amongst competing enterprises, vertical agreements relate to supply and distribution of goods or services.

Vertical agreements are necessary for the functioning of businesses as no enterprise can operate the entire production and supply chain by itself. As such, all businesses enter into a variety of vertical agreements with their suppliers and/or their distributors. Accordingly, vertical agreements are inevitable and are not always considered anti-competitive. In fact, a large number of vertical agreements result in enhanced efficiencies which lead to competitive pricing and increased choice for customers. However, certain vertical agreements have the effect of distorting competition, and it is such vertical agreements that competition law seeks to regulate. Vertical agreements which are typically considered problematic are: (a) exclusive supply/distribution agreements; (b) refusal to deal; (c) tie-in arrangements, and lastly, (d) resale price maintenance ('**RPM**'). Of these, RPM is globally the most frowned upon by antitrust authorities. RPM is a form of vertical restraint wherein the upstream supplier of goods or services imposes upon the downstream procurer who intends to resell the product or service, obligations in relation to the price at which the resale takes place.[1] Given that RPM directly or indirectly controls the price at which a product/service is made available to a customer, it is most likely to have an impact on competition in the market.

In this article the authors seek to discuss the law on regulation of RPM and compare the legal framework and jurisprudence in India and the European Union ('**EU**'). In the first part, the authors set out the law governing RPM in India and the EU and how vertical agreements may lead to pro and anti-competitive effects. In the second part, landmark cases from India and the EU which have laid down the jurisprudence on RPM will be discussed with a brief encapsulation of the principles established therein. This will be followed by a comparison of the approach in terms of the law as well as regulation in India and the EU. In the third part, the authors relying upon various primary and secondary sources would propound legal and economic justifications for RPM. Lastly, the fourth part would summarise the discussion and put forward suggestions regarding the treatment of RPM.

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1 Indian Competition Act 2002, s 3(4), Explanation (e); Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, art 4(a).

II. LEGISLATIVE FRAMEWORK IN INDIA AND EU

The primary legislation governing competition law in India is the Indian Competition Act, 2002 ('**ICA**'). Section 3 of the ICA lays downs the law in relation to anti-competitive agreements, which are further categorised as horizontal (section 3(3)) and vertical (section 3(4)) agreements.[2] Section 3(4) of the ICA dealing with vertical agreements provides that any agreement amongst enterprises or persons at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services shall be in contravention of the ICA if such agreement causes or is likely to cause an appreciable adverse effect on competition ('**AAEC**')[3]. As such, there is no automatic presumption that a vertical agreement will result in an AAEC, rather, a vertical agreement will be considered anti-competitive if it results in an AAEC.

The test for AAEC is prescribed under Section 19(3)[4] of ICA which contains three positive and three negative factors. It is notable that under ICA, it is not necessary to fulfil all the factors mentioned under section 19(3), as ICA itself provides the discretion to consider 'all or any' of the factors in determination of AAEC, albeit case law suggests that it is prudent to consider all the factors to ascertain the net impact on competition.[5]

In the EU, Article 101 of the Treaty on the Functioning of the European Union ('**TFEU**') lays down the framework for regulation of anti-competitive agreements. In Article 101 TFEU however, there is no clear distinction between horizontal and vertical agreements, rather the distinction is contained in various supplementary documents such as the Guidelines on Vertical Restraints ('**VRG**'),[6] Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to Horizontal Co-operation Agreements ('**HCG**')[7] and, the Commission Regulation (EU) No. 330/2010, on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practice, termed as Vertical Block Exemption Regulations ('**VBER**').[8] Accordingly, unlike the ICA, the TFEU does not establish criterion for the treatment of vertical and horizontal agreements. Article 101 of TFEU prohibits agreements

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2 The Indian Competition Act 2002, s 3.

3 The Indian Competition Act 2002, s 3(4).

4 The Indian Competition Act 2002, s 19(3).

5 Automobiles Dealers Association, Hathras, U.P. v Global Automobiles Limited & Anr. Case No. 33/2011, Order dated 03.07.2012.

6 Guidelines on Vertical Restraint 2010/C 130/01.

7 Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements 2011/C 11/01.

8 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices.

which might restrict or distort competition by their object or effect. Thus, the difference in treatment comes from whether the agreement is restrictive by object or effect. Further, under Article 1(1)(a) of the VBER, a vertical agreement is defined as an agreement or concerted practice entered into between two or more undertakings each of which operates, for the purposes of the agreement or the concerted practice, at a different level of the production or distribution chain, and such an agreement relates to the conditions under which the parties may purchase, sell or resell certain goods or services.[9]

Under EU law, an effects analysis similar to that which is done under ICA for vertical agreements, is carried out for those agreements which as per Article 101 of TFEU, have an effect of restricting or distorting competition. However, the effects analysis under EU is based on a complex assessment. The EU Court of Justice has noted that in order to restrict competition by effect, an agreement must have an AAEC on the parameters of competition, such as price, quantity and quality of goods and services.[10] This assessment must be based on a thorough analysis of economics and law.[11] In case of agreements which restrict or distort competition by object, it is not necessary to prove that it will produce anti-competitive effects[12] similar to the treatment of horizontal agreements under ICA which are per se presumed to be anti-competitive. However, Article 101(3) provides the test for rebutting the presumption cast upon an agreement violating Article 101(1) of TFEU. As such, in the event all four conditions under Article 101(3) are satisfied, the presumption may be rebutted.[13] The exception under Article 101(3) dismisses the presumption based on the following factors - the agreement or practice (a) contributes to improvement in the production or distribution of goods or promote technical or economic progress; (b) allows a fair share of the benefits arising from such improvement or promotion, to the consumers; (c) does not impose restrictions which are not indispensable for attaining the aforementioned objectives; and (d) does not allow the parties to the agreement to eliminate competition from a substantial part of the market.[14] The EU law contains various regulations termed as block exemptions. These block exemptions create a safe harbour for agreements. Agreements which fall under the block exemptions are automatically exempted from the prohibitions contained in Article 101(1) of TFEU.[15] One such regulation, VBER functions as an umbrella block exemption

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9 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, art 1(1)(a).

10 C-382/12 P MasterCard and Others v Commission.

11 C-345/14 Maxima Latvija.

12 Richard Whish & David Bailey, Competition Law (9th ed, OUP 2020) 121.

13 Guidelines on the application of Article 81(3) of the Treaty 2004/C 101/08 [42]; Case C-68/12 Protimonopolný úrad Slovenskej republiky vs Slovenská sporitel'na a.s.,

14 The Treaty on the Functioning of the European Union, art 101(3).

15 Alison Jones & Brenda Sufrin, EU Competition Law, Text and Cases & Materials (6th ed, OUP 2017) 253.

and applies to vertical agreements in general.[16] Recitals in the VBER provide that vertical agreements can improve economic efficiency and the likelihood of these efficiency enhancing effects outweighing the anti-competitive effects hinges on the market power of the parties to the agreement.[17] It is pertinent to note here, that recitals of a regulation are potent tools of interpretation.[18] Now, Article 2 of VBER provides that Article 101(1) of TFEU will not apply to vertical agreements having vertical restraints. Further, Article 3 provides that the exemption in the VBER shall apply only where the market share of the supplier and buyer does not exceed 30% of their respective relevant markets. In addition to the VBER, the VRG are used as a significant guidance on the application of Article 101 of TFEU to vertical agreements.[19]

The above discussion provides a broad overview of the law governing anti-competitive agreements under ICA and EU law. In the following sections the discussion will focus specifically on RPM as a vertical restraint and its treatment under ICA and EU law.

III. Resale Price Maintenance – Legal Framework in India and EU

As mentioned above, Section 3(4) of the ICA relates to the regulation of vertical agreements. An explanation to Section 3(4) describes five types of vertical agreements as potentially anti-competitive.

RPM, according to the explanation, includes any agreement to sell goods on condition that the prices to be charged on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.[20] The other types of vertical agreements mentioned in the explanation include tie-in arrangements, exclusive supply agreement, exclusive distribution agreement, and refusal to deal.

Vertical agreements are considered to be less likely to harm competition when compared to horizontal agreements. In addition to the factors described under Section 19(3) of the ICA, the CCI also considers whether the parties to the vertical agreement possess market power - which is the ability to maintain prices above competitive levels, or to maintain output, product quality and variety or innovation below competitive levels, for a period of time which is not insignificant. As such, vertical agreements are problematic only when

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16 ibid.

17 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Recital 6,7.

18 Case C-429/07 Inspecteur van de Belastingdienst v X BV.

19 Guidelines on Vertical Restraints 2010/C 130/01 [1].

20 Indian Competition Act 2002, s 3(4), Explanation (e).

there is certain degree of market power at the level of supplier or buyer or both.[21]

While market share has been considered to be a factor for determining market power, India does not have a bright-line test for market share. In a recent decision[22] the CCI directed an investigation to be undertaken where the opposite party had a market share of 28%, on the basis that its conduct, *prima facie*, was likely to cause an AAEC. Similarly, while ordering an investigation into an alleged anticompetitive vertical agreement between MakeMyTrip (an online travel agency) and OYO (a budget hotel chain),[23] the CCI noted that 'both have considerable presence in their respective market segments and any restrictive agreement which may lead to refusal to deal with some players or exclusive arrangement with some players, may potentially have an adverse effect on competition'. As such, while there is no fixed market share above which the CCI is likely to intervene, in practice enterprises with over 20-25% market share in their relevant market need to be more careful in relation to their conduct with upstream and downstream business partners.

Under EU law, albeit Article 3 of VBER indicates the importance of market share while analysing applicability of VBER, Article 4 of VBER contains a list of vertical restraints such as RPM that cannot avail the benefit of block exemption and are termed as hardcore restrictions. Additionally, recital 10 of the VBER clarifies that restrictions like RPM, which are covered in Article 4, will not get the benefit of block exemption, regardless of the market share.[24] The reason behind this is that such agreements, which include hardcore restrictions such as RPM are presumed to fall under Article 101(1) and are unlikely to fulfil the conditions under 101(3).[25] Further, the inclusion of such hardcore restrictions removes the benefit of block exemption regulations for the whole agreement and not just the infringing provision[26] as there is no severability for hardcore restrictions.[27]

Article 2 of VBER provides an exemption to vertical agreements from the application of Article 101(1) of TFEU in so far as they contain vertical restraints and provided the conditions under Article 2 of VBER are met. However, Article 4 of the VBER provides that the exemption provided in

21 SM Dugar, Guide to Competition Act 2002 (7th ed, LexisNexis 2018) 258.

22 Jasper Infotech Pvt. Ltd, v KAFF Appliances (India) Pvt. Limited (2014) CCI Case No. 61 of 2014, Order dated 29.12.2014. ("Snapdeal Case").

23 In Re: FHRAI v. MakeMyTrip India Pvt Ltd and others (2019) Case No. 14 of 2019, Order dated 28.10.2019 ("MMT Case").

24 Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, Recital 10.

25 Guidelines on Vertical Restraints 2010/C 130/01 [47].

26 ibid; Richard Whish & David Bailey, Competition Law (9th ed, OUP 2018) 677.

27 Guidelines on Vertical Restraints 2010/C 130/01 [70].

Article 2 of VBER will not be applicable to agreements which have as their object:

> *"(a) the restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties."*

Based on the above, it is understood that the exemption under Article 2 does not apply to agreements which directly or indirectly, in isolation or in combination with other factors have the objective of RPM. Further, RPM can be categorised as (a) maximum; and (b) minimum. A reading of Article 4 makes it clear that a maximum resale price or recommending a sale price is not problematic, except when such a maximum or recommended price becomes a fixed or minimum sale price. An instance of direct RPM, for instance, would be a provision in a contract which establishes a minimum price. On the other hand, RPM can also be achieved indirectly by fixing the distribution margin or fixing the amount of discount that the distributor can offer during resale.[28] Indirect RPM may also be achieved when a supplier grants rebates or reimburses the cost of promotion incurred by its distributor on the condition that its distributor observes a certain price level.[29] A supplier may also align the prescribed resale prices to a competitor's resale prices to achieve RPM indirectly.

Prescribing resale price is one thing, but the actual AAEC occurs when the RPM is enforced by the prescribing enterprise. The frequently used means to enforce RPM, include threatening or intimidating buyers; issuing warnings or imposing penalties on buyers; delaying or suspending deliveries; terminating contracts, for failure to observe prescribed price levels etc. Further, prices can be fixed effectively when certain measures are applied to identify price-cutting distributors viz software or via a retailer network bound by the obligation to report such distributors who do not adhere to the prescribed price levels. An indirect RPM may also be achieved by using measures to incentivise the buyer to maintain a price level such as printing a recommended resale price on the product or applying a most-favoured-customer clause. All the indirect ways of maintaining a price level, mentioned above may also be used for maximum or recommended prices, in order to make them work like RPM.[30] However, it is clarified in the VRG that even if supportive measures or recommended prices are used, this in itself does not constitute RPM.[31]

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[28] Guidelines on Vertical Restraints 2010/C 130/01 [48].

[29] ibid.

[30] ibid.

[31] ibid.

IV. RPM: Evolution and Jurisprudence in India

The ICA was enacted in 2002 as a successor to the Monopolies and Restrictive Trade Practices Act, 1969 ('**MRTP**'). In an early case under MRTP,[32] fixing of maximum prices which were purportedly only recommendatory in nature was found to be anti-competitive. It was held that the association revising the maximum price and expressly stating that the members had full discretion in selling the products at prices lower than those recommended, had only done so to fulfil the requirement of MRTP which provided that stipulating prices to be charged on resale by the buyer would be a restrictive practice, excepting the situation where the buyer is expressly allowed to charge prices lower than those recommended. It was observed that the product in question had a low profit margin, therefore all the producers would view the upward revision in price as a signal to increase prices and would do so without the fear of price undercutting by competing manufacturers. It was even observed by the MRTP Commission that if an association which comprises of producers making up a majority of production, fixes or increases the maximum price, it would be per se restrictive of competition.

Under the ICA, RPM is considered anti-competitive, only where it causes or is likely to cause AAEC. In the case of *Hyundai Motor India Limited* ('**Hyundai case**')[33], the Competition Commission of India ('**CCI**') observed that the practice of prescribing the minimum price and the maximum discount that the dealer could offer to customers amounts to setting a floor price below which the product cannot be sold and therefore constitutes RPM. CCI noted that discounts offered by dealers were monitored by way of mystery shoppers posing as customers and in case of deviation, they were penalised. An agreement having as its direct or indirect object the establishment of a fixed or minimum resale price level is restrictive of competition as it prevents the dealers from effectively competing on price. This leads to higher prices for consumers and loss of intra-brand price competition.

On the other hand, RPM not just reduces intra-brand competition but also removes inter-brand competitive pressure when a significant player in the market imposes minimum price restrictions on its dealers who might be dealing with multiple manufacturers. RPM by multiple manufacturers allows for a price cartel.[34]

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32 SM Dugar, Guide to Competition Act 2002 (7th ed, LexisNexis 2018) 297; Re Alkali Manufacturer's Association of India (1984) RTP Enquiry No. 26/1984.

33 Fx Enterprise Solutions India Pvt. Ltd. and Hyundai Motor India Limited with St. Antony's Cars Pvt. Ltd. and Hyundai Motor India Limited (2014) Case No. 36 and 82 of 2014, Order dated, 14.06.2017.

34 However, the National Company Law Appellate Tribunal ("NCLAT") observed that the CCI had only relied on an analysis of the Director General and not conducted any independent investigation and also failed to delineate the relevant market. Therefore, the order was set aside. The order of the NCLAT is currently under challenge in the Supreme Court of India.

Although the CCI in the Hyundai case tried to expound all the detriments of RPM, it did not clearly elucidate how intra-brand competition reduces inter-brand competition. This gap was filled by CCI in the case of *Maruti Suzuki India Limited* (‘**Maruti**’) in implementing a discount control policy *vis-à-vis* dealers[35]. This case also involved the restriction of the maximum discount to be offered to customers. The dealers were monitored by way of mystery shoppers and penalised in case of non-adherence. The CCI emphasised that the RPM was not only imposed but also monitored and enforced by way of various penalties and sanctions.

While in the Hyundai case, the CCI did not refer to the market share of Hyundai in the market for passenger cars in India, in the case of Maruti, it highlighted that Maruti had a market share of 50% in the market for passenger vehicles. The high market share of Maruti along with the resultant higher prices leading to denial of benefits to consumers was held by the CCI to lead to an AAEC.[36]

It is to be noted that while Maruti argued that the discount control policy solved the free-riding problem, the CCI upon review of the detailed guidelines by Maruti to its dealers observed that there was no scope for free-riding, thus rejecting any pro-competition justification.

There have also been instances where the CCI has dismissed allegations of RPM such as in the case of *Jasper Infotech*[37] where KAFF (a kitchen appliance manufacturer), aggrieved by the sale of its products at discounted prices on Snapdeal (an e-commerce platform), displayed a caution notice on its website stating that the products sold on Snapdeal were counterfeit, infringing its trademark, deceiving the public by trading on the goodwill of KAFF and were also undercutting the prices of authorized dealers. Further, it was also alleged that KAFF mentioned in the notice that it will not honour the warranties of the products sold in its brand name through Snapdeal. Moreover, KAFF attempted to impose a price restriction on Snapdeal to make sales at a minimum price and threatened to ban online sales if such prices were not maintained. However, the CCI did not find that any AAEC was caused by the restraint that KAFF tried to impose on Snapdeal and the sale of KAFF products continued on Snapdeal’s platform at discounted prices, the case was dismissed.

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35 In Re: Alleged anti-competitive conduct by Maruti Suzuki India Limited in implementing discount control policy vis-à-vis dealers (2019) Suo Moto Case No. 01 of 2019, Order dated 23.08.2021.

36 ibid.

37 Jasper lnfotech Private Limited (Snapdeal) vs KAFF Appliances (India) Pvt. Ltd. (Kaff) (2014) 61 of 2014, Order dated 15.01.2019.

On another occasion[38], Esys (a distributor of Intel's products) alleged that Intel dictated adherence to resale prices while Intel claimed that it only provided the distributors with suggested prices leaving discretion in the hands of distributors. CCI noted that the agreement expressly provided that the distributors had full discretion to set the sale prices. While it was observed that Intel used to monitor the market prices of its products, the CCI held that such monitoring in itself cannot be termed anti-competitive. Further, such practices by Intel could not create entry barriers, drive competitors out of the market or foreclose competition in the market. Accordingly, no case of RPM was made out.

This concludes the discussion on the approach adopted by the CCI in dealing with RPM. The following part discusses and compares the approach of the antitrust authorities in EU.

V. RPM: Evolution and Jurisprudence in EU

The approach in EU differs from India in that it treats RPM as a hardcore restriction regardless of the market power of the entities involved. In the case of Asus[39], a strategy was followed to monitor and intervene in the resale prices of retailers in order to stabilise the prices to the level of its Recommended Resale Prices ('**RRP**'). It monitored the prices via software tools or complaints by retailers against each other. The employees of Asus used online price comparison websites to keep track of the resale prices of retailers. In case of deviation, the employees contacted retailers, who in turn adjusted their prices in accordance with the RRP. Asus undertook a series of measures to ensure adherence to RRP such as - a premium partner program providing bonuses and better prices to retailers who followed the RRP, threats to take away the bonus and premium status, threat of withdrawal of authorisation to use the logo of Asus, threat to cut supply, etc. The European Commission ('**EC**') thus noted that Asus violated Article 101(1) of TFEU by limiting the resale price competition which kept the prices at the level of RRP thereby increasing prices for customers which would have been lower, had the retailers set the prices independently. Further, it was noted that price monitoring ensured that prices do not fall below the desired levels, lest other retailers in the market would align their prices with the lowest pricing retailers, thereby causing a market-wise drop in prices.

In the case of Guess,[40] the EC noted that the agreement with multi-brand retailers stipulated that Guess will fix a price at which its products would be sold to consumers in order to create a uniform image of the product in the market. Deviation from this was to be penalised in the form of reimbursing

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38 M/s ESYS Information Technologies Pvt. Ltd vs Intel Corporation (Intel Inc.) and Ors. (2011) Case No. 48 of 2011, Order dated 16.01.2014.

39 CASE AT.40465 – ASUS.

40 CASE AT.40428 – GUESS.

Guess for the damages and discontinuation of all supplies. Further, Guess also monitored the prices of its retailers. The EC noted that RPM restricts competition by object as per Article 101(1) of TFEU. Further, where a selective distribution was already in place, which itself restricts competition, RPM was beyond justification.

Similar restrictions were found by the EC in the case of Pioneer,[41] in addition to RPM, Pioneer also prevented the retailers from making cross-border sales to consumers in other member states. This led to different resale prices in different member states. This was achieved by restricting orders of those retailers who made cross-border sales.[42]

The above-mentioned cases on RPM come after a long gap from the EC after its Yamaha decision in 2003.[43] Yamaha, in its distribution contracts with dealers, incorporated guidelines that dealers shall use recommended retail trade prices inside the shop and outside the shop, based on a price list supplied by Yamaha. Further, a circular was sent by Yamaha stating that bonuses will not be allowed to dealers if they offered rebates to customers over 15%. Further, it also supplied public price lists to certain dealers in addition to a stipulation in the contract that deviating from the price leads to automatic annulment of rebates. One of the contracts however allowed dealers to establish prices freely for end users, but only with prior approval from Yamaha.

The EC held that albeit the guidelines mentioned only recommended prices. However, in practice, they prevented the dealers from communicating any price inside or outside the shop, which deviates from the price list. Even if the dealer was free to offer discounts, he could not communicate it to the customer without violating the guidelines. It was observed that even though the circular does not prohibit discount altogether, it fixed an upper limit of the discount to 15%. This led to a minimum RPM which was achieved indirectly by fixing an upper limit to discount.

The EC also observed that the provisions of the contract are restricted by objects which do not require demonstration of any actual restrictive effect. Even if a clause which directly or indirectly restricts the dealers' freedom to fix resale prices is not actually implemented, it does not prove that there was no effect as it may create a visual and psychological effect. Article 81(1) (now the revised Article 101 (1)) is concerned not only with actual effects but also potential effects. Additionally, the strong market position of Yamaha is important as it poses a higher risk that the recommended price, coupled with provisions limiting the freedom to deviate from them, will lead to a uniform application of that price as it is used as a focal point.

41 CASE AT.40182 – PIONEER.

42 European Commission, 'Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices' (2018) <https://ec.europa.eu/commission/presscorner/detail/en/IP_18_4601> accessed 20 August 2023.

43 Case COMP/37.975 PO/ Yamaha.

While the above cases show instances where the EC penalised the parties for RPM, there are several cases where the conducts are not found to infringe Article 101(1). In *Volkswagen,*[44] the EC relied upon the fact that the circulars formed a part of the dealership agreements. However, on appeal, it was held that since the dealership agreements contained only non-binding price recommendations and no evidence of acquiescence by the distributors was found, no agreement could be established.[45]

Similarly, the EC's decision to fine *JCB*[46] for RPM by fixing discounts, on appeal, was overturned noting that although JCB had recommended prices, no additional evidence was put forward to establish the existence of an agreement.

Although, the above decision indicates, that where the existence of an agreement is difficult to prove, the otherwise prohibited vertical conduct might not be punished by the authorities. However, this depends on the particular facts of a case and no general conclusion should be drawn.

VI. Analysis of Legislative and Regulatory Approach to RPM in India and EU

It is clear from the foregoing sections that there is a marked distinction in the treatment of RPM in India and the EU. While under the ICA, RPM is assessed on the basis of the rule of reason, under the EU law, it is per se anti-competitive. Further, in India, the CCI's practice demonstrates that for a vertical agreement to cause AAEC, the CCI looks at the enterprises' market power. As such, while there is no market share threshold under the ICA, a high market share is quite likely to indicate towards market power. It has also been observed that in its initial orders relating to vertical agreements, the CCI took note of the EU's practice under VBER which typically exempts vertical agreements unless both parties possess at least 30% market share in their respective markets.[47] However, the CCI in another case ordered an investigation into a vertical agreement imposing RPM where the market share of the party was only 28%.[48] Thus, while there is no prescribed market share threshold, a market share above 20-25% might be a reasonable metric to arrive at a conclusion of AAEC. However, no such requirement of market share benefits an agreement which fixes minimum prices under the EU. The VBER clarifies that hardcore restrictions such as RPM won't be protected for want of market power. Additionally, notice on agreements of minor importance which

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44 Case COMP/F-2/36.693 Volkswagen.

45 Case T-208/01 Volkswagen AG vs Commission of the European Communities.

46 Case COMP.F.1/35.918 JCB.

47 Automobiles Dealers Association, Hathras, U.P. v Global Automobiles Limited & Anr. (2011) Case No. 33/2011, Order dated 03.07.2012.

48 M/s Jasper lnfotech Private Limited (Snapdeal) v M/s Kaff Appliances (India) Pvt. Ltd. (2014) Case No. 61 of 2014, Order dated 29.12.2014.

do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (**'De Minimis'**)[49] also does not provide the benefit of lack of market share to restrictions which are considered to be hardcore restrictions under VBER.

Further, in India, the Legal Metrology Act, 2009 (along with the rules framed thereunder) requires disclosure of the maximum retail price for pre-packaged commodities and as such, imposing a maximum resale price is allowed under the ICA provided prices lower than that can be charged[50]. This is justified since it prevents an arbitrary price rise.[51] Under EU law, maximum RPM is allowed as per Article 4(a) of VBER, so long as it does not lead to a minimum price directly or indirectly.

While RPM in the EU is per se anti-competitive, it is still available to parties to justify their actions and rebut the presumption. As such, RPM under limited circumstances may be justified. For instance, RPM may promote non-price competition or improvement in the service offered.[52] Additionally, it may resolve the problem of free-riding wherein one party may hog the investments made by the other party in attracting customers, and thereby use it to offer lower-priced products due to lower cost (by virtue of saving on individual investment in promotion etc.). Another potential situation could be providing territorial protection to distributors when the supplier wants to enter newer markets, which would require first-time investments by distributors.[53]

VII. CONCLUSION

This article comprehensively discusses the law and jurisprudence on RPM in India and the EU. While the competition law regime in the EU is one of the most developed and mature in the world, the law in India is only a decade old. As such, there is limited guidance in relation to various aspects of competition law in India on account of a lack of guidelines as also jurisprudence. In contrast, the law and guidance in the EU are comprehensive and robust. While TFEU provides the primary legislation governing anti-competitive agreements, it is also supplemented by a host of other documents such as guidance from the Commission in the form of VRG, VBER, De Minimis Notice etc. This exhorts us to argue for a similar approach in Indian law. While the Indian law derives a lot of jurisprudence on competition law from the EU, it is yet to emulate the legal certainty provided therein which would serve a dual purpose. Firstly, it would allow for definitive legal guidance on vertical agreements to

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49 Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice) 2014/C 291/01.

50 SM Dugar, Guide to Competition Act 2002 (7th ed, LexisNexis 2018) 433.

51 ibid.

52 Guidelines on Vertical Restraints, 2010/C 130/01 [106].

53 Guidelines on Vertical Restraints, 2010/C 130/01 [107].

enterprises and secondly, it would also create an automatic threshold to screen information filed before the CCI, thereby reducing the burden on the CCI's limited resources. While the CCI is a proactive body which is dealing with not just the conventional competition issues but also the new age competition problems, the lack of guidance on self-assessment as well as prior consultation in relation to agreements and practices results in a high level of uncertainty for businesses. The draft Competition (Amendment) Bill, 2020 is pending before the parliament, proposes that a new Section 64B be inserted under which the CCI may publish guidance, however, it also provides that such guidance will not be construed as a determination of any question of law or fact.[54]

Until such guidance notes and guidelines are formulated it would be useful if the CCI's orders detail the criteria as well as market share thresholds considered for determining whether an enterprise has the market power to cause an AAEC in cases of vertical restraint. Although such precedents will not lay down definitive principles to be followed as a rule, but would at least provide some guidance on the assessment of market power.

Thus, it is yet to be seen, how the Indian competition law in general and law relating to RPM evolves into a more definitive system with comprehensive guidance for businesses and practitioners alike.

54 The Competition (Amendment) Bill 2020.