

# Minimum Advertised Prices: How They Differ from RPM\*

by

**Professor Sean Ennis<sup>†</sup>**

**Professor Kai-Uwe Kühn<sup>‡</sup>**

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<sup>†</sup> [s.ennis@uea.ac.uk](mailto:s.ennis@uea.ac.uk). Centre for Competition Policy, University of East Anglia, Norwich, NR4 7TJ, UK.

<sup>‡</sup> [k.kuhn@uea.ac.uk](mailto:k.kuhn@uea.ac.uk). Centre for Competition Policy, University of East Anglia, Norwich, NR4 7TJ, UK.

## Executive Summary

Minimum advertised price (MAP) policies constrain retailers to advertise prices above the minimum level set by a product manufacturer. As a vertical restraint on pricing they are often considered by law and economic theory as a type of resale price maintenance (RPM). We argue in this paper that there are core differences between MAP and RPM because MAP applies only to advertising but places no restriction on in-store retail pricing. As a result MAP has different implications from RPM and merits a distinct legal treatment.

Case law and regulations in the EU and US diverge in their treatment of MAP. In the EC and UK, case law treats MAP as a form of RPM. The Vertical Block Exemption Regulation makes no distinction between the two. But treating MAP as a form of RPM is far from obvious – both as an appropriate legal policy and from an economic perspective.

In the US, for example, MAP has been evaluated under the rule of reason - even before the 2007 Supreme Court decision in *Leegin* switched the presumption for RPM from per se illegality to a rule of reason approach.

The economic literature has mostly ignored MAP. Only recently has a small literature focused on MAP as a mechanism for limiting the price comparison possibilities for customers who decide on which store to patronize. This recent work suggests that MAP is used to price discriminate between customers who shop around and are well informed about prices at different stores and those who do not shop around and use advertised prices to make their shopping decisions. As a result of MAP restrictions, the latter then pay a higher price.

While one may be tempted to conclude that price discrimination via MAP harms consumers, we know from welfare theory that this is not necessarily the case. The possibility of positive welfare effects casts doubt on the notion that a general prohibition of MAP is appropriate. We argue in this paper that the case for a more differentiated approach to MAP restrictions is even stronger than the welfare theory on price discrimination suggests, because the existing literature appears to overlook another primary motivation for using MAP: externalities that arise from retailer advertising.

A retailer's price advertising of a *specific product* is aimed at bringing customers into the shop and thus winning sales *for the entire shopping basket*. We call this phenomenon "marketplace competition". The retailer advertises a very low price on popular items that generate high frequency of visits to the store. Sometimes this price can even be below marginal cost. The reason for such aggressive advertised pricing is to win customers that will also buy other products with a high margin for the retailer. This practice obviously distorts price setting between different brands in a store.

The practice may also hurt brand manufacturers and their incentives to invest. After a retailer advertises a product at a very low price, consumer willingness to pay for the product may fall due to (i) consumers feeling that they are treated unfairly when they are offered a higher price later or (ii) consumers fearing regret when they buy at a higher price than they previously observed, because they believe they might have missed out on a better offer somewhere else. These motivations are known to reduce the willingness to pay for a product and thus reduce demand. As a result, the incentives for manufacturers to invest in product quality may decline.

In sum, MAP is an instrument to limit the degree to which retailers use low advertised prices for their products to attract customers to their marketplace to sell unrelated products. MAP can correct distortions of inter-brand competition and maintain incentives for manufacturers to invest in product quality. Unlike RPM, MAP preserves the incentives for inter-brand competition *within the store*. However, it allows brand manufacturers to prevent an externality imposed on them by the retailer's efforts to enhance the demand for unrelated goods sold at high margin. For these reasons, MAP should not be treated as equivalent to RPM. More generally, marketplace competition merits closer attention from policymakers when examining competition at the retail level.

## 1. Introduction

A Minimum Advertised Price (MAP) is a type of vertical restraint between a manufacturer and a retailer<sup>1</sup>, such as a supermarket. MAP restraints ensure that prices advertised by a retailer are above a contractually determined level. However, MAP does not constrain the actual retail price set in the store.<sup>2</sup> We argue in this paper that this feature of MAP makes it fundamentally different from resale price maintenance (RPM) and warrants a different treatment under competition law.

Our analysis is in contrast to current competition enforcement practice in many countries. In Europe, MAP has long been treated by both EU and national case law as equivalent to RPM. This is also reflected in the Vertical Block Exemptions Regulation and the Vertical Guidelines, which suggest that RPM is a by object infringement of competition law<sup>3</sup> and draw no distinction with MAP. This European view is in stark contrast to the US treatment of MAP, which considered MAP as a practice to be examined under the rule of reason long before the Supreme Court lifted the pre-se prohibition of RPM in favour of a rule of reason treatment in *Leegin*.

In stark contrast to the large literature on RPM, economic research has paid very little attention to the competitive effects of MAP. The great majority of the literature has empirically studied the limitations of enforcing MAP in practice. Even the existing theoretical literature did not recognize the fundamental difference between RPM and MAP for a long time. For example, Kali (1998) interpreted MAP as a combination of RPM and an advertising subsidy, aimed at internalizing externalities in the manufacturer retailer relationship. Asker and Bar-Isaac (2020) is the first paper to recognize that the central feature that makes MAP different from RPM is the retail price flexibility the retailer retains. They argue that minimum advertised price leads to greater price dispersion in the

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<sup>1</sup> We here define a marketplace as a forum that sells products, such as supermarkets, electronics superstores, stock markets or internet marketplaces.

<sup>2</sup> Often minimum advertised prices are associated with co-financing of advertisements for a product.

<sup>3</sup> Paragraph 223 of the VBER C/130/46 does give undertakings “the possibility to plead an efficiency defense under Article 101(3) in an individual case.”

retail market, effectively allowing the manufacturer to better discriminate between customers with high and low costs of searching for the best price among retailers.

In this paper we argue that this literature overlooks the main motivation for MAP restrictions, because it ignores the fact that retailers typically sell many different products belonging to different product markets. The theoretical literature on MAP has ignored the fact that competition between retailers concerns the whole product line and that retailer advertising policies are directed at winning over customers to buy their whole shopping basket at the advertising retailer. We call this feature of competition between retailers “competition between marketplaces”, which refers to competition to attract customers to a specific shopping venue.

In such a setting, customers decide on their shopping venue based on pricing experience in different shops, word of mouth about the attractiveness of different shopping venues, as well as retailer advertised prices. In this setting advertising some popular products has a positive externality on the demand for non-advertised products because some customers visit a store due to the advertised price. We interpret MAP as an instrument that can affect the prices that are advertised by a marketplace in order to attract customers to that marketplace from other marketplaces.

We argue that the impact of marketplace competition on the selection of advertised products can be substantial and can be socially harmful by distorting the relative prices of advertised and non-advertised products. The prices selected for advertisement can reduce the supplier incentives to invest in products that are likely to be selected for advertising by marketplaces. MAP can be viewed as a tool for preventing such harmful marketplace competition and consequently providing an environment conducive to more investment.

In this note, we provide an overview of the legal and economic literature on MAP. We then elaborate on the nature and possible implications of competition between marketplaces. We conclude that MAP is *not* just a variation on RPM: there are reasons to think MAP can serve socially beneficial

purposes and has inherently less anticompetitive potential. For these reasons, it should not be treated as a by object or per se restriction under competition law.

In section 2 we first discuss the legal treatment of MAP in different jurisdictions. Section 3 reviews the economic literature on the topic. Section 4 goes beyond the existing literature and discusses MAP in the more realistic context of competition between marketplaces. Section 5 summarises our conclusions.

## 2. The Legal Treatment of MAP in Different Jurisdictions

From a legal perspective treating a “minimum price” and a “minimum advertised price” as equivalent may be tempting because both appear to impose a minimum restriction on the prices a retailer can set. It may therefore not be surprising that many jurisdictions appear to treat MAP as a form of RPM.<sup>4</sup>

Especially European jurisdictions, including the EU, have classified MAP as a form of RPM. In the EU, MAP has been found to be a *de facto* form of RPM, where RPM is a restriction of competition by object. The European Commission found in PO/Yamaha (COMP/37.975), 2003 that MAP is a form of RPM.<sup>5</sup> Similarly, an Office of Fair Trading decision from 2003 (‘Agreements between Lladro Comercial SA and UK retailers fixing the price for porcelain and stoneware figures’, CP/0809-01, 2003) and a Competition and Market Authority decision in 2016 (‘Online resale price maintenance in the commercial refrigeration sector’, CE/9856/14) treated MAP as RPM.

Germany’s Bundeskartellamt is less clear about MAP. While minimum promotional prices are clearly prohibited under the RPM according to its guidance note on vertical price fixing<sup>6</sup>, the document

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<sup>4</sup> See Albert (2012), Asher et al. (2005), Elahi (2001) and Passo (2015) for legal analyses of MAP policies.

<sup>5</sup> The European Commission (2017, p.167) reports that despite this assessment 3% of 1,051 surveyed retailers reported that they had received “indications” about the price they should use in advertisements.

<sup>6</sup> Bundeskartellamt (2017) “Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector”.

does not mention MAP. But the Bundeskartellamt guidance on vertical price fixing can be interpreted as opening the possibility of treating MAP and RPM differently. In a section titled “Potential efficiencies of vertical price fixing”, the Bundeskartellamt states that: “From the supplier's view, the brand image can be damaged if the price for its product is "too low". This would, however, require that a low product price is capable of compromising the brand image of a product and/or a manufacturer. In any case, suppliers that are convinced that their product price is a signal of quality are able to shape the retail price by raising their own selling price, thus preventing a "cheapening" of their products.” (Par. 33).

Raising wholesale prices to prevent the retail price from falling will not be successful when a branded product is advertised by a retailer as an instrument of competition between marketplaces. Such low-price advertising is not aimed at selling the branded product but at selling other products at a high margin to customers that were attracted to the store by the advertising. The retailer will therefore be willing to sell at a very low price – even at a high wholesale price – to generate sales of high margin products. If there is a legitimate concern about price signalling quality, there is therefore a strong case that MAP should be treated differently from RPM under the Bundeskartellamt guidance note.<sup>7</sup>

Canadian competition law has also historically found MAP to be anticompetitive. For example, in *R. vs Epson Canada* the defendant was fined on the grounds that MAP discouraged price reductions.<sup>8</sup> However, a change to the Canadian competition law in 2009 has made unilateral minimum advertising pricing restraints, along with price maintenance more generally, presumptively legal, absent evidence of an “adverse effect on competition” or other violations of the law.

The US has, in contrast, historically made clear distinctions between the presumed effects of MAP and RPM. US court decisions have, for example, found MAP to be legal under a rule of reason

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<sup>7</sup> *Ibid*, par 69-75.

<sup>8</sup> *R.v.Epson (Canada) Ltd.* (1987), 19 C.P.R. (3d) 195 (Ont. Dist. Ct.) 388.

standard in *Holabird Sports Discounters v. Tennis Tutor, Inc.*, 1993 and *Commodore Business Machines, Inc v Montgomery Grant, Inc*, 1993. At the same time US law still treated RPM as per se illegal, which only changed with the 2007 *Leegin* decision of the US Supreme Court that determined RPM would be examined under a rule of reason standard.<sup>9</sup>

### 3. Economic Treatment of MAP

There are few studies of MAP from a theoretical perspective in the economic literature. Until recently MAP was only studied in two theoretical papers to the authors' knowledge, namely Kali (1998) and Cetinkaya (2009). More recently, Asker and Bar-Isaac (2020) have contributed a new perspective on the role of MAP. We discuss these contributions to the literature below. This sparseness of the theoretical literature on MAP literature is in stark contrast to the extensive literature on RPM, which has a long history in industrial organization.

Kali (1998) models MAP as RPM with an advertising subsidy to the retailer. The advertising subsidy is conditional on the retailer abiding by MAP. Kali's model is in the tradition of theoretical models that show how vertical constraints can internalize externalities in the manufacturer/retailer relationship and thus increase the incentives to invest in retailer demand enhancing activities like advertising and sales effort. His model is a standard model with advertising externalities.<sup>10</sup> If the only effort decision would be related to advertising an efficient solution could be implemented with RPM, a fixed fee and the wholesale price. However, Kali introduces sales effort in addition to advertising effort. In this case vertical externalities can only be internalized when an additional instrument is used,

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<sup>9</sup> In the US, there has been substantial debate about whether resale price maintenance should be illegal, with the US Supreme Court having ruled in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007) that resale price maintenance agreement is not per se illegal. It identifies factors that would make RPM more likely to constitute a violation of the law, such as RPM being imposed at the will of retailers or by a company with market power. Some US states have modified their laws, such as Maryland, to make RPM per se illegal by state statute. In Europe, there is much more scepticism about RPM than in the US, with a recent set of cases fining RPM by electronics manufacturers by the European Commission being AT.40465(Asus), AT.40469 (Denon & Marantz), AT.40181 (Philips), AT.40182 (Pioneer).

<sup>10</sup> See Mathewson and Winter (1984).



namely an advertising subsidy. MAP is simply interpreted in this paper as a combination of RPM with an advertising subsidy, but there is no additional insight relative to the literature.

In Cetinkaya (2009) MAP is modelled in a setting of monopolistic competition between retailers. Retailers set their price and service level. In such a setting it is a standard result that the externalities between a manufacturer and retailers can be internalized through a combination of a wholesale price above marginal cost and RPM, using a fixed fee to distribute profit between manufacturer and retailer. Cetinkaya adds to this model free entry of retailers as in Kühn and Vives (1999).<sup>11</sup> The manufacturer therefore also needs to optimally control the degree of entry into the market, which creates the need - as in Kali (1998) - to add an additional instrument to align the entry incentives of retailers with those of the manufacturer. Centinkaya achieves this through a service subsidy. Analogously to Kali he interprets RPM plus the service subsidy as MAP. Both of these papers therefore do not explain the phenomenon of MAP.

The first paper that has attempted to model MAP recognizing that it does not restrict retail price setting in the same way as RPM is Asker and Bar-Isaac (2020). They look at a framework in which it is costly for consumers to visit several stores to find out where the product is priced most attractively. Such costs of shopping around are referred to in the economic literature as search costs. Advertising tends to reduce search costs because the customer is informed about the price at the advertising store before a visit. MAP restricts such advertising and therefore makes it harder for consumers to identify the store with the lowest retail prices, thereby maintaining a higher degree of retail price dispersion. Asker and Bar-Isaac also identify cases in which MAP may soften retail competition.

The impact of MAP on total welfare depends on what it is used for. Asker and Bar-Isaac identify three roles of MAP: (i) to facilitate price discrimination between consumers; (ii) to encourage service provision; and (iii) to facilitate manufacturer collusion. The first effect is specific to MAP. Minimum

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<sup>11</sup> See Kühn and Vives (1999).

advertised prices allow different manufacturers to set different prices, with high price sellers selling only to consumers with higher search costs. This allows high price manufacturers to extract more surplus from high value consumers with high search costs. The second effect is similar to RPM. MAP protects retailer margins, raising the returns to providing services that can expand the market. It does, however, provide retailers with more choice than RPM by allowing retailers to set in-store prices taking into account their specific marginal costs. Asker and Bar-Isaac argue that by allowing low-cost producers to set a price lower than MAP, MAP can increase industry profits and dominate RPM as a way for manufacturers to incentivise retailer investment in demand enhancing effort by reducing the inefficiencies from imposing rigid prices. The third effect is also similar to potential effects of RPM. Like RPM, MAP can facilitate collusion by enabling more effective monitoring of collusive agreements by controlling the advertised retail price. Asker and Bar-Isaac recognise that in (i) and (ii) the conclusions may be affected by their model only considering a monopoly manufacturer and advertising solely being a tool to communicate prices. Asker and Bar-Isaac note that MAP can be pro-competitive in the first two scenarios.

Asmat and Yang (2019) test the basic ideas of Asker and Bar-Isaac empirically on data from internet searches for Seagate HDD hard disks.<sup>12</sup> In their work they verify that there appear to be search costs and that a majority of customers purchase at the first vendor they find. Since Seagate imposes MAP for some product lines but not for others, they can show that MAP leads to greater price dispersion between internet retailers.

Other work on MAP has not focused on the competitive effects but the difficulties of enforcing MAP restrictions.<sup>13</sup> They are therefore not relevant for the issues discussed in this paper.

#### **4. Competition Between Marketplaces**

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<sup>12</sup> This is so the model generates price dispersion regardless of whether a MAP exists.

<sup>13</sup> Examples include Israeli et al. (2016) and Charness and Chen (2002).

While Asmat and Yang have provided evidence that the basic price discrimination mechanism of Asker and Bar-Isaac appears to have some support for internet search, we believe that a major reason for the use of MAP in the real world has not been captured by this literature. The models used by these authors all assume that shopping and search are done for a specific product. This is not the case for grocery shopping and many other searches for products where customers go to marketplaces repeatedly to purchase different products.

We suggest that MAP has a particularly important role to play when there is competition between marketplaces. Especially in grocery retail it is common that the retailer advertises only part of the product line (of thousands of products) to attract customers to the marketplace. Even over the course of years, only part of the product line would be advertised, with a focus on the products that bring the most people into the store. Stores advertise systematically those products that generate the highest frequency of visits. Once the customer has chosen the (physical or digital) store, the customer will buy other products than just the advertised ones and these generate retailer profits.

This leads to very specific features of competition when customers choose a marketplace (i.e. a shopping venue) before they choose a product to buy. Customers make the choice of marketplace depending on their expectations of the total cost of the basket they are likely to buy. In the absence of marketplace advertising these expectations will be formed by past purchase experience and word of mouth information about the relative cost of shopping at different venues. These sources of information leave customers uncertain about the prices they will face in a shop. Advertising affects expectations in a different way. Price advertising for specific products is a *commitment* to a low price for customers who visit the store. It can therefore tip the choice of shopping venue.

But advertising that brings the customer to the store not only generates demand for the advertised product but also for other products that are not advertised. Price advertising can thus have positive externalities for other products on the marketplace. This creates retailer incentives to advertise products with broad appeal at a low price to bring customers to the shopping venue in order

to enhance demand for non-advertised products with higher margin. The retailer can then exploit the lack of price comparison on non-advertised products to generate margins on the whole basket of goods purchased by the customers brought to the platform.

Competition between marketplaces thus leads to much lower prices for products chosen for advertising. The reason is that the effective perceived marginal costs of the advertised product is lower from the perspective of the retailer because it will include the marginal benefit of winning sales for other products with higher margin. The advertised price is thus generally considerably below the normal competitive price for that product and may even fall below the purchase price of the marketplace.

This distortion relative to normal competition may have detrimental effects. First, when some products are advertised, the weight in customer price comparisons between marketplaces shifts from past price experience and word of mouth information to the advertised prices. That will generate lower incentives to keep prices of products that are not advertised low because they affect customer decisions on where to buy less when there is advertising for other products. As a result, the commitment to low prices on advertised products will lead to higher prices on non-advertised products. The advertising incentives of the retailer thus distort inter-brand competition and increase the market power exercised on unrelated products.

Second, the advertised price distorts customer perceptions of the price they should reasonably expect when the good is not advertised. There is considerable evidence that customers react negatively when facing a normal price when the good has previously been sold at a discount. Essentially, the willingness to pay falls even when customers do not have a lower priced substitute available for purchase. This phenomenon appears to arise from behavioural biases like preferences for fairness and aversion to regret. First, customers sometimes experience a sense of being treated unfairly when they are offered a higher price after having experienced a lower price. Second, customers who search for the best price and only find a higher price than they experienced before

often have a feeling of anxiety that they might have missed a better offer. They experience regret if they do find out that someone else might have bought the product at a lower price. The economic literature has shown that there is often regret aversion in the sense that customers avoid making a purchase in order to avoid the possibility of feeling regret.

In both cases, the willingness to pay for the product falls so that a discounted price at a marketplace will lead to demand decreasing at other shopping venues when the normal competitive price is observed by customers. Marketplace advertising thus has a negative externality on demand of the manufacturer at other shopping venues that does not arise from competition (namely substitution between buying at different marketplaces) but because of reduced willingness to pay of customers.

Effectively, the retailer shifts rent from the brand image of the brand owner to itself by using it to generate greater volume on unrelated products while reducing the value of the brand image to the brand owner. This will obviously reduce the brand owner's marginal return on investments into the building of the brand image and product enhancements generally. This means that there will be inefficiently low investment into the quality of the brand.

MAP is a vertical restraint that allows the brand owner to prevent the use of excessively low price on the brand for the purpose of generating business for other products on the marketplace. It thus corrects the distortions of intra-brand competition on the marketplace and maintains the incentives of the manufacturer to invest in product quality. At the same time, unlike RPM, it preserves the incentives for inter-brand competition within the store.

The incentive for a manufacturer to maintain quality and invest in a brand is reduced when others can destroy the brand image in order to shift rent to the retailer. One may reasonably consider that maintaining incentives for manufacturers to produce a wide range of products, with different quality levels, is part of serving the interest of consumers. However, allowing marketplaces to unilaterally lower the quality incentives of a manufacturer is not in the obvious interests of consumers.

MAP may then be regarded as a tool that manufacturers can use to prevent retailer use of their product in a way that distorts competition in the market.

## **5. Conclusion**

The legal treatment of MAP has differed from that of RPM even in some jurisdictions where RPM was historically illegal. This already points to the fact that MAP and RPM do not have the same effects. However, economic analysis has looked at this difference only recently. That literature has focussed on MAP increasing search costs and thus increasing price dispersion relative to a situation without advertising restrictions.

In this paper we have argued that this literature captures only one, and possibly not the most important, brand owner incentive to use MAP: to correct distortions in pricing arising from competition between marketplaces.

In retail markets, marketplaces often compete by advertising prices for a small proportion of their product line. This pricing is designed to bring customers to the marketplace and make money on products that have not been advertised. We have argued that such advertising policies of retailers distort inter-brand competition and competition between non-advertised products and reduce the incentives of brand manufacturers to invest in quality improvements for their products. MAP is a tool to maintain those incentives while not restricting inter-brand competition between manufacturers on the marketplace.

Further research on MAP may help to illuminate the role of marketplace competition. Given the substantial incentives of marketplaces such as large retailers to attract additional customers, the role of marketplace competition merits more serious consideration when analysing competition at the retail level.

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