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LEEGIN CASE AND ITS IMPACT ON EUROPEAN COMMUNITY COMPETITION POLICY IN REGARD TO VERTICAL MINIMUM PRICE-FIXING

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Annotation. *This paper analyses the decision of the Supreme Court of the United States of America (US) in Leegin Creative Leather Products v. PSKS case (2007) and its possible influence on evolution of the European Community (EC) antitrust law concerning minimum resale price maintenance. The paper's goal is to find out whether a new approach in EC antitrust law after US Supreme Court's decision in Leegin case is needed. For these purposes the author focuses on several core related issues: first, on the assessment of the main principles of vertical restraints in US law, such as per se rule and rule of reason, before and after Leegin; second, on the regulation of vertical price-fixing in EC antitrust case-law, and finally - on the question whether the new approach to vertical price-fixing in EC law is necessary after US Leegin decision.*

Keywords: *vertical restraint, resale price maintenance (RPM), minimum price-fixing, per se illegality, rule of reason.*

Introduction

In 2007 in *Leegin Creative Leather Products, Inc. v. PSKS*¹ (hereinafter – “Leegin case”) the US Supreme Court by 5 votes against 4 overruled a nearly one century old precedent, under which vertical minimum price-fixing was declared *per se* illegal under the US antitrust law – the Sherman Antitrust Act² (hereinafter – “the Sherman Act”). In *Leegin* the Court concluded that vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed, and thus they must be assessed under the *rule of reason*. After this decision vertical price-fixing became no more *per se* illegal and thus in some cases it may be considered as lawful under the antitrust law. This Court’s decision induced many debates and gained both – supporters and opponents.

It is a well-known fact that EC competition law intercepted many traditions of US competition law and practice. Thus a very natural and topical for EC law question arises – will (or even – shall) the *Leegin* decision have any impact on assessment of vertical restraints under the EC antitrust law? Will it be necessary to revise the EC law and practice or maybe *Leegin* case just made US and EC principles of assessment of vertical price-fixing similar and thus any reform is not necessary? The answer to these questions is the main goal of this paper which the author endeavours to reach by analysing US antitrust law and practice on vertical price-fixing before and after *Leegin* case and comparing the newly adopted rules with the present relevant EC regulation and case-law. It shall be emphasised that most scholars are focused on the thorough analysis and critics of *Leegin* case, however none of them deeply analyses the impact of this case on the EC competition law concerning vertical price-fixing.

1. Legal Assessment of Minimum RPM Under the United States Antitrust Law Before and After *Leegin* Decision

Article 1 (§1) of the Sherman Act states that “*every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.*” Since the beginning this provision seemed very broad (all commercial contracts somehow restrain trade) and, if applied as it is, it could “outlaw many useful and harmless business arrangements”³. Therefore, the provision was left for interpretation to the US federal courts. Later the US courts developed a “reasonableness” doctrine, under which only those restraints that harm competition in the relevant market should be considered as unreasonable and thus illegal under the US antitrust law. Those “unreasonable” and illegal restraints later in

1 *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. (2007).

2 The Sherman Antitrust Act. Ch. 647, 26 Stat. 209, as amended, 15 U. S. C.

3 Joelson, M. R. *An international antitrust primer: a guide to the operation of United States, European Union, and other key competition laws in the global economy*. Third Edition. The Netherlands: Kluwer Law International, 2006, p. 13.

case-law were divided into two main categories: a) *per se* illegal restraints and b) restraints that could be analysed under the *rule of reason*.⁴

Under the US competition law a *rule of reason* is a general legal standard for the assessment of competition restraints, and the *per se* rule is an exception.

1.1. The *Rule of Reason*

Rule of reason is a doctrine that was stated and applied in the case of *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), the accepted standard for testing whether a practice restrains trade in violation of §1 of the Sherman Act. “Under this rule, the fact finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.”⁵ Appropriate factors to take into account include “specific information about the relevant business” and “the restraint’s history, nature, and effect”⁶. That is, under the *rule of reason* negative and positive effects of the restraint on competition shall be evaluated and “balanced” and the restraint may be acknowledged as unlawful only if its anticompetitive effects outweigh procompetitive ones.

Under the *rule of reason* a burden of proof is divided between the parties in the following way:

First, the plaintiff (state institution or private individual) shall present *prima facie* evidence that a certain practice actually harms the competition within the relevant market (proof of “actual detrimental effect” such as increased price or reduced output);

Second, the defendant must prove that the practice is justified, i.e. has procompetitive effect outweigh the harm to competition that was proved by the plaintiff;

Finally, the plaintiff still has chance to negate the defendant’s arguments and evidence by proving that the defendant could achieve the same procompetitive benefits “by means of a “less restrictive alternative””⁷.

1.2. *Per se* Illegality

Some restraints are governed by “unlawfulness *per se*.” A *per se* rule was created by the US courts after it was realised that there are restraints “that would always or almost always tend to restrict competition and decrease output”⁸, and thus the courts designated “certain conduct as being so damaging to competition that it must be condemned as unreasonable regardless of what justification may be proffered in a particular case”⁹. As the US Supreme Court interprets, the *per se* rule, by treating certain categories of restraints

4 Broder, D. F. *A guide to US antitrust law*. London: Sweet & Maxwell, 2005, p. 55.

5 *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977).

6 *State Oil Co. v. Khan*, 522 U. S. 3, 10 (1997).

7 Steinžórsson, H. *The Rule of Reason Related to the Interpretation of Article 81(1) of the ToR and block Exemptions* [interactive]. April 2005 [viewed 2009-03-25]. <http://haraldurs.googlepages.com/Semester_Paper_Haraldur_final_combined.pdf>.

8 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988).

9 Joelson, M. R., p. 15.

as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work.¹⁰ To justify a *per se* prohibition a restraint must have “manifestly anticompetitive” effects¹¹, and “lack any redeeming virtue”¹².

It may be summarised that a *per se* approach suggests a presumption of unlawfulness of certain restraints and allows no possible defence, i.e. it establishes impossibility to negate the presumption. In such cases a prosecutor (in criminal case) or plaintiff (in civil case) establishes that “the restraint is unreasonable, simply by proving that the defendant entered a *per se* illegal agreement”¹³.

1.3. Application of US Per Se Rule and *Rule of Reason* in Regard to Vertical Restraints

The historical analysis of the US Supreme Court’s decisions shows that the main trend of the case-law was a gradual liberalization of competition policy in regard to vertical restraints: the US Supreme Court practice has been gradually turning from *per se* rule into the *rule of reason* in regard to most of vertical restraints.

In *Dr. Miles* case¹⁴ the Supreme Court established the rule that vertical restraint setting minimum resale prices shall be treated as *per se* illegal. During the almost century-long validity of *Dr. Miles* precedent, until *Leegin* case, the US Supreme Court abandoned the rule of *per se* illegality for all vertical restraints that manufacturers impose on their distributors with the exception of minimum vertical resale price maintenance (hereinafter – RPM) restraints. In 1919 in the *Colgate* case¹⁵ the Supreme Court formulated a so-called “*Colgate rule*” under which only “agreements” between the supplier and its reseller may constitute a violation of Article 1 of the Sherman Act and the unilateral practices of suppliers are not caught by this provision, since the Sherman Act only forbids “contracts” that restrain trade or commerce.¹⁶ In *Sylvania* case¹⁷ (1977) the Court acknowledged the potential legality of non-pricing vertical restraints. Twenty years later, in the *State Oil v. Khan* case¹⁸, the Supreme Court liberalized its position towards the maximum vertical price fixing which since then has to be evaluated in accordance with the *rule of reason*. *Leegin* case was the last step for the US Supreme Court to liberalise its position towards vertical restraints, however, this decision of the court has been evaluated extremely controversially.

10 *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U. S. 717, 723 (1988).

11 *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977).

12 *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U. S. 284, 289 (1985).

13 Broder, D. F., p. 63.

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

15 *United States v. Colgate & Co.*, 250 U. S. 300, 307 (1919).

16 Therefore, after *Colgate* case, a unilateral prescription from the supplier addressed to the reseller may not violate the Sherman Act until the reseller accepts and/or adheres to the suggested prices (in other words - concludes a vertical agreement on price fixing).

17 *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U. S. 36, 49 (1977).

18 *State Oil Co. v. Khan*, 522 U. S. 3, 10 (1997).

1.4. *Leegin* Decision

Leegin is a company, specialising in design, manufacture, and distribution of leather goods and accessories, including belts sold under the brand name “Brighton”. PSKS operated Kay’s Klose - a women’s apparel store in Texas, which sold “Brighton” products. *Leegin* sold only to small specialty stores that it believed could offer customers better service and would “support the Brighton product”. It had an announced policy of selling only to dealers who did not discount its suggested retail prices, because “discounting harmed Brighton’s brand image and reputation”.¹⁹ When PSKS was found to be discounting the “Brighton” line of products (by 20 percent), *Leegin* requested PSKS to cease the discounting, PSKS refused, and *Leegin* stopped selling to the store. PSKS sued *Leegin*, alleging a violation of §1 of the Sherman Act as interpreted in *Dr. Miles*. The district court relied on *per se* rule established by *Dr. Miles* and awarded PSKS damages in the amount of \$1.200.000. The Court of Appeals affirmed. Finally the Supreme Court overruled *Dr. Miles* and declared that “vertical price restraints are to be judged according to the *rule of reason*” (see *Leegin* decision, Part IV, B).

The US Supreme Court also confirmed that vertical agreements setting RPM can have both procompetitive justifications and anticompetitive effects and that “unlawful price fixing, designed solely to obtain monopoly profits, is an ever present temptation” (see court’s decision Part III, B).

As the Supreme Court explained in the *Leegin* case, the *justifications for vertical price restraints* are similar to those for other, non-price vertical restraints and are the following (see *Leegin* decision, Part III, A):

A. Stimulation of interbrand²⁰ competition (which is the primary purpose of the antitrust laws²¹) by reducing intrabrand²² competition: intrabrand price competition is totally eliminated, however the dealers gain the opportunity to compete over services and other non-price aspects of competition, thus strengthening manufacturer’s position against rival manufacturers.

B. Possibility to avoid “free riding” problem. Discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate, because the consumers get all the necessary information about the benefits of a manufacturer’s product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees and then they buy the product from a retailer that discounts, because it is able to afford it since it did not invest in providing sales services or developing a quality reputation.

C. Facilitating market entry for new firms and brands. New manufacturers and manufacturers entering new markets can use the minimum RPM in order to induce retailers

19 *Leegin* case, see Part I.

20 *Interbrand competition* means the competition among manufacturers selling different brands of the same type of product.

21 *State Oil Co. v. Khan*, 522 U. S. 3, 10 (1997).

22 *Intrabrand competition* stands for the competition among retailers selling the same brand.

to make investments of capital and labour, which is often required in the distribution of products not yet known to the consumer.

D. Encouraging retailers to provide ancillary services and thus increasing interbrand competition: minimum RPM, ensuring for the retailer a guaranteed margin, together with threats to terminate the contract if RPM is not observed, may be the most efficient way to expand the manufacturer's market share by inducing the retailer's initiative and experience in providing valuable services.

However, the Supreme Court pointed out that notwithstanding the pro-competitive-ness of minimum RPM, its potential anticompetitive consequences must not be ignored or underestimated. Minimum RPM may cause the following *anticompetitive problems* (see Part III, B of the *Leegin* decision):

A. RPM may facilitate a cartel at either manufacturer or retailer level and lead to higher prices for consumers. An unlawful cartel between manufactures will seek to discover whether some of them are undercutting the cartel's fixed prices. RPM could facilitate the monitoring of competitors and identifying price-cutting manufacturers who benefit from the lower prices they offer. Possibility to apply minimum RPM may induce to make a cartel between retailers which may agree to fix prices (at a higher level) and ask for support or force the manufacturer to apply minimum RPM in the distribution contracts thus disguising a horizontal price fixing which is untruthfully *per se* illegal as vertical price fixing. In judge J. Breyer's dissenting opinion, the increase of prices to consumers is considered as one of the main problems of RPM.²³

B. RPM may be abused by an undertaking having market power. A dominant retailer, for example, might request RPM and a manufacturer might accommodate the retailer's demands since it needs access to the retailer's distribution network. A manufacturer with market power might use RPM to give retailers an incentive not to sell the products of smaller rivals or new entrants.

2. Regulation of Minimum RPM in Accordance With the EC Competition Law

Some scholars state that *Leegin* decision had placed the United States "at odds with the European Union, since under the EU's Vertical Agreements Block Exemption Regulation, minimum RPM is considered a "hard-core" restraint, a rough equivalent of a *per se offence* in the U.S., that does not qualify for a block exemption from Art. 81 of the Treaty of Rome."²⁴ However to find out the correctness of this statement, the EC competition rules on assessment of vertical restraints shall be scrutinized.

23 His view was not supported by the majority of the Supreme Court, in which opinion, the attempts of the manufacturer to improve its product quality or to promote its brand and thus to increase demand shall not be automatically illegal because of the fact that it also leads to higher prices.

24 Lao, M. *Leegin* and Resale Price Maintenance: A Model for Emulation or for Caution for the World? *International Review of Intellectual Property and Competition Law*. 2008, 39 (3): 253-258.

2.1. “European” *Per Se* Rule

Paragraph 1 of the Article 81 (hereinafter – “Article 81(1)”) of the Treaty establishing the European Community (hereinafter – the “EC Treaty”) prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which: (a) directly or indirectly fix purchase or selling prices or any other trading conditions”.²⁵

Paragraph 3 of the Article (hereinafter – “Article 81(3)”) establishes conditions when the provisions of the aforementioned paragraph 1 may be declared inapplicable, i.e. exempted from the prohibition²⁶.

It is obvious from the wording of the cited Article 81(1) that agreements, including vertical ones, may have as their object or effect the prevention, restriction or distortion of competition. EC courts had developed a case-law interpreting this provision and stating what kind of vertical agreements (restraints) by their object restrict competition. In its Notice on the application of Article 81(3) of the Treaty²⁷ the EC Commission, following the case-law, explains that restrictions of competition by object are those that by *their very nature* have the potential of restricting competition. These are the restrictions which have such a high potential of negative effects on competition that it is unnecessary for the purposes of applying Article 81(1) to demonstrate any actual effects on the market. This presumption is based on the serious nature of the restriction and on experience showing that restrictions of competition by object are likely to produce negative effects on the market and to jeopardise the objectives pursued by the EC competition rules.

Vertical restraints having the object of restricting competition are also sometimes called *per se* restricting competition. Vertical price fixing is amongst them.²⁸ In *Binon* case²⁹ the court clearly declared that the provisions which fix the prices to be observed in contracts with third parties (in the case it was an agreement between the publisher and distributor, i.e. vertical agreement) “constitute of themselves a restriction on competition” within the meaning of the Article 81(1) of the EC Treaty.

The Commission points the following negative anticompetitive features of price fixing and market sharing: they reduce output and raise prices leading to a misalloca-

25 Analogous prohibition is established in the Article 5 of the Law on Competition of the Republic of Lithuania. *Official Gazette*. 2004, No. 181-6732.

26 Article 81(1) may be declared inapplicable in the case of any agreement which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not: (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question. Analogous exemption conditions are indicated in the Article 6 of the Law on Competition of the Republic of Lithuania.

27 Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty. [2004] OJ, C101/97.

28 Communication from the Commission - Notice - Guidelines on the application of Article 81(3) of the Treaty. [2004] OJ, C101/97. Para 21.

29 Case 243/83, *SA Binon & Cie v. SA Agence et messageries de la presse* [1985] ECR 02015.

tion of resources, lead to a reduction in consumer welfare, because consumers have to pay higher prices for the goods and services in question.³⁰ In the Guidelines on Vertical Restraints³¹ (see para 111-112) the Commission distinguishes two main negative effects of RPM on competition: (1) a reduction in intrabrand price competition, and (2) increased transparency on prices. In the case of fixed or minimum RPM, distributors can no longer compete on price for that brand, leading to a total elimination of intrabrand price competition. Increased transparency on price and responsibility for price changes makes horizontal collusion between manufacturers or distributors easier, at least in concentrated markets. The reduction in intrabrand competition may, as it leads to less downward pressure on the price for the particular goods, have as an indirect effect a reduction of interbrand competition.

So in the EC competition law vertical price fixing is a restraint that by its object, *per se* restricts competition. *Per se* restriction of competition means that the parties to the price fixing agreement cannot argue that the fixing of prices does not restrict competition: “the Community Courts have decided, on the basis of the wording of the Treaty and subsequent experience acquired through case law, that it does; it follows that the parties to a price fixing agreement who wish to assert that it could produce efficiency-enhancing effects can do so only by proving that it satisfies the criteria of Article 81(3), the burden of proof being on them to prove that it is so”.³²

The *per se* restrictiveness of competition of certain vertical restraints later was transferred from the case-law into EC antitrust legislation and the *per se* restricting competition vertical restraints were granted the status of “hardcore restraints”. For instance, in the *De minimis* notice³³ the EC Commission established a rule under which agreements between non-competitors, i.e. vertical agreements, which “restrict buyer’s ability to determine its sale price, without prejudice to the possibility of the supplier imposing a maximum sale price or recommending 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“ may not be treated as „*de minimis*“ agreements, i.e. agreements not appreciably restricting competition within the meaning of Article 81(1), even if the market share of each of the parties do not exceed the established 15 percent threshold.

A very similar provision is provided in Article 4 of the Commission Regulation No. 2790/1999 – a Block Exemption Regulation (BER) for vertical agreements and concerted practices³⁴. The Commission commented that Article 4 of BER contains the list of hardcore restrictions which lead to the exclusion of the whole vertical agreement from the scope of application of the BER. The hardcore restriction set out in Article 4(a) of the

30 Guidelines on the application of Article 81(3) of the Treaty, para 23.

31 Commission notice - Guidelines on Vertical Restraints [2000] OJ, C291/1.

32 Whish, R. *Competition law*. Sixth Edition. London: LexisNexis, 2009, p. 117.

33 Commission Notice on agreements of minor importance which do not appreciably restrict competition under Article 81(1) of the Treaty establishing the European Community (*de minimis*). [2001] OJ, C368/07.

34 Commission Regulation (EC) No 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices. [1999] OJ, L336/21.

BER concerns RPM, i.e. agreements having as their object the establishment of a fixed or minimum resale price/price level to be observed by the buyer.³⁵

Analogous provisions are established in the Lithuanian legislation. The Law on Competition³⁶ prohibits agreements to directly or indirectly fix prices of certain goods or other conditions of sale or purchase. The restriction of buyer's ability to fix its sale price may not be considered as *de minimis*³⁷. The BER in Lithuania is applied directly and eliminates the possibility of the agreement to benefit from the block exemption in case it provides vertical price fixing.

The above-cited provisions show that under the EC (and Lithuanian) competition law vertical price fixing is a serious, hardcore restraint, which prevents the opportunity:

- 1) to acknowledge a vertical agreement as *de minimis*³⁸;
- 2) to apply a block exemption to the agreements containing such kinds of restrictions.

However, all these legal consequences do not prevent the possibility to use the defence under the Article 81(3) of the EC Treaty. This was constantly confirmed by the EC courts. In already mentioned Binon case the court acknowledged that the fixing of the retail price may benefit from the Article 81(3) of the EC Treaty “in so far the distribution of newspapers and periodicals is concerned”³⁹. The court explained that in such cases the fixing of the retail price by publishers constitutes the sole method by which a wide selection of newspapers and periodicals can be made available to readers, and this circumstance must be taken into account when examining an agreement under the Article 81(3). Actually it was the only case where it was clearly confirmed that vertical price fixing may satisfy the conditions for exemption under the Article 81(3). Later, in *Matra Hachette SA v Commission of the European Communities* case⁴⁰ the Court of First Instance (CFI) generally acknowledged that there is no such a category of agreement which, on a *priori* grounds, is incapable of satisfying the criteria for exception under Article 81(3), which means that there are no practices (including vertical price fixing) which are automatically unlawful and any defence cannot be used to justify them. However, such severe restrictions of competition are unlikely to fulfil the conditions of Article 81(3) and usually do not meet them.

Summarising the analysis of the EC and Lithuanian legislation on vertical restraints it shall be concluded that a so-called “*per se* rule” under EC (and Lithuanian) compe-

35 Commission notice - Guidelines on Vertical Restraints [2000] OJ, C291/1.

36 The Law on Competition of the Republic of Lithuania. *Official Gazette*. 2004, No. 181-6732.

37 Resolution of the Competition Council concerning the amendment of resolution No. 1 of 13 January 2000 of the Competition Council of the Republic of Lithuania “on requirements and conditions in respect of agreements of minor importance that are not considered infringing article 5(1) and (2) of the law on competition” No. 1S-172. *Official Gazette*. 2004, No. 181-6732.

38 Although some authors reasonably point out the limitation of the Commission's *de minimis* rule and state that even those vertical agreements which by their object restrict competition may be found *de minimis* and thus may not be caught by Article 81(1) if their impact on competition in certain case is for sure insignificant. For more information on this issue, see Whish, R., p. 117, 137-142.

39 Case 243/83, *SA Binon & Cie v SA Agence et messageries de la presse* [1985] ECR 02015.

40 Case T-17/93, *Matra Hachette SA v Commission of the European Communities* [1994] ECR II-00595.

tition law means that there are restraints which *always* restrict competition and thus it may not be argued that they do not have such an object, however, they are not *per se* illegal, since the possibility to prove their lawfulness under the Article 81(3) still exists. This is contrary to the US *per se* rule, which establishes absolute and undisputed (non-defensive) unlawfulness of certain restraints that under the case-law shall be regarded as *per se* unlawful.

2.2. “European” Rule of Reason?

It is sometimes quoted that a “European rule of reason”⁴¹, however, it is not analogous to the US *rule of reason*. EC courts are cautious about the recognition of the existence of the *rule of reason* in the EC competition law. In *European Night Services* case⁴², where the issue of existence of a *rule of reason* in EC competition law was analysed, the CFI emphasised that the existence of such a rule has not, as such, been confirmed by the Community courts, “quite to the contrary, in various judgments the Court of Justice and the Court of First Instance have been at pains to indicate that the existence of a rule of reason in Community competition law is doubtful”.

In *Metropole* case⁴³ the court explained that while applying the Article 81(3) of the EC Treaty, i.e. analysing if the agreement already caught by the prohibition laid down in Article 81(1) of the Treaty satisfies the conditions for exemption from the prohibition, it is necessary to weigh the pro- and anti-competitive effects of an agreement. In the court’s words, Article 81(1) of the EC Treaty is only a precondition that the pro- and anti-competitive aspects of a restriction may be weighed under the Article 81(3), otherwise Article 81(3) of the Treaty would lose much of its effectiveness if such an examination had to be carried out already under Article 81(1) of the Treaty. The structure of Article 81 of the EC Treaty means that the legal analysis of the agreement may already be finished where it does not fall under the prohibition of Article 81(1) and may only be declared as unlawful and invalid if it does not satisfy the conditions of the Article 81(3). Evaluating the possibility to apply prohibition, the anticompetitive effects (or object) of the agreement is assessed. Later, if caught by prohibition, it is analysed, if the agreement may be exempted from it, *inter alia*, evaluating the procompetitive effects of the agreement. It also shall be emphasised that it is the plaintiff who must prove the anticompetitive features of the agreement and the conditions for application of Article 81(1), and the defendant is obliged to prove that the agreement is “procompetitive”, i.e. meets all the conditions of the exemption (Article 81(3)).

41 See e.g. Jones A.; Sufirin B. *EC Competition Law. Text, Cases, and, Materials*. Third Edition. Oxford University Press, 2008, p. 215; Goyder D. G. *EC Competition Law*. 4th Edition. Oxford University Press, 2003, p. 127.

42 Joined cases T-374/94, T-375/94, T-384/94 and T-388/94. *European Night Services Ltd v Commission of the European Communities*. [1998] ECR II-03141.

43 Case T-112/99, *Métropole télévision (M6), Suez-Lyonnaise des eaux, France Télécom and Télévision française 1 SA (TF1) v Commission of the European Communities* [2001] ECR II-02459.

The aforementioned scheme of assessment of agreements only partly reminds of US *rule of reason* with its “balancing” of agreement’s anti- and procompetitive effects. Thus EC and US *rule of reason* differ:

- US *rule of reason* in all cases involves the balancing test, however in EC law the assessment may be limited to the analysis of agreement’s anticompetitive features (in case it is found that the agreement does not fall within Article 81(1);
- US *rule of reason* is not as precise as European one – the conditions for “legality” are not designated as exactly as the exemption conditions in Article 81(3) of the EC Treaty.

More distinctive features of EC and US *rule of reason* may be found, e.g. that under EC law not only economic, but also social, cultural, etc. features of the agreement may be considered as procompetitive, however, these are not analysed in more detail in this article. The aforementioned arguments prove that EC antitrust law “*rule of reason*” only remotely reminds of US *rule of reason*, however, they cannot be identified as analogous. Notwithstanding all the distinctive features of US and EC *rule of reason*, taking the process of assessment of vertical restraints in general, it may be concluded that usually it encompasses the balancing between the anticompetitive effects and procompetitive benefits of the agreement and the burden of proof is strictly divided between the parties – a party stating the illegality of the agreement proves anti-competitiveness of the restraint, the defending party proves its efficiency and positive impact on competition and consumers. Thus, it could be agreed with those scholars, who allege that the US and EC *rule of reason* have much in common, and that the new decentralisation regime in EC antitrust law providing the evaluation of all of the issues of the Article 81 at the same time “brings the EC practice into approximation of U.S. Sherman Act §1 practice”⁴⁴.

3. Impact of the Leegin Case Decision on the Evolution of US and EC Antitrust Laws: Any Need for Reformation of EC Competition Law After US *Leegin* Case?

Finally, having performed a thorough analysis of EC and US regulation and case-law on assessment of vertical restraints and bearing in mind the peculiarities of the EC *per se* rule and *rule of reason* (embedded in the structure of Articles 81(1) and 81(3)) it shall be concluded that Supreme Court’s decision in *Leegin* case may not significantly impact the EC rules on vertical restraints but rather it may inspire to have more liberal approach to some specific cases related to minimum RPM. It would be reasonable to state that *Leegin* decision “brings US law into alignment with that of the EC”⁴⁵ for the below presented reasons:

First, after *Leegin* decision in both – EC and US – systems an opportunity of vertical price fixing lawfulness exists: under the EC antitrust law, vertical price fixing, even

44 Joelson, M. R., p. 299.

45 Whish, R., p. 118-119.

though *per se* restricts competition, still may be declared legal if the conditions for exemption of Article 81(3) are satisfied. In US, the lawfulness of minimum RPM may be proved through the balancing test under the *rule of reason*. For this reason the *Leegin* decision is welcome. It is widely acknowledged that minimum RPM still may have procompetitive effects that were mentioned in Section 1.4 of this paper, thus it would not be reasonable to declare really procompetitive minimum RPMs as *per se* illegal and deprive them of any opportunity of defence. If any minimum RPM may bring benefit to competition, the opportunity to conclude and perform such an agreement shall be guaranteed for the parties. And the success of implementation of that opportunity is left for the parties to the agreement.

Second, the party claiming the benefits of the minimum RPM must present relevant evidence of its procompetitive effects. Thus in both legal systems – in EC and US – the burden of proof is divided similarly, although the distribution of burden of proof became the object of critique between the *Leegin* decision opponents. For instance, it is sometimes stated that the *rule of reason* operates as a de facto *legality* rule in the US. These cases are expensive and difficult to litigate, and „often degenerate into duelling matches between competing economic experts with contradictory economic theories on market definition, elasticities of demand or supply, entry barriers, and so forth. This litigation reality will likely deter most private RPM suits under a rule of reason standard.“⁴⁶ Moreover, in judge Breyer’s opinion, the object of substantiation also may become a challenge for judges and juries who in application of *rule of reason* to minimum RPM cases may not be expected to apply complex economic criteria without making a considerable number of mistakes (see part I of the dissenting part of *Leegin* decision).

What may be opposed to these “pessimistic” arguments? Of course, they are partly true, but as judge Breyer noted in his dissenting opinion in *Leegin* decision (see part I of the dissenting), *per se* illegal restraints are considered by the courts as such since „the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e.g.*, so difficult to prove)“. This shall also mean that the minimum RPM will still have obvious anticompetitive consequences which may be rather easy to prove and still lack, except for very rear cases, the potential justifications (since it reserves all its features even if it shall be assessed under the *rule of reason*). Thus a heavy burden of proof will be mostly put on the defendant, not the plaintiff. And thus the arguments on aggravated burden of proof shall be overruled. The plaintiff’s burden of proof is only aggravated in comparison to the burden of proof existing under the *per se* rule, however, in comparison to the burden of proof put on the defendant it shall not be treated as highly aggravated.

Moreover, in overruling *Dr. Miles*, the Supreme Court made clear that it was not proclaiming a rule of *per se* legality and it both suggested to the lower courts to “establish the litigation structure to insure [that] the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses [...and] devise rules over time for offering proof, or even presumptions, where justified, to make

the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote competitive ones” (see *Leegin* decision, Part III, C). Acknowledging certain difficulties in substantiation process some authors propose quite reasonable means to facilitate the substantiation process for the defendant by establishing the *presumption of minimum RPM unlawfulness*. In such a case the burden is on the defendant to introduce “concrete and persuasive factual evidence showing (a) actual economic benefits to consumers arising from this price-fixing, and (b) that these economic benefits outweigh the anticompetitive effects of price-fixing.”⁴⁷ This could to a greater extent make similar the application of the *rule of reason* to minimum RPM in US and EC law, where minimum RPM are considered to be *per se* restricting competition and there is no need to prove their anti-competitiveness, moreover - no possibility to argue this negative effect (See Section 2.1 of this paper).

Summarising the above presented analysis it may be finally concluded that the *Leegin* case made the assessment of vertical price fixing restraints in US and EC anti-trust law much more similar, since now in both legal systems vertical price fixing can be evaluated under the relevant *rule of reason* and in both (though in very rare cases) an opportunity of vertical price fixing lawfulness exist.

It may also be the question if *Leegin* case may make impetus onto EC law to revise the “hardcore nature” of minimum RPM or even make pressure “to create a block exemption for minimum resale price maintenance”⁴⁸. Taking into consideration the stable anticompetitive effects of minimum RPM (which were listed in Sections 1.4 and 2.1 of this paper) that have been established constantly over the years in EC and US courts’ practice and its very limited capability to promote competition and benefit from the exemption under Article 81(3)), we see no need to revise the current regulation of minimum RPM under the EC law by, for instance, deleting minimum RPM from the list of hardcore restrictions in *De minimis* notice and/or BER and thus facilitating the plaintiff’s substantiation process and leaving for the defendant all the burden of proof on the efficiency of minimum RPM and consequently – its lawfulness under the EC competition law.

Conclusions

After thorough analysis of *Leegin* case and the US and EC antitrust law, the author has come to the following conclusions and suggests the following (non-) recommendations:

1. Vertical restraints on price fixing under the EC competition law are not automatically unlawful: although they restrict competition *per se* and there is always (though

47 Cavanagh E. D. *Vertical Price Restraints After Leegin* [interactive]. 2008, see. p. 31. [viewed 2009-03-13]. <http://works.bepress.com/cgi/viewcontent.cgi?article=1001&context=edward_cavanagh> .

48 Shubha G. *Vertical Restraints, Competition, and the Rule of Reason*. [interactive] Prepared for *The Law and Economics of Antitrust*, ed. Hylton, K. Elgar Press, 2008. [viewed 2009-03-25]. <<http://ssrn.com/abstract=1005380>>.

very insignificant) an opportunity to find them legal under the Article 81(3) of the EC Treaty.

2. EC competition law has the concept of *per se* restrictiveness of competition, but there are no agreements that may be automatically, *per se* illegal under the Article 81, thus *per se* doctrines in EC and US antitrust law are conceptually different.

3. The assessment of vertical restraints under Article 81 of the EC Treaty have some features of the *rule of reason* analysis which is typical of US antitrust law, thus it may be conditionally concluded that all the agreements (including vertical agreements on price fixing) in EC law are assessed under the *rule of reason*.

4. After *Leegin* case vertical price fixing is no more illegal *per se* and shall be evaluated in accordance with the *rule of reason*, which means that the vertical price fixing restraints in both legal systems – the EC and US - are now assessed under the similar rules, requiring the balancing between pro- and anticompetitive effects of the restraints and totally eliminating their *per se* unlawfulness. Therefore, there is no need to revise the EC law in regard to the adoption of *Leegin* decision since this decision had just confirmed the similar liberal approach to minimum RPM which was established in EC law years ago.

5. Moreover, taking into consideration numerous constant negative affects of minimum RPM and the consequent case-law on their *per se* restrictiveness of competition, there is no legal or factual ground to revise this EC *per se* rule and eliminate minimum RPM form the list of hardcore vertical restraints.

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LEEGIN BYLA IR JOS ĮTAKA EUROPOS BENDRIJŲ KONKURENCIJOS POLITIKAI DĖL VERTIKALIŲJŲ SUSITARIMŲ MINIMALIŲ KAINŲ FIKSAVIMO

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Santrauka. Straipsnyje analizuojamas JAV aukščiausiojo teismo 2007 m. priimtas sprendimas *Leegin Creative Leather Products v. PSKS* byloje, kuriuo teismas pripažino, jog apribojimai dėl minimalių perpardavimo kainų palaikymo (PKP) neturėtų būti laikomi per se draudžiamais, bet turi būti vertinami pagal protingumo (angl. rule of reason) taisyklę, kuri reikalauja pasverti antikonkurencines ir prokonkurencines atitinkamo apribojimo

savybės ir tik tada daryti galutinę išvadą dėl tokio apribojimo draudžiamumo. Šis teismo sprendimas sukėlė daug diskusijų, tačiau straipsnio autorius dėmesį sutelkia ne į Leegin sprendimo kritiką, bet priima jį kaip faktą ir nagrinėja šio fakto galimą įtaką Europos Bendrijų (EB) konkurencijos teisės vertikalinių apribojimų politikai. Siekdamas šio pagrindinio straipsnio tikslo autorius pirmiausiai nagrinėja, kokiais pagrindiniais principais vadovaujantis apribojimai dėl minimalių PKP buvo vertinami JAV konkurencijos teisėje prieš Leegin sprendimą ir kas pasikeitė jį priėmus. Toliau autorius analizuoja minimalių PKP apribojimų reglamentavimą EB konkurencijos teisėje. Autorius atkreipia dėmesį, kad EB išplėtotą per se taisyklę iš esmės skiriasi nuo JAV per se draudžiamumo taisyklės, kadangi EB galioja tik susitarimų (apribojimų) per se konkurencijos ribojimo prezumpcija, tačiau nėra tokių susitarimų, kurie visais atvejais būtų automatiškai pripažįstami draudžiamais ir pažeidžiančiais EB sutarties 81 straipsnį. Autorius taip pat prieina prie išvados, jog remiantis EB sutarties 81 straipsniu vertikalieji apribojimai vertinami remiantis taisyklėmis, kurios labai panašios į JAV egzistuojančią protingumo taisyklę. Galiausiai autorius daro išvadą, jog priėmus Leegin sprendimą minimalių PKP apribojimų taikymo vertinimo principai EB ir JAV supanašėjo, kadangi abiejose teisės sistemose yra galimybė įrodyti, kad tokio pobūdžio apribojimai gali būti prokonkurenciniai ir dėl to – nedraudžiami, t. y. vertinami pagal protingumo taisyklės principus.

Atsižvelgęs į faktą, jog minimaliam PKP būdingos gana aiškios konkurenciją ribojančios savybės, kurios ilgainiui buvo patvirtinamos praktikoje, ir tik retais atvejais gali tenkinti išimties (EB sutarties 81(3) straipsnio) sąlygas, autorius nemano, jog yra poreikis keisti EB teisės normas (De minimis taisyklės, Bendrosios išimties vertikaliesiems susitarimams reglamentą), kuriose apribojimai dėl minimalių PKP laikomi „sunkiaisiais“ (angl. *hardcore*), per se (savo esme, prigimtimi) ribojančiais konkurenciją.

Reikšminiai žodžiai: *vertikalusis apribojimas, perpardavimo kainų palaikymas (PKP), minimalių kainų fiksavimas, draudžiamumas per se, protingumo (rule of reason) taisyklė.*

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