RESALE PRICE MAINTENANCE: *A COMPARATIVE STUDY BETWEEN THE EUROPEAN UNION AND MALAYSIAN COMPETITION LAWS*

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Abstract

Resale Price Maintenance (hereinafter 'RPM') can be defined as the practice whereby a manufacturer and a distributor agree that the former will sell the latter's products at certain prices. RPM may take a variety of forms including fixed, minimum, maximum, or recommended resale prices. In general, practice of RPM may restrict the distributors' freedom of setting their prices at the downstream level henceforth attracting the application of competition law. The paper aims to analyse the legal status of RPM in the context of competition law in European Union and Malaysia including the ways RPM is able to restrict competition. This paper contains a detailed analysis of Article 101 of the Treaty on the Functioning of the European Union (hereinafter 'TFEU'), the Competition Act 2010 (hereinafter 'CA 2010'), related regulations, guidelines, case law, and scholarly writing in this area. The paper concludes that not all forms of RPM are prohibited under these two jurisdictions. Some of them are deemed illegal or anti-competitive because they are likely to harm competition and some of them may be permitted subject to the fulfilment of certain conditions.

Keywords: Competition, resale price maintenance, distribution, fixed, minimum

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Introduction

In the rapidly growing business competition, manufacturers should not only think about manufacturing of their goods and services (hereinafter 'products') but also on how to distribute their products to consumers. Regardless of how ground-breaking the produced products are, manufacturers may still incur loss if the products do not reach the consumers. Thus, an important phase of the business activity is product distribution. Employing distributors is one of the methods of distribution that manufacturers could adopt to distribute their products (Jones & Sufrin, 2016). The manufacturers may enter into agreements or concerted practices (collectively referred to as 'arrangements') (both terms 'agreements' and 'concerted practices' will be defined later in the following paragraph) with distributors to distribute the products. Contents of the arrangements to protect the business interests of both parties may be discussed. In doing so, the arrangements may contain vertical restraints limiting the freedom of one or more of the parties as pointed out by Jones and Sufrin. The term 'vertical restraints' has been described by MacCulloch and Rodger (2015) as the restrictions which are employed in the distribution arrangements including RPM. RPM can be defined as the practice whereby "a manufacturer and a distributor agree that the distributor will sell the manufacturers' products at certain prices" (Hubert, Leppard & Lécroart, 2014). RPM may take a variety of forms including fixed, minimum, maximum, or recommended resale prices. In general, practice of RPM may restrict the distributors' freedom of setting their prices at the downstream level henceforth attracting the application of competition law. However, it is important to note that not all forms of RPM are prohibited in EU and Malaysia. Some of them are deemed illegal or anti-competitive because they are likely to harm competition and some of them may be permitted subject to the fulfilment of certain conditions. In short, parties to the distribution arrangements in both jurisdictions are not at full liberty to agree on everything in order to maximise their profitability at the expense of competition. So far, there has been little discussion about the position of RPM in Malaysia particularly with reference to the EU Competition law. Thus, the paper aims to analyse the legal status of all types of RPM in the context of competition law in European Union and Malaysia including the

ways they can restrict competition. In this paper, EU competition law is used as a focal point of discussion. This is because its enforcement agency, the EU Commission, has wide experience in dealing with the practice of RPM. A number of cases involving RPM have been investigated and decided by the EU Commission. Besides, the EU Commission has produced a detailed legal framework on RPM that can be found in its Regulation 330/2010 on the application of Art 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1 (hereinafter 'Regulation 330/2010') as well as the Vertical Guidelines [2010] OJ C130/1 (hereinafter 'Guidelines 2010'). This research adopts a qualitative approach to analyse Article 101 of the TFEU, the CA 2010, related regulations, guidelines, case law, and scholarly writing in this area. The first part of the paper begins with the discussion on RPM in the context of EU competition law. The second part explains RPM in the context of Malaysian competition law. The third part deliberates on the similarities and differences between EU and Malaysian competition laws over RPM. The fourth part concludes the paper and presents a set of recommendations to provide more clarity to the existing legal framework on the practice of RPM in the distribution arrangements in Malaysia.

RPM in the Context of EU Competition Law

In EU, matters concerning competition are dealt with by the EU Commission. The EU Commission is responsible for enforcing EU competition law which aims to make better EU markets, by ensuring that all business players compete fairly on their merits (EU Commission, 2017). This has been reflected in Article 101 (1) of TFEU in which it prohibits arrangements between at least two independent undertakings which prevent, restrict, and distort competition in European States (the words 'European States' and 'Member States' will be used interchangeably throughout this paper). The inclusion of RPM in the distribution arrangements may fall under the prohibition contained in the said Article because of its potential anti-competitive effects on competition in EU (this will be discussed in detail in paragraphs 2.1.2 and 2.1.3 of this paper). The EU Commission's stance towards RPM can be found in Regulation 330/2010 and further elaborated in the Guidelines 2010. To begin with, it is better to explain Article 101 of TFEU followed by the rest in order to know the scope of applications of the said Article to RPM contained in the distribution arrangements. This is because only distribution arrangements which meet all the conditions prescribed by the Article are subject to its prohibition. Indirectly, what is not covered by Article 101 of TFEU may be permitted subject to the national competition laws of the Member States. For the sake of clarity, the text is reproduced in full as follows:

(1) The following shall be prohibited as incompatible with the internal market: 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 internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development, or investment;

(c) share markets or sources of supply;

(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

In light of the above Article, it prohibits agreements or concerted practices between two or more independent undertakings which prevent, restrict, and distort competition in European States. In essence, the application of Article 101(1) of TFEU is subject to a number of conditions. First, there is an agreement or concerted practice between undertakings. Before proceeding further, it is necessary to

clarify the following terms 'agreement', 'concerted practices' and 'undertakings'. First, an agreement means "a concurrence of wills between at least two parties"[1]. Second, a concerted practice signifies "a form of coordination between undertakings that had not reached a formal agreement" [2]. Whereas, the expression 'undertakings' refers to "as every entity engaged in an economic activity regardless of the legal status of the entity and the way in which it is financed" [3]. (The terms 'undertakings', 'parties', and 'enterprises' are used interchangeably throughout the rest of this paper unless the context dictates otherwise). The minimum requirement of two independent undertakings is mandatory because of the letter 's' which is added after the word 'undertaking' prescribed in the Article which indicates plurality. It is noted that Article 101 (1) of TFEU uses the general word 'agreement' encompassing both horizontal and vertical agreements. Hence, distribution arrangements meet the first condition because they are generally termed as 'vertical agreements' in light of competition law (Geradin, Layne-Farrar, & Petit, 2012).

Second, the distribution arrangements may affect trade between Member States. The Court of Justice in the case *of Consten & Grundig v Commission*[4] interpreted the phrase 'affect trade between Member States' as "to guarantee that competition in internal market is not distorted". It is worth stressing that the Article only applies to the distribution arrangements which have an appreciable effect on trade between Member States. This was affirmed in *Volk v Vervaecke*[5] where the Court decided that a distribution agreement falls outside Article 101 of TFEU when its effect on the market is determined to be insignificant. Since this case, the EU Commission has provided guidance on the application of the de minimis on the so-called agreements of minor importance in its Notice on Agreements of Minor Importance 2001[6] (Whish & Bailey, 2015). However, it is important to note that in 2014, the EU Commission revised the Notice to reflect the ruling of the Court of Justice in *Expedia Inc. v Autorité de la concurrence and Others*[7]. In this case, it was held that "an agreement that may affect trade between Member States and that has an anti-competitive object constitutes, by its nature and independently of any concrete effect that it may have, an appreciable restriction on competition". This decision infers that although the market share held by each of the parties to the distribution arrangements does not exceed 15 %, but if such arrangements have as their object of restricting competition, they cannot benefit from a safe harbour of the Notice. In other words, such arrangements cannot be considered as minor because they have by definition an appreciable effect on competition (EU Commission, 2014).

Third, the distribution arrangements must have as their object or effect the prevention, restriction, or distortion of competition. In *Societe Technique Miniere (STM) v Maschinenbau Ulm GmbH*[8], it was decided that both the words 'object' and 'effect' should be read disjunctively and not conjunctively to the effect that it is sufficient to prove either one of them only. In determining the existence of a restriction by object, it is necessary to look at the purpose of the distribution arrangements which have as their object the restriction of competition (Jones & Sufrin, 2016). For hardcore restrictions, they are considered by the EU Commission to constitute restrictions by object (EU Commission, 2013)[9]. That is to say, the Notice will not apply to the distribution arrangements which contain hardcore restrictions as prescribed by the EU Commission in its regulations. Restrictions by object are considered to be more serious than restrictions by effect because of their very nature of preventing competition in the market from functioning properly and effectively[10]. For that reason, they are presumed to infringe Article 101 (1) of TFEU.

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1 *Bundesverband der Arzneimittel-Importeure eV and Commission v Bayer* [2004] 4 CMLR 13.
2 *Suiker Unie and others v Commission* [1975] ECR 1663.
3 *Hofner and Elsner v Macroton* [1991] ECR I-1979.
4 [1966] ECR 299.
5 [1969] ECR 295.
6 OJ 2001 C368/13 (hereinafter 'Notice').
7 (C-226/11).
8 [1966] ECR 235.
9 Paragraph 13 of the Notice.
10 Commission Guidelines on the application of Article 101(3) of the Treaty [Official Journal No C 101 of 27.4.2004].

From the discussion above, it can be summarised that the distribution arrangements which contain RPM may attract the application of Article 101(1) of TFEU if the arrangements involve at least two undertakings, and if the arrangements have an appreciable effect on trade between Member States and the agreements have as their object or effect the prevention, restriction, or distortion of competition. When all the requirements are met, the distribution arrangements concerned may fall under the prohibition of the said Article. However, the distribution arrangements are not immediately prohibited but will be further examined to determine whether the arrangements fall under the safe harbour of the Regulation 330/2010. Having said that, should the arrangements fall outside the safe harbour, the parties may still have an opportunity to defend their arrangements pursuant to Article 101 (3) of TFEU.

The Scope of Application of Regulation 330/2010

In essence, Regulation 330/2010 serves as a safe harbour exempting all vertical agreements subject to the fulfilment of its conditions[11]. The word ‘vertical agreement’ includes distribution arrangements as defined by Article 1(1)(a) of Regulation 330/2010. It is important to note that the Regulation 330/2010 shall be read alongside the Guidelines 2010 to have a better understanding on the approach of the EU Commission towards RPM in the distribution arrangements (Faella, 2013). According to Article 3 of the Regulation 330/2010, the first condition that has to be met is that the market share of each party to the distribution arrangements does not exceed 30%[12] and such arrangements do not contain hardcore restrictions of competition[13]. For the former, there is no presumption of illegality under Article 101 (1) of TFEU[14]. Whereas, in respect of the latter, presumption of illegality under the said Article will arise[15]. It is important to note that the distribution arrangements fall outside the safe harbour does not immediately imply that the arrangements are caught by the prohibition of Article 101 (1) of TFEU. In both situations, parties can bring forward evidence that their arrangements will likely lead to efficiencies which will be examined under conditions stipulated in Article 101(3) of TFEU[16]. There is no presumption that the former will fail to meet the conditions of the said Article. However, in respect of the latter, they are unlikely to be exempted under Article 101(3) of TFEU[17] on the grounds that hardcore restrictions are considered to be severe restrictions of competition[18].

Fixed and Minimum RPM

A reading of Article 4 (a) of Regulation 330/2010 shows that fixed and minimum RPM are considered as hardcore restrictions. The effect of the inclusion of fixed and minimum RPM in the distribution arrangements does not only give rise to the presumption of illegality but also the arrangements are unlikely to be exempted under Article 101(3) of TFEU[19]. The EU Commission’s strong stance against the fixed and minimum RPM can be seen in paragraph 224 of the Guidelines 2010 in which the EU Commission succinctly sets out a number of ways where the fixed and minimum RPM can restrict competition and some of them can be summarised as follows:

Firstly, price transparency is increased with fixed and minimum RPM[20]. When manufacturers are made aware of the fixed prices at the downstream level, this may give rise to competition concerns. Not only that, manufacturers of different brands (known as ‘inter-brand competition’) may engage in a collusion (Lorenz, 2013) agreeing on certain prices for the sale of their products. ‘Collusion’, according to the Oxford Dictionary (2017), means a “secret or illegal cooperation or conspiracy in order to deceive others”. Other colluding manufacturers may easily identify a manufacturer that

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[11] Article 3 of Regulation 330/2010.
[12] *Ibid*., Article 3(1).
[13] *Ibid*., Article 4.
[14] Paragraph 23 of the Guidelines 2010.
[15] *Ibid*., paragraph 47.
[16] *Ibid.*
[17] *Ibid.*
[18] Recital 10 of the Regulation 330/2010.
[19] Paragraph 223 of the Guidelines 2010.
[20] *Ibid*., paragraph 224.

decides to diverge from the collusion (Buttigieg, 2015). Therefore, Stigler (1964) argued that price transparency is the crucial factor for stable collusion.

Secondly, a manufacturer that has control over the market may utilise the fixed and minimum RPM to exclude their smaller competition[21]. This occurs when the inter-brand competition makes use of the same distributor to distribute their products. A strategy to guarantee higher profit margin at the downstream level may be devised whereby the manufacturer with market control imposes fixed and minimum RPM to their distributor as a method to ensure the latter prefers their brand over other rival brands[22]. This leads to the distributor recommending the manufacturer's brand to customers over other brands by rival manufacturers, which leads to losses in sale and the risk of needing to terminate business operations due to market manipulation.

Thirdly, the intra-brand competition may be restricted, and competition may also be eliminated among distributors through the use of fixed and minimum RPM[23]. This happens when distributors of the same manufacturer are unable to offer lower prices for the same products, as the manufacturers have already dictated the prices. This direct restriction of freedom for distributors leads to the customers' inability to obtain products at lower prices.

Fourthly, manufacturers may be pressurised by strong or well-organised distributors through the use of fixed and minimum RPM to set prices above the competitive level[24]. In this case, the fixed and minimum RPM lead to collusion among distributors at the downstream level. The distributors thus can rely on manufacturers to set the price on their behalf rather than setting the price themselves.

Lastly, innovation and market entry at the distribution level may be hindered due to the lack of price competition between different distributors[25]. Due to fixed and minimum RPM, the distributors are constrained from offering discounts regardless of the innovativeness or efficiency levels of their distribution process. This further restricts the entry of more innovative and efficient distributors into the market as they can no longer fix lower prices to consumers.

Maximum and Recommended RPM

On the other hand, the practice of maximum and recommended RPM is not considered as hardcore restrictions and may benefit from a safe harbour of the Regulation 330/2010 subject to two conditions which are the market share of each of the parties does not exceed 30% and such practice does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties[26]. However should the market share held by each of the parties to the distribution arrangements exceeds the threshold, the inclusion of maximum or recommended RPM in the arrangements does not give rise to the presumption of illegality. Thus, such arrangements may be permitted subject to the satisfaction of all conditions under Article 101(3) of TFEU.

The main argument supporting maximum RPM is to avoid double marginalization[27]. Maximum RPM plays its role by ensuring that distributors do not set an excessive profit margin over what was paid to the manufacturers, as this may lead to severe disadvantages to the consumer due to higher end prices (Faella, 2013). The recommended RPM remains a recommendation; it is not obligatory for the distributor to follow the recommendation. This means manufacturers may set the maximum or recommended RPM to the distributor as long as this is not equivalent to the fixed or minimum RPM due to any parties providing additional pressure or incentives[28].

[21] Paragraph 224 of the Guidelines 2010.
[22] *Ibid.*
[23] *Ibid*.
[24] *Ibid*.
[25] *Ibid.*
[26] *Ibid*., paragraph 226.
[27] *Ibid*., paragraph 229.
[28] Article 4(a) of Regulation 330/2010.

Nevertheless, the practice of fixing maximum and recommended RPM by the manufacturers to their distributors is treated with caution by the EU Commission because they may give rise to competition concerns as well. First, maximum and recommended RPM serve as a focal point for distributors pricing and might be followed by most or all of them[29]. Second, the maximum or recommended prices may facilitate collusion between manufacturers and do not depart from them thereby softening competition at the upstream level[30]. The maximum and recommended RPM may be taken up as the preferred resale price rather than determining the resale price based on market conditions (Bernitz, 2012). This situation is likely to happen when the manufacturers have strong market power and therefore the fixing of maximum and recommended RPM may be viewed to be the preferred resale price proposed by such important manufacturers on the market rather than responding to market conditions when determining resale prices[31].

The Applicability of Article 101 (3) of TFEU

The fact that the arrangements fall outside the safe harbour does not immediately imply that the arrangements are caught by the prohibition of Article 101 (1) of TFEU. Such arrangements may be permitted subject to the fulfilment of conditions as set out by Article 101 (3) of TFEU. In other words, Article 101 (3) of TFEU provides a defence to parties to the distribution arrangements against a finding of an infringement of Article 101 (1) of TFEU[32]. The parties to the distribution arrangements can bring forward evidence that their arrangements will likely lead to efficiencies which will be assessed under conditions stipulated in Article 101 (3) of TFEU which reads:

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,

- any decision or category of decisions by associations of undertakings,

- any concerted practice or category of concerted practices,

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.

The first condition is that the distribution agreements must improve the production and distribution of goods or promote technical and economic progress. Second, consumers must receive a fair share of the benefits. Fair share implies that the resulting benefit must at least compensate consumers for any negative impact caused by the restrictions of competition[33]. For instance if the agreement leads to higher prices, consumers must be compensated through better quality or other benefits[34]. Third, the restrictions of competition must be indispensable to achieve the objective sets out in the agreement. Restrictions must not go beyond what is necessary to achieve the beneficial objectives of the agreement based on the concept of proportionality (Homewood, 2014). Fourth, the distribution agreements must not eliminate competition in the market.

Theoretically, an exemption to practice fixed and minimum RPM may be sought under Article 101(3) of TFEU (Bernitz, 2012). However, such exemption is very unlikely to be granted (Nagy, 2013) as

[29] Paragraph 227 of the Guidelines 2010.
[30] *Ibid*.
[31] *Ibid*., paragraph 228.
[32] Paragraph 1 of the Guidelines on the application of Article 101(3) of the Treaty.
[33] Paragraph 85 of the Guidelines on the application of Article 101(3) of the Treaty.
[34] *Ibid*., paragraph 86.

seen in both the EU Commission's decision and Guidelines 2010. The case of Hennessy-Henkell[35] reflects this. Hennessy and Henkell entered a distribution agreement whereby Henkel was appointed to sell Hennessey cognac in Germany. In the agreement, the fixed and minimum RPM clause stated that Hennessey would fix the resale prices for Henkell at the downstream level. The EU Commission decided that the clause restricted Henkell's freedom to set its resale prices, which thus fell under the prohibition of Article 101(1) of TFEU. Paragraph 223 of the Guidelines 2010 stated for the latter "It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3)". Thus, even though a party may seek for an exemption under Article 101 (3) of TFEU, the success of it is very unlikely if the distribution arrangements contain either fixed or minimum RPM. On the other hand, for practice of maximum and recommended RPM, since there is no presumption of illegality, it may benefit from the exemption under Article 101 (3) of TFEU if parties to the distribution arrangements satisfy all the conditions of the said Article.[36].

RPM in the context of Malaysian Competition Law

In Malaysia, competition matters are regulated by the Malaysia Competition Commission (hereinafter 'MyCC'). The MyCC is a body which was established under the Competition Commission Act 2010 to enforce provisions of the CA 2010. Its primary function is to protect the competitive process for the benefit of businesses, consumers, and the economy[37]. Likewise in Malaysia, the practice of RPM is viewed as a potential threat to competition. The MyCC's stance towards RPM has been succinctly expressed in its Guidelines on Chapter 1 Prohibition (hereinafter 'Guidelines'). While it is necessary to understand the Guidelines in order to know the EU Commission's stance towards RPM, an understanding of the Guidelines is not complete without having the knowledge first on the legal framework of section 4 of the CA 2010. In essence, section 4 of the CA 2010 prohibits any agreement which has its object or effect the restriction of competition in Malaysia. The full text of section reads as follows:

> (1) A horizontal or vertical agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services.
>
> (2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to—
>
> (a) fix, directly, or indirectly, a purchase or selling price or any other trading conditions;
> (b) share market or sources of supply;
> (c) limit or control—
>
> (i) production;
> (ii) market outlets or market access;
> (iii) technical or technological development; or
> (iv) investment; or
> (d) perform an act of bid rigging,
>
> is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services.
>
> (3) Any enterprise which is a party to an agreement which is prohibited under this section shall be liable for infringement of the prohibition.

[35] (Commission Decision) OJ 1980 L 383/1.

[36] Paragraph 229 of the Guidelines 2010 and the Court in Case 161/84 *Pronuptia de Paris GmbH v Pronuptia de Paris Irmgard Schillgallis* [1986] ECR 353.

[37] Preamble of the CA 2010.

In light of the above section, there are several conditions that have to be fulfilled for the application of the said section. First, the agreement is entered into by at least two enterprises. For the purpose of the CA 2010, the word ‘agreement’ includes concerted practices as defined by section 2 of the CA 2010 (hereinafter ‘arrangements’). The term ‘enterprises’ is used to denote “any entity carrying on commercial activities relating to goods or services” resembling the meaning of ‘undertakings’ under the EU competition law. The section also applies to both horizontal and vertical agreement which is similar to the EU’s position. The term ‘vertical agreement’ has been defined by section 2 of the same Act to include distribution arrangements. Second, the arrangements must have the effect or object of significantly preventing, restricting, or distorting competition. The expression ‘significant’ has been elucidated in paragraph 3.4 of the Guidelines explaining that the arrangements “must have more than a trivial impact”. Section 4(2) of the CA 2010 recognises that certain restrictive horizontal agreements between enterprises (agreements between competitors) are regarded as anti-competitive. Examples of such restrictions are price fixing, production control, market sharing, and bid rigging. Under these circumstances, they are deemed to have as their object of significantly preventing, restricting, or distorting competition in the market.

A reading of the above section indicates that the distribution arrangements which contain RPM do not fall under the section 4(2) of the CA 2010. Having said that, the distribution arrangements which contain RPM satisfying the preceding conditions may attract the prohibition of section 4(1) of the CA 2010 because of its potential anti-competitive effects. In general, different forms of RPM may have different impacts on competition[38]. Therefore, the MyCC’s treatment over RPM may be different from one to another. The next paragraph will explain the Guidelines in detail shedding light on the MyCC’s approach over RPM.

The Scope of Application of the Guidelines over RPM

In essence, the Guidelines provide general guidance for the industry on the approach that will be taken by the MyCC in respect of restrictive horizontal and vertical arrangements. Basically, it provides a safe harbour using the market share as a parameter in determining whether the anti-competitive arrangements have a significant effect on competition or not. Similar to the approach adopted by the EU Commission, the MyCC also sets a market threshold which provides a safe harbour if the market share of each of the parties is less than 25%[39].

In paragraph 3.14 of the same Guidelines, the MyCC has stated that it will take a strong stance against minimum RPM and find it anti-competitive. Not only that, other forms of RPM such as fixed, maximum, and recommended RPM which serve as a focal point for downstream collusion are also considered as anti-competitive by the MyCC[40].

There are three ways for the parties to the distribution arrangements to relieve their liabilities for the infringement of section 4 of the CA 2010 which are through invoking section 5 of the CA 2010, applying individual exemption under section 6 of the CA 2010 and block exemption under section 8 of the CA 2010. Each one of them has its own conditions. For the purpose of the paper, it will discuss the first two ways to get relief from liability under section 4 of the CA 2010 since no block exemption on vertical restraints particularly on RPM issued by the MyCC.

Relief from Liability under Sections 5 and 6 of the CA 2010

Basically, parties to the distribution arrangements may conduct a self-assessment based on the criteria set forth by section 5 of the CA 2010. There are 4 cumulative conditions that must be met by the parties that:

(a) there are significant identifiable technological, efficiency, or social benefits directly arising from the agreement;

[38] Paragraph 3.16 of the Guidelines.
[39] *Ibid*., paragraph 3.4.
[40] *Ibid*., paragraph 2.5.

(b) the benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting, or distorting competition;

(c) the detrimental effect of the agreement on competition is proportionate to the benefits provided; and

(d) the agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.

Having satisfied all the above conditions, the parties may then proceed with the arrangements and rely on this section as a defence should the MyCC decide to take action for violation of section 4 of the CA 2010.

Alternatively, the parties may avoid the risk of violating section 4 of the CA 2010, by applying in advance from the MyCC for an individual exemption under section 6 of the CA 2010. Upon receiving the application, the MyCC will examine and analyse the application based on the criteria set forth in section 5 of the CA 2010. If the MyCC is satisfied that all the criteria are met, then the individual exemption may be granted. Such exemption given may be accompanied with some conditions or obligations as the MyCC considers necessary for a period time as may be determined by the MyCC[41]. Nestle Products Sdn. Bhd. ('Nestle') had once appealed for this section whereby the company applied for exemption for its pricing policy called 'Brand Equity Protection Policy (BEPP)' from the prohibition under section 4 of the CA 2010. The MyCC found that the policy included elements of RPM which led to concerns in competition, as pursuant to the policy, the distributors were unable to set their own prices, which led to increased prices. Therefore, the BEPP pricing policy was likely to infringe section 4 (1) of the CA 2010, which led MyCC to request Nestle to dismantle its pricing policy in BEPP (MyCC, 2013).

Similarities and Differences between EU and Malaysian Competition Laws over RPM

This part seeks to highlight the similarities and differences between the EU and Malaysian competition laws over RPM based on the discussions above on the RPM framework in both countries.

Firstly, both countries set out the market share thresholds which provide the 'safe harbour' in their respective Regulation 330/2010 and the Guidelines. In EU, the safe harbour is provided in Regulation 330/2010 exempting distribution arrangements if the market share of each of the parties does not exceed 30%, the arrangements do not contain fixed and minimum RPM as well as maximum or recommended RPM which are equivalent to the fixed or minimum RPM as a result of pressure from, or incentives offered by, any of the parties. Whereas in Malaysia, the safe harbour is stated in the Guidelines if the market share held by each of the parties is less than 25%. However, the Guidelines are silent as to whether the distribution arrangements falling below the specified thresholds but containing minimum RPM can benefit from the safe harbour of the Guidelines despite the fact that the MyCC will take a strong stance against it and finds it anti-competitive.

Besides, in EU, the practice of minimum RPM is regarded as hardcore restriction. Thus, it does not only give rise to the presumption of illegality but also the practice is unlikely to be exempted under Article 101(3) of TFEU. Hence, even though the parties may seek for an exemption under Article 101 (3) of TFEU, but the success of it is very unlikely if the distribution arrangements contain either fixed or minimum RPM. In contrast, under the Malaysian law, although the MyCC finds the practice of minimum RPM anti-competitive but the Guidelines are silent as to whether it will be excluded from benefitting the safe harbour of the Guidelines nor is disqualified from exemption under section 5 of the CA 2010.

[41] Section 6(4) of the CA 2010.

Moreover, in EU, it is plainly elucidated in the Guidelines 2010 that the practice of maximum and recommended RPM covered by the Regulation 330/2010 should the market share of each of the parties fall within the scope of safe harbour and such practice does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered, by any of the parties. Conversely, in Malaysia, there is no such similar provision in the Guidelines.

In EU, the parties of the distribution arrangements may proceed with the RPM clause by complying with the criteria as spelt out in Regulation 330/2010, or should the criteria not be met, by satisfying all the requirements stipulated under Article 101(3) of TFEU as a defence against any action by the EU Commission. It should be noted that in EU, there is no longer necessary for the parties to the distribution arrangements to notify the EU Commission in order to obtain individual exemption. In other words, the burden is placed on the parties themselves to ensure their distribution arrangements do not violate Article 101 (1) of TFEU (Storey & Turner, 2014). Before Regulation 1/2003[42] was enacted on 1st May 2004, the EU Commission had to be notified for exemption to be granted under Article 101(3) of TFEU[43]. Due to this requirement, the EU Commission was swamped with 30,000 notifications of exclusive distribution agreements alone (Kaczorowska, 2016), which led to a divert in the Commission's resources from focusing on more severe cases pertaining to competition, such as cartel (Kennedy, Cahill, & Power, 2011). Regulation 1/2003 was introduced to overcome this issue and abolish the notification system. Malaysia, in contrast, provides three methods for parties to the distribution arrangements to proceed with the RPM clause. The first is by invoking section 5 of the CA 2010 together with the Guidelines as a defence against an action taken by the MyCC. The second is by applying for individual exemption under section 6 of the CA 2010. The third is by satisfying the criteria set out in block exemption under section 8 of the CA 2010. However, block exemption in respect of vertical restraints particularly RPM has not yet in place unlike Regulation 330/2010 in EU.

Conclusions and Recommendations

In conclusion, this paper discusses the legal framework of RPM in EU and Malaysian competition laws in distribution arrangements. In general, the practice of RPM is viewed as a potential threat to competition. Thus, distribution arrangements which contain RPM may violate Article 101 (1) of TFEU and section 4 of CA 2010. Having said that, both countries provide a safe harbour to the parties to the distribution arrangements. In EU, Regulation 330/2010 serves as a safe harbour exempting distribution arrangements if market share of each of the parties does not exceed 30%, the arrangements do not contain fixed and minimum RPM as well as minimum or recommended RPM which are equivalent to the fixed or minimum RPM as a result of pressure from, or incentives offered by, any of the parties. On the other hand, the practice of maximum and recommended RPM is not considered as hardcore restrictions and may benefit from exemption under the Regulation 330/2010 should the market share of each of the parties does not exceed 30% and such practice does not amount to a minimum or fixed sale price as a result of pressure from, or incentives offered by, any of the parties. Nevertheless, should the arrangements fall outside the safe harbour, it does not immediately imply that the arrangements are prohibited by Article 101 (1) of TFEU. Such arrangements may be permitted subject to the fulfilment of conditions set out in Article 101 (3) of TFEU. Having said that, in practice, for fixed and minimum RPM, the exemption under Article 101 (3) of TFEU is very unlikely as discussed in paragraph 2.1.4. Whereas in Malaysia, the safe harbour is stated in the Guidelines if the market share held by each of the parties is less than 25%. The MyCC has stated that it will take a strong stance against minimum RPM and find it anti-competitive. Not only that, other forms of RPM such as fixed, maximum, and recommended resale prices which serve as a focal point for downstream collusion are also considered as anti-competitive by the MyCC. However, the Guidelines are silent as to whether the distribution arrangements falling below the thresholds but containing minimum RPM and other forms of RPM which serve as a focal point for downstream collusion can benefit from the safe harbour of the Guidelines should the arrangements fall within the

[42] Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty Official Journal L 1, 04.01.2003. The Regulation aims to provide a more efficient and effective competition law enforcement.

[43] Article 4(1) Regulation 17/62.

specified market share threshold. Similar to the EU's approach, should the distribution arrangements fall outside the safe harbour, it does not immediately imply that the arrangements are caught by the prohibition of section 4 of the CA 2010. The parties may relieve their liabilities for the infringement of the prohibition through invoking section 5 of the CA 2010 or applying for individual exemption under section 6 of the CA 2010.

The followings are suggestions to improve the existing Guidelines. First, if the MyCC views that it is unlikely for minimum RPM to be exempted under section 5 of the CA 2010 because of its harmful effects on competition, then it is proposed that the MyCC clearly states in the Guidelines that the practice of minimum RPM is unlikely to fulfil the conditions of section 5 of the CA 2010 like in the EU. The proposal is aimed to send a clear message to the industry players that minimum RPM is highly discouraged.

Second, it has not been plainly stated whether the practice of maximum and recommended RPM which does not serve as a focal point for downstream collusison can benefit from the safe harbour of the Guidelines should the market share of each of the parties is less than 25%. For businesses which plan to practice maximum and recommended RPM on the grounds stated in paragraph 2.1.3, this lack of explanation may lead to uncertainty. It is therefore important for the MyCC to clarify such position in the Guidelines to aid business players in their operations.

Lastly, in Malaysia, unlike the EU, less focus is given on the potential positive effects of RPM on competition. The main focus is more on the anti-competitive effects of RPM. Thus, it is recommended for the MyCC to provide an economic viewpoint on RPM in terms of its advantages and disadvantages in the Guidelines, on top of discussing the matter from the legal perspective, to add further understanding of the public.

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