DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

ROUNDTABLE ON RESALE PRICE MAINTENANCE

-- Note by the United Kingdom --

This note is submitted by the United Kingdom to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 21-23 October 2008.
1. Introduction

1. The OFT has recently been reviewing its position on Resale Price Maintenance (RPM) in light of developments in international practice and economic theory, and an increased need to target scarce authority resources on interventions that maximise impact.

2. This paper starts with a brief summary of UK and EC law, and a comparison with US law. It then summarises recent developments in economic theory before applying them to some relatively recent UK cases. It concludes with some initial thoughts as to how the OFT might apply its prioritisation process in deciding which RPM complaints to take forward in the future.

2. Legal framework

3. UK legislation on RPM is based on the EC Treaty. It is regarded as an ‘object’ restriction under Chapter I of the Competition Act 1998 (the UK embodiment of Article 81 of the EC Treaty). In addition, the UK is required to apply Article 81 if there is an effect on trade between Member States resulting from the practice under investigation.

4. Because RPM is regarded as an 'object' restriction, the Office of Fair Trading (OFT) is not required to demonstrate harm caused by a particular RPM agreement in order to find it unlawful. Rather, RPM is viewed as harmful by object. This essentially means that RPM is considered to be so likely to be anti-competitive that a harmful effect may be presumed.

5. That said, EC law recognises that it may be necessary to consider the economic context in which the agreement is (to be) applied before concluding whether a particular restriction constitutes a restriction by object.

6. As with EC law, even if it is found to restrict competition, an RPM agreement can nevertheless be exempted under UK law if it is broadly demonstrated to be indispensable to achieving evidenced efficiency gains that benefit consumers and does not eliminate competition.

7. In the UK, the OFT has adopted prioritisation principles, with the aim of ensuring maximum impact with its resources, and thus of ensuring that it only brings cases where there is a clear and plausible theory of harm. The OFT will not take forward a case that is incompatible with its prioritisation principles of ensuring high impact and strategic significance for any given level of resource, cost, and risk. The issue of how we might apply these prioritisation principles to RPM complaints is discussed below.

8. The situation in the UK and EC can be contrasted with that in the US. From 1911 to 2007, RPM was per se illegal in the US, meaning that the act in itself was illegal without the possibility of rebuttal. This US approach, while often considered similar to an infringement having 'object' status under EC law,

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1 See, for example, Case 56/65 Société Technique Minière v Maschinenbau Ulm [1966] ECR 235; paragraph 22 of the Commission’s Article 81(3) guidelines; and Case T-168/01 GlaxoSmithKline v Commission [2006] ECR II-2969 at paragraphs 119 et seq. GlaxoSmithKline is currently under appeal to the ECJ in Cases C-501/06, C-513/06, C-515/06 and C-519/06.

2 See OFT 401 for guidance on the 1998 Competition Act, and OFT 419 for guidance on Vertical Restraints.

3 See OFT 953con for details of the now closed consultation of our prioritisation principles. Final principles will be published shortly.

4 See Dr. Miles Med. Co. v John D. Park & Sons Co., 220 US 373 (1911)).
has a crucial difference in that there is no possibility of exemption by proving efficiency gains. The Supreme Court’s recent decision in Leegin replaced this per se presumption of harm with a rule of reason approach, implying that RPM is an infringement only if, having weighed all the circumstances of the case, the conclusion is that the restrictive practice should be prohibited as imposing an unreasonable restraint on competition under the Sherman Act.

9. Both the Department of Justice (DoJ) and the Federal Trade Commission (FTC) filed amicus briefs supporting a rule of reason approach. The two agencies argued that per se treatment should be reserved for behaviour that always, or almost always, reduces competition and reduces output and consumer welfare. Since the effects of RPM may be pro- or anti-competitive (as discussed below), they argued that per se treatment is inappropriate.

10. It is not yet precisely clear how the rule of reason approach will be applied in practice in the US. In particular it is not clear whether there will effectively be a rebuttable presumption of illegality (similar to EC 'object' cases) or whether there will be a full rule of reason assessment (more similar to EC 'effect' cases). It is also important to note that there is extensive private competition litigation in the US, with the DoJ and FTC bringing only a small fraction of the total number of cases taken. This is in sharp contrast to the EC and UK where the administrative system means that, at present, the vast majority of cases are taken by DG COMP or the national competition authorities.

3. Economic theory

11. The argument against a presumption of unlawfulness for RPM is based on a combination of two intuitions. The first, which formed the basis of the DoJ and FTC's submissions in the Leegin case, is that while RPM reduces intra-brand competition, it can promote inter-brand competition. It can do this by providing quality certification, or by reducing free riding at the distribution level on aspects such as service provision.

12. The second intuition is based on the standard thinking of the Chicago school that, in any given market, there is only one monopoly profit. An upstream monopolist has no ability to increase its profits through RPM, since it should in any case be able to extract the full monopoly market rent through its wholesale pricing structure (at least so long as non-linear pricing is possible). As such, the argument runs, RPM cannot be welfare reducing.

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5 Leegin Creative Products, Inc v PSKS, Inc, Supreme Court of the United States, 28 June 2007.

6 We also note that legal practitioners are uncertain whether the Leegin judgment will be as important in practice as it first appears. At least 26 States objected to the Federal Trade Commission's decision to modify a 2000 consent order relating to Nine West, a shoe manufacturer, in light of the Leegin judgment (and are continuing to enforce their State laws on a per se basis). Consequently, US lawyers are likely to continue to advise businesses to comply with a per se approach to RPM, at least for the time being.

7 We note, though, that over 60 per cent of the private actions that did take place in the EU between 2004 and 2008 related to vertical restraints. See 'White Paper on Damages actions for breach of the EC antitrust rules, Impact Assessment' COM(2008) 165 final.


9 This argument was first highlighted in Telser, L.G. (1960).”Why should manufacturers want fair trade?” Journal of Law and Economics, 3.

However, there is also economic literature which supports the claim that RPM can potentially have significant welfare-reducing anti-competitive effects. Specifically, this can occur either where there is a dominant firm upstream in the market, or where there are multiple RPM agreements operating concurrently in the same market.

Categorising the literature rather coarsely, but hopefully without too much injury to the underlying intuitions, there are at least five plausible theories of harm setting out ways in which possible anti-competitive effects can occur.

- **Upstream collusion - a facilitating practice.** This theory relates to inter-brand competition. When upstream firms wish to collude, but negotiate contracts with wholesalers or retailers in private, it can be hard for any collusive agreement to be monitored; rival wholesale prices cannot be monitored and enforced, and retail prices are an imperfect proxy for them. Upstream firms can use RPM as a facilitating practice for collusion since it brings the publicly observable element of price under their control.11

- **Upstream protection of monopoly rents - a commitment story.** Where an upstream firm with market power contracts with multiple downstream retailers at different times, and in private, the asymmetric nature of each contracting situation can lead to a dissipation of monopoly rents. Essentially, each negotiation takes previous contracts as given, and so is based on the residual demand curve of the market. The effect of this is that the upstream firm will have an incentive to sign later contracts on more favourable terms. But if those signing earlier contracts expect this to occur, then they will reject their initial offers.

  The overall effect of is that the upstream firm is unable to extract the full rent associated with its market power, because it is unable to commit itself to not cutting prices on later contracts. This commitment problem can be overcome by setting the retail price at the monopoly level under a system of RPM, thus maximising joint profits. As such, RPM can allow upstream firms with market power to extract their full monopoly rents.12

- **Downstream collusion - a facilitating practice.** This can occur where downstream firms wish to engage in collusion. They can use the imposition of multiple RPM agreements by an upstream firm (acting as a 'common agent') to facilitate downstream price collusion. The enforcement of RPM can facilitate agreement on prices, monitoring of prices, and even punishment for cheating on the collusive agreement. In some instances, the RPM is effectively no more than a 'sham' vertical agreement, masking a pure horizontal agreement.13

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13 In the UK, the practice of retailers coordinating their behaviour via an upstream supplier has become known as “A to B to C” coordination.

In *Argos Ltd & Anor v Office of Fair Trading* [2006] EWCA Civ 1318, the Court of Appeal held (at paragraph 141) that ‘... if (i) retailer A discloses to supplier B its future pricing intentions in circumstances
- **Downstream protection of rents - entry deterrence.** RPM can benefit downstream firms by making it harder for cut-price entrants to steal business through undercutting them. Such entrants can still make additional profits through greater efficiencies, but they can not use these efficiencies to steal business through lower prices.\(^{14}\)

- **Dampening of system competition via interlocking relations.** Where the market is characterised by a network of “interlocking” relationships between upstream and downstream firms, RPM can have additional anti-competitive effects. The simplest example would be a market where there is a duopoly of manufacturers upstream and a duopoly of retailers downstream and both retailers carry the products of both manufacturers.\(^{15}\)

  When retailer bargaining power is high, in such a setting, but there is strong competition between retailers in the downstream market (absent RPM), then this downstream competition incentivises retailers to fight hard for reductions in wholesale prices. Because RPM prevents downstream undercutting, it reduces this retailer incentive to negotiate hard on wholesale prices. This in turn dampens upstream competition and creates higher retail prices, to the detriment of consumers.\(^{16}\)

  RPM can also potentially eliminate all effective competition — at the inter-brand level as well as at the intra-brand level — and yield instead the monopoly outcome, if used jointly with franchise fees. This can be the case even when retail prices are set independently for

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14 See OFT 981. "An evaluation of the impact upon productivity of ending resale price maintenance on books" (2007). Report prepared for the OFT by the Centre for Competition Policy at University of East Anglia.

15 This situation can also be defined as "double common agency".

16 The main reference here is Dobson, P.W. and M. Waterson (2007) “The Competition Effects of Industry-Wide Vertical Price Fixing in Bilateral Oligopoly” International Journal of Industrial Organization, 25. Essential to this paper is the bargaining process, whereby wholesale prices depend on the distribution of bargaining power between manufacturers and retailers. This paper finds that RPM may have an anti-competitive purpose by dampening downstream inter-brand competition, since without RPM retailers seeking to remain competitive would bargain more forcibly with manufacturers to cut margins, therefore intensifying competition at both levels.
each retailer, and vertical contracts are negotiated bilaterally and independently from each other (purely “vertical” RPM).17

15. RPM was traditionally viewed as being imposed by the upstream firm on a price-taking retail market, and much of the economic literature maintained this assumption. By contrast, the last three economic theories above are based on retailers having a degree of buyer power, such that there is negotiation between upstream firms and downstream retailers. This suggests that, in assessing RPM, it can be as important to examine the nature of competition for retailers, both as buyers and as sellers, as the nature of competition upstream.

16. It is also noteworthy that all of the above theories of harm – other than the commitment one – rely on RPM having a horizontal effect. That is, although the agreement is a vertical one, it will typically be harmful only if there are multiple RPM agreements covering competing firms such that it has some form of horizontal impact.

4. Indispensability and RPM

17. Under current EC legislation, RPM can still be allowed if the parties are able to show that it is indispensable for achieving evidenced efficiencies which outweigh the negative anti-competitive effects, and so long as there is no alternative way of achieving the same benefits with less anti-competitive harm.18

18. RPM is one of a number of vertical restraints that can be used to control for welfare reducing negative externalities arising from the failure of different firms along a production chain to align their incentives. A classic example is free riding by some retailers on the services provided by others. Depending on industry characteristics, such control can equivalently be achieved through different vertical restraints, and it may be hard to show that RPM is truly indispensable. An example is the equivalence between using either RPM or refusal to supply in order to block low cost, low price entry by internet retailers.19

19. By contrast, we note that RPM is unique in its ability to facilitate horizontal coordination by increasing informational transparency on prices, and thus alternative restraints, such as exclusive territories, exclusive dealings, quantity forcing, or even vertical integration with one retailer, may be expected to create less anti-competitive harm than RPM.

20. In certain situations, however, alternative restraints might not be as easy to implement as RPM, or may not be sufficient on their own. This may make an argument for indispensability easier to make. This is more likely to occur when:

- there is imperfect observability and/or enforceability of the terms of alternative restraints20 or

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18 In addition, the parties involved would also need to show that the other criteria for exemption are met (notably consumer pass-on and lack of a substantial elimination of competition).

19 We note that such a refusal to supply may also constitute an abuse of a dominant position and thus also be a breach of competition law, though in this case Chapter II of the Competition Act 1998 rather than Chapter I.

20 For example, if transport costs are low consumers could easily bypass distribution barriers erected by exclusive territories.
• more than one externality simultaneously affects the vertical production chain, and more than one vertical restraint must be used to deal with these multiple externalities21.

5. UK Cases

5.1 Removal of RPM on books (1997)

21. From 1901 until 1997, the Net Book Agreement (NBA) allowed publishers to set the retail prices of books. Any retailer that deviated from the agreement could be refused supply of future books by all publishers. The nature of the enforcement of the NBA constitutes a good example of collective RPM.

22. The book industry was one of the last sectors of the UK in which RPM was legal, since it was seen as having special characteristics, including important social and cultural aspects. The proposal to remove the NBA was therefore hotly debated. Those in favour argued that it would lead to lower prices. Those against argued that increased retail competition would lead to fewer local bookshops, and fewer titles being stocked or published (due to retailers’ no longer being able to cross subsidise less popular books with the income gained from best-sellers). This in turn was expected to lead to lower book sales overall.

23. In 2007 the OFT commissioned the University of East Anglia to evaluate the effects on the UK book industry of removing the NBA.

24. The study suggested that, contrary to some expectations, total sales volumes for books have increased, as has the number of titles published. In addition, there has been a significant increase in retail diversity. While the sales volumes of traditional retailers have declined, there has been strong growth in new retail channels - in particular internet retailers, supermarkets, and retailers of consumer entertainment products across multiple media (such as the US chain, Borders). The study suggests that this growth of innovative book retailing in the UK would have been substantially slower absent the ability to offer discounted prices. These new entrants had different business models, mostly based on lower costs and innovative cross-marketing and promotional systems. Their growth, at the expense of traditional booksellers, represents an increase in industry productivity.

25. From this study, we conclude that the NBA caused harm by preventing downstream entry and thereby protecting the inefficient business models of traditional retailers. This is supported by the concerns of high street retailers before the agreement was lifted:

"(some booksellers) expressed fears that expansion of the US chains on the UK high street would be as 'reckless' as it had been in the US, and that a price war would break out."

26. In addition, in showing that RPM was not in fact needed in this industry for maintaining either sales volumes or range, this study also suggests that the efficiency benefits of RPM can (at the least) be over-stated.

21  For example, a franchise fee could be used to set the wholesale price equal to marginal cost, thus aligning the incentives of downstream and upstream firms to sell a marginal unit of a good. RPM could also be used to prevent downstream firms free-riding on each others’ service provision. Together, the franchise fee and RPM could simultaneously solve a combination of double marginalisation and free-riding externalities.

5.2 RPM on Children's toys (2003)

27. In 2003, the OFT found that Hasbro, one of the largest toy and games suppliers in the UK, had entered into vertical agreements with Argos and Littlewoods, the two largest catalogue-based retail chains, to fix the price of certain Hasbro toys and games at the recommended retail price (RRP). The agreement included two concurrent bilateral price-fixing agreements: one between Hasbro and Argos and the other between Hasbro and Littlewoods as well as a trilateral concerted practice featuring all three companies.

28. As a case involving RPM, and horizontal price-fixing, Toys was treated as an object infringement and no case-specific theory of harm was required. In fact, it seems unlikely that this is a classic case of manufacturer-induced RPM. No evidence was provided of industry-wide RPM at the upstream level (required for an upstream collusion theory) and it was not obvious that Hasbro had substantial market power (required for a commitment theory).

29. Rather, the most likely theory of harm would appear to be that the RPM facilitated downstream retail collusion. The two downstream retailers, Argos and Littlewoods, competed vigorously on price and, due to the medium-term permanence of catalogue prices, faced substantial risks from one firm undercutting the other. The agreements essentially removed this element of competition.

30. The two firms, and Argos in particular, held substantial buyer power over Hasbro since they were the primary retail channel for the toys covered by the agreement. There was also evidence presented in the decision that Argos was viewed as a price leader for much of the remainder of the retail market. If true, then collusion between these two retailers would have had wider downstream effects.

31. This interpretation is of particular interest since it shows two roles potentially played by RRP in facilitating collusion: as a way of both communicating intended pricing levels, and as a way of monitoring intentions to deviate from them through a third party. A statement of a Hasbro account manager on his communication role describes this mechanism:

"Having determined Argos' pricing intentions and passed these on to the other account managers within Hasbro; I received information from those account managers regarding the intentions of other retailers to go with RRP. I then reverted to Argos and said, without being specific, that it was my belief that the future retail price of a product would or would not be at the RRP. I told Argos which products this related to. I never mentioned the name of the retailer who was involved or quantified exactly the price that retailer would go out at. I simply said to Argos that it was my belief from what retailers told us that this or that product would or would not be at the RRP."

23 Case number CA98/02/2003.

24 It is noteworthy that the OFT's appeal body, the Competition Appeal Tribunal reviewed the evidence for this horizontal 'tripartite' concerted practice and concluded that a finding on this would have been supportable. Nevertheless, it held that it was sufficient for an infringement finding that the OFT had found two bilateral vertical agreements which operated in parallel. "In those circumstances it does not seem to us to make much difference whether the correct analysis is that there was, in addition, a tripartite agreement or concerted practice having the same object or effect." ([2004] CAT 24, Judgment on Liability in Argos Limited & Littlewoods Limited v Office of Fair Trading, paragraph 778).

25 It may be relevant here that Hasbro was granted 100 per cent leniency, since it was the first to provide the OFT with evidence of the infringing agreements before the investigation commenced.

26 Ibid, paragraph 57.
5.3 *RPM on replica football kits (2003)*

32. The market for replica football kits has three layers:

- Upstream are licence holders such as Manchester United Football Club, Chelsea Football Club, and the English Football Association.
- These licensors grant exclusive licences to manufacturers to make both the actual and replica football kits.
- The replica kits are then sold by the manufacturers to retailers.

33. An added complication arises from the fact that many of the licensors themselves have significant retail operations.

34. In 2003 the OFT found that Umbro, a manufacturer of replica kits, had entered into vertical agreements with a number of downstream retailers to fix the price of England, Manchester United, Chelsea, and Nottingham Forest replica kits at the same retail price level.\(^{27}\) The decision also found that the network of agreements constituted a horizontal concerted practice between the retailers, a theory that was endorsed and expanded by the Competition Appeal Tribunal (and the Court of Appeal) on appeal.

35. Again, as a case involving both RPM and horizontal price fixing, Replica Kits was treated as an object infringement and no case-specific theory of harm was required, since it was sufficient that the OFT had found two bilateral vertical agreements which operated in parallel. However, there was a clear horizontal element to the case, which is compatible with at least four plausible theories of harm, suggesting that the presumption of anti-competitive effect from RPM was reasonable.

36. **Upstream protection of monopoly rents – the commitment story:** Umbro's exclusive license for each replica kit provides them with market power that they may be prevented from exploiting through the problem of contractual commitment discussed earlier. The network of vertical agreements between Umbro and downstream retailers may have been designed to overcome this commitment problem and thereby increased Umbro's ability to extract market rents, to the detriment of consumers. In addition, in increasing the rents that Umbro could extract for a licence, the value of the licence to the upstream licensors would also be increased, making it in the interests of both upstream layers of the market.

37. **Downstream protection of rents – entry deterrence:** By imposing a uniform price on retailers, the agreements will have reduced the incentive and ability for cut-price retailers to enter the market and compete away current retailers' profits. During the period of the agreements a large supermarket chain, Asda, had been trying to sell replica kits at a discount, and had resorted to parallel imports to source kits to sell in their shops. Thus the agreements may have been primarily in the interests of the retailers, at their instigation, again at the expense of the consumer.

38. **Downstream collusion – a facilitating practice:** The story here is essentially the same as in Toys. That is, that the downstream retailers used the upstream manufacturer as a common agent to facilitate collusion between themselves.

39. **Upstream collusion – a facilitating practice:** The inclusion of the national kit in the agreements suggests there may have been an additional element of collusion between the licensors, especially since the agreement coincided with the 2000 European Cup. While a Chelsea supporter is typically unlikely to buy a

\(^{27}\) Case number CA98/06/2003.
Manchester United replica kit just because it is a little cheaper, they might have purchased an England kit instead on this basis. RPM may therefore have played a role in facilitating collusion between these various brands.28

40. An interesting aspect of this case is that it might have been difficult to assess which of these various theories of harm was in fact the most likely. As such, and depending on the required burden of proof, it might have been difficult to demonstrate a precise likely effect, if this had been required under the legal framework, even though there are a number of plausible alternatives.

6. Policy implications

41. In the UK, as under EC law, RPM is presumed to be anti-competitive 'by object' with no requirement for an anti-competitive effect to be demonstrated.

42. There is little evidence from a UK casework perspective that would militate in favour of relaxing this presumption of anti-competitive effect:

- While the economics literature on RPM highlights some efficiency benefits of RPM, our experience from UK book publishing has been that these efficiency benefits can be overstated. As discussed above, this was one of the last sectors in the UK where RPM was legal. When RPM was removed, there were significant concerns about whether the efficiency benefits associated with RPM would be lost. In practice, we have instead seen an increase in book sales, in number of titles, in diversity of shopping experience, and we expect future increases in productivity.

- At the same time, whilst accepting the argument that RPM need not always have anti-competitive effects, the facts of the OFT's cases against RPM on Replica Football Kits and Toies were clearly consistent with RPM having anti-competitive effects. There was a clear horizontal story of harm in both cases, and indeed in both cases the horizontal concerted practice was set out as a specific element of the case alongside the vertical RPM.

43. There may be occasions when RPM, viewed in the economic context, is not necessarily harmful or is indispensable for the efficient correction of incentive misalignment between vertically differentiated firms. The fact that RPM can be harmful in some circumstances, and beneficial in others, implies that interventions can potentially give rise to Type I errors (whereby pro-competitive and efficient activity is prohibited) and Type II errors (whereby there is too little enforcement and anti-competitive activity is

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28 More speculatively, there may also have been an effect through fans 'benchmarking' the price of their own replica kits against others, and being less willing to purchase their club's kit if it is seen to be substantially more expensive than others.
insufficiently deterred). Both types of error can have serious and long-lasting effects both on markets directly affected, and on wider markets via the deterrent effect of interventions.

44. It is important to think about these errors when choosing whether and where to intervene, and the OFT takes minimisation of Type I and Type II errors seriously. One way in which it does this is by applying a set of principles for prioritising its work. These focus on the impact and strategic significance of cases, and weigh this against the associated resource cost and risks. Carrying out this assessment intrinsically requires the OFT to establish a plausible theory of harm before taking forward any case, including RPM cases.

45. We have been considering how we might analyse RPM complaints to see if they may raise a plausible theory of harm consistent with our prioritisation principles. We consider the following questions to be potentially helpful in this context:

- **Is there significant unilateral upstream market power?**
  If not, then there is unlikely to be a plausible theory of harm related to protecting upstream market power against the commitment problem outlined above.

- **Is there evidence of a network of RPM agreements involving a number of upstream suppliers, and do these suppliers jointly account for a significant share of the upstream market?**
  If not, then there is unlikely to be a plausible theory of harm from RPM facilitating upstream collusion or dampening market competition.

- **Is there evidence that the RPM agreements are ‘retailer-instigated’ rather than instigated by the upstream supplier?** (Relevant evidence here would include (i) whether the retailers engaged in RPM have a degree of bargaining power, (ii) whether they jointly have a degree of downstream market power, and (iii) their role in both initiating and monitoring the RPM.)
  If not, then there is unlikely to be a plausible theory of harm from RPM facilitating downstream collusion or deliberately foreclosing downstream entry.

46. It should be recognised that any individual complainant is unlikely to be aware of the full nature and penetration of RPM agreements in their industry. As such, the OFT would strongly encourage parties to continue to lodge complaints about individual instances of RPM. This would allow the OFT to build up a holistic picture of the role of RPM within a particular industry, and then to make an informed prioritisation decision.

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29 There is some (albeit limited) evidence that the law on RPM is giving rise to the former (Type I errors). A survey conducted for the OFT on 'The deterrent effect of competition enforcement by the OFT – discussion document', OFT 963, found that, in interviews, the most common type of business chilling that UK firms mentioned was that of a supplier who wishes to implement a promotion (or meet competition from a new entrant) by requiring retailers to cut their retail prices. Suppliers are concerned that this may be seen as vertical price fixing and so refrain, even though the behaviour would be likely to benefit consumers. The report mentions that this may be because some of the most prominent cases taken by the OFT under the Competition Act 1998 (such as Hasbro/Argos/Littlewoods and Replica Football Kit) have involved vertical price restraints (even though the agreements investigated were clearly rather different).

30 See [http://www.of.t.gov.uk/shared_of.t/speeches/sp008.pdf](http://www.of.t.gov.uk/shared_of.t/speeches/sp008.pdf) for a recent speech on the subject by John Fingleton at the 2008 Fordham autumn conference,