RPM seminar – University College London
13 November 2012

RPM – some observations from an enforcement perspective

Nelson Jung
Director
Office of Fair Trading

The views expressed are personal and should not be taken as representing those of the Office of Fair Trading.

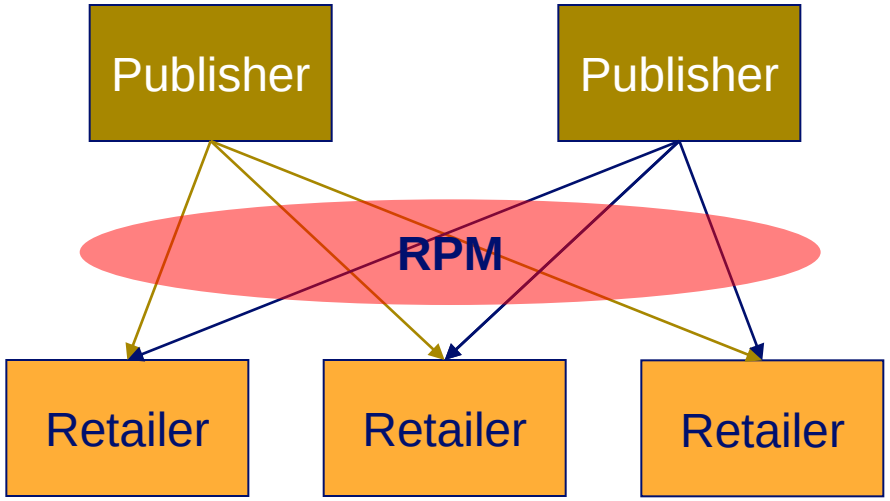
RPM – experiences in the UK

- **OFT's 'most complained about' practice**
  - Increasingly relating to internet discounters
  - LEAR report: can best price guarantees play a role in monitoring deviation from RPM?
- **Removal of RPM for books (1997; evaluation 2008)**
- **Toys and football kits (2003)**

Removal of RPM for books

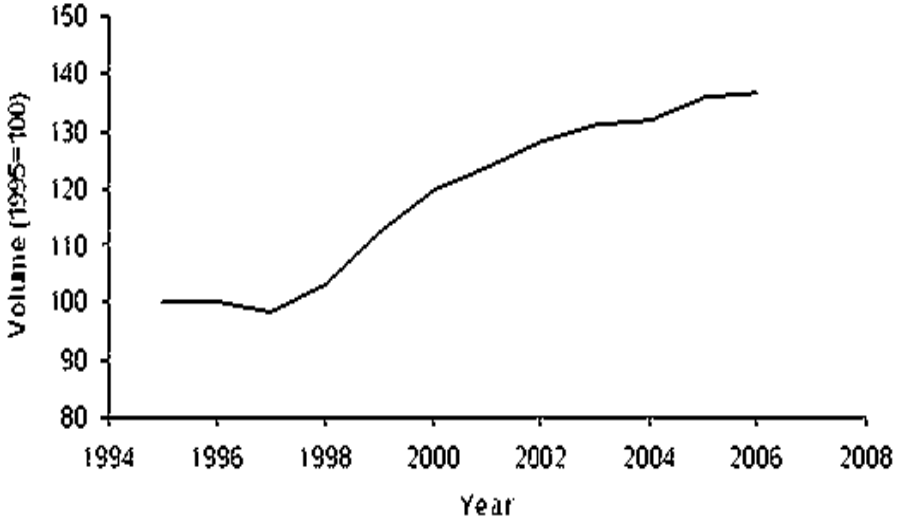
- Net Book Agreement (NBA) was removed in 1997
- Retailers became free to discount
- OFT/UEA (2007) evaluates impact

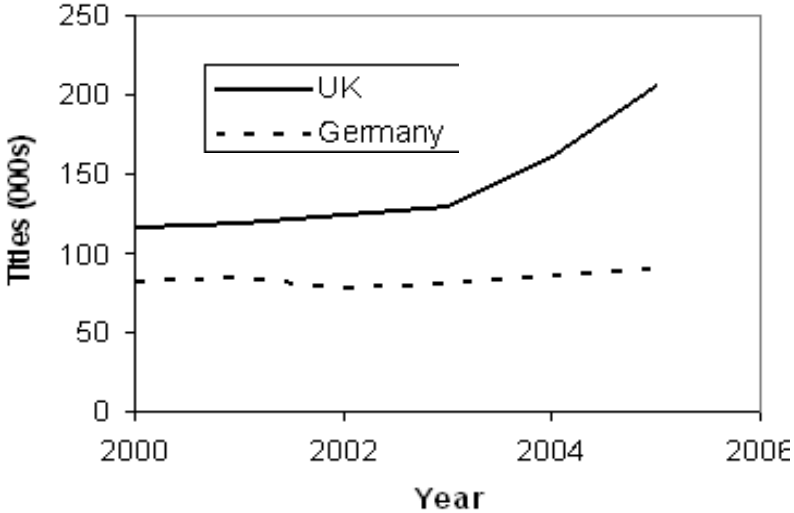
RPM industry-wide



Concerns about removal

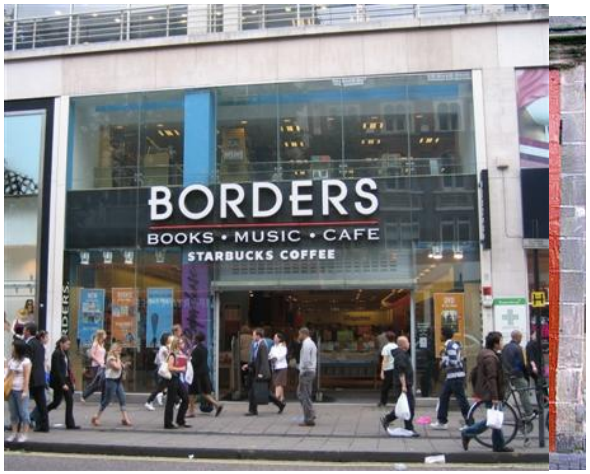
- Fewer books would be sold - Wrong!
- Fewer titles would be published - Wrong!

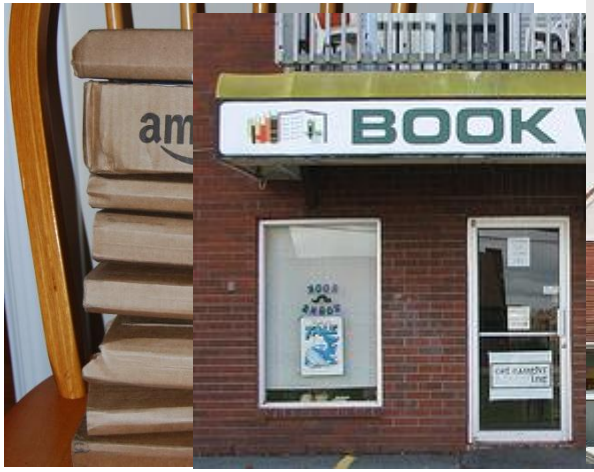




Effects on competition

- Effect on prices difficult to measure
- But allowed new entry
- UK situation compared positively with Germany where RPM was maintained





Why?

- **Potential/incentives for innovation**
  - New pricing models
  - Business stealing by more efficient firms

After the EU Verticals Review

- **OFT agrees with the position reached by the Commission**
  - RPM remains 'hardcore' restriction
  - more guidance on exceptional cases when 101(3) criteria may be satisfied
- **Little empirical evidence of beneficial RPM**
- **Note: businesses did not call for changes to RPM**
  - value in legal certainty, especially for small retailers

2010 Vertical Guidelines: RPM may restrict competition in a number of ways

- **OFT considers theories of harm when applying Prioritisation Principles**
  - Facilitation of collusion between suppliers
  - Facilitation of collusion between buyers
  - Softening of competition between manufacturers and/or retailers
  - Lowering pressure on manufacturer's margin
  - Reducing dynamism and innovation at distribution level – preventing entry/expansion of price discounters
- **Not an exhaustive list – assessment on case by case basis**
- **Further research into RPM in fragmented markets (Shaffer)**

2010 Vertical Guidelines acknowledge possible efficiencies:

- Introduction of new product
- Coordinated short-term low price campaign in a franchise system
- May allow retailers to provide (additional) pre-sales services

- **RPM may prevent free-riding, in particular in the case of 'experience' or complex products**
- **But: free-riding arguments not accepted lightly**
  - Is RPM an efficient way to achieve the pre-sales services? Is the extra margin providing distributors with an incentive to spend it on these services?
  - Do consumers value the extra efforts? What about more mature and simple products?
  - Indispensability : is it feasible for the manufacturer to directly contract the extra sales efforts and services? Selective distribution less restrictive?
- **Implications of Pierre Fabre?**

an illustrative example

2010 Vertical Guidelines and agency

- **Guidelines clear that it is possible to fall within the scope of Article 101(1) irrespective of whether the agent/intermediary selling goods or services on behalf of another undertaking takes title (and 're-sells')**

- In the case of agency agreements, the principal normally establishes the sale price, as the **agent does not become the owner of the goods**. However, where such an agreement cannot be qualified as an agency agreement for the purposes of applying Article 101(1) an obligation preventing or restricting the agent from sharing his commission, fixed or variable, with the customer would be a hardcore restriction under Article 4(a) of the Block Exemption Regulation. In order to avoid including this hardcore restriction in the agreement, **the agent should thus be left free to lower the effective price paid by the customer without reducing the income for the principal.**

  (paragraph 49 of the Vertical Guidelines, emphasis added)

E-books

- **EU E-books Article 27(4) Communication**

'For a period of two years, the Four Publishers will **not restrict, limit or impede e-book retailers' ability to set, alter or reduce retail prices for e-books and/or to offer discounts or promotions**. However, as regards agency agreements, the aggregate value of the price discounts or promotions offered by any retailer should not exceed the aggregate amount equal to the total commissions the publisher pays to that retailer over a 12-month period in connection with the sale of its e-books to consumers.

Moreover, for a period of five years: (i) the Four Publishers will not enter into any agreement relating to the sale of e-books within the EEA that contains a price MFN clause as defined in the Four Publishers' commitments; and (ii) Apple will not enter into any agreement relating to the sale of e-books in the EEA that contains a retail price MFN clause as defined in Apple's commitments.'

(emphasis added)