

Client Update Germany Resale Price Maintenance – The Forgotten Evergreen

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The German Federal Cartel Office (“FCO”) recently imposed a serious fine on a producer of mattresses for resale price maintenance *vis-à-vis* retailers of its products. In contrast to U.S. federal antitrust rules, retail price maintenance (“RPM”) is generally a strict violation of German (and EU) antitrust laws. The FCO still takes a very active role in identifying and vigorously prosecuting RPM arrangements in Germany by imposing fines and issuing orders to terminate the infringement. The fines often amount to millions of Euro. In 2014, the FCO imposed fines totaling 8.2 million Euro in a previous mattress case. The fines in the latest mattress case mentioned above amount to 3.4 million Euro.

RESALE PRICE MAINTENANCE – A “HARDCORE” RESTRICTION

Retail price maintenance refers to a practice whereby the producer or upstream supplier engages in influencing the (minimum) pricing of its products by the downstream distributor or retailer. Under German antitrust laws, as under EU antitrust laws, RPM constitutes so-called “hardcore” restrictions on competition. As such, RPM is often deemed to lead to negative effects in the market. An individual exemption is rare and likely not available.

The FCO generally approaches such vertical restraints with hostility. This approach differs significantly from the one adopted by the U.S. Supreme Court in *Leegin*,¹ which eliminated *per se* illegal treatment of minimum resale price agreements under U.S. federal antitrust law. Since that decision, the pro- and anti-competitive effects need to be analyzed on a case-by-case basis based on economics and allocative efficiency.

By contrast, the EU Commission does not regard RPM as an effective instrument for bringing about economic efficiency. Even though it has granted undertakings

¹ *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

the possibility to plead an efficiency defense in individual cases, the EU Commission ultimately decided that RPM cannot benefit from block exemptions of certain vertical agreements and that no individual exemption was attainable. As a result, RPM arrangements were fined. Today, cases of vertical restraints typically rest with the national competition authorities.

In Germany and the EU, solely non-binding recommended retail prices (“RRP”) and maximum sale prices are allowed. While not every contract between a producer and its distributor constitutes an illegal practice under German and EU competition law, a form of coordination where the producer actively seeks to, and successfully does, influence the pricing of the distributor is not allowed. In the mattress case, the FCO stressed again that producers “may not impose binding obligations on their retailers on what price to ask for a specific product”.

RESALE PRICE MAINTENANCE IN THE GERMAN PRACTICE

In practice, RPM can take several forms. It can occur explicitly by way of contractual or oral agreement or impliedly. In previous cases, the FCO took the view that pushing the distributor or retailer to achieve a certain price level (e.g., by threatening to cut back on rebates, by delaying or stopping supplies, or by suspending the contract if the distributor deviates from a certain price) would constitute an illegal RPM. Equally, illegal RPM can also be seen in incentivizing compliance with a certain resale price, e.g., by offering kickbacks or margin compensations or supporting special offer prices.

According to the FCO, the pricing can even be influenced impliedly by “reminding” the distributor of its recommended retail price. In its 2009 *Ciba Vision* decision, the FCO concluded that “any contact beyond the mere communication of an RRP and its emphasis by subsequently and repeatedly addressing the subject – in particular with regard to the trader’s current pricing behavior – calls the RRP’s non-binding character into question and is to be regarded as an exertion of pressure”.

CONCLUSION

The practice of the FCO is consistent in its view that RPM, in whatever form, generally restricts competition and thus constitutes a prohibited arrangement. The FCO also actively pursues other forms of illegal vertical restraints, such as restrictions or prohibitions of online sales, so-called price parities by internet platforms or best price clauses by online hotel portals.

When drafting distribution contracts in Germany (or elsewhere in the EU), regard must be had that vertical agreements comply with German (and EU)

antitrust rules. Furthermore, from an antitrust compliance point of view, the sales personnel should be appropriately trained on permissible and non-permissible vertical restraints including RPM and restrictions of online sales. Agreements in vertical relationships can affect competition and their legality or illegality is not always evident at first glance.

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Please do not hesitate to contact us with any questions.