
The German Federal Cartel Office Clarifies its Approach to Resale Price Maintenance

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Recent activities of the German Federal Cartel Office ("FCO") indicate that the cartel authority focuses more and more on vertical practices, and in particular on resale price maintenance ("RPM"). In two decisions in September and October 2009, the FCO fined companies for illegally **enforcing recommended resale prices** ("RRP"), thereby violating Article 101 of the Treaty on the Functioning of the European Union and Section 1 of the German Act Against Restrictions of Competition (*Gesetz gegen Wettbewerbsbeschränkungen*). In January 2010, it searched consumer goods producers and retailers on suspicion that they had colluded on end consumer prices. On 13 April 2010, the FCO issued a "Guidance Letter," setting out its general approach to practices of producers to influence retail price levels beyond pure RRP allowed by Article 4 (a) of the European Commission's vertical group exemption regulation (on 20 April 2010, the Commission published the future vertical group exemption regulation, replacing Regulation No. 2790/1999 as from 1 June 2010).

The FCO's CIBA Vision and Phonak Decisions

After having concentrated on restrictive horizontal agreements and cartels for many years, in 2009 the FCO started focusing more on vertical restraints. In two recent decisions it sanctioned companies for what it found to constitute illegal RPM:

- In September 2009, the FCO imposed a fine of EUR 11.5 million on CIBA Vision, the market leader in the contact lenses business in Germany, for having restricted Internet sales of contact lenses and for enforcing its non-binding price recommendations. According to the FCO, CIBA Vision operated **a price surveillance and intervention system monitoring the retail prices** of Internet sellers. If the resale prices went below a certain level of the RRP, CIBA Vision contacted the respective Internet trader and urged them – in many cases successfully – to raise their prices.
- In October 2009, the FCO fined one of the leading German manufacturers of hearing aids, Phonak, EUR 4.2 million for having influenced in an anticompetitive manner the resale prices of its products. A retailer had published prices for hearing aids from all

manufacturers on the Internet. The prices for Phonak hearing aids were significantly below the minimum price level applied in the market by retailers until then. Phonak reacted to complaints of competing retailers by **refusing to supply the respective retailer and thus forcing it to raise its price.**

In its decisions, the FCO stated that – while RRP is generally permissible – **any exertion of pressure may invalidate the non-binding character of a price recommendation and thus violate competition law.** The FCO made clear that it would consider *any* contact beyond the mere communication of RRP and any approach of customers by the supplier adding authority to such recommendation as an anticompetitive exertion of pressure.

The FCO's Approach According to its "Guidance Letter"

Following criticism of inconsistencies in its CIBA Vision and Phonak decisions, on 13 April 2010 the FCO issued a "Guidance Letter" on its **approach to distinguish legal RRP and illegal RPM.** While this Guidance Letter was addressed to companies in the food retail sector, drugstore sector and pet supplies sector, as well as several manufacturers of branded consumer goods, which it had searched earlier for allegedly illegal resale price practices, it presents further guidance also to suppliers and distributors or retailers in other industries.

According to the FCO, the following practices are generally prohibited:

- fixing of resale prices through agreement or concerted practices or through unilateral exertion of pressure or granting of incentives. The FCO hereby clarified that in regard to RRP, the threat of commercial disadvantages (such as penalties, delisting, contract termination and delay, suspension or limitation of deliveries) and/or the granting of benefits (i.e. rebates, marketing support, refunds) removes the non-binding character of such resale price recommendations;
- marketing support by the supplier in exchange for special price offers by the retailer;
- agreement on or coordination of fixed retailer margins even in cases where the producer increases its prices; and/or
- binding recommendation of resale prices or minimum resale prices through pre-printed orders or other documents and their unchanged implementation.

According to the FCO, the following practices, considered independently, do not constitute a restriction of competition, but might incur risks, in particular if they accompany generally prohibited measures or if they occur in a package with such measures:

- (re-)addressing resale prices during follow-up contacts, to the extent that the indications given to the distributors or retailers go beyond explanations for the original resale price and product positioning strategy;

- systematic price monitoring in cooperation with distributors or retailers;
- compilation of price comparison lists or related sensible information in order to disclose them to other retailers;
- providing calculation or pricing manuals or guidelines to distributors or retailers; and/or
- the imprint or labeling of RRP's or resale prices on products or shop material without clearly setting out the non-binding character of those prices.

Furthermore, the practices addressed by the FCO might – in addition to vertical price fixing – have **indirect horizontal effects**, as they may lead to a "hub-and-spoke" coordination between distributors/retailers.

In this respect, the FCO considered the following practices as generally illegal:

- disclosure by producers to distributors or retailers of conditions or agreements with, or sensible pricing information from competing distributors or retailers;
- most-favored treatment clauses aiming at a coordinated retail price level;
- coordinating assortments, marketing strategies, or sales campaigns;

if these practices have the object or effect of (indirectly) coordinating prices or other conditions.

Again, the FCO considers as not per se illegal, but risky practices of exchanging information on, or complaining about, resale prices observed in the market or involving retailers in monitoring resale prices.

With its "Guidance Letter," the FCO tried to clarify its approach, and in some instances may have modified the approach it took in its 2009 decisions. Even though the FCO has left producers and their distributors and retailers some room for maneuver in relation to the communication of RRP's, companies should be aware that the FCO continues to investigate such practices more rigorously than in the past.

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