

National German Report

Summary

Up to the national reform of 2005, German law provided for differentiated regulations on vertical practices. The Federal and State competition authorities were empowered to intervene against practices which constituted an abuse of market power. However, in line with economic theory, vertical restrictions of competition were generally exempted from the cartel prohibition. The only exception were fixed prices which were declared illegal in the form of a *per se* rule, no exemption being allowed. The same applied to terms of business if agreed with respect to third parties. The competition authorities' practice included a considerable number of decisions sanctioning price-related vertical restrictions of competition.

Since 2005, the German law mirrors EU legislation. Restraints of the freedom to determine sale prices are hardcore restrictions which may, at least in theory, benefit from an exemption under specific circumstances. The German authorities' practice continues to focus on sanctions against illicit price fixing and unlawful price recommendations. There are a remarkable number of recent decisions, some of which were not upheld by the courts.

The Federal Cartel Office (FCO) reiterates that it does not feel bound by EU guidelines and practice. However, the FCO increasingly tends to take the EU Vertical Guidelines as a benchmark for its own judgment.

In recent decisions the FCO seems to follow a very stringent interpretation of the vertical price fixing prohibition. It considered, in a decision expressly designed at paving the way for future practice, the existence of a price fixing agreement to be proven by the mere fact that some of the distributors, after occasional contacts with the supplier, had adapted their prices to or in the direction of the recommended sale price. The FCO also regarded the supplier's telephone calls as pressure being exerted on the distributors, thereby turning a price recommendation into a price fixing agreement.

The FCO's extremely strict interpretation of the vertical price fixing prohibition is likely to obstruct also economically sound distribution strategies. In particular, any kind of price recommendation tends to become an unpredictable risk as it may be interpreted as a vertical price fixing agreement if – as is naturally the objective of such recommendation – it is followed by a certain number of distributors.

According to newspaper articles, industry in Germany is criticising the legal uncertainty resulting from the new practice of the FCO with regard to vertical price agreements and, in particular, price recommendations. The new FCO approach may even become a barrier to leniency applications as the undertakings concerned do not exactly know which practices will be accepted by the authority and which will be regarded as hardcore restrictions that would nullify an existing leniency application. Whether the FCO's "preliminary assessment" of April 2010, that was sent to certain companies and in a short version is available on the internet, and that aims at clarifying the FCO's legal position regarding price fixing between producer and retailer will provide for more legal certainty remains to be seen.

In summary, a clearer FCO practice that would be more in line with economic theory concerning price-related restrictions of competition might be desirable.