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Questions for National Reporters of LIDC BORDEAUX 2010

Question A: Competition Law

Which, if any, agreements, practices or information exchanges about prices should be prohibited in vertical relationships?

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The purpose of, and idea behind, the captioned question is to assess what kind of practices that are considered illegal on a scale ranging from resale price fixing through recommended prices to vertical exchange of information about prices. These issues may be assessed under the same or different rules, they may also be subject to strict prohibitions or subject to a rule of reason analysis. However, not all the practices covered in the captioned question stem from formal agreements. Some may contain some sort of implied consent or may be unilateral, like price recommendations.

The various practices that we have in mind are the following:

- resale price maintenance;
- margin maintenance;
- minimum margin;
- guaranteed margin;
- suggested or recommended price;
- information exchanges about prices to consumers.

Please kindly revert to the international reporter and the general reporter without delay if you consider that other types of practices fall within the same question. This will allow the international reporter to communicate the other examples to the other national reporters.

All the above practices have intra-brand purposes. We are not considering consumer prices for the purpose of exchanges between competitors in this questionnaire. Now, it might be that under some legislations, information on prices is prohibited as a result of the risk that it leads to taming with inter-brand competition.

These practices may have intra-brand justifications, thus it is of interest to understand under what rationale they may be declared illegal. The rationale may vary depending on the practice considered.

Where these practices or some of them are considered illegal, it is of interest to understand whether they can be justified; for what reasons and to which extent. Are the justifications the same for all the practices? Justifications may stem from different rationales depending on the situations.

1. Legal framework

1.1 What is the legal framework in the national competition act applicable to vertical agreements, i.e. are these agreements in generally permissible or in part impermissible. Are vertical agreements or some of them illegal per se, presumed illegal or assessed on the basis of a type of rule of reason analysis? Does a block exemption apply to vertical agreements in your jurisdiction?

According to German law, vertical practices resulting in an appreciable restriction of competition are prohibited by virtue of Section 1 of the German Act against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen, GWB). This general ban of vertical restrictions of competition has only been introduced with the 7th amendment of the GWB, with effect from 1 July 2005. This reform was expressly designed at aligning national German competition law with the European rules in Art. 81 EC (now: Art. 101 TFEU).

Up to that reform, German competition law had provided for a special regime for vertical restrictions of competition. Whereas certain restrictions that were deemed especially harmful to competition, such as the (vertical) fixing of prices or business terms (RPM), were prohibited by a *per se* rule, all other vertical restrictions were in principal legally permitted. The competition authority was empowered to declare such agreements to be of no effect and to prohibit those commitments if they restricted one of the parties in its freedom to use the goods supplied, to purchase other goods or to sell the supplied goods, or if they imposed an unreasonable tying of products on one of the parties, provided that competition in the market was substantially impaired by those practices. This regime reflected the fact that vertical restrictions, as a general rule, are not as harmful to competition as horizontal restrictions (cartels) and that according to economic theory negative effects of vertical restrictions are normally only to be expected if one of the parties has a certain market power.

In Germany, the then prevailing opinion was that this national regime was more appropriate in respect of the specificities of vertical restraints than the general ban in EU law. Nevertheless, the legislator has decided for an alignment with EU rules, as the scope for specific divergent national legislation is extremely reduced as a consequence of the primacy of EU regulations.

Since 1 July 2005, national German law imposes a general ban on vertical restrictions of competition which is completely in line with the prevailing EU rules. This does not only apply to those practices that may affect trade between Member States, i.e. the domain directly governed by EU law, but applies also to all practices that are exclusively subject to national law.

Equally, since 1 July 2005 the exemption of vertical restrictions of competition is fully in line with EU rules. The relevant national provision in Section 2 (1) GWB has been adapted, with some minor linguistic differences, to Art. 81(3) EC (now: Art. 101 (3) TFEU). In addition, EU block exemption regulations are automatically applicable in national German law, even in the domain of purely national competence where trade between Member States is not affected (expressly stated in Section 2 (2) GWB). In particular, the Vertical Block Exemption Regulation (Vertical BER) has direct effect to all vertical practices that fall under German law.

Section 28 (2) GWB exempts vertical price fixing relating to the sorting, labelling or packaging of agricultural products from the cartel prohibition of Section 1 GWB. Section 30 (1) GWB contains an exception from the prohibition to fix resale prices with regard to newspapers and magazines and comparable products. In addition, the German law on fixed prices of books (Buchpreisbindungsgesetz) contains a specific exception, allowing for RPM in the case of books, music notes and cartographic products. This regime has no equivalent in EU law, but is closely adapted to the requirements of the EU law, as defined by the European Court of Justice in the decision concerning the German and Austrian book price restrictions.

In substance, therefore, German and EU law do not diverge.

1.2 Do these principles vary depending on the type of vertical practice considered?

As in EU legislation, the prohibition in the German law applies to all agreements, concerted practices and decisions of associations, irrespective of the type of the vertical practice. The only precondition in all these cases is that the objective or the effect of the agreement, concerted practice or decision must be an appreciable restriction of competition.

1.3 Is there a specific prohibition in the national competition act on all vertical practices pertaining to prices? If not, which ways of controlling the prices applied to end-users are permissible?

Since 1 July 2005, there is no longer a specific prohibition on (vertical) price fixing in the GWB. The rules in Art. 4 lit. a of the Vertical BER (in the version in force until 31 May 2010) apply. According to this provision, price fixing is a hardcore restriction which is not block exempted and which normally does not qualify for an individual exemption.

1.4 What is the de minimis/appreciability threshold, if any, applicable to vertical arrangements and practices?

In March 2007, the Bundeskartellamt (Federal Cartel Office, FCO) published a revised notice on agreements of insignificant effect on competition (de minimis) which is in line with the terms of the de minimis notice of the EU. The threshold regarding vertical restrictions is fixed at a combined market share of 15% of the undertakings concerned in any of the relevant markets, but does not apply in cases of hardcore restrictions, in particular price fixing.

Even if the level of the threshold is in line with the EU notice, the legal character of the two notices is different. Contrary to the practice of the EU, in the FCO's view, the threshold laid down in its notice is not a substantial definition of the term of appreciability but only an information on how the FCO will exercise its discretion in taking up a case and initiating a procedure against the parties to an agreement. The FCO notice therefore does not indicate whether an agreement below the threshold is legally valid or not. In practice, however, this theoretical difference is not of great importance for the undertakings concerned.

1.5 Has the competition authority in your jurisdiction issued guidelines regarding exchanges of information and/or vertical price agreements?

Neither the FCO nor any of the 16 competition authorities of the Länder (i.e. the regional German states) have so far issued guidelines on vertical restrictions. The information leaflet of the FCO of March 2007 on cooperation of SME's contains a chapter on purchasing agreements, but it applies only to the horizontal effects of these practices. The vertical restrictions of these agreements are not covered by the notice. However, in April 2010 the FCO sent a "preliminary assessment" regarding price fixing between producer and retailer to certain companies and a short version of this legal assessment of RPM is available on the internet. This preliminary assessment outlines which practices in the context of the fixing of prices in the vertical relation between supplier and retailer the FCO considers legal and those it considers illegal. Whilst it provides examples for each measures that are permitted, that are prohibited and that are problematic, and might to some extent clarify the FCO's legal position regarding price fixing between producer and retailer, this preliminary assessment is kept rather general and therefore, further guidance on the FCO's stance would be desirable.

2. Criteria applicable to price related vertical agreements

2.1 Is the national competition act declaring these or some of these practices as illegal under a per se rule, presumption or rule of reason?

All vertical practices having as their object or effect an appreciable restriction of competition are, as in EU law (Art. 101 (2) TFEU), automatically prohibited and therefore legally void. This rule is regarded in Germany as a *per se*-illegality.

2.2 Are only agreements pertaining to prices considered illegal? Which conditions have to be fulfilled in order to render "agreements" to be considered illegal?

The prohibition applies to all types of vertical restrictions of competition. As in EU law, the German legislation covers not only agreements but also concerted practices and decisions of associations of undertakings. F

Regarding the interpretation of the term agreement, European standards have to be applied; in particular the decisions of the EU courts are decisive in that respect. An agreement can consist not only of an express commitment but may also result from factual behaviour which can be regarded as an implicit acceptance of the terms of business of the other undertaking concerned. A wide notion of agreement is applied by the FCO, in line with the criteria in the EU practice and jurisprudence, which is often very close to the notion of concerted practice. However, as in EU law, a purely unilateral conduct which cannot be construed to be accepted by the other party does not fulfil the conditions of an agreement.

2.3 What about the situations which are in-between, such as recommendations / suggestions and exchange of information?

These practices are covered by the German (and European) prohibition only if they constitute an agreement, a concerted practice or a decision. Recommendations or suggestions as such are unilateral conduct but they may form part of the contractual relations between the undertakings concerned or may turn into an agreement if the other undertaking implicitly approves or regularly follows the recommendations / suggestions.

Insofar as a price recommendation constitutes an agreement or a concerted practice, the rules in Art. 4 lit. a of the Vertical BER apply. A recommended sale price is generally exempted (or is not even a restriction of competition), except in the event that it amounts to a fixed or minimum price as a result of pressure or incentives exercised by the supplier.

A vertical exchange of information on prices or other competitive parameters might constitute an agreement. Whether and to what extent such an exchange may restrict competition or may be permitted has to be decided on the basis of all circumstances of the relevant case. As a general rule, reference may be made to the principles concerning the horizontal exchange of information.

2.4 What is the assessment of vertical unilateral practices in relation to prices?

Unilateral practices which do not fulfil the terms of an agreement or concerted practice do not fall under the prohibition of a (vertical) restriction of competition as laid down in Section 1 GWB (Art. 101 (1) TFEU). They may however, in certain circumstances, constitute an abuse of a dominant position if the conditions of the relevant provisions (Section 19 GWB, Art. 102 TFEU) are met.

Further, German law contains a specific provision (Section 21 (2) GWB) that prohibits undertakings to threaten other undertakings with disadvantages or to impose disadvantages on them or to promise or grant other undertakings advantages in order to induce them to a behaviour that according to cartel law (e.g. Section § 1 GWB) could not legally be subject of a contractual commitment. Accordingly, the unilateral use of pressure or incentives aiming at enforcing vertical price fixing can constitute a cartel law violation, if the object is to lead the addressee to a behaviour that, if agreed in a contract, would infringe Section 1 GWB. Section 21 (2) GWB is of great importance in the context of RPM as its infringement constitutes a cartel law violation even in cases in which an agreement or a concerted practice do not exist or cannot be proven by the competition authority. And indeed, in several recent decisions the FCO has either directly based its decision against suppliers in the context of RPM on this German provision or at least mentioned it as subsidiary in cases in which the FCO considered an agreement or concerted practice as proven.

2.5 Are some of these practices not considered illegal merely as a result of a de minimis/appreciability rule?

See chapter 1.4 above.

3. Anti-competitive effects

3.1 Are the anti-competitive effects considered by the national competition act different for each of these practices, or is it always the same kind of anti-competitive effect which is considered and found more or less serious?

With regard to the anti-competitive effects of a restrictive practice, all circumstances of the relevant have to be taken into account, and all facts must be properly assessed. The law does not distinguish between specific effects to be regarded as an appreciable restriction of competition. In practice, the most important effect is a potential increase in prices, or a reduction of output. But all other possible negative effects which may cause harm to consumers or industry must be considered likewise.

3.2 To which extent is the national competition act considering only inter-brand effects or does it consider intra-brand effects?

The principles as described in chapter 3.1 above apply to inter-brand and intra-brand effects likewise. The law does not refer to these types of practices. As a general rule, inter-brand restrictions are considered to be more harmful than practices with respect to intra-brand competition. Especially in the case of hardcore restrictions, however, intra-brand effects may suffice to establish a grave infringement of competition rules (Section 1 GWB, Art.101 (1) TFEU) and may even be severely sanctioned. The highest fine ever imposed on illegal vertical practices in Germany concerned a restriction of intra-brand competition by specific types of rebate schemes the objective of which was to exclude small and medium sized competitors from the market (see chapter 5.4 below).

3.3 Is also the anti-competitive intent of the vertical agreement considered?

Agreements or concerted practices the objective of which is to restrict competition are generally regarded as hardcore restrictions. This objective as such renders such agreements or concerted practices illegal, even if they have not been executed or if they have not had any actual effect on the market. In practice, only this type of infringement is likely to be sanctioned (fined) by the competition authorities.

3.4 Do the courts take into account the actual acts performed by the supplier, e.g. if the supplier, in practise encourages a recommended price to constitute a fixed price through punishments or remunerations? Please give examples from case law and/or legal doctrine.

The relevant legal statute is contained in Art. 4 lit. a of the Vertical BER (see chapter 2.3 above). There are no court decisions relating to this question. However, the FCO has in several cases imposed considerable fines where a supplier allegedly had exerted pressure (e.g. supplier's refusal to supply a retailer in order to make him increase his prices) on his distributors to respect a recommended sale price. Some cases were settled between the FCO and the undertakings concerned. The exact details of these cases are not publicly known.

4. Pro-competitive effects

4.1 Does the national competition act recognise justifications in relation to these vertical practices regarding prices? Has the relevant case law taken into account practical justifications for the need of price agreements and/or pro competitive aspects in relation to the exchange of information regarding price?

Pro-competitive effects may generally be recognized by an exemption of the relevant practice from the general prohibition to restrict competition. In principle, all vertical practices are block exempted by the Vertical BER if the market share threshold of 30% is not exceeded, with the exception of clauses falling under Art. 4 or 5 of the Vertical BER. In addition, an individual exemption (Section 2 (1) GWB, Art. 101 (3) TFEU) may be applicable, in particular in cases where the market share exceeds the threshold of 30%.

With regard to vertical price fixing, the rules in Art. 4 lit. a of the Vertical BER apply, according to which price fixing is a hardcore restriction which is not block exempted and which normally does not qualify for an individual exemption. Whilst the FCO acknowledges that in theory an individual exemption of a vertical price fixing agreement or concerted practice is possible, the FCO has also made it clear that, as vertical price fixing constitutes a hardcore restriction, it does not only presume that the conditions of Section 1 GWB / Art. 101 (1) TFEU are fulfilled, but also that an individual exemption pursuant to Section 2 (1) GWB / Art. 101 (3) TFEU is not applicable. Accordingly, in its recent decisions the FCO has only very briefly stated that an individual exemption would not be possible for lack of efficiency gains.

The case of pro-competitive effects which may fulfil the conditions of an exemption, has to be distinguished from cases where price agreements or other restrictive clauses are justified because they lead to an effective functioning of an agreement. If, for example, two undertakings have agreed on joint distribution in the context of a joint R&D or a joint production agreement which is permitted by the relevant competition regulation, they must also be allowed to determine the price of the jointly distributed products. In such case the fixing of prices may not restrict competition appreciably.

4.2 What are the types of pro-competitive effects recognised in relation to vertical practices on prices?

The German (and EU) law does not differentiate between the different types of pro-competitive effects. The conditions as laid down in the relevant BERs, in particular the Vertical BER, or the whole set of criteria for an individual exemption (Section 2 (1) GWB, Art. 101 (3) TFEU) must be fulfilled. With respect to vertical practices on

prices, no pro-competitive effects have so far been accepted by the competition authorities or the courts.

4.3 Are the following types of justifications taken into consideration and if yes, in relation to which sort of practices and to which extent?

- **competitive oversight inside the distribution network**
- **price-level positioning of the products by a supplier**
- **consumers benefits in relation to a resale price cap**
- **consumers' interest in general (please specify)**
- **launching of a new product**
- **market positioning of a product**
- **promotional organisation**
- **after sale services**
- **coordination with consumers' information**
- **short term promotional campaigns.**

Please give examples from case-law and/or legal doctrine.

There is no general answer to this question. Whereas a block exemption is based on a general assessment of the pro-competitive effects of a certain type of agreement or concerted practice, an individual exemption requires an in-depth analysis of all circumstances of the actual case. All above-mentioned justifications may result in an exemption, if the other conditions are met, or may lead to the conclusion that competition is not restricted appreciably. In particular, the launching of a new product may justify certain – even hardcore – restrictions for a limited period of time, with the result that Section 1 GWB or Art. 101 (1) TFEU may not even be violated. In the case of an individual exemption, the pro-competitive effects must outweigh the negative effects resulting from the restriction of competition.

In 2003 the German Federal Court of Justice (BGH) held that restrictions of retailers' pricing freedom that are limited to a short period of time (here six weeks) and that are not appreciable do not constitute an unlawful RPM. Further, the Court mentioned that price incentives for the consumers resulting from sales-promotional actions would usually lead to an at least temporary increase in sales from which the dealers would benefit (BGH, decision of 8 April 2003, KZR 3/02 "1 Riegel extra").

In the post-modernisation regime, only few cases are decided by the authorities or the courts. The legal exemption applies automatically, without a decision being required to that effect. For this reason it is very difficult to find relevant precedents on exemptions being recognized by the competition authorities or the courts, and in the area of RPM we are not aware of any such recent cases.

4.4 Does the national competition act and case law take into consideration other justifications?

No pro-competitive effect and no justification are *per se* excluded by German (and EU) law with respect to the assessment whether competition is appreciably restricted or whether an individual exemption is applicable. Because of the limited pertinent case law, there are no precedents on other possible justifications. With regard to block exemptions, the relevant criteria are exclusively defined in the regulation.

4.5 Are pro-competitive effects automatically taken into consideration by the authorities / the courts or ought they be invoked by the interested parties?

As in EU law, German law provides for a system of legal exemption which is automatically applicable, no decision to that effect being required. There is also no obligation to notify an exemption. Therefore, competition authorities have to assess pro-competitive effects even if they are not invoked by the undertakings concerned. However, in practice the interested party will normally bring forward the necessary evidence. Furthermore, the burden of proof lies with the undertaking which benefits from the exemption. In Germany, this rule applies only to administrative and civil proceedings. In cases of fine proceedings the authority must provide evidence that no exemption is applicable.

4.6 Might any of these justifications have anti-competitive effects and are they considered in the national competition act and case law?

Possible anti-competitive effects have to be taken into account in the context of an individual exemption and in the assessment of whether competition is appreciably restricted. If the conditions of a BER are fulfilled, the exemption is applicable irrespective of any negative effects. In these cases, the competition authority may be entitled to withdraw the exemption, but only with effect for the future (ex nunc).

4.7 Have these justifications led to the conclusions that the agreement is not covered by a prohibition on anti-competitive agreements or to an exemption from the competition rules?

See chapter 4.3 above. Up to now, there are no precedents in German case law on justifications or exemptions.

4.8 In your opinion do the antitrust authorities sufficiently take into consideration the pro-competitive effects of some of these practices?

As mentioned above (see chapter 4.4 and 4.7), it follows from the post-modernisation regime that only in exceptional cases the authorities or courts have to decide on pro-competitive effects (justifications or exemptions). Therefore, no precise answer is possible on how and to what extent authorities or courts would accept possible pro-competitive effects.

5. <u>Sanctions:</u>

5.1 Is the national competition legislation sanctioning vertical practices in general and if yes through which forms of sanctions; administrative and/or criminal or other?

The fine in German law is an administrative penalty. Even if its character is different from criminal fines, many general principles of penal law apply to administrative fines alike (e.g. *nulla poena sine lege*, *nemo tenetur*, no retroactive effect of an infringement). Criminal sanctions, including imprisonment, are provided for bid rigging and for fraud. (N.B: A case concerning the question of whether and to what extent a (horizontal) cartel infringement may constitute fraud is pending before court.)

Contrary to EU law, not only undertakings but also individual persons who are directly or indirectly involved in or responsible for the infringement are subject to fines.

The maximum fine imposed on undertakings is, following the EU example, limited to 10% of the worldwide turnover of the undertaking or the group to which the undertaking belongs. In case of individual persons, the maximum amount is 1 million EUR.

In German law, as in EU law, the calculation of the fine is based on the duration and the gravity of the infringement. In September 2006, the FCO issued guidelines on the setting of fines. They apply to horizontal as well vertical restrictions of competition. First, the basic amount of the fine is set in the range of up to 30% of the turnover connected with the cartel violation, i.e. the turnover generated with the products or services related to the infringement. However, the most severe violations where the fine is generally set in the upper range of the margin (i.e. more than 20% of the relevant turnover) are horizontal infringements. In contrast, the basic amount in cases of vertical infringements will normally be set in the middle of the margin, i.e. up to 15% of the relevant turnover. In a second step, the basic amount of the fine is adjusted for deterrent purposes and/or because of aggravating or mitigating circumstances.

5.2 Are the above practices subject to sanctions as well?

All practices are in principle subject to sanctions, provided that they constitute an appreciable restriction of competition. However, in practice only hardcore restrictions, in particular price fixing and other price related practices are likely to be prosecuted and fined by the authorities.

5.3 Is the specificity of vertical relationships, for instance the lesser harm in relation to intra-brand restrictions, taken into consideration in the application of sanctions?

The gravity of the infringement is the decisive factor in calculating the fine (see chapter 5.1 above). Even if the margin is the same for all types of infringements (i.e. from 0 to 30% of the relevant turnover), the actual setting of the basic amount of the fine must take into consideration all specificities of the case, e.g. the fact that in principle vertical restrictions are less harmful than horizontal ones, and that in general restrictions of intra-brand competition are less harmful than inter-brand restrictions. Other factors which may determine the setting of the fine are, for example, the damage caused by the infringement, the role of the undertaking (e.g. driving force) or its financial situation.

The FCO guidelines reflect the less detrimental character of vertical infringements insofar as the basic amount of the fine is generally not set in the upper range of the margin. However, the calculation of the fine depends on the actualities of the case. Therefore, in cases of exceptional circumstances even a restriction of intra-brand competition may constitute a severe violation of competition rules that is subject to extremely strict sanctions (see chapter 5.4 below).

5.4 What are the major fines in your jurisdictions (in EUR) for vertical restraints? In which context have they been imposed? What is the major criminal or other sanction imposed?

On 30 November 2007, the FCO sanctioned the two major German private TV broadcasting groups with fines of 96 million EUR (RTL) and 120 million EUR (Pro7Sat1). These are the highest fines ever imposed for vertical restraints. The decision was based on a settlement between the FCO and the undertakings concerned, which had announced their acceptance of the fines in advance. The decision is not published, but there is an FCO press release available (also in English) on the FCO's website.

The two TV broadcasting groups are the major distributors of TV advertising "time slots", with a combined market share of 80% in an allegedly oligopolistic market. In similar, but apparently not concerted or coordinated practices, they had granted so-

called share discounts to the media agencies which "purchase" advertising time slots on behalf of the advertising industry. The discounts exercised a strong economic incentive to place a high proportion of the advertising budget with the two large TV groups, thereby foreclosing the TV advertising market to the smaller and less powerful broadcasters. Even if such fidelity rebate schemes may constitute an abuse of joint (duopolistic) market dominance, the FCO based its decision primarily on a vertical restriction of (intra-brand) competition.

The majority of the other fine proceedings in the area of vertical restrictions of competition concern price fixing and price recommendations in cases where the supplier has put pressure on the distributors to respect the recommended sale price, most of them with respect to exploitative prices above the level of competitive prices. The fines imposed in cases regarding RPM currently range up 11.5 million EUR.

6. Assessment

6.1 Is the national competition act sufficiently taking into consideration the specificity of vertical agreements when dealing with price-related practices?

The answer is twofold. With regard to the prohibition and possible sanctions, there are no specific dispositions on vertical restrictions and price-related practices in particular. The general rules on restraints of competition apply. They allow, however, for sufficient flexibility for the authorities and the courts in taking into consideration the specificities of vertical agreements (e.g. by the term "gravity" of the infringement).

Additional indirect criteria may follow from the listed hardcore restrictions in the Vertical BER that has direct effect in German law. In particular Art. 4 lit. a may be seen as an indication of what type of price-related practices are prohibited and do not generally qualify for an individual exemption. Furthermore, the EC vertical guidelines put forward some examples of justifications which may lead to the conclusion that competition is not appreciably restricted in certain cases.

As long as German law is in line with EU standards, no change of the existing situation is to be expected. Introducing more specific regulations concerning the prohibition of vertical anticompetitive practices would require a modification of the EU treaty which is not a realistic perspective. As for sanctions, more specific regulations are theoretically conceivable but again a change of Art. 23 of Regulation No. 1/2003 does not seem a realistic perspective in the near future.

The situation is different as for exemptions. The Vertical BER provides for a general exemption of vertical restraints, with specific provisions on price-related practices. Generally speaking, the BER takes into consideration the specificities of vertical restraints. The existing BER (expiring on 31 May 2010) has in principle functioned to a satisfactory degree.

It is an open question and has to be further discussed whether the same will follow from the newly revised BER. Some doubt in that respect may arise in particular because of the new double market share threshold in Art. 3 which might considerably reduce the practicability of an ex-ante assessment of the block exemption.

6.2 Is the case law evolving? Towards which tendency? On which points are an evolution of the situation advisable?

In the first years following the reform of 2005 the FCO continued more or less its decision practice as under the former German law, in particular with respect to price

fixing and price recommendations. Meanwhile it has further developed its practice by generally adapting it to EU standards.

With respect to price-related practices, the FCO nowadays bases its decisions sanctioning illegal restrictions not only on German but also on EU law. Nevertheless, there seems to be a clear tendency of the FCO to extend the scope of the prohibition of price-related practices. In a recent decision the FCO regarded occasional telephone and e-mail contacts between employees of the supplier (producer) and its distributors in the context of recommended prices as qualifying for a price fixing agreement even though no price was explicitly agreed upon. Evidence of the alleged agreement was deduced from the fact that some of the distributors adapted their prices to the recommended sale price, albeit to a different extent. Further, the FCO held that the sheer fact of several telephone calls of the supplier to his distributors suffices to establish the exertion of pressure on the distributors, irrespective of the exact content of the telephone conversations.

The FCO's extremely strict interpretation of the prohibition of price-related practices is likely to impede substantially economically reasonable distribution strategies. It may in particular hamper a selective distribution policy which is supported by recommended consumer prices. The FCO has not even accepted an exception in the case of health products (contact lenses) where normally qualified consulting services are required. In general, a supplier may find it extraordinarily difficult to implement a strategy of recommended prices since the mere fact that the recommended sale prices are respected by some of the distributors may already serve as proof of the existence of a price agreement.

According to a press article (Frankfurter Allgemeine Zeitung of 27 April 2010), industry in Germany is complaining about the legal uncertainty caused by the new practice of the FCO with regard to vertical price agreements and, in particular, price recommendations. The new FCO approach may even turn out to become a barrier to leniency applications because the undertakings concerned do not precisely know which practices will be accepted by the authority as legal and which ones will be regarded as hardcore restrictions that would nullify an existing leniency application.

Even if cases as the above-mentioned ones may remain exceptional, a decision practice which would be more in line with sound economic theory might be advisable.

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