



Case Summary

14 December 2016

Fines imposed on account of vertical price fixing of Haribo products

Sector:	Production and sale of food; food retail sector
Ref:	B 10 – 040/14
Date of decisions:	19 December 2014, 2 June 2015, 16 June 2015 and 23 February 2016

In December 2014, June 2015 and February 2016 the Bundeskartellamt imposed fines totalling approx. 60 million euros on Haribo and leading food retailers for vertical price fixing in the sale of fruit gum and liquorice of the Haribo brand. The companies involved are:

- Edmund Münster GmbH & Co. KG, the (indirect) legal successor of Haribo GmbH & Co. KG (old) (*Haribo*),
- EDEKA Zentrale AG & Co. KG and EDEKA Zentralhandels-gesellschaft mbH (*Edeka*),
- REWE-Zentral-Aktiengesellschaft and REWE-ZENTRALFINANZ eG (*Rewe*),
- Kaufland Stiftung & Co. KG and Kaufland Warenhandel GmbH & Co. KG (*Kaufland*),
- METRO Dienstleistungs-Holding GmbH, the (indirect) legal successor of MGB Metro Group Buying GmbH (*Metro*),
- Aldi Einkauf GmbH & Co. oHG, Essen (*Aldi Nord*) and Aldi Einkauf GmbH & Co. oHG, Mülheim/Ruhr (*Aldi Süd*) and
- Lidl Stiftung & Co. KG (*Lidl*).

The accusations concern the period from 2004 onwards. At least until mid-2009, Haribo, by far the largest supplier of fruit gum and liquorice, was involved in consistently intensive "price management", i.e. it systematically attempted to influence retail sale prices beyond making price recommendations to ensure adherence to minimum sales prices. This took place firstly during two price increases, in which

Haribo achieved an increase in retail sales prices throughout the sector in 2004/2005 and 2007/2008. Secondly, Haribo intensively monitored the price level achieved, taking immediate action when a retailer appeared likely to fall below the price floor.

Not only were traditional food retailers involved, but also discounters. Already in the early 1980s Haribo was one of the few brand manufacturers to decide to have its brand-name products included in Aldi's product range and subsequently in the range of other discounters. Listing Haribo products in the discount sector limits the scope of other retailers to set prices. On account of its favourable cost structure, Aldi in particular was in a position to make good profits even with low sales prices, while retailers such as Edeka, Rewe, Kaufland, Lidl and Metro felt that their margin was not very attractive. They therefore called on Haribo to take steps to increase retail sales prices and to take action against the particularly low promotion prices of competing retailers. When in 2004 Haribo announced an increase in the manufacturers' delivery price to retailers on account of the increasing prices of raw materials, several retailers called on Haribo to ensure first of all that Aldi increased its retail sales prices, because only then did they see a possibility of raising their own sales prices and preventing a reduction in their margin. Aldi, however, did not accept the purchase price increase and initially also did not raise its sales prices. Thus, Haribo considered itself to be forced not to pass on the increase in its manufacturers' delivery price to the significant other retailers or to make compensation payments until Aldi raised its retail prices. In this situation, from the end of 2004 onwards Haribo once again attempted to persuade Aldi to raise its retail prices, because this was the condition for the rest of the retail trade to accept the purchase price increase. After further pressure from Haribo, Aldi finally decided to increase its retail prices and informed Haribo of this in advance. Haribo then informed the other retailers of this intended price increase and asked when they would increase their retail sales prices. Within two weeks of Aldi's retail price increase, usually after a just a few days, the other retailers thereupon increased their retail prices.

When in 2007 Haribo once again saw the need to increase the manufacturer's delivery prices on account of increased raw material prices, it once again became clear in talks with other retailers that they were only willing to accept a purchase price increase on condition that Aldi increased its retail prices for Haribo products. In spite of Haribo's repeated enquiries, Aldi initially provided no clear information on its own position. Finally, however, following Aldi's decision to increase retail prices, partly on account of Haribo's constant urging, it informed Haribo to this effect before implementing the price increase. As it had done in 2005, Haribo immediately informed the other retailers of Aldi's planned price increase and asked when those retailers would follow suit. Once

again, Haribo thus succeeded in ensuring that all the other retailers also raised their retail prices shortly after Aldi had done so.

Subsequently Haribo intensively monitored the retail price level reached as a result of the price increases in 2005 and 2008 and intervened without delay when it appeared likely that a retailer was going to undercut the defined price floor.

In such cases, those responsible at Haribo attempted first of all to use arguments to dissuade retailers from charging their low promotion price. For example, reference was made to the joint interest in creating a high level of added value and to the risk of a "conflagration", i.e. that other retailers would follow suit, thus jeopardising the price level that had been achieved. This use of arguments to exert an influence was often successful, but not always. If a retailer did not relent, Haribo often threatened not to deliver the goods or not to deliver them in full, and this threat was actually carried out as necessary in a number of cases. On occasion, financial incentives were also given in order to discourage retailers from setting promotion prices too low.

Retailers were by no means merely the object and victim of such price management measures on the part of Haribo. Rather, with the exception of Aldi, they informed Haribo when another retailer undercut the price level. In such cases some retailers actively called on Haribo to maintain the minimum prices.

In 2005 and 2008, Aldi gave Haribo assurances that it would increase retail prices. In the context outlined, the Decision Division assesses these assurances as being special agreements on the retail price structure. With regard to the other retailers, the retail prices agreed by Aldi with Haribo within the context of prices increases were subsequently accepted as minimum prices. The agreements on retail prices made with those respective retailers in the context of the price increases and in connection with the subsequent price monitoring were therefore elements of a single offence under Article 81 of the EC Treaty and Section 1 of the German Competition Act, GWB. Possible efficiencies which may under certain circumstances exempt resale price maintenance from the ban on cartels were unlikely in the present case and were also not presented by the companies concerned.

In all cases, the gain and harm potential derived from the turnover achieved from the infringement was of relevance to the calculation of the fines to be imposed on the retailers concerned in accordance with the Bundeskartellamt's Guidelines for the

setting of fines¹. In setting the fines, it was considered in Aldi's and Lidl's favour that the effects of the price resale price maintenance were largely limited to 300 g bags whilst in the case of the other retailers other pack sizes were also affected. In the case of the manufacturer Haribo, the fine was set within the scope of the statutory framework of fines, based exclusively on 10 per cent of the company's total turnover.

No fines were imposed on natural persons.

With regard to the companies Haribo and Rewe, their cooperation in the proceedings was taken into account as a mitigating factor in the calculation of the fines.

All the companies fined have come to a negotiated agreement (settlement). All the fines imposed have now become final.

This case summary gives an account of the situation as of 14 December 2016.

¹ Guidelines for the setting of fines in cartel administrative offence proceedings, 25 June 2013.