



Case summary

14 December 2016

Fines imposed on account of vertical price fixing in the sale of beer

Sector:	Sale of beer products via the food retail trade
Ref.:	B10-20/15
Date of decision:	16 June 2015, 30 December 2015, 28 April 2016 and 2 December 2016

On 16 June 2015, 30 December 2015, 28 April 2016 and 2 December 2016, the Bundeskartellamt imposed fines totalling around 112 million euros on account of vertical price fixing in the sale of beer products of Anheuser Busch InBev Germany Holding GmbH. The companies fined were

- A. Kempf Getränkegroßhandel GmbH, Offenburg (*Kempf*),
- EDEKA Handelsgesellschaft Hessenring mbH, Melsungen (*EHR*),
- EDEKA Handelsgesellschaft Minden-Hannover mbH, Minden (*EMH*),
- EDEKA Handelsgesellschaft Nord mbH, Neumünster (*ENO*),
- EDEKA Handelsgesellschaft Rhein-Ruhr mbH, Moers (*ERR*),
- EDEKA Handelsgesellschaft Südbayern mbH, Gaimersheim, (*ESBY*),
- EDEKA Handelsgesellschaft Südwest mbH, Offenburg (*ESW*),
- EDEKA Nordbayern-Sachsen-Thüringen GmbH, Rottendorf (*ENBY*) – all of the above Edeka companies and Kempf hereinafter jointly referred to as ‘Edeka’
- Kaufland Warenhandel GmbH & Co. KG, Neckarsulm (*Kaufland*),
- METRO AG, Düsseldorf (*Metro*) and
- NETTO Marken-Discount AG & Co. KG, Maxhütte (*Netto*) – all of the above hereinafter jointly referred to as the ‘retailers concerned’

No fine was imposed on Anheuser Busch InBev Germany Holding GmbH, Bremen (*AB InBev*) and REWE-Zentral-Aktiengesellschaft, Cologne (*Rewe*). Although the Bundeskartellamt's Leniency Programme¹ is not relevant because it only applies to cartel proceedings relating to horizontal relationships between competitors and not to vertical relationships between producers/suppliers and their customers, as in this case, the Bundeskartellamt can, at its discretion, take the cooperation of individuals and companies in vertical cases into consideration and even grant immunity from a fine. Rewe had already fully cooperated with the Bundeskartellamt from August 2011 before the initiation of proceedings; and AB InBev's cooperation enabled the Bundeskartellamt to provide evidence of the infringements relating to the other retailers concerned (except for Rewe). In recognition of AB InBev's cooperation, the Bundeskartellamt exercised its discretion and did not impose a fine on the company in relation to its dealings with Rewe.

All the companies fined, with the exception of EHR and ENO, agreed to conclude the proceedings by way of settlement and had their fines reduced by 10%. The orders imposing a fine of June 2015, December 2015 and May 2015 have since become final.

The Bundeskartellamt issued orders imposing fines on EHR and ENO on 2 December 2016. These are not yet final and can still be appealed before the Düsseldorf Higher Regional Court.

According to the result of the investigations, representatives of AB InBev had reached a basic agreement with representatives of the retailers concerned at the beginning of 2006 at the latest. On the basis of this agreement, the retailers concerned would maintain a certain minimum retail price level for AB InBev's beer products if and insofar as AB InBev regulated retail sale prices by means of "price management", i.e. ensured that the major competitors on the retail side also maintained these retail price levels. These basic agreements related to shelf or normal prices and to promotion prices and, where a permanent low-price concept was used for marketing, they also related to permanently low prices. The basic agreements focused on AB InBev's premium brands, i.e. Beck's, Franziskaner and Hasseröder, which accounted for the bulk of AB InBev's sales volume and which were sold across several regions or nationwide.

The aim of the basic agreements between AB InBev and the retailers concerned was to maintain a certain minimum retail price level (that was at least slightly below AB InBev's RRP). In the

¹ Bundeskartellamt, notice no. 9/2006 on the immunity from and the reduction of fines in cartel cases of 7 March 2006 – Leniency Programme.

interests of AB InBev and the retailers concerned, the particular aim was to prevent predatory prices (price cuts significantly below the agreed sales price level), which could have triggered fierce price competition resulting in a loss against projected sales margins.

The retailers concerned expected AB InBev to take moderating measures, which were generally referred to as “price management”, in order to implement the basic agreements. Between 2006 and 2009, the measures primarily involved the coordination of sales price increases by Edeka, Kaufland, Metro, Netto and Rewe, as the retailers concerned, after corresponding sales price increases by AB InBev. These coordinated efforts followed the same pattern over and over again. The retailers concerned would accept a purchase price increase by InBev, as the company concerned, on condition that all relevant retailers were also going to increase their sales prices. InBev, as the company concerned, undertook to swiftly coordinate sales price increases between all relevant retailers on the market within a timeframe of generally four to six weeks. Implementation deadlines and target sales prices were agreed via a mutual exchange of information between the retailers concerned and AB InBev. Between 2006 and 2009, AB InBev, as the company concerned, rewarded Edeka, Kaufland, Metro, Netto and Rewe, as the retailers concerned, for (largely) maintaining the agreed sales price level of certain InBev products. The various rewards, which included improved terms and conditions in the form of higher refunds, discounts on the purchase price and a delayed increase in purchase prices that came into effect only after retail prices had been increased (“supply at old price”), were usually agreed within the framework of annual agreements or at meetings on the implementation of price increases. At least one of the retailers concerned received several additional lump sums (“*first-mover payments*”) for its willingness to be one of the first to raise sales prices and so send a signal to the other retailers on the market. The combined purchase and sales price increases were designed by InBev in accordance with the expectations of the retailers so that both sides profited from the sales price increase to the detriment of the end consumer. If sales prices were increased successfully to the extent proposed by InBev, the gain – regardless of other financial incentives for the retailers – would generally be split with 60% going to InBev and 40% going to the retailers.

Between 2006 and 2009, Edeka, Rewe, Metro, Netto and Kaufland, as the retailers concerned, largely implemented the coordinated retail prices across the board with some regional differences in agreed sales prices. The basic agreements were continuously updated through individual implementation measures from the beginning of 2006 until the end of 2009. The Bundeskartellamt assumes that these practices, which not only affected beer products, only ended with the Bundeskartellamt’s search on 14 January 2010 (which at that time related to coffee, confectionary and pet food).

The basic agreements were implemented through a range of measures:

- Participation in relevant annual meetings and price increase meetings and corresponding agreements that discussed or defined adherence to agreed sales price levels and rewards with regard to certain AB InBev beer products.
- Participation in the “*moderation*” of the increase in retail price for certain InBev beer products during price increases until March 2006, May 2007, May 2008, July 2008, September 2008 and February 2009, particularly by arranging specific “*implementation deadlines*” with AB InBev, and participation in corresponding agreements.
- Participation in the coordination and/or agreement of promotion prices and (special) payments for compliance with specific sales prices and corresponding agreements during the year.
- Participation in the agreed or coordinated continuous monitoring of the development of retail prices by reporting retailers for undercutting the prices recommended by AB InBev (MSRP) or the agreed (regional) sales prices. The reports regularly contained threats that the low or an even lower retail price would be displayed during the next promotion and that financial compensation would be sought if AB InBev did not manage to maintain the agreed sales prices by successfully intervening against those deviating from the price. This threat was generally issued with the expectation that it was passed on to the retailer deviating from the agreed price.

The Bundeskartellamt based its calculation of the fines on the assumption of a single offence. In all cases, fines were imposed within the turnover-based framework of fines by applying the Bundeskartellamt’s guidelines on fines² of June 2013. In setting the amount of the fines, the Bundeskartellamt considered the type, gravity and duration of the infringement of competition law.

This case summary reflects the situation as of 13 December 2016 and does not take account of subsequent events (appeals, withdrawal of appeals, etc.).

² Cf. Bundeskartellamt, Guidelines on the setting of fines in cartel administrative offence proceedings of 25 June 2013 – guidelines on fines.