



Case summary

31 May 2022

Imposing minimum advertised prices in online sales

Sector: Ordering and billing systems for the hospitality industry

File number: B7-35/22

Date of decision: 30 May 2022

The Bundeskartellamt has terminated an administrative proceeding against Orderman GmbH (**Orderman**) without issuing a formal decision. The subject of the proceeding was a possible violation of the German and European prohibitions of anti-competitive agreements pursuant to Section 1 of the German Competition Act (GWB) and Article 1 TFEU. Orderman had been accused of restricting the freedom of retailers to offer Orderman products online at sales prices below the recommended retail prices (RRPs). In response to this accusation Orderman stated that it had merely imposed minimum advertised prices, not final sales prices. The proceeding was triggered by a complaint filed by one of Orderman's distributors. Orderman is based in Austria and belongs to the US-based NCR Corporation. The company offers mobile ordering and billing systems for the hospitality industry. According to its own statement, the company's distribution system includes more than 400 retailers. The complainant which is based in Germany sells Orderman products online and uses public online platforms such as Ebay for this purpose. Orderman called on the complainant to exclusively observe Orderman's RRPs when offering new goods online, in particular on public online platforms. Compliance with this requirement was a precondition for continued supply by Orderman. Orderman subsequently claimed vis-a-vis the retailer that it had only imposed minimum advertised prices. According to Orderman, the requirement to advertise new goods only based on the RRPs did not restrict the retailer's freedom to ultimately sell the products concerned at prices below the RRPs. In the company's opinion such requirements were not objectionable under competition law.

The Bundeskartellamt terminated its administrative proceeding without reaching a conclusive assessment of the accusations. External lawyers engaged by Orderman to clarify the facts of the case were able to plausibly demonstrate to the Bundeskartellamt that with the exception of some individual cases, the company had at least not systematically violated the prohibition of anti-competitive agreements. Orderman undertook to provide its sales staff with further training on the compliance issues that were relevant to this case. The company also expressly clarified to all retailers that they are free to determine their own prices for advertising and selling Orderman products on all distribution channels. Even though, according to Orderman, the company itself did not consider public online platforms to be suitable for selling new Orderman goods, it was exclusively up to the retailers to decide on which distribution channels and at what prices the products should be advertised and sold.

A manufacturer's restriction of a distributor's possibility to determine its own sales prices, also referred to as resale price maintenance, constitutes a restriction of competition by object within the meaning of the German and European prohibitions of anti-competitive practices pursuant to Section 1 GWB and Article 101(1) TFEU. Furthermore, as they constitute so-called hardcore restrictions, such restraints are not exempted from the ban on cartels under the Block Exemption Regulation on Vertical Agreements (**Vertical BER**, cf. Article 4 (a) VBER). An exemption under this regulation only applies to the setting of maximum sales prices and RRP's provided that they do not amount to fixed or minimum sales prices as a result of pressure from, or incentives offered by, any of the parties. This will not be changed by the new Vertical Block Exemption Regulation which will enter into force on 1 June 2022.

A specific feature of the present case was that the supplier claimed vis-a-vis the distributor that they had merely imposed minimum advertised prices which in their view was permissible under competition law. However, the setting of minimum advertised prices is also covered by the hardcore restriction pursuant to Article 4 (a) VBER and can thus not be generally exempted either. Minimum advertised prices constitute an indirect restriction by object of the distributors' possibilities to determine their sales prices. As they remove the possibility for retailers to advertise their own sales prices, minimum advertised prices remove a key parameter for price competition between retailers. The European Commission once again clarified this in paras. 187 and 189 of its Guidelines on Vertical Restraints which were recently revised within the context of the evaluation and review of the VBER.