

**JOINT COMMENTS OF THE AMERICAN BAR ASSOCIATION’S SECTION OF
ANTITRUST LAW AND SECTION OF INTERNATIONAL LAW ON THE
GERMAN FEDERAL CARTEL OFFICE’S GUIDANCE NOTE ON THE
PROHIBITION OF VERTICAL PRICE FIXING IN THE BRICK-AND-MORTAR
FOOD RETAIL SECTOR**

March 9, 2017

The views stated in this submission are presented on behalf of the Section of Antitrust Law and Section of International Law (“Sections”) of the American Bar Association (“ABA”) only. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and, therefore, do not state the views or policy of the American Bar Association.

The Sections welcome the opportunity to participate in the public consultation by the German Federal Cartel Office (“FCO”) regarding its Draft Guidance Note on the Prohibition of Vertical Price Fixing in the Brick-and-Mortar Food Retail Sector (“Draft Guidance Note”), published on January 25, 2017.

The following comments reflect the experience and expertise of the Sections’ members with competition law in the United States and other jurisdictions, including the European Union. The Sections are available to provide additional comments or to participate in any further consultations with the FCO.

A. Limitation of scope

The Draft Guidance Note limits its scope to the prohibition of vertical price fixing in the brick-and-mortar food sector. The Sections recognize that the FCO states in footnote 2 that the assessment of restrictions of retailers’ online sales is not addressed in this paper and that respective investigations are still ongoing. However, leaving online sales aside, the questions addressed in the Draft Guidance Note are also relevant to various other sectors. Hence, the Sections recommend that the FCO clarify the role of the Guidance Note outside of the food retail sector.

B. Letter of the Chair

The second paragraph of the Draft Guidance Note refers to a note issued by the FCO during ongoing investigations relating to potential vertical infringements in 2010 (“Letter of the Chair”),¹ which contained behavioral advice to companies that cooperated with the FCO. Paragraph 2 of the Draft Guidance Note states that, following the completion of those proceedings, this behavioral advice has become obsolete.

However, the envisaged Draft Guidance Note falls short of the advice in the Letter of the Chair in that it does not address all of the points discussed in the Letter of the Chair. While the Sections are aware that the Letter of the Chair was intended primarily to serve as guidance during the specific vertical investigations, companies have *de facto* observed the

¹ Letter of the Chair of the 11th Division of the FCO on Cases B 11-13, 16 and 19/09, 12/10 (Apr. 13, 2010).

advice. In the interest of legal certainty it would be helpful to clarify whether the advice provided in the Letter of the Chair has now lost all validity. Without further guidance, it seems likely that the Letter of the Chair will still be referred to especially in relation to the issues not addressed in the Draft Guidance Note. Guidance on the issues and examples addressed in the Letter of the Chair but not in the current Draft Guidance Note (*e.g.*, the provision of calculation tools or the printing of recommended resale price (“RRP”) on the product / packaging, hub & spoke, provision of aid on calculation of resale prices) would be helpful.

C. Effects based approach

In paragraph 16, the Draft Guidance Note acknowledges that the prohibition of anticompetitive agreements covers only behavior that has an appreciable effect on competition. It goes on to say that the classification of vertical price fixing as a restriction of competition by object means that it is presumed to appreciably distort competition.

However, the case law and the economic literature² tell us that this is not always the case. For example, the U.S. Supreme Court in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*³ overruled a nearly century old rule established in *Dr. Miles Medical Co. v. John D. Park & Sons Co.*,⁴ that vertical agreements to fix minimum prices should be treated as *per se* illegal. In doing so, the U.S. Supreme Court found that the economic effects of vertical price fixing agreements were not always anticompetitive and therefore such restraints did not warrant *per se* illegality. The Court observed that RPM can facilitate manufacturer or retailer collusion and be anticompetitive when used: (i) by a manufacturer cartel to identify cheating; (ii) by retailers to coerce manufacturers to eliminate price cutting; (iii) by a dominant retailer to forestall distribution innovation; and (iv) by a dominant manufacturer to incentivize retailers in order to exclude competitors or new entrants. However, in finding that a strict *per se* rule was not warranted, the Court also identified a number of potential procompetitive justifications for RPM, including: (i) promoting interbrand competition and enhanced retail services; (ii) creating more options for consumers; and (iii) facilitating market entry for new companies and brands (by guaranteeing favorable margins).⁵

Furthermore, in its “1 Riegel extra” decision,⁶ the Federal Court of Justice (“BGH”) ruled that to be unlawful, vertical price fixing requires an appreciable effect on the pricing of

² Economic learning has taught that vertical restraints such as RPM may benefit consumers by increasing demand, and/or creating a more efficient distribution channel. As the former head of the U.S. Federal Trade Commission’s Bureau of Economics explained, “it appears that when manufacturers choose to impose [vertical] restraints, not only do they make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision.” Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, in *HANDBOOK OF ANTITRUST ECONOMICS* 391 (Paolo Buccirossi ed., 2008). With respect to minimum RPM in particular, because both pro- and anticompetitive theories predict higher prices, all else equal, to determine the consumer welfare effects, it is critical to measure the impact of the restraint on product/service quality and output.

³ 127 S. Ct. 2707 (2007).

⁴ 220 U.S. 373 (1911).

⁵ *Leegin*, 127 S. Ct. at 2713.

⁶ BGH, Judgment dated 8 April 2003 - KZR 3/02 (LG Köln) „1 Riegel extra”, para 13 “An dieser Rechtsprechung hält der Senat jedoch nach erneuter Überprüfung insoweit nicht fest, als Einschränkungen der Preisgestaltungsfreiheit, die von Verkaufsförderaktionen der Herstellerseite ausgehen, ohne Rücksicht auf ihre

the distributor. In that case, the manufacturer had advertised a product promotion with a slogan suggesting that pricing would remain the same despite an increase in the product's volume. An investigation was triggered by a competitor claiming that the conduct amounted to vertical price-fixing. While the BGH agreed that the conduct could lead to unlawful vertical price fixing, it stated that the short period of the promotion excluded an appreciable effect on the pricing of the distributor.

The Sections therefore suggest amending the Draft Guidance Note by clarifying that the requirement of an appreciable effect on competition may not be assumed automatically. Instead, it has to be established in every case and may not be established for example, in cases of promotions running for only a short period.

D. Vertical price fixing in the German food retail sector

Paragraph 43 of the Draft Guidance Note states that food is a “standard product that usually does not require any pre-sale advice.” However, the Sections note that there are non-standard products (*e.g.*, artisanal cheeses) for which pre-sale advice and pre-sale sampling may be helpful. This paragraph also states that there is “limited scope for the development and launch of new, innovative products.” Although this is true for some commodity products, the retail food sector often sees new products, new delivery mechanisms for old products, innovation regarding ingredients, nutrition, and packaging, or a revival of old products. For example, the “granola bar” was once a new product, and variations on this basic product (*e.g.*, new flavors, new ingredients) as well as competitive products (*e.g.*, breakfast bars) continue to emerge. Artisanal breads bring new ingredients or recover older ingredients (*e.g.*, “ancient grains”). New products come to market for new dietary needs (*e.g.*, gluten-free breads or vegan cookies) or shifts in taste preference (*e.g.*, “Greek” yogurt). Old products come in new delivery forms (*e.g.*, 100-calorie packages, hummus in a flexible stand-up container).

Therefore, the Sections believe that the food sector has seen plenty of innovation and that there is room for future innovation.⁷ Consequently, the Sections suggest that the FCO revise the Draft Guidance Note accordingly.

E. Agreements on fixed and minimum prices

Paragraph 50 of the Draft Guidance Note lists examples where the FCO considers that suppliers are exercising pressure or granting incentives to induce retailers to conclude or

Dauer und die Spürbarkeit für den Handel als Verstöße gegen das Preisbindungsverbot angesehen worden sind.“ and para 25 „Soweit der Senat in seiner bisherigen Rechtsprechung faktische Einschränkungen der Preisgestaltungsfreiheit für Zweitverträge ohne Rücksicht auf deren Spürbarkeit dem Preisbindungsverbot unterworfen hat (BGH WuW/E 1519 – “4 zum Preis von 3”), hält er daran aus den vorstehend dargelegten Gründen nicht fest.“.

⁷ For a listing of some recent innovations in the packaged foods sector, see Katherine Pendrill, *Top 100 Food Product Ideas in 2016*, TREND HUNTER (Jul. 3, 2016), <http://www.trendhunter.com/slideshow/june-2016-food-product> (listing products including allergy-free veggie burgers, plant-based frozen dinners, fishless vegan fillets, toaster pastries, bearded gummy candies and milk-flavored potato chips); Mintel Inc., *10 Innovative New Food and Drink Products from Around the World* (Oct. 19, 2015), <http://www.mintel.com/blog/food-market-news/10-innovative-new-food-and-drink-products-from-around-the-world> (listing products including Sweet Chili & Mint Kale Crisps, an iced coffee liquid concentrate, hummus in a flexible stand-up pouch, and no-boiling-required pasta).

adhere to an agreement on price. The Sections note, however, that the first example—“*A supplier threatens to refuse to supply a retailer or restrict supplies if the retailer undercuts the recommended resale prices.*”—does not provide any details on when a unilateral announcement changes from being a mere provision of information to a threat. For example, a supplier must be able to make an initial announcement of its policy. Is sending a reminder to all resellers a “threat” to any one reseller? Or does the reminder have to be specifically targeted to a particular reseller? Or does a threat require specific consequences (such as a statement that future orders will be “slow-shipped,” or that the manufacturer will decline further orders from the supplier)?

In addition, the second example—“*In their negotiations a supplier states that it will only supply the products requested by a retailer if the retailer adheres to the recommended resale price.*”—does not imply an agreement. Instead, the supplier signals its own behavior if, in the future, the retailer chooses to sell below the minimum price. In this context the Sections observe that while the heading of this section states “[a]greements on fixed and minimum prices,” Paragraph 12 of the Draft Guidance Note states that “[i]n some specific cases, however, also unilateral demands for vertical price fixing may be prohibited under German law.” Therefore, the Sections recommend amending this example with a comment that this example amounts to a violation of German national law and would infringe European competition law only if the retailer agreed to sell at the RRP.⁸

F. Recommended resale prices

In the example in Paragraph 57bb, the Sections recommend replacing “announces to” with “informs” in order to avoid any confusion between a private communication from the retailer to the seller informing the seller of the retailer’s adoption of the RRP (beyond the scope of full and unequivocal compliance with competition law), and a public announcement of an adoption of a price change that follows on the heels of supplier informing the retailer of an RRP (presumably compliant with competition law). There are many legitimate reasons why a retailer may decide to publicly announce a price change, and the use of “announces to” here potentially encompasses legitimate public price announcements. Such change would also better reflect the Draft Guidance Note’s wording in German, which is “ankündigen,” but the German term does not necessarily imply a necessity of any public announcement.

The Sections have also noted in this section on RRP that the Draft Guidance Note states in its Paragraph 66 that the circumstances of each individual case must be taken into account in order to establish whether particular conduct will be seen as a threat by the supplier, thereby contradicting the non-binding character of price recommendations. The example used considers a repeated price recommendation to be permitted under certain circumstances.

⁸ See Guidelines of Vertical Restraints, paragraph 25(a), at Official Journal C 130, 19.05.2010, p. 1: “*The Block Exemption Regulation applies to agreements and concerted practices. The Block Exemption Regulation does not apply to unilateral conduct of the undertakings concerned. Such unilateral conduct can fall within the scope of Article 102 which prohibits abuses of a dominant position.*”

The FCO suggests that in particular the power relationship between the supplier and the retailer should be considered in order to assess whether repetition of RRP could amount to such a threat. In this respect, the example might be read as suggesting that two preconditions must be met—that the retailer has substantial buyer power and that the supplier is easily replaced. Either condition is likely to be sufficient to negate any inference of an agreement. In addition, such requirement of substantial buyer power would sometimes be very hard to judge by businesspersons, as the “correct” definition of a relevant market may necessitate extended economic analysis without a conclusive result.

It also remains unclear whether the mere repetition of a price recommendation in itself, assuming that factually and legally no pressure or threat is exerted, would be considered as legal by the FCO. The Sections therefore suggest adding a sentence at the end of this paragraph explaining that an RRP may be stated several times and that mere repetition, absent any pressure or threat, is unproblematic and cannot result in the RRP being considered binding, regardless of the power relationship between the supplier and the retailer.

G. Quantity management/promotion planning

Paragraph 72 states that informing the supplier about designated promotional retail prices can raise competitive concerns. Paragraph 74 deems problematic a scenario in which the retailer, while placing the order, indicates its designated promotional retail price as being in line with the supplier’s price recommendations.

The Sections suggest clarifying that, if there are no indications that the retailer is not free in its price finding decision, the mere fact that promotional retail prices are addressed in discussions with a supplier is not in itself problematic. This would also align the legal position in Germany with other EU jurisdictions, such as the UK and Austria.

In Austria, for instance, the Vertical Guidelines of the Federal Competition Authority⁹ clarify in point 14 of the practical examples that the retailer is free to communicate to its supplier designated promotional retail prices, in particular in cases where this is helpful for quantity planning, as long as the prices are set by the retailer and there are no price fixing measures.

Furthermore, the British Competition Appeal Tribunal has acknowledged the following in its decision practice:¹⁰

Disclosures of actual or likely retail prices by a customer to its supplier are often part of normal commercial dialogue. Suppliers may be better informed about the suitability of a particular retail price point, both in absolute terms and relative to the products of other suppliers, than a retailer. A supplier may be legitimately concerned that, without that information, the retailer will incorrectly position the supplier’s goods in the market and that the supplier will be unable to negotiate appropriate cost prices. In Toys and Kits, the Court of Appeal was clearly of the view that bilateral, vertical discussions

⁹ See Austrian Federal Competition Authority, available at <http://www.bwb.gv.at/Documents/BWB-Leitfaden%20-%20Standpunkt%20zu%20vertikalen%20Preisbindungen.pdf> (last updated July 2014).

¹⁰ [2012] CAT 31, Case No: 1188/1/1/11, para. 59.

between a supplier and its customer in relation to matters such as “actual or likely retail prices, profit margins and wholesale prices or terms of sale” may be necessary and, therefore, permissible (see paragraph 106). The Court of Appeal was equally clear, however, that competition law concerns may arise where a retailer discloses such pricing information to its supplier, which uses it for anti-competitive purposes such as by disclosing it to other retailer-customers. This can amount to the knowing substitution of practical co-operation for the risks of competition by the retailers.

In addition, the FCO seems to suggest with these paragraphs that a supplier must ship any quantity of product that the retailer orders. However, independent of the pricing policies of a particular retailer, a supplier may choose to limit the quantity of product that it produces. Likewise, a supplier might choose to limit the quantity that it ships to a particular retailer. This may result in shortages at the particular retailer, but the retailer has retained its pricing autonomy.

Consequently, the Sections recommend that the FCO allow communication about promotional retail prices between a supplier and a retailer within the framework laid out above (instead of only if a retailer asks for an assessment of several alternative promotional prices to avoid the impression that it has agreed to a specific price).

H. Guaranteed margins

Section IV of the Guidance Note provides guidance regarding the practice of a supplier guaranteeing a margin to a retailer. Again, the Sections would observe that simply offering a guaranteed margin to a retailer without requiring the retailer to sell at or above a minimum price does not, in itself, establish an agreement on price between the supplier and the retailer. Furthermore, the Sections would invite the FCO to provide comfort in the Guidance Note that a related common commercial practice does not give rise to any competition law concerns, i.e., a supplier providing a retailer with hypothetical margin impact analysis in the context of a cost price increase. Retailers commonly ask their suppliers to, and suppliers commonly do calculate the margin impact of a proposed price increase on the basis of the supplier’s original cost prices and RRP’s and the supplier’s new prices and RRP’s. These calculations are typically clearly described as hypothetical scenarios based on the supplier’s old and new RRP’s. Similar hypothetical margin impact calculations may also be prepared in the context of the discussion of planned promotions.

These calculations are also presented with an acknowledgement that the retailer will set the price in its sole discretion and any actual resulting margins may, therefore, be different from the modeled scenario. The Sections suggest that the FCO provide guidance that such practices, in themselves, do not give rise to competition concerns, provided these discussions and models are not intended to restrict or otherwise influence the retailer’s price setting freedom.

The Sections would welcome an acknowledgement in the Guidance Note that such practices are unproblematic from a competition law perspective.

I. Renegotiations

In relation to a subsequent demand for re-negotiation of purchase prices by a retailer, the Guidance Note states in its paragraph 83 that the fact that the demand is made only at the end of the business period is an indication that the supplier is not seeking to pressure other retailers for undercutting RRP.

However, the Sections recommend that the Guidance Note provide that such re-negotiations between retailers and suppliers during the business year are possible and unproblematic, if there are no additional indications that the parties are seeking to ensure a certain price level. In particular, a clarification that such re-negotiations can also occur after specific sales promotions without raising concerns would be helpful because it may be commercially desirable to settle the invoice for such promotions soon after they have been concluded.

J. Data exchange between retailers and suppliers

In relation to the data exchange between retailers and suppliers, the Draft Guidance Note simply refers in Paragraph 95 to the use of “sales data.”¹¹ The whole section uses this collective term without providing a precise definition. The FCO seems to refer to the combination of “sales quantities and the respective sales prices” (*see* Paragraph 98). Assuming that this is the intended interpretation, it remains unclear whether data regarding mere sales quantities may be exchanged. Therefore, a precise definition of the kind of data referred to would be desirable.

As it is generally not possible to coordinate pricing strategies based on volume data alone, the Draft Guidance should also clarify that the exchange of volume data is harmless and therefore permitted without restriction. The Sections believe that the last sentence in Paragraph 95, which states that the provision of sales data is generally allowed under competition law, does not suffice, as the definition of sales data remains unclear and as sales quantities (or volumes) are mentioned in the examples.

K. Provision of public price points

Another common practice is for retailers to ask their suppliers to prepare a summary of public retail price points for their products (and possibly also other similar products in the same product category), and to regularly provide such summaries to the retailer. This request effectively transfers the burden and associated costs of producing these tables from the retailer to the supplier. It is clearly a commercial question for the supplier to decide whether to undertake this work for free for the supplier, but, in our experience, suppliers frequently accept such requests.

In the Sections’ experience, it is good practice where a supplier undertakes such a task to make clear that such information is collated from public price points at the request of the

¹¹ *Absatzdaten* in the German version.

retailer. The communications should also not provide a forum for any discussions of the retailer's actual retail price-setting decisions. On this basis, the above activities do not appear to raise any competition law concerns. Given that the Sections understand this practice to be fairly common, the Sections suggest that the FCO briefly address it to provide comfort to businesses and their advisors.

L. Fulfillment agreements

The Draft Guidance Note does not address one particular contractual arrangement between manufacturers/suppliers and retailers under which the manufacturer appoints a fulfillment agent to supply stock to retailers (such as a dispersed group of convenience stores) or food service customers.

These agreements typically require the fulfillment agent to pick up the relevant goods from the supplier, store them in his warehouse for a short period of time, and then deliver them to the retailer and/or food service outlet.

Under this scenario, it is common for the fulfillment agent to take title to the goods, but the agent does not bear any significant commercial or financial risks in relation to the supply of the goods. These are borne by the supplier, who also continues to control the downstream prices by the fulfillment agent of its goods to the ultimate customers.

This type of arrangement is an unusual manifestation of the “genuine agency” relationship under EU competition law, as the fulfillment agent takes title to the goods it distributes to the end customer. However, provided that the fulfillment agent does not bear any commercial or financial risks in relation to the contract goods (accounting for the commercial reality of the arrangements and their practical implementation), this aspect of the contractual relationship—in and of itself—should not bar the application of the genuine agency doctrine to such a relationship.

The Sections note in this regard that the European Commission's Guidelines on Vertical Restraints (para. 16) states that, “*for the purpose of applying Article 101(1), an agreement will thus generally be considered an agency agreement where property in the contract goods bought or sold does not vest in the agent . . .*” The Commission's guidelines therefore acknowledge that there may be circumstances in which an intermediary can be a “genuine agent” even where it takes title to the contract goods.

While the above analysis is widely accepted, there is, to the Sections' knowledge, an absence of guidance by competition authorities on this point. Therefore, the Sections suggest that the FCO address this type of commercial arrangement in its Guidance Note and provide guidance to businesses and their legal advisors in relation to the permitted price-setting arrangements under such arrangements.

Conclusion

The Sections appreciate the opportunity to provide comments on the FCO's public consultation on possible improvements of the Draft Guidance Note. The Sections would be pleased to respond to any questions the FCO may have regarding these comments, or to

provide any additional comments or information that may be of assistance to the FCO in finalizing any changes to the Guidance Note.