ANTITRUST COMMITTEE OF THE INTERNATIONAL BAR ASSOCIATION

SUBMISSION TO THE BUNDESKARTELLAMT REGARDING DRAFT GUIDANCE NOTE ON THE PROHIBITION OF VERTICAL PRICE FIXING IN THE BRICK-AND-MORTAR FOOD RETAIL SECTOR

1 Introduction and Purpose of submission

1.1 Introduction

The IBA is the world's leading organisation of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to shape the future of the legal profession throughout the world.

Bringing together antitrust practitioners and experts among the IBA's 30,000 international lawyers from across the world, with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in this area. Further information on the IBA is available at http://ibanet.org.

1.2 Purpose of Submission

The International Bar Association's Antitrust Committee Working Group (***Working Group***) sets out below its submission to the Consultation on the Draft Guidance Note on the Prohibition of Vertical Price Fixing in the Brick-and-Mortar Food Retail Sector (***Guidance Note*** or the ***Consultation***) issued by the Bundeskartellamt on 25 January 2017.

The Working Group is comprised of international antitrust practitioners from multiple jurisdictions around the world as well as practitioners from Germany. The Working Group is conscious of the detailed nature of the Guidance Note prepared in the context of the issues facing the German market and wishes to address only specific issues based on the Working Group's international and German experience in a manner that the Bundeskartellamt will hopefully find constructive and helpful.

2 Overview

At the outset, we would like to emphasize that we applaud the efforts of the Bundeskartellamt in preparing the Guidance Note as a tool for non-legal experts, designing it for use by "undertakings in the sector," particularly "small and medium-sized undertakings…which do not have easy access to antitrust advice."[1]

It is with this fundamental goal of the document in mind that we submit the comments contained herein. In particular, we are sensitive to the fact that translating certain competition law concepts into terms understandable and readily applicable by non-experts is often difficult and always

[1] Press Release, Publication of guidance note on the prohibition of vertical price fixing in the food retail sector – public consultation, Bundeskartellamt (25 Jan. 2017), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/25_01_2017_Vertikale%20Hinweise.html.

requires a delicate balance in terms of the level of detail to use. In many cases, too much detail can create more confusion than it resolves. This task is made all the more challenging when trying to craft guidelines to cover a broad array of potential conduct.

3 Scope of the Document

We realize that the Bundeskartellamt wanted to make use of its vast experience of cases in the retail sector. The scope of the document is therefore limited to the "brick-and-mortar food retail sector". However, given the specific characteristics of that sector and the likelihood that the guidance note will be used as general guidance for vertical price fixing cases, we would suggest emphasising where relevant the sector specific nature of the guidance. For example, in paragraph 11 the guidance relates to services but in the food retail sector, services will not play a major role. Also in paragraph 17, the draft guidance note refers to consumer goods in general. In paragraph 40, the document mentions that only a few branded products in Germany have a superior brand strength without mentioning explicitly the food retail sector. The sentence therefore could perhaps be amended to read: "However, only a few branded products in the food retail sector in Germany have such a superior brand strength." Also in paragraph 45, it would be helpful if sentence 2 read: "This overview is based on issues that have proved to be relevant in practice and have emerged in fine proceedings in the food retail sector."

4 Concerted Practices

In paragraph 13, the Guidance Note states that it "also applies mutatis mutandis to cases in which price fixing is achieved through concerted practice," which it defines as "autonomous behaviour which is solely focused on the market conditions is replaced by coordination that knowingly substitutes practical cooperation for the risks of competition."[2] The Guidance Note goes on to explain that "in contrast to an agreement, concerted practices can only be established where the participating companies adjusted their market behaviour accordingly."[3]

While this language is familiar to competition law practitioners,[4] even among experts the precise meaning of what constitutes a "concerted practice" remains the subject of substantial debate. Indeed, this is reinforced by the way in which the concept is discussed in the Guidance Note, which describes this as a "catch-all" concept.

In addition, the discussion of concerted practices in the Guidance Note sometimes undermines the clarity of other guidance provided in the document, particularly regarding recommended resale prices. In paragraph 52, the Guidance Note states that "[s]uppliers can issue non-binding retail price recommendations" because "[t]his is a unilateral legal practice…"[5] "Suppliers are, in general, free to explain their opinion as long as this does not put in doubt the non-binding character of their recommendation, including refraining from providing retailers with additional information that is intended to influence their decisions in an anti-competitive way, i.e. inducing the retailers to adhere to the RRP."[6] The Guidance Note concludes that so long as suppliers act within this framework, "retailers can follow their recommendation without this constituting an

[2] Guidance Note at 13.
[3] Id.
[4] *Imperial Chemical Industries Ltd. v. Commission (Dyestuffs)* [1972], 48-69.
[5] Guidance Note at Paragraph 52.
[6] Guidance Note at Para. 52.

agreement on retail prices or a concerted practice."[7]

The Guidance Note does not, however, clearly explain why, for example, the announcement of a recommended resale price together with adoption by the retailer (even absent the provision of additional information or coercion)—something explicitly endorsed elsewhere in the Guidance Note[8]—does not constitute a concerted practice. While the fact that the Guidance Note generally limits its explanatory power to agreements confirms that the unilateral announcement of a recommended resale price does not give rise to an agreement (a principle with which the Working Group agrees), it does not explain why it does not constitute a concerted practice. Thus, the Guidance Note does not make clear where the liability for a unilaterally-announced pricing policy likely ends.

It would thus be helpful if the Guidance Note could more clearly clarify when a behavior is an agreement or concerted practice and when a behavior is legitimate unilateral conduct. The examples in paragraphs 47- 50, especially those in paragraph 50, show that only threatening a retailer should not amount to an agreement.

More generally, and absent some significant and articulable risk from concerted practices, the Working Group suggests that addressing concerted practices in the Guidance Note introduces significant uncertainty for undertakings not familiar with this concept, without clear benefits in terms of clarifying the landscape of legal vertical pricing behaviour. Rather, the Working Group recommends the inclusion of a clear statement explaining that "agreements" can be formal or informal, express or implicit, to run afoul of the vertical pricing rules.

5 Unilateral pricing policies

In paragraph 86, the Guidance Note explains that except for situations "where a retailer is dependent on a dominant or powerful supplier," a "manufacturer may refuse the request of a retailer to supply it, irrespective of the reasons for this refusal."[9] The Guidance Note at paragraph 88 goes on to state that "[a] supplier's decision not to engage in a supply relationship with a retailer does not raise competition concerns as long as the supplier takes this decision autonomously ***and keeps quiet about the reasons behind it***."[10]

Thus, the Guidance Note takes the position that once a supplier communicates that it will not enter into or continue a supply relationship with the retailer if it does not comply with a recommended pricing policy, any new supply contract entered into between the supplier and retailer is likely to "contain[] an (implicit) agreement on the part of the retailer to adhere to the supplier's [recommended resale price] from now on."[11]

As an initial matter, (setting aside the permissibility of this under Section 21(2) GWB) the Working Group disagrees that as a matter of EU competition law it is "very likely that the new supply contract" contains any agreement (implicit or otherwise) on the part of the retailer to adhere to the RPP.[12] As the Guidance Note itself acknowledges, a retailer's adoption of a non-binding

[7] Guidance Note at Para. 52.
[8] Guidance Note at Para. 52.
[9] Guidance Note at Para. 86.
[10] Guidance Note at Para. 88 (emphasis added).
[11] Guidance Note at Para. 88.
[12] Id.

recommended resale price unilaterally-determined and announced by a supplier does not give rise to "an agreement on retail prices or a concerted practice."[13] So too, the Guidance Note recognizes that a supplier has the right to refrain from supplying a retailer that declines to implement that supplier's unilaterally-determined recommended resale price policy.[14]

Explaining to a retailer that it is being terminated for failure to implement the policy does nothing to change the unilateral nature of such an approach. This is substantially different from a system of monitoring and related penalties as it is a "take-it-or-leave-it" proposition.

Moreover, the suggestion that a supplier has the right to discontinue its relationship with a retailer so long as it does not communicate the reasons for that decision and then subsequently enter into a new relationship with that retailer elevates form over substance as it does not reflect the practical realities facing undertakings in these situations.

Indeed, the Guidance Note itself acknowledges that it is neither practical nor reasonable to expect one trading partner not to inform the other of the reasons for the termination of that arrangement: "where a contractual relationship is terminated by the supplier it seems hardly likely that the supplier will not reveal to the retailer any of its reasons for taking this step."[15] From a compliance perspective, it is also difficult to tell business people that a behavior is legitimate only if they do not give reasons for their behavior.

In any event, it is also far from clear that an affirmative communication (whether express, implicit, or by reference to the policy) is necessary in order for the very harm about which the Bundeskartellamt is concerned to arise. A retailer is likely to understand very well the reasons for its termination if it has failed to comply with a pre-announced, unilaterally-determined pricing policy from the supplier (or communicated its intention not to comply), regardless of whether it is affirmatively communicated by the supplier.

6 Usefulness for Non-Expert Audience

In addition to the issues discussed above, in order to maximize the usefulness of the document for a non-expert audience, certain points contained in the Guidance Note are worthy of additional emphasis.

This is particularly the case for explanation of the basic circumstances in which vertical pricing issues can and cannot arise. For example, Paragraph 17 of the Guidance Note explains that the rules involving vertical price fixing do not apply where a manufacturer distributes its products either "via a company it controls" or through a "genuine agent."[16] While this principle is well understood by antitrust practitioners, undertakings are unlikely to be familiar with it and particularly given the threshold nature of the issue, it would be useful to move this up to earlier in the Guidance Note.

Likewise, it should be further emphasized that, although in principle certain vertical pricing agreements may be "exemptable in individually justified cases," the circumstances in which this is likely to be the case are exceedingly rare.[17] As drafted, the Guidance Note correctly articulates

[13] Guidance Note at Para. 52.
[14] Guidance Note at Para. 86.
[15] Guidance Note at Para. 89.
[16] Guidance Note at Para. 17.
[17] Guidance Note at Para. 15.

the four conditions required to qualify for an exemption under Article 101(3) TFEU and Section 2(1) GWB and notes that these conditions may be satisfied "in the following three case scenarios in particular: Market launch of new products, short-term low price campaigns in a franchise system or similar distribution system and, in order to avoid the free-riding problem, in the case of complex products for which retailers provide intensive pre-sales services."[18]

While the Working Group agrees that each of these examples is worthy of highlighting in this context, it would be useful additional context for undertakings to make clear that the mere presence of a vertical price restriction raises a presumption that it violates Article 101 and, thus, the undertaking seeking an exemption under these provisions faces the burden of establishing that each of the requirements has been met. Conversely, it may also be more accurate to note that the cases mentioned are not the only cases which may qualify for an exemption.

Furthermore, particularly in light of the narrow circumstances under which vertical pricing restrictions can be justified together with the fact that the intended audience for the Guidance Note is non-experts, the Working Group recommends significantly simplifying or removing altogether Section II of the document, which addresses the economic theory of vertical price fixing in the abstract. This recommendation is driven by the fact that the discussion in Section III is likely to be both most useful for the target audience, and also sufficient as it addresses the application of these legal principles in the industry. Thus, a broader discussion of the economic theory of vertical pricing restrictions is unlikely to be necessary or helpful. Reducing or eliminating this section will also cut down on the overall length of the document, which could otherwise be a barrier to certain undertakings making the most of the Guidance Note.

7 Data exchange

It is positive that the Guidance Note stresses that suppliers and retailers have a legitimate interest in sharing sales data.

8 Discretion of the Bundeskartellamt

It is to be welcomed that the Bundeskartellamt will use its discretion and will focus on the "serious" cases (see paragraph 102) and will choose between fine proceedings and administrative proceedings. It is also to be welcomed that the Bundeskartellamt is willing to reduce potential fines in case of cooperation.

9 Conclusion

We appreciate the opportunity to participate in this Consultation and submit these comments regarding the draft Guidance Note.

[18] Guidance Note at Para. 19.