PRK Partners s.r.o., attorneys at law
Hurbanovo námestie 3, 811 06 Bratislava, Slovak Republic
tel.: +421 232 333 232, fax: +421 232 333 222

FROM: **PRK Partners s.r.o.**, with its registered seat at Hurbanovo námestie 3, 811 06 Bratislava, Slovak Republic, ID No.: 35 978 643 (***PRK Partners*** or ***we***)

TO: **Bundeskartellamt**, Kaiser-Friedrich-Str. 16, 53113 Bonn (***Office*** or ***you***)

VIA EMAIL

In Bratislava, on 27 February 2017

RE: Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector (draft of 25 January 2017) - Comments and questions

Dear Sirs,

PRK Partners is one of the leading law firms in the Czech Republic and Slovakia, which provides legal services (among others) in the field of competition law in Slovakia, the Czech Republic as well as internationally.

We have read with interest the published draft Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector (the ***Guidance***). We appreciate the complex and comprehensive document, which provides answers to certain practical questions which have not been answered in such detail by other national competition authorities so far. That being said, we do have a few comments/questions in this regard.

You invited any interested parties to submit comments on the draft Guidance until 10 March 2017. We provide our comments and questions below:

A. RPM and hub-and-spoke

In relation to the recommended resale prices, we understand from the Guidance that you believe that announcement of the retailer's intends to adopt supplier's recommended resale prices to the supplier would be quite problematic. In this regard, the Guidance distinguishes between three different situations in paragraphs 55, 57 and 59.

We understand that while first situation is in compliance with competition law and the second one can be somewhat problematic (but is not in itself in breach of competition law), the third one– according to the Guidance – is contrary to competition law.

The third situation (points 59 and 60) can be summarized as follows: The supplier recommends a retail prices to the retailer and make it clear that it intends to impose a market-wide retail price increase with the aim of achieving the new recommended resale price. The retailer after internal consultation announces to the supplier that it will adopt the recommended resale prices.

We understand that pursuant to your opinion "*if the retailer states that it is going to accept the price recommendation and set its retail price accordingly, this is to be assessed as approval to an agreement on the retail price. A potential inner resolution of the retailer to nonetheless ultimately set a lower price would be irrelevant.*" Even more importantly, you claim that "*As it is highly likely that the supplier will use X's agreement as an argument in discussion with other retailers, X cannot be confident that the supplier will keep its approval confidential.*"

In this case, however, we recommend that you strictly distinguish between RPM (which is a typical vertical practice) and horizontal agreement on retail prices, in which the retailers do not communicate on retail prices directly but rather through a supplier acting as a hub. You admit to similarity of these practices yourself, though; we believe your conclusion is not accurate.

We believe that on one hand it is necessary to distinguish a practice of sharing/aligning prices between competitors via a supplier which is in theory usually called "*A2B2C*" or "*hub-and-spoke*", which has been dealt with in detail for example by the British competition authority and the British courts.[1] If the retailer's purpose is to provide information to another retailer via their shared supplier, such practice is considered a horizontal cartel where the horizontal element is key to this type of infringement.

On the other hand, resale price maintenance (***RPM***) is a typical vertical practice, at the core of which is the restriction by the supplier of the retailer's ability to set up its own resale prices independently (via exercising pressure or granting incentives) and not the aligning of the resale price among retailers. In RPM a "*horizontal element*" has no place. RPM should not be confused with the above mentioned hub-and-spoke practice – and most importantly – the means of proving RPM are not suitable to prove hub-and-spoke and vice versa. We believe that RPM is a pure vertical practice with bilateral (vertical) relationships just between the supplier and its customer.

Therefore, certain problematic conduct could either be horizontal or vertical. Nothing in between.

We believe, that it should not be possible to replace lack of evidence to prove a vertical practice such as RPM (typically exercising pressure or granting incentives) with elements which are relevant for a horizontal practice (typically with elements from the "*A2B2C*" test).

In the light of the above, we believe that in no case should the retailer's reply to the supplier's recommended resale price (by itself) be considered to constitute a proof of the RPM practice. Such reply (by itself) could have been used just to receive a better procurement price and the retailer's ability to set up its own resale prices independently would be in no way restricted. We, therefore, doubt whether your conclusion in point 60 ("*A potential inner resolution of the retailer to nonetheless ultimately set a lower price would be irrelevant.*") is correct.

B. Undesired communication from the supplier

In the Guidance we have not found any provisions that would deal clearly with the following particular situation:

[1] E.g. Decision of the Competition Appeal Tribunal no. 1188/1/1/11, dated 20 December 2012, points 54-86.

The supplier provides to retailer A its new non-bidding retail price recommendation for a certain product. In the same communication the supplier also informs retailer A that his competitor (retailer B) has already confirmed that it will apply the recommended resale price (or is already applying the recommended resale price). The information regarding retailer B has not been requested by retailer A and supplier provided it on its own initiative.

In such cases, we would normally recommend to retailer A to make it perfectly clear to the supplier (e.g. by sending a formal letter) that such information about retailer B's retail prices was undesired and to request strongly that the supplier refrains from such communication in the future.

However, it is possible that after internal consideration retailer A comes to a conclusion that the recommended price (and also the price that will be/is used by retailer B) fits its own pricing policy and would like to adopt an equal (or very similar) retail price.

The question is, whether if retailer A in the end adopts a retail price, which is equal (or very similar) to the communicated recommended retail price (and the retail price of its competitor B), can the conduct of retailer A still be considered to comply with competition law or would the Office consider the whole situation as a proof of RPM or any other anti-competitive conduct? We believe that a clear answer to the above question would be very helpful to many undertakings.

C. Comment 3

Finally, we note that most of the Guidance focuses on communication between the supplier and retailer – which is certainly understandable. However, we would find it helpful to also understand the view of the Office regarding the role of other types of evidence the competition authorities could try to use when proving the RPM practice. In particular, we are interested to understand the role of economic analysis (comparison of prices) in such cases.

In other words, is a comparison of prices of product X relevant in order to prove the RPM practice? To what extent would you considered the RPM practice proven when retailers' prices of product X are identical for a certain period of time – and would this change if the prices diverge to a certain extent (e.g. 5% or 10%) – in particular taking into account the price sensitivity of customers in the food sector?

*****

We hope that you might find our comments and questions above helpful and would very much appreciate if you could take them into account in the final version of the Guidance.

In case of any questions please contact PRK Partners s.r.o., attorneys-at-law, att.: Peter Oravec, (tel.: +421 (2) 32 333 232, e-mail: peter.oravec@prkpartners.com).

Best regards,

Peter Oravec