



Bundeskartellamt

# Guidance note on the prohibition of vertical price fixing in the brick-and-mortar food retail sector

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**Guidance note on the prohibition of vertical price fixing  
in the brick-and-mortar food retail sector**

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**Table of contents**

- A. Introduction** 3
- B. Legal and economic background** 5
  - I. Legal background .....5
  - II. The economic theory of vertical price fixing .....9
  - III. The German food retail sector .....13
- C. Assessment under competition law in practice** 15
  - I. Agreement on fixed and minimum prices .....15
  - II. Recommended resale prices (RRPs).....18
  - III. Quantity management/ promotion planning.....22
  - IV. Guaranteed margins/ renegotiations .....24
  - V. Termination of and refusal to engage in business relations.....27
  - VI. Data exchange between retailers and suppliers.....29
- D. Case prioritisation and discretion** 31
  - I. Case prioritisation .....31
  - II. Choice of type of proceedings.....32

## A. Introduction

- 1 The Bundeskartellamt has concluded most of its fines proceedings on illegal vertical price fixing in the food retail sector and imposed fines on both manufacturers and retailers. All of the cases have in common that for years the manufacturers concerned agreed with their retailers on the retail prices of well-known brand products. This guidance note was prepared upon the conclusion of the proceedings. More detailed information on the individual cases can be found in the case summaries issued by the Bundeskartellamt.<sup>1</sup> The aim of this publication is to explain to undertakings in the sector, also with the help of practical examples, the background, purpose and scope of the prohibition of vertical price fixing in the brick-and-mortar food retail sector.<sup>2</sup> The information is also expressly intended for small and medium-sized undertakings which do not have easy access to antitrust advice.
- 2 In the cases now concluded the Bundeskartellamt issued a note containing behavioural advice to the undertakings cooperating with the investigation on how to ensure that they had effectively terminated the violations they were accused of.<sup>3</sup> The purpose of this note was to provide these manufacturers and retailers with guidance on how to fulfil their obligation to fully cooperate. The note met with interest throughout the food retail sector, beyond the cases in question. This specific behavioural advice relating to the individual cases becomes obsolete with the conclusion of the proceedings.
- 3 Vertical price fixing is prohibited both under German and European law. It can be exempted from the prohibition of anti-competitive agreements in exceptional cases. The European Commission has published Guidelines on Vertical Restraints which contain statements on the interpretation of the prohibition of vertical price fixing under European law.<sup>4</sup> The Guidelines provide important guidance for the Bundeskartellamt's work. This guidance note complements the Commission's Guidelines by adding advice on the application of the

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<sup>1</sup> The relevant case summaries, which are published on the Bundeskartellamt's website, are: B10-20/15 of 9 May 2016 (beer); B10-50/14 of 18 January 2016 (roasted coffee); B10-40/14 of 16 June 2015 and B10-41/14 of 19 December 2014 (confectionery).

<sup>2</sup> The assessment under competition law of distribution models used in the Internet is currently the subject of intense debate among antitrust experts. This concerns in particular distribution models where manufacturers make qualitative demands on the retailers they supply to (so-called selective distribution). The assessment of restrictions of retailers' online sales is also currently the subject of proceedings conducted by competition authorities and courts. These issues are not addressed in this paper.

<sup>3</sup> Cf. letter of the Chair of the 11th Decision Division of the Bundeskartellamt of 13 April 2010 on the cases B 11-13, 16 and 19/09, 12/10.

<sup>4</sup> Cf. European Commission, Guidelines on Vertical Restraints, OJ EU C 130 of 19 May 2010, p.1 (hereafter: Vertical Guidelines).

prohibition of vertical price fixing on practices specifically used in the brick-and-mortar food retail sector. The guidance note can also be of relevance for other economic sectors, depending on the similarity of market conditions in these sectors to those in the brick-and-mortar food retail sector.

- 4 Apart from the Bundeskartellamt, other authorities are also responsible for the public enforcement of the prohibition of vertical price fixing.<sup>5</sup> This paper solely reflects the Bundeskartellamt's opinion on the scope of the prohibition of vertical price fixing and is not binding either for other authorities or the courts.<sup>6</sup>
- 5 For the assessment of whether a certain type of conduct falls under the prohibition of vertical price fixing, the circumstances of each individual case are of key importance.<sup>7</sup> This guidance note is therefore by no means a substitute for a thorough self-assessment by the undertakings concerned, which takes account of the circumstances of their specific case. The paper does not explicitly deal with possible scenarios of market power abuse along the food retail value chain or with the prohibition of horizontal agreements between suppliers, between retailers, or between the market participants in a hub-and-spoke network.
- 6 In the drafting of the guidance note, the Bundeskartellamt has taken account of feedback from the sector and competition law practitioners. Prior to the drafting process, the authority held talks with the German trademark association (Markenverband), the German retail association (Handelsverband Deutschland, HDE) and the Competition Lawyers' Association (Studienvereinigung Kartellrecht). On 25 January 2017, the Bundeskartellamt published a first draft (in German and English) on its website to give all interested parties the opportunity to comment. The responses received upon the publication of the note are available via the Bundeskartellamt's website. Several of the suggestions received on case examples and wording have been incorporated in the final version of the guidance note.

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<sup>5</sup> In Germany, the European Commission and the competition authorities of the *Länder*; in other EU Member States, the European Commission and the respective local national competition authorities of the Member States.

<sup>6</sup> The Austrian federal competition authority has presented its view on the prohibition of vertical price fixing in its own guidance paper, which is available on its website.

<sup>7</sup> Cf. Federal Court of Justice, decision of 6 November 2012, KZR 13/12 -Sternjakob.

## **B. Legal and economic background**

### **I. Legal background**

#### **1. Applicability of the prohibition of anti-competitive agreements under German and European law**

- 7** Both under European law and under the German Competition Act (Act against Restraints of Competition, GWB)<sup>8</sup> vertical price fixing is generally covered by the prohibition of anti-competitive agreements (Article 101 TFEU<sup>9</sup>, Section 1 GWB) and can only be justified in exceptional cases.
- 8** European law is applicable if the conduct in question is likely to affect trade between Member States. This is generally the case if, for example, a price-fixing measure affects the whole domestic market.<sup>10</sup> Trade between Member States can already be affected in cases where the price-fixing measure covers large regions of the domestic market.<sup>11</sup>
- 9** If a price-fixing measure does not affect trade between Member States, only German law will be applicable. However, German competition law follows the rules laid down by European law. The result of the legal assessment of a price-fixing measure will therefore not depend on whether both European and German law or solely German law is applicable.
- 10** Under German and European law vertical price fixing is an appreciable restriction of competition generally covered by the prohibition of anti-competitive agreements. The extensive exemption from the prohibition available for agreements between companies operating at different levels of the distribution chain, which European law has provided

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<sup>8</sup> German Act against Restraints of Competition (German Competition Act - GWB) as published on 26 June 2013 (Federal Law Gazette BGBl. I p. 1750, 3245), last amended by Article 1 of the law of 17 February 2016 (BGBl. I p. 203) (hereafter: GWB).

<sup>9</sup> Treaty on the Functioning of the European Union, amended version following the entry into force of the Treaty of Lisbon on 1 December 2009, OJ C 115 of 9 May 2008, 47 ff., last amended by the Act concerning the conditions of accession of the Republic of Croatia and the adjustments to the Treaty on the European Union, the Treaty on the Functioning of the European Union and the Treaty establishing the European Atomic Energy Community, OJ L 112/21 of 24 April 2012 with effect from 1 July 2013.

<sup>10</sup> For detail on this cf. European Commission, Guidelines on the effect on trade concept, OJ C 101/81 ff. of 27 April 2004; on vertical price fixing cf. *ibid.*, in particular, para. 88.

<sup>11</sup> Cf. *ibid.* para. 90.

under the so-called Vertical BER<sup>12</sup>, cannot be applied to such cases. However, in special case constellations vertical price fixing can be justified.<sup>13</sup>

## **2. Elements of the prohibition of vertical price fixing**

- 11** The prohibition of anti-competitive agreements covers agreements on vertical price fixing and so-called concerted practices resulting in vertical price fixing.<sup>14</sup> A relationship between companies is referred to as "vertical" if the companies, e.g. supplier and distributor, operate at different levels of the supply chain. All cases in which the purchaser of a product or service (in a supplier-retailer relationship this will be the retailer) is restricted in its freedom to set its own resale prices (e.g. retail prices) for the products or services it offers, constitute vertical price fixing falling under the prohibition. However, suppliers are generally allowed to set a maximum resale price not to be exceeded by retailers.
- 12** An agreement is any expression of a common will to operate in the market in a specific way.<sup>15</sup> The intention to fix resale prices may not always be expressly indicated, but can become evident from the circumstances of a specific case. The agreement does not have to be binding or legally enforceable. In contrast to this, purely unilateral measures where it is not evident that a common will is expressed, will not fulfil the conditions of the prohibition. In some specific cases, however, also unilateral demands for vertical price fixing may be prohibited under German law (cf. 4. below).
- 13** In the case of concerted practices, autonomous behaviour which is solely focused on the market conditions is replaced by coordination that knowingly substitutes practical cooperation for the risks of competition. In this respect the concept of concerted practices represents a catch-all provision. However, in contrast to an agreement, concerted practices can only be established where the participating companies adjusted their market behaviour accordingly. Most vertical price fixing measures are covered by the concept of agreement. It is thus unnecessary to examine whether concerted practices can be found to exist as

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<sup>12</sup> Commission Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(1) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ EU L 102/1 ff. of 23 April 2010 (hereafter: "Vertical BER").

<sup>13</sup> Cf. Guidelines on Vertical Restraints, para. 47, more details on this in Chapter III. below.

<sup>14</sup> Cf. ECJ, judgment of 7 June 1983, joined cases 1983 01825 (1983), 1825 ff., para. 72-80 – *Musique Diffusion française and others v. Commission* („Pioneer“); Article 1(a) Vertical BER.

<sup>15</sup> Cf. e.g. ECJ, judgment of 15 July 1970, case 1970 00661, (1970), 661, para. 112 – *ACF*; ECJ, judgment of 29 October 1980, joined cases (1980), 03125, (1980), 3125, para. 86 – *van Landewyck*. Cf. also Federal Court of Justice, decision of 15 February 1962, case KRB 3/61 – *Putzarbeiten II*, and Federal Court of Justice, judgment of 22 April 1980, case KZR 4/79 - *Taxi-Besitzer-Vereinigung*.

well. For the sake of simplicity the following text will solely refer to agreements. The text also applies mutatis mutandis to cases in which price fixing is achieved through concerted practice.

- 14** The prohibition of anti-competitive agreements generally applies to any agreements which have as their object or effect a restriction of competition. Vertical price fixing measures are considered to be restrictions of competition by object. Such price-fixing measures in themselves generally result in a restriction of competition, in the same way as e.g. price-fixing and market allocation agreements between competitors.<sup>16</sup> In order to establish a restriction of competition caused by such measures it is therefore not necessary to examine their effects on the market.
- 15** Against this background the Vertical BER considers the establishment of a fixed resale price to be observed by the buyer to be a so-called hardcore restriction. This assessment means that the price-fixing agreements are not covered by the block exemption provided for by the Vertical BER for cases of vertical agreements. Their categorisation as hardcore restrictions expresses the presumption under European law that resale price fixing measures result in a restriction of competition and are only exemptible in individually justified cases.
- 16** For the application of the prohibition of anti-competitive agreements on cases of price fixing, the size of the market shares held by the participating companies is irrelevant. The prohibition only covers behaviour that has an appreciable effect on competition. However, the classification of vertical price fixing as a restriction of competition by object means that it is presumed to appreciably distort competition in the market, even if the parties have insignificant market shares.<sup>17</sup>
- 17** In view of the various distribution models that can be used for the sale of consumer goods, it should be noted that the prohibition of anti-competitive agreements only covers vertical price fixing in cases where suppliers distribute their products via independent retailers. Only the right of independent retailers to set their own prices is protected by competition law. If a manufacturer distributes its products via a company it controls, e.g. a group company, the prohibition of vertical price fixing is not applicable. This also applies if the

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<sup>16</sup> On the economic background of this assessment, cf. C.II. below.

<sup>17</sup> ECJ, judgment of 13 December 2012, case C-226/11, para. 37 – Expedia.

manufacturer uses so-called "genuine" agents for its distribution. An agency relationship will be considered "genuine" if the principal, not its representative, bears the financial and economic risks arising from the agent's business activities.<sup>18</sup>

### **3. Admissibility of vertical price-fixing practices in individual cases**

**18** The classification of vertical price fixing as a restriction of competition by object and as a hardcore restriction does not mean that such price fixing is prohibited in every case. Vertical price fixing can be admissible in exceptional cases if all of the following four conditions are met (Article 101 (3) TFEU and Section 2 (1) GWB):

1. The agreement must contribute to improving the production or distribution of goods or to promoting technical or economic progress;
2. Consumers must be allowed a fair share of the resulting benefit;
3. The agreement must be indispensable to the attainment of these objectives, and
4. It must not afford the parties the possibility of eliminating competition in respect of a substantial part of the products in question.

**19** In the distribution process, vertical price fixing could possibly be justified on the basis of these criteria 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.<sup>19</sup>

### **4. Prohibition of attempted vertical price fixing**

**20** Vertical price-related practices can turn out to be merely unilateral conduct, for example if, despite the supplier's request, the desired vertical price fixing between the supplier and the retailer does not materialise. Under European law, price fixing attempts that remain unilateral are not prohibited. German law, however, prohibits companies from threatening other companies and from causing disadvantages or promising or granting advantages to other companies in order to induce them to engage in conduct which is prohibited under competition law (Section 21(2) GWB). Businesses may therefore not attempt to use incentives or pressure in order to induce other businesses to agree to a prohibited vertical price-fixing practice. The price fixing does not necessarily have to be agreed between the

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<sup>18</sup> For more details, cf. para. 21 in conjunction with para. 16 of the Vertical Guidelines.

<sup>19</sup> For more details, cf. para. 225 of the Vertical Guidelines.

business exerting the pressure or promising the advantages and the addressee of such pressure or promise. The prohibition also covers attempts to induce the addressee to agree on fixed prices with a third business.<sup>20</sup>

- 21** In the case of a violation of Section 21(2) GWB the German competition authority can impose fines on the company that issued the threat or promised or granted an advantage. The addressee of the threat or the advantage will not have to expect a fine as long as it does not agree to the proposed price-fixing practice.
- 22** If, however, the addressee accepts the influence and concludes the desired agreement or coordinates its conduct, it will be in violation of the European and/or German prohibition of anti-competitive agreements, together with the company that issued the threat or promised or granted an advantage.<sup>21</sup>

## **II. The economic theory of vertical price fixing**

- 23** Vertical price fixing agreements can generally have both positive and negative effects on competition. In this respect a differentiation must be made between the type of agreement and the products and markets affected by it. Vertical agreements between manufacturers and distributors can increase economic efficiency within a distribution chain by allowing for better coordination between the companies concerned. This also applies to restrictions of competition contained in these agreements with regard to the distribution of products or brands of a specific manufacturer. Vertical restraints are often associated with fewer disadvantages to competition than horizontal restraints, which directly restrict competition between different manufacturers and brands or competition between resellers and which are often primarily aimed at increasing the suppliers' market power vis-a-vis consumers.
- 24** However, vertical agreements can also lead to severe restrictions of competition. This occurs in particular where such agreements dampen competition among retailers or among suppliers, or where they contribute to securing and abusing market power. Vertical price fixing, which aims at controlling resale prices, thus poses a particularly serious potential threat to competition. Coordination aiming to increase efficiency, e.g. to safeguard sufficient pre-sales services or adequate product presentation, can generally be achieved

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<sup>20</sup> Cf. Federal Court of Justice, decision of 14.7.1980, KRB 6/79 – markt intern.

<sup>21</sup> In the case of the company that issued the threat or promised an advantage, this violation is considered an independent offence committed in addition to the violation of Section 21 (2) GWB (so-called concurrence of offences (*Tateinheit*)).

through less extensive restrictions.

### **1. Possible anti-competitive effects of vertical price fixing**

- 25** Vertical price fixing can harm competition because it eliminates price competition between retailers offering the same product (intra-brand competition). Vertical price fixing prevents retailers from passing on cost savings they have achieved to the end consumer. Competition between different products or manufacturers (inter-brand competition) must be taken into account as well. Under certain circumstances, price fixing on the downstream level has a direct price-raising effect on the product concerned and an indirect effect on the intensity of competition in the market as a whole. The severity of the negative effects depends on the market power of the companies involved, the degree to which suppliers and retailers are interconnected through a web of purchase and supply agreements, and the extent to which vertical price fixing is a common phenomenon on the respective market levels.
- 26** Vertical price fixing can have anti-competitive effects at the manufacturing and the retail level because it facilitates implicit and explicit collusion. At the manufacturing level vertical price fixing can be a tool to stabilise anti-competitive agreements (explicit collusion). It can also be conducive to tacit parallel conduct (implicit collusion) among manufacturers because it facilitates a mutual monitoring of price-setting strategies. At the retail level, vertical price fixing can be used to enforce cartel agreements more effectively and prevent competitive moves of individual retailers. This is particularly true for vertical price fixing systems that are initiated by the retail level itself.
- 27** Vertical price fixing can in particular help to secure excessive business margins on different market levels. This may apply, for example, where a supplier with superior market power is faced with competitive structures at the retail level, and at least some of the retailers have bargaining power against the supplier and demand better purchase conditions on account of the competitive situation on the downstream level. By employing vertical price fixing measures, the supplier can discipline those retailers that have the reputation of being particularly price-aggressive, thus reducing pressure on its selling prices and enforcing a higher selling price level in the market.
- 28** Finally, vertical price fixing can hinder or prevent new developments in the market. At the manufacturing level, this concerns the launch of new products, and at the retail level the market entry of new competitors and the development of alternative distribution systems.

The latter concerns in particular price fixing that is initiated by the retailers and aimed against more efficient or price-aggressive new distribution models.

## **2. Potential efficiencies of vertical price fixing**

- 29** According to economic research, vertical price fixing can, in individual cases, also generate efficiencies. However, research has shown that in many cases the same efficiencies can be achieved with other forms of vertical agreements that result in a less severe restriction of competition.
- 30** Vertical price fixing can, under certain circumstances, help to address a 'free-rider' problem. This problem usually occurs with products that require pre-sale advice. If a customer seeks advice on a product from one retailer and proceeds to buy the product from another retailer who does not offer such advice and is therefore able to offer the product at a cheaper price, the second retailer is 'free riding' on the services provided by the first retailer. In such a case the first retailer lacks an incentive to provide pre-sale services in the first place. This, in turn, runs contrary to the interests of the supplier because sales of its product will drop if the necessary advice services are not provided. To avoid this scenario, the supplier could resort to vertical price fixing. This, however, means that all customers have to pay the fixed price, irrespective of whether they are familiar with the product and irrespective of whether or not they need pre-sale advice. The supplier could achieve similar results at less harm to competition in individual cases by using a selective distribution system and demanding a certain (minimum) amount of pre-sale services from its distributors.
- 31** The problem of uncertainty of demand when launching a new product is another efficiency argument frequently raised. It is argued that the restriction of price competition at retail level and the resulting margin guarantee for retailers ensure an appropriate risk allocation between manufacturer and retailer when a new product is launched. The retailer is encouraged to add new products to its portfolio (despite the uncertainty of demand) and to make specific investments for them. However, also in this case there is a less restrictive means available to the supplier who can explicitly reimburse retailers for the investments made.
- 32** In addition, vertical price fixing can help to solve the problem of 'double mark-ups'. Double mark-ups occur if on each market level a powerful company adds a surcharge to a product's price, with the consequence that the end product has a higher price and is sold

in lower quantities than would be the case if one (integrated) company controlled the entire value added process. This problem could be solved with the help of vertical price fixing. However, double mark-ups can usually also be prevented by other means, such as vertical maximum price fixing or non-linear pricing<sup>22</sup>, both of which are allowed under competition law.

- 33** Finally, suppliers can be tempted to fix retail prices if end consumers understand the product price as an indication of quality. This is likely if the supplier has built a reputation of producing high-quality products (brand image). From the supplier's view, the brand image can be damaged if the price for its product is "too low". This would, however, require that a low product price is capable of compromising the brand image of a product and/or a manufacturer. In any case, suppliers that are convinced that their product price is a signal of quality are able to shape the retail price by raising their own selling price, thus preventing a "cheapening" of their products.

### **3. Relevant criteria for the assessment of vertical price fixing in practice**

- 34** The critical view taken by German and European law on vertical price fixing is justified. This notwithstanding, the anti-competitive effects and potential efficiencies of vertical price fixing can vary, depending on individual circumstances. It is therefore possible to establish criteria to determine when administrative intervention in a given case of vertical price fixing is appropriate.
- 35** A major criterion is the structure of the markets affected. The stronger the market position of the supplier initiating vertical price fixing and the more concentrated the affected upstream and downstream markets, the stronger the anti-competitive effects of vertical price fixing will be. Other important aspects are the degree to which suppliers and retailers are interconnected through a web of purchase and supply agreements, and the extent to which vertical price fixing is used in the market affected. If there is an extensive web of purchase and supply agreements or if vertical price fixing is a common phenomenon in the market, individual price-fixing measures have a much stronger pro-collusive effect than in cases where the purchase and supply agreements are more linear or vertical price fixing occurs only sporadically.

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<sup>22</sup> Non-linear pricing means that the price per item varies with the number of items sold. A typical example are quantity rebates where the price per item drops with increasing quantities sold.

**36** Whether vertical price fixing generates efficiencies also depends on the product concerned: The more pre-sale services a product requires, the more convincing the argument that consumers benefit. If, however, the product concerned is a "standard product", the efficiency argument can be rejected straight away. If a new product is launched, vertical price fixing is the more likely to generate efficiencies, the higher the necessary investments of the retailers or the greater the uncertainty of demand. This in turn will depend on the extent to which the new product differs from previous offers. German and European law only recognise the efficiency argument in the case of genuinely innovative products.

### **III. The German food retail sector**

#### **1. Market structure and distribution of power**

- 37** Operating a dense network of outlets throughout Germany, the food retail sector organises the provision of food to end consumers. For the food industry, it represents the most relevant distribution channel for sales to end consumers.
- 38** The market structure of the relevant sales and procurement markets of the sector largely correspond to the criteria described under B. II. 3. In more concrete terms, this means:
- 39** Both the sales and the procurement markets exhibit a high level of concentration that is still increasing.<sup>23</sup> At the retail level, competition is dominated by a leading group of four retailers that are active nation-wide and together account for about 85% of all food retail sales in Germany. These leading retailers act as "gatekeepers" as regards access to the end consumer, because they decide on the listing and the shelf placement of the manufacturers' products and their own (competing) private labels. In the case of branded products, which are mainly listed by full-range retailers (such as Edeka and Rewe) and only occasionally listed by discounters (such as Aldi), the leading group consists of even less companies, namely the three leading full-range retailers Edeka, Rewe and Kaufland. Conversely, there are only a few leading suppliers on the procurement markets, who generate most of their turnover with the top-level customers from the retail sector.
- 40** On account of this high level of concentration on the upstream and downstream markets, most of the suppliers maintain a comprehensive web of purchase and supply links with almost all of the retailers. Within these stable supply relations, the major retailers are largely able to use their strong market position to their advantage in negotiations with the food

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<sup>23</sup> Cf. Bundeskartellamt, Sector inquiry into the food retail sector, Final report, 2014, p. 9-12; BKartA, decision of 31 March 2015, B2-96/14 -Edeka/Kaiser's Tengelmann, available at <http://www.bundeskartellamt.de/SharedDocs/Entscheidung/DE/Entscheidungen/Fusionskontrolle/2015/B2-96-14.html?nn=4592442>.

industry.<sup>24</sup> The supplier's negotiating position can improve if the negotiations concern a strong, or even indispensable brand. However, only a few food retail products in Germany have such superior brand strength.

- 41** In addition to portfolio depth and breadth, other important competition parameters include: prices (including campaign prices), the geographic position of the outlet and the service level provided by the respective distribution channel. The individual food retailers in Germany differ (sometimes significantly) with regard to these parameters. Another characteristic of the German food retail sector is the high price sensitivity of end consumers, at least with regard to well-known basic products. Here, the pricing policy of the discounter Aldi plays a significant role because its competitors (discounters as well as full-range retailers) regard Aldi's prices as a benchmark, at least with regard to branded products in the entry-level price segment and branded products that are also listed by Aldi.

## **2. Vertical price fixing in the German food retail sector**

- 42** On account of the structural conditions described under 1., vertical price fixing in the German food retail sector is in almost all cases harmful to competition. There is little evidence of efficiencies generated by vertical price fixing in the sector.
- 43** Foodstuffs usually do not require any pre-sale advice. There is limited scope for the development and launch of new, innovative products. Accordingly, new products only concern a small proportion of the retailer's total turnover, which in turn means that the uncertainty of demand linked to the launch of a new product has little effect on the sales policies of the retailer.<sup>25</sup>
- 44** In the fines proceedings against food manufacturers and retailers on account of vertical price fixing, several factors militated against an efficiency-based justification: the product groups affected (high market volumes, high levels of concentration on both market sides, strong manufacturers' brands) and the offences under consideration (evident infringements over a longer period concerning well-established products). A distinctive feature common to all cases was that the market side whose price-setting freedom was restricted (i.e. the retailers) played a rather significant role in the offences. Some retailers went as far as asking manufacturers to intervene if other retailers did not observe a uniform retail price level. In this respect the offences not only involved vertical price fixing but also came close

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<sup>24</sup> Cf. Bundeskartellamt, Sector inquiry into the food retail sector, Final report, 2014, p.407.

<sup>25</sup> In 2010, a full-range retailer offered between 5,000 (small supermarket) and up to 160,000 (self-service store) brands listed on a regular basis, and a hard discounter such as Aldi still offered up to 1,000 regularly listed brands. Cf. Sector inquiry into the food retail sector, Final report 2014, table p. 82.

to a horizontal coordination among the retailers.

## **C. Assessment under competition law in practice**

**45** The following text is meant to provide guidance to market participants on how to assess under competition law practices that may involve vertical price fixing. This overview is based on issues that have proved to be relevant in practice and have emerged in fine proceedings. It explores the borderline between legal and illegal conduct and provides manufacturers and retailers with guidance on how to manage the communication processes that are necessary and useful for their business relationships in compliance with competition law requirements. The case examples that are used to illustrate this have been simplified in many cases for presentation purposes. They also take into account the fact that practices which in themselves comply with competition law can be part of an overall price fixing system or indicate the existence of such a system. The case examples are marked in italics. In view of the variety and mutability of vertical price fixing practices it is not possible to provide a conclusive categorisation and assessment of these complex issues. Other conceivable practices which so far have not been the subject-matter of an in-depth investigation are not covered in this guidance note.

### **I. Agreement on fixed and minimum prices**

**46** Agreements on retailers' fixed or minimum prices are illegal unless an exemption rule applies. The autonomous decision-making process of a trading partner with regard to its pricing policy is to be protected in order to safeguard price competition on the retail level. Agreements between manufacturers and retailers on the resale price (in the following also referred to as retail price) counteract this objective, regardless of whether the retail price is fixed directly or indirectly. Where a retailer allows a supplier to fix the retailer's prices, this is tantamount to the agreement of a retail price between the supplier and the retailer.

**47** The prohibition of anti-competitive agreements thus clearly covers the following types of agreements:

- Direct fixing of (minimum) retail prices:

*"The shelf price shall be € 1.89, the promotional price at least € 1.69."*

*"It shall be admissible to undercut the RRP by a maximum of 3%."*

- Fixed markup over the purchase price:

*"The retail price shall consist of the n/n purchase price plus a markup of 25%."*

- Linking the retail price to another retailer's price:

*"The retail price may not undercut the retail price of retailer X."*

**48** Even if a condition is provided for, there is no doubt that a retail price has been agreed:

- *"The retail price of at least € 0.89 will not be undercut as long as the main competitors X and Y stick to the RRP."*

The condition in this case does not call into question the anti-competitive character of the agreement. On the contrary, the reference to competing retailers indicates that vertical price fixing here also includes a clearly horizontal aspect with the aim of a comprehensive price-fixing scheme.

**49** The agreement on or coordination of the resale price does not necessarily have to be reached on the basis of pressure or incentives. The prohibition of price fixing also covers agreements or concerted practices that are based on a common interest of the two parties. In many cases a retailer will only be willing to commit itself to adhere to a specified retail price in the expectation that the supplier will also induce competing retailers to agree to this, thus ensuring a market-wide price increase:

- **Example:** *Supplier A and the retailers X, Y and Z are each interested in a retail price increase because only part of the difference to the previous retail price is to be used to increase the purchase prices whereas the remaining difference will increase the trade margin. For this reason they agree to raise their retail prices and expect the supplier to induce the other retailers to do the same.*

**50** In many cases, however, suppliers exercise pressure or grant incentives to induce retailers to conclude or adhere to an agreement, as in the following **examples**:

- *A supplier threatens to refuse to supply a retailer or restrict supplies if the retailer undercuts the recommended resale prices.*
- *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.*

- *A supplier promises a retailer improved conditions if the retailer agrees to adhere to the recommended resale price. The retailer accepts the offer.*
- *For a promotional campaign that includes a raffle, a supplier provides three cars as first prizes. In return, he not only demands a maximum promotional retail price of no more than € 1.89 but also a minimum promotional price of no less than € 1.85. A retailer participates in the campaign and accepts these conditions.*

The agreement on a maximum promotional retail price - in this case € 1.89 - is permitted under competition law. Agreeing on a minimum price of € 1.85, however, constitutes illegal vertical price fixing.

- *A supplier supplies a retailer with products for a promotional campaign that contain 25% more content per package than is usually the case. This is advertised by a conspicuous print on the packaging ("Special size offer! 25% extra!"). The supplier demands that the retailer maintains the previous price of the product for the duration of the promotional campaign; raising the price would, in the view of the supplier, violate the prohibition of unfair competition because it would mislead customers on the value-for-money of the promotional product. The supplier demands, however, that the retailer raises the retail price of the normal sized packages to a minimum of € 2.59 once the promotional campaign has ended. Otherwise the supplier will refrain from supplying the retailer with the product. The retailer accepts these conditions.*

Again, the first part of the agreement (not to raise the price for the duration of the campaign) is admissible. Irrespective of whether this is required under the Act against Unfair Competition, such an agreement is a case of vertical maximum price fixing, which is allowed under competition law. The second part of the agreement (to raise the sales price after the campaign), on the other hand, is an illegal vertical price-fixing agreement.

- *A supplier agrees with a retailer to grant a 1.5% "price management discount" on the purchase price which will be deducted from the bill quarterly, provided that the retailer adheres to the recommended resale price.*

In the latter example regarding a "price management discount", the retailer is still

formally free to lower the retail price and forego the discount. However, the objective purpose of the discount granted subject to the above condition is to eliminate incentives for the retailer to engage in dynamic price competition (in which case the retailer would lose the discount) and to prevent the retailer from promptly reacting to lower prices set by a competing retailer (in this case the retailer will tend to be more willing to accept a short-term loss in turnover caused by a competitor's low-price campaign in order not to jeopardise the discount.) The agreement of such a price management discount is therefore intended and likely to restrict price competition; it constitutes a vertical price fixing measure.

**51** In the above examples, the supplier has exercised anti-competitive influence on the retailer's decision-making process by applying pressure or giving price-setting incentives. By doing so it has already violated German competition law (Section 21(2) GWB). The retailer has also violated competition law when it ultimately agreed to the suggested price fixing practice and thus concluded a restrictive agreement with the supplier under German and European law (Section 1 GWB; Article 101(1) TFEU). The retailer can avoid a violation of the law by, for example, opposing the attempted influence, pointing out the legal situation and, if necessary, by contacting the competition authorities. If, in view of the market situation in an exceptional case, this is not a realistic option (e.g. because a retailer that does not have buyer power depends on being supplied by a powerful manufacturer that threatens to delist the retailer or create other economic disadvantages), it will be advisable to at least document these threats. In possible subsequent antitrust proceedings this would enable the retailer to prove that it was not the initiator of the price fixing practice. This fact must be taken into account in favour of the retailer, even though it formally participated in the infringement along with the supplier.

## **II. Recommended resale prices (RRPs)**

**52** Suppliers can issue non-binding retail price recommendations. This is a unilateral legal practice by which suppliers can express their opinion on which retail price they consider to be appropriate for the products supplied by them. Suppliers are free to explain their opinion as long as this does not put in doubt the non-binding character of their recommendation, and as long as they do not provide retailers with additional information (in particular on the pricing strategies of their competitors) to illegally induce them to adhere to the RRP. Suppliers are allowed to provide support in the calculation of hypothetical margin effects,

provided this does not enable the retailer to draw conclusions on the pricing decisions of competing retailers. If suppliers act within this framework, retailers can follow their recommendation without this constituting an agreement on retail prices or a concerted practice.

- 53** In the Bundeskartellamt's proceedings on account of illegal vertical price fixing in the food retail sector, all cases in which vertical price fixing could be established involved RRP as a vehicle for price fixing. In such case scenarios the differentiation to be made between legal and illegal practices is based on two aspects: The question of whether unilateral or bilateral practices (agreement, concerted practices) are involved, and whether the influence exercised over the retailer's decisions is to be classified as legal or anti-competitive.
- 54** **a) Example 1:** *In an annual talk supplier A recommends a retail price of € 0.89 as shelf price and € 0.85 as promotional price for its product. It explains that the recommendation is based on the results of internal market research in the course of which consumers were consulted and price sensitivity analyses were made that also included the retail prices of competing products as observed in retail outlets.*
- 55** **aa) Initial case:** *Retailer X takes note of the explanations, but does not express a final opinion on the pricing policy. After internal consultations it adopts the recommended prices for the products.*
- 56** The conduct of the supplier and the retailer complies with competition law. The supplier's explanations on its RRP are admissible. The retailer autonomously decided to base its own pricing policy on the recommended prices and did not promise the supplier to adhere to a specific pricing structure. An agreement on retail prices or an illegal unilateral influence exercised by the supplier cannot be found to exist in this case.
- 57** **bb) Variation 1:** *Retailer X takes note of the explanations. After further internal consultations it informs the supplier that it will adopt the RRP.*
- 58** In contrast to the initial case, the retailer informs the supplier about the retail price it is going to adopt. This conduct is beyond the scope of full and unequivocal compliance with competition law. An overall assessment of the case will have to be conducted to establish whether the retailer's reply could be interpreted as agreement to vertical price fixing suggested to the retailer by the supplier's price recommendation. In order

to prevent uncertainty as to whether this constitutes vertical price fixing, the retailer is well advised to avoid making comments to the supplier which could give the impression that the retailer intends to adhere to the RRP (cf. C.III below C.III).

**59**     **cc) Variation 2:** *In the talks explaining the RRP supplier A made it clear that it intended to impose a market-wide retail price increase with the aim of achieving the new RRP within a specific period of time, and that it needed the retailer's agreement to "go along" with this.*

**60**     The retailer is thus clearly aware of the fact that it is expected to make a binding statement on its retail price and that the supplier will use this information for a market-wide coordination. 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. As it is highly likely that the supplier will use X's agreement as an argument in discussions with other retailers, X cannot be confident that the supplier will keep its approval confidential. The vertical agreement is thus very similar to a horizontal coordination between retailers which is achieved by the supplier and in which X cooperates by giving its approval.

**61**     **b) Example 2:** *Supplier B wants to make sure that retail prices reach a higher level as this will enable it to impose higher purchase prices on the retailers. It thus presents to the retailers new, higher RRPs amounting to the desired retail prices which are meant to come into effect from the next quarter.*

**62**     **aa) Initial case:** *B makes it clear to retailer X that if the RRP level were to be undercut, it would refuse to supply the retailer. Retailer X accepts this and raises its retail prices.*

**63**     Supplier B threatens to refuse to supply retailer X with the aim of inducing X to fix its retail prices. This constitutes a violation of German competition law (Section 21(2) GWB). Moreover, X's adherence to the RRP can be considered as tacit approval of the proposed price-fixing measure (and thus as an agreement restricting competition under German and European law), even though X did not explicitly reply to B's proposal. X would thus also have violated the prohibition of illegal agreements. In this case X's conduct can be reasonably interpreted as acceptance of the price-fixing measure, because X could have been expected to object to B's proposal if it had not intended to comply with it.

- 64** **bb) Supplement to the initial case:** *Several months later retailer X complains to supplier B about a promotional campaign by retailer Y that undercuts X's price recommendation. X calls on B to inform it about what action B intends to take.*
- 65** From the complaint it can be concluded that X considers the RRP to be binding and that raising its own retail price constituted approval to the price fixing agreement. The complaint by X must be seen as a call on B to take action to ensure Y's and other retailers' price discipline. This confirms the assessment of X's conduct in the context of its retail price increase.
- 66** It should also be noted that threats in cases of non-compliance, even if they are expressed subtly, contradict the non-binding character of price recommendations. What is decisive in such cases is the perspective of an informed addressee of the supplier's statements. The circumstances of each individual case must be taken into account, in particular the power relationship between the supplier and the retailer, and previous behaviour patterns in the light of which the retailer will interpret the supplier's statements. For example, there will be no objection if, in their annual talk and also on another occasion during the same year, a supplier that the retailer can easily replace by another company points out its RRP to a retailer which has substantial buyer power. In such a scenario the retailer will generally not have any indication that there will be negative consequences in the case of its non-compliance with the supplier's price recommendation. If, however, the supplier plays a key role for the retailer's sales prospects (e.g. because its product range makes it one of the leading suppliers in the relevant product group), and if, because of previous refusals to supply, it can be expected that the supplier will use this measure again, even one single contact with the retailer during which its low price is discussed can be seen as a threat and an attempt to exert pressure on the retailer (which is illegal under Section 21(2) GWB).<sup>26</sup>
- 67** **cc) Variation on the initial case (cf. aa above), para. 62):** *In their talks supplier B does not issue any threats to retailer X, but hints that X's major competitors Y and Z have already agreed to raise their retail prices in the forthcoming quarter in compliance with the new RRP's. X states that it is going to "adapt to the developments in the market".*

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<sup>26</sup> Cf. Berlin Court of Appeals, decision of 2 February 2012 – 2 U 2/06 Kart, and Federal Court of Justice, decision of 6 November 2012 – KZR 13/12.

**68** In this case, too, anti-competitive influence has been exercised on the retailer's decision as the information provided by B on the position taken by the competitors Y and Z will, at least to some extent, eliminate X's insecurity with regard to the pricing policies of its competitors. In this context, X's reply to B is to be seen as a promise that, should Y and Z raise their retail prices in compliance with the new RRP, it will do the same. This constitutes an agreement restricting competition under German and European law (Section 1 GWB; Article 101(1) TFEU).

### **III. Quantity management/ promotion planning**

**69** Suppliers and retailers can have a mutual interest in exchanging information for the sake of efficient production planning in order to avoid supply shortages. This is particularly important for the planning of promotional campaigns since the supply quantities needed during a campaign are usually far larger than the quantities sold under the normal price (the so-called shelf price). For this reason, suppliers often demand sufficient lead time to be able to meet the additional demands of a retailer.

**70** In their annual talks, the supplier and the retailer may choose to agree in advance on supplier-supported *promotion periods*, bearing in mind the planned campaigns of other retailers (where known to the supplier). This is to ensure an efficient use of production facilities and does not violate competition law. The fact that this also ensures that not all retailers plan supplier-supported campaigns at the same time with the same products does not raise competition concerns. Otherwise, supplier-supported promotional activities at retail level would lose much of their attraction.

**71** This does not mean, however, that the supplier may prohibit the retailer from undertaking any further promotional activities at its own expense and at a date chosen by the retailer itself. If the retailer informs the supplier in good time when it will require the additional quantities needed for its campaign, the supplier should be able to deliver them as needed. Informing the supplier well in advance of planned campaigns prevents capacity bottlenecks, which is also in the interest of the end consumers.

**72** If the supplier is not only informed of the quantities needed but also of the designated promotional retail price, this can, however, raise competition concerns. In some cases it can be very difficult to distinguish between a (legal) information about an autonomous price a retailer intends to charge and a *promise* on the part of the retailer to charge a certain retail price (which constitutes illegal vertical price fixing under German and

European law).

**73** **Example:** *In the cases of vertical pricing which the Bundeskartellamt investigated in the food retail sector, the suppliers often intervened if they deemed a promotional price to be too low. First they argued with the retailer trying to induce it to raise the price. Where this proved unsuccessful they started to exert pressure on the retailer, e.g. by withholding order confirmations or revoking them under some pretext. The suppliers considered it a red flag if a retailer ordered large quantities but did not reveal the planned promotional price. Conversely, if the retailer indicated its promotional price and the price was in line with the supplier's specifications, this signalled that the retailer intended to observe the supplier's minimum price level.*

**74** If the retailer, while placing the order, indicates its designated promotional retail price, and if this price is in line with the supplier's price recommendations, the experience described above suggests that this is in fact a *promise* to observe the supplier's recommended prices. This applies in particular if the retailer can be expected to be able to estimate by itself the effect its designated promotional retail price will have on the quantities needed. In view of the fact that retail companies carefully analyse their promotional campaigns, and considering the retail trade's large experience with promotional prices, this should usually be the case.

- If possible, retailers should therefore refrain from informing their suppliers in advance of their designated promotional prices to prevent any intervention by the supplier in the first place. Where the supplier is known to have intervened in the setting of promotional prices in the past, such restraint is even more important in order to avoid that the quotation of a promotional price which corresponds to the supplier's recommended promotional price is interpreted as a promise to observe the supplier's minimum price levels.
- Where a retailer nevertheless wishes to obtain an assessment from the supplier on the sales volumes it can expect to achieve with a certain promotional retail price, the retailer is well advised to ask for an assessment on several alternative promotional prices to avoid the impression that it has agreed to a specific price.
- Suppliers, in turn, are advised not to oblige their retailers to inform them in advance of designated promotional prices as this gives grounds for suspicion that they

intend to influence the retailer's promotional price. If a retailer, in fulfilment of such obligation, quotes its promotional price in advance, this quotation can usually no longer be considered non-committal.

**75** In the case of franchise systems or similar distribution systems where the distribution methods are standardized, an explicit obligation to observe a certain promotional price can, however, be allowed if it serves to coordinate a short-term special offer campaign.<sup>27</sup>

#### **IV. Guaranteed margins/ renegotiations**

**76** Retailers and suppliers often engage in debates on the contribution margins of the suppliers' products. The purchase price level the retailer is willing to accept largely depends on the retail prices it expects to be able to realise with the products. The supplier's recommended resale prices often influence the retailer's sales price expectations, but they can also be challenged by the retailer. Such debates are legal within the limits described above under C.II on the subject of RRP's. However, there are two critical aspects that warrant consideration: One is the extent to which the supplier may guarantee a certain (minimum) margin to the retailer, thus relieving the retailer from the risk that market prices will develop differently than expected. The other aspect is the question of whether the retailer may request a compensation payment from the supplier if the expected margin cannot be realised, or whether the prohibition of vertical price fixing does not allow for such requests.

**77** Such guarantees or compensation requests deviate from the usual risk allocation between suppliers and retailers according to which the retailer determines the retail price autonomously and has to bear the consequences of its price decision, which includes the risk that its margin expectations cannot be realised in the market. Assuming that none of the companies involved is dominant or has relative market power, and hence subject to specific legal obligations, this deviation does not violate competition law but is the result of a free negotiation between supplier and retailer. If needed, the parties can readjust their negotiation results for future business periods. Guaranteed margins and renegotiations on compensations can, however, raise concerns with regard to the prohibition of resale price fixing:

**78** If the supplier guarantees a certain margin, the retailer could understand this as an

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<sup>27</sup> Cf. the Commission's Guidelines on Vertical Restraints, para 225.

assurance that the other retailers have agreed to "go along" with the supplier's RRP. From the retailer's perspective, it would otherwise not be reasonable for the supplier to offer a guarantee of such detrimental potential, thus relieving the retailer from the price setting risk. On the other hand, if the retailer justifies its compensation demands by referring to the price setting behaviour of its competitors, this could be understood by the supplier as an attempt to induce it to ensure that the other retailers also observe its price maintenance.

- 79** **Example 1:** *Supplier A wishes to impose a purchase price of € 0.60 on retailer X. The previous purchase price of retailer X was € 0.55. The new RRP for the product is € 0.99, including 7 % VAT. This corresponds to an increase of € 0.10 compared to the previous RRP. X has doubts that consumers will accept this price increase. In response to X's concerns A guarantees X a margin of € 0.3252 per piece in case the retail price of € 0.99 (net € 0.9252) "cannot be realised". It also promises to compensate for any differences by granting a discount on the respective purchase price.*
- 80** Retailer X will most likely understand the wording "cannot be realised" as a paraphrase for "should other retailers undercut the RRP". From the fact that A is willing to assume the price setting risk, X will conclude that the other retailers have signalled their intention to implement the RRP as well. By offering the above terms, A provides an incentive for X to implement the new RRP, at least for the time being. Providing such an incentive is illegal under German law (Section 21(2) GWB). If X accepts the terms offered, this constitutes an agreement restricting competition under German and European law (Section 1 GWB; Article 101(1) TFEU): In essence, X accepts the increase of the purchase price and promises to set a higher retail price that corresponds to the new RRP on the condition that A enforces the retail price increase on the other retailers as well or, if it fails to do so, (over-) compensates X.
- 81** A subsequent demand to compensate for unfulfilled revenue expectations is more difficult to assess. Unless such a compensation is a settled practice between the retailer and its supplier, the retailer initially bears the price setting risk. Whether and to what extent it can subsequently expect a compensation depends on the market position and negotiation skills of the parties. If the retailer has a strong market position, its demands for compensation can raise concerns with regard to abuse control issues but are in themselves not a sign of an illegal agreement on the retailer's prices. For the assumption of such an illegal agreement further evidence is required.
- 82** **Example 2:** *Retailer Y has implemented the (increased) RRP of supplier B. Its*

*strongest competitor, retailer Z, does not adhere to the RRP and accordingly does not raise its retail prices. This fact, together with several special offer campaigns of other retailers, induces retailer Y to lower its retail prices after a short while. In the next annual talk Y refuses to agree to a further increase in B's selling price arguing that, due to the current retail price level, the margins are already weak, and demands certain "economic concessions" on the part of the supplier. As a consequence, B offers to support two additional campaigns with attractive advertising subsidies. On this basis, the parties come to an agreement.*

**83** Y's demand of economic concessions on account of dissatisfying margins does not constitute vertical price fixing. Y's demand concerns the selling prices of B and does not contain any request to exercise pressure on Z to change its pricing policy. Nor do the circumstances indicate such an (implicit) request. The fact that Y makes its demands at the end of the business period (rather than immediately after realising that Z is undercutting the RRP) also speaks against such an interpretation.

**84** **Variation on Example 2:** *When Y realises that its competitor Z does not adhere to the RRP, it informs B of this fact. Y is aware that B will exercise pressure on the other retailer to adhere to its RRP, as Y has been the subject of such pressure itself when B temporarily refused to supply it after a low-price campaign. In addition, Y wants to strengthen its bargaining position in case Z does not budge and reserves the right to demand compensation for Z's price violations. B thanks Y for the information and promises to look into the matter straight away. B adds that it considers price management a priority task and will not accept any action that jeopardizes the price level and the value creation strategy jointly pursued by manufacturers and the retail trade.*

**85** On account of its previous experience with B, in this scenario Y is aware of B's "price management" measures (which is nothing other than the enforcement of previously agreed resale prices). B's response also implies this enforcement practice. Y's informing of B is therefore not only an attempt to prepare B for any compensation demands Y will make in the next annual talk. Rather, it is a sign that Y approves of B's vertical price fixing measures and asks B to intensify its activities in this field. This in turn suggests that there is an agreement between Y and B to the effect that Y observes the RRP, provided B ensures that the price level is also maintained by the other retailers. This constitutes a restrictive agreement under German and European law (Section 1 GWB; Article 101(1) TFEU). The fact that at the same time Y is striving to

improve its negotiating position in case B fails in this endeavour, does not contradict this assessment.

## V. Termination of and refusal to engage in business relations

- 86** German competition law does not impose a general obligation to supply on manufacturers. Only where a retailer is dependent on a dominant or powerful supplier, it may have a right to be supplied (Sections 19, 20 GWB). Where these special provisions do not apply the manufacturer may refuse the request of a retailer to supply it, irrespective of the reasons for this refusal. For example, a manufacturer may refuse to supply a retailer because the retailer's price setting policies are incompatible with the manufacturer's view on how its product should be positioned in the market.
- 87** **Example 1:** *A supplier that is neither dominant nor powerful decides not to sell its products to discount retailers because it fears that the aggressive pricing policy of discount retailers will exert pressure on the prices of full-range providers which in turn will affect its selling prices. Such a business strategy is in principle legal.*
- 88** 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. If the supplier makes it clear, however, that it has decided to terminate an existing business relationship with a retailer on account of that retailer's pricing policy, this can be seen as an attempt to exert pressure on the retailer to change its retail prices. Such conduct is prohibited by German competition law (Section 21(2) GWB). For in principle it can be expected that the supplier will be willing to resume supplying the retailer once the retailer has adapted its prices. By referring to the pricing policy of the retailer, the supplier indicates that its refusal to supply is not a permanent refusal but that it will resume supplying the retailer once the latter has abandoned its pricing policy. The same applies if the supplier refuses to engage in a supply relationship on the grounds that the retailer is not willing to accept the supplier's RRP's as minimum prices. Consequently, where a supplier gives such reasons for its refusal to engage in or resume a supply relationship, and where the parties nevertheless proceed to engage in or resume business relations and the retailer now observes the supplier's RRP's, it will be very likely that the new supply contract contains an (implicit) agreement on the part of the retailer to adhere to the supplier's RRP's from now on. Such an agreement is an agreement

restricting competition under German and European law (Section 1 GWB; Article 101(1) TFEU).

- 89** This also applies if the supplier does not openly communicate its dissatisfaction with the retailer's prices but, for example upon inquiry by the retailer, alludes to it or implicitly reveals its expectations on the retailer's pricing policy in the context of more general announcements. In particular 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.
- 90** **Example 2:** *Supplier A has criticised several times the low retail prices of retailer X. When X again sets a retail price below A's recommended price, A informs X that it will not continue to supply X. Upon inquiries by X, A's sales manager hints that A regrets having to end the supply relationship; however, according to the sales manager, A can only continue to work with retailers that are willing to support A's entrepreneurial philosophy which aims at creating added value in a mutual effort. In response X asserts that it is very much interested in continuing its cooperation with A, regrets the irritations caused and will take all necessary measures to support A's sales policy to the best of its capabilities. As a consequence, A resumes its supplies to X.*
- 91** On account of the preceding events and the explanations provided by the sales manager, it is obvious to X that A will only supply it if X observes A's price recommendations. The renewal of the supply agreement between X and A indicates that X is willing to comply with this demand, even though their communication on this issue is deliberately vague. Accordingly, the renewed supply agreement includes an agreement restricting competition.
- 92** Such a communication between supplier and retailer on why the supplier has terminated (or did not enter into) a contractual relationship becomes less relevant the more time has passed before the supply relationship is resumed, or if credible efforts have been undertaken to make the cooperation acceptable under competition law.
- 93** **Variation on Example 2:** *Two years have passed since the termination of the supply contract. To avoid conflict with competition law, supplier A has taken compliance measures and told retailer X that the latter is free to set its retail prices, even if they undercut A's recommendations. A explains further that any attempts by its sales staff to exert pressure in this regard should be reported to A's management which would*

*immediately put a stop to such actions.*

- 94** In this scenario, the supplier has credibly abandoned its earlier practices and thus made it possible to resume supply relations, this time in line with competition law.

## **VI. Data exchange between retailers and suppliers**

- 95** Data on sales prices and quantities (sales data) are an important source of information for retailers. They analyse them in detail and base their price and portfolio decisions on the results of their analyses. Such data are also relevant for the manufacturers of the respective products. Professional market research companies regularly collect data on sales prices and quantities, e.g. by conducting surveys in retail outlets or by surveying households. They also collect data from the retailers themselves. Many suppliers purchase these data for their distribution strategies and product planning. A lot of them have a strong interest in purchasing the sales data directly from the retailers, as the data from the market research companies are rather costly and only cover random samples. The retailers are also interested in providing the suppliers with sales data because this generates another source of income and offers them the opportunity to use the expertise of the suppliers' market research departments for an analysis of the sales data. This provision of sales data is generally allowed under competition law.
- 96** However, the data may not be used to coordinate pricing strategies, either between the retailer and the supplier, or between retailers with the supplier acting as a mediator, or between suppliers with the retailer acting as a mediator. The provision of data relating to the future (such as a designated promotional price) is therefore subject to the limitations described above.
- 97** The provision of past sales data raises concerns if it not only serves the legitimate purposes outlined above, but is also used to monitor the retail prices of a retailer in order to assess whether the retailer adheres to a vertical price-fixing agreement. If data from the recent past are provided, this can be an indication of such price fixing because the supplier needs current data to effectively enforce the agreed resale prices. The provision of current data is, nevertheless, only a first indication of price fixing. Further evidence is required to prove a price-fixing agreement between supplier and retailer.
- 98** **Example:** *Every three months retailer X provides supplier A with sales data on A's products from the penultimate quarter. X provides data on sales quantities and the*

*respective sales prices for each of its retail outlets. In return, X receives a fixed remuneration, irrespective of whether or not X has followed A's price recommendations. A has pledged not to pass on the data provided by X to any third party. X has no indication that A has failed to meet its commitments.*

- 99** There is a gap of at least three months between the sale of the products and the provision of the sales data. In the Bundeskartellamt's experience, a coordination of price increases usually takes place within a shorter period (a few weeks) and is therefore not likely in this case. The supplier is prohibited by contract from informing other retailers of X's prices. The remuneration for the provision of the data is not linked in any way to whether X observes A's price recommendations. There seem to be no other sanctioning mechanisms. The provision of the data is therefore legitimate under competition law.
- 100** **Variation:** *Retailer X provides supplier A with data on sales quantities and prices on a weekly basis. As in the original case, A has pledged not to pass on the data to any third party. However, upon receipt of the latest data, A's client account manager asks X why, all of a sudden, five of X's outlets in the Saarland undercut the accepted retail price level that has not been undercut by any other retailer in the past 18 months. The account manager further points out that an increase in purchase and sales prices planned for the beginning of the next quarter makes it imperative that no retailer steps out of line. The other retailers might accept a one-off lapse in the current case but for the sake of credibility, X should make sure that such missteps do not occur again. X's next weekly report shows that all of its retail prices are now in line with A's price recommendations.*
- 101** In this case, the period between the sale of the products and the provision of the sales data is very short. This allows for prompt reactions (or interventions) by the supplier, as happened in the example above. The immediate reaction by A's client account manager, and the fact that he mentions the planned price increase and cautions about the reaction of the other retailers, indicates that A uses the price data to coordinate and control retail prices. The fact that, upon A's intervention, X continues to provide A with data, thus demonstrating that it is now adhering to A's recommended prices in all of its outlets, can be interpreted as a promise to observe A's price recommendations from now on. Such a promise would constitute an agreement restricting competition under German and European law (Section 1 GWB; Article 101(1) TFEU). X could have countered this impression by, e.g., objecting to the intervention and demanding an

explanation from A's management as well as requesting a longer interval between the sales period and the transmission of the sales data.

## **D. Case prioritisation and discretion**

**102** The Bundeskartellamt decides at its discretion whether to initiate proceedings if it suspects an infringement of the prohibition of vertical price fixing (Section 54(1) GWB); Section 47(1) Administrative Offences Act (OWiG)). Not least due to resource constraints, it will not be able to follow up any potential infringement of the prohibition that comes to its notice. The Bundeskartellamt also has discretion to initiate either fines or administrative proceedings in order to investigate a suspected infringement.

### **I. Case prioritisation**

**103** In assessing whether the suspicion of an infringement of the prohibition of vertical price fixing justifies the initiation of proceedings, the Bundeskartellamt considers the extent of the restriction of competition caused by the alleged conduct as well as indications for a possible justification on account of generated efficiencies. In cases concerning the food retail sector, the following aspects are generally of particular importance:

- a) **Market structure criteria** such as the market position of the manufacturer and the retailer; the degree of market concentration at the manufacturer and retail level; the duration and extent of the alleged infringements; and the degree to which manufacturers and retailers in the market are interconnected through a web of purchase and supply agreements;
- b) **Product related criteria** such as the product's complexity or the amount of pre-sale services required for its sale as well as the innovativeness of the product in comparison to previous offers;
- c) **Other criteria** such as the extent of the binding effect of the alleged conduct; the available evidence; the extent of the harm presumably caused, in particular to the end consumer; an obstruction of innovative distribution concepts associated with the alleged conduct; and the potential need to create a signal/deterrent effect in the market.

**104** The Bundeskartellamt attaches particular importance to infringements which go beyond vertical price fixing between suppliers and retailers by aiming to coordinate the competitive conduct between retailers or between suppliers, or to facilitate such coordination.

**105** In individual cases market or company specific characteristics can also indicate a need to initiate proceedings. This may apply, for example, if several complaints point towards a systematic pattern of vertical price fixing in a particular market, or if there are indications that an undertaking has repeatedly infringed the prohibition.

## **II. Choice of type of proceedings**

**106** The Bundeskartellamt can address competition law infringements by initiating either fines or administrative proceedings. Fines proceedings are initiated to sanction clear-cut infringements which the parties concerned have committed intentionally or negligently, and which entail a significant potential to cause harm. The Bundeskartellamt can impose substantial fines on undertakings and natural persons in such proceedings (cf. Section 81(4) GWB).

**107** Administrative proceedings are more appropriate for complex cases that raise difficult legal and/or economic questions, and for pilot proceedings to clarify the interpretation of the law in case constellations that have not previously been dealt with in the competition authorities' decision-making practice or by the courts. In administrative proceedings, the finding of an infringement is not conditional on the undertakings concerned having acted intentionally or negligently. If the allegations are confirmed, the proceedings end with an administrative decision prohibiting the continuation of the infringement. Administrative proceedings also enable the authority to issue a declaratory decision that an infringement of competition law was committed in the past, if there is a justified interest to do so, for example to enable claims for damages. Where an infringement was committed intentionally or negligently, the Bundeskartellamt can also skim off the economic benefit achieved from the infringement.

**108** Applied to vertical price fixing this means that the initiation of fines proceedings is likely in the case of clear-cut infringements of the prohibition of vertical price fixing for which an efficiencies justification appears unlikely, provided the Bundeskartellamt, after considering the above-mentioned criteria, has decided to formally investigate the alleged infringement.

**109** If the Bundeskartellamt initiates fines proceedings, the decision against whom the

proceedings are directed depends in particular on the market position of the undertakings that participated in the infringement and the gravity and significance of their involvement. The authority is not obliged to conduct proceedings against every undertaking involved in a suspected infringement.

**110** The Bundeskartellamt can decide to impose a reduced fine if undertakings help to uncover vertical price fixing by cooperating with the authority. In individual cases, the Bundeskartellamt can also decide to refrain from imposing a fine if the cooperation provided by the undertaking is particularly valuable for the authority's investigations.

**111** If there are substantial indications that a justification on account of generated efficiencies may exist and merits closer examination, the Bundeskartellamt will usually initiate administrative proceedings to investigate the case, provided it has decided to launch a formal investigation. Similar considerations apply if it has not been clarified yet either by case law or decisional practice whether a specific commercial practice constitutes a prohibited price-fixing measure.