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## Resale Price Maintenance vs. Hub & Spoke Cartels

German Federal Cartel Office assesses vertical and horizontal price fixing in cartel proceedings focusing on the food sector

In June 2015, the German Federal Cartel Office ("FCO") has concluded most of its long going proceedings against manufacturers and retailers in the food sector for illegally fixing the retail prices of branded products. The FCO imposed fines of EUR 151.6m on both manufacturers and retailers, underlining its strict view towards vertical restraints of competition. As these are the first vertical price fixing cases – falling short of hub & spoke cartels – in which the FCO expressly granted full immunity from fines for cooperation, their relevance is not limited to the food sector but extends to the sale of all types of branded goods.

### Highlights of the proceedings

The so-called "vertical cartel" proceedings were triggered by information gathered by the FCO in the horizontal coffee and confectionary cartels. Based on this information the FCO conducted dawn raids at 15 sites in January 2010. In the majority of the proceedings, the FCO has issued its decisions in December 2014 and June 2015.<sup>1</sup> Single cases concerning the coffee and beer segment are still pending but expected to be decided in the next months.

The FCO fined brand manufacturers and food retailers, incl. the German "big five" (Edeka, REWE, Schwarz Group, Aldi and Metro), as well as two pet food retailers. The brand manufacturers fined so far include Haribo, Ritter, Johnson & Johnson and Dr. Kurt Wolff.

The FCO based its fining decisions on illegal resale price maintenance ("RPM"). A distinct feature of the proceedings was that apart from the suppliers, the retail companies bound by the agreements played an important role in the infringements by – in most cases – urging the suppliers to persuade other retailers to stick to the (vertically) agreed price. This role was facilitated by the countervailing buyer power of German food retailers which makes it particularly hard for manufacturers to

successfully influence retail prices. It is for this active role of the retailers in the suppliers' RPM schemes that the FCO fined the suppliers as well as the retailers.

Initially, the FCO investigated the alleged illegal conduct within a hub & spoke scenario, i.e. as horizontal price fixing agreements between the downstream retailers, using the upstream manufactures as conduit for the alignment of their retail prices. The decisions were eagerly awaited as the FCO (like the European Commission) had never sanctioned a hub & spoke cartel. However, the FCO had to fall back to mere vertical price fixing, i.e. RPM, due to a lack of evidence with respect to the retailers' intention for a horizontal coordination via their suppliers as (passive) intermediates. Along the lines of the existing British case law<sup>2</sup>, infringements in these scenarios can only exist when it can be shown that retailer A disclosed to supplier B its future pricing intentions in circumstances where A may be taken to *intend* that B will make use of that information to influence market conditions by passing that information to retailer C and retailer C may be taken to know the circumstances in which the information was disclosed by A to B and adjusts its prices accordingly. The difference to a mere vertical RPM scenario can be illustrated as follows:



The FCO has considered its "vertical cartel" proceedings to be somewhat in the middle of the above scenarios. Following the amendment of German antitrust law in 2005, the differentiation between mere vertical and horizontal agreements is not as vital anymore as both practices fall under the ban of cartels. However, there are differences with respect to the prerequisites of a potential exemption from

<sup>1</sup> FCO press release of 18 June 2015.

<sup>2</sup> Competition Appeal Tribunal, decision of 20 Dec. 2012, *Tesco Stores Ltd v OFT* [2012] CAT 31; CoA, decision of 19 Oct. 2006 - *Argos Ltd v OFT* [2006] EWCA Civ 1318 (joined appeals against the CAT's judgments in *Football Kits* and *Toys and Games*).

the general prohibition as well as to the calculation of fines. More important, the FCO's leniency guidelines explicitly only apply to horizontal agreements and concerted practices, not to vertical scenarios. In its "vertical cartel" proceedings, the FCO nevertheless has granted full immunity to a number of producers, including InBev, Mars and Melitta, in exchange for their full cooperation.

All fines imposed so far are based on settlements. The information publicly available is limited to the case summaries of the following three proceedings<sup>3</sup>.

#### *Melitta - Coffee*

The FCO has imposed fines on four retailers in the amount of EUR 44.7m. The coffee maker Melitta was granted full immunity for cooperation prior and during the proceeding. Pursuant to the FCO, Melitta agreed with each of the retailers bilaterally that retail prices (shelf and promotion prices) were not to be set below a certain minimum level if, in turn, Melitta would ensure that the other retailers would also implement this price. These vertical agreements were concluded in line with a number of price increases agreed between several coffee suppliers in the coffee cartel previously fined by the FCO.

#### *Haribo – Confectionary I*

The FCO, furthermore, has imposed fines in the total amount of EUR 48.5m on the sweets manufacturer Haribo and 5 retailers, including the German discounter Aldi. Similar to the coffee case, Haribo tried to enforce a minimum retail price in its vertical relationships with the retailers. However, the discounter Aldi proved to be reluctant to adopt intended price increases. The other retailers urged Haribo to persuade Aldi to raise its retail prices in order to have more leeway with respect to their own pricing policy. Only after Haribo succeeded to get Aldi on board, the other retailers also agreed to adopt the intended price increases.

#### *Ritter – Confectionary II*

In the Ritter case, the FCO has imposed fines in the total amount of EUR 23.4m on the chocolate manufacturer Ritter and two retailers. Ritter had incentivized the retailers to follow desired price increases by granting financial incentives that aimed to cushion the increased purchasing prices.

#### *Comment*

In these proceedings, the FCO has not issued its long awaited fundamental decision on hub &

spoke cartels. Instead, the FCO merely found straight forward RPM scenarios constituting clear-cut competition infringements. A distinct feature compared to the FCO's previous RPM cases, however, is the retailers' active role in the infringements which is the reason why the FCO has fined both, suppliers and retailers.

With respect to hub & spoke scenarios, the decisions confirm that the burden of proof concerning the parties' intentions for a horizontal cooperation is high and in the present cases it was not met. Since the FCO will face the same difficulties in future cases, the outcome of the proceeding is relevant for all industries, in particular with respect to branded goods.

The decisions show that, even though the FCO's leniency guidelines are not applicable to vertical cases, full cooperation of the first undertaking to come in – at least in cases with horizontal elements that come close to hub & spoke cartels – is most likely rewarded with full immunity from a fine.

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<sup>3</sup> FCO decisions of 19 Dec. 2014, 10 and 16 June 2015, B10-050/14 – *Coffee*; 19 Dec. 2014, 2 and 16 June 2015, B 10 – 040/14 – *Haribo*; 19 Dec. 2014, B 10 – 041/14 – *Ritter*.