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German Federal Court of Justice: Minimum resale price maintenance always appreciable

The Federal Court of Justice held that the fixing of minimum resale prices constitutes a restriction of competition 'by object' which is appreciable regardless of its effects.

In its recently published judgment of 17 October 2017[1], the Federal Court of Justice quashed a decision taken by the Celle Higher Regional Court in April 2016 which had ruled that minimum resale pricing did not result in an appreciable restriction of competition given its limited timeframe and scope. The Federal Court of Justice pointed to the case-law of the European Court of Justice according to which the setting of minimum resale prices constitutes a restriction of competition 'by object' that is appreciable regardless of its effects and clarified that these principles have to be complied with when applying Sec. 1 GWB, the German equivalent of Article 101 (1) TFEU. Therefore, minimum resale price schemes can, if at all, only comply with EU and German law if they meet the strict conditions for an individual exemption under Article 101 (3) TFEU and Sec. 2 GWB, respectively.

Background

In its judgment of 7 April 2016[2], the Celle Higher Regional Court (*Oberlandesgericht Celle* – **"OLG"**) found that weight loss product maker Almased did not breach Article 101 (1) Treaty of the Functioning of the European Union ("**TFEU**") or Sec. 1 German Act against Restraints of Competition (*Gesetz gegen Wettbewerbsbeschränkungen* – "**GWB**") by offering its buyers (dealers) discounts in return for maintaining minimum resale prices.

The OLG took the view that, even though Almased's behaviour met the criteria for a hard-core-restriction within the meaning of Article 4 Regulation (EEC) No 330/2010 of 20 April 2010 (*Vertical Block Exemption Regulation* – "**VBER**") and had an anti-competitive object, it did not constitute an appreciable restriction of competition given its limited timeframe and scope.

The OLG found that an agreement with the anti-competitive object to fix a minimum resale price did not *per se* constitute an appreciable restriction of competition. Rather, in order to determine whether a restriction of competition by object is appreciable, all relevant circumstances of the individual case had to be taken into account. This, the OLG argued, followed from the "*1 Riegel extra*" decision taken by the Federal Court of Justice (*Bundesgerichtshof* – "**BGH**" or the "**Court**") on 8 April 2003[3] in which the BGH held that a manufacturer's pricing campaign effectively restricting its dealers to charge higher resale prices for a short time period did not constitute an appreciable restriction of competition.

The OLG further held that it did not follow from the "*Expedia*" ruling taken by the European Court of Justice ("**ECJ**") on 13 December 2012[4] that agreements which have an anti-competitive object constitute appreciable restrictions on competitions regardless of the concrete effects they may have.

BGH Decision and Reasoning

The BGH now quashed the decision taken by the OLG and held that Almased's behaviour, setting minimum resale prices vis-à-vis its dealers, constituted an appreciable restriction of competition within the meaning of Sec. 21 GWB in conjunction with Sec. 1 GWB.

In its reasoning the BGH pointed to the EU case-law concerning Article 101 (1) TFEU and the concept of appreciability and concluded that the OLG has failed to fully comply with the following principles established by the ECJ:

(i) Article 101 (1) TFEU is not applicable where the impact of the agreement on competition is not appreciable;

[1] Federal Court of Justice, 17 October 2017, KZR 59/16.
[2] Celle Higher Regional Court, 7 April 2016, 13 U 124/15 (Kart).
[3] Federal Court of Justice, 8 April 2003, KZR 3/02, "*1 Riegel extra*".
[4] European Court of Justice, 13 December 2012, C-226/11, "*Expedia*".

(ii) agreements that have an anti-competitive object constitute, by their very nature and independently from any concrete effects that they may have, appreciable restrictions of competition;

(iii) agreements that restrict the buyer's ability to determine its minimum resale price are hardcore-restrictions within the meaning of Article 4 VBER that have an anti-competitive object.

The BGH was prevented from taking a final decision on whether Almased's behaviour was in breach of EU competition law (Article 101 (1) TFEU) because the OLG had failed to determine whether Almased's behaviour had been capable of affecting trade between Member States and the BGH does not undertake fact-finding. However, this question could be left open given that in line with the German legislator's objective to synchronize German and EU competition law, as the Court stressed, the above-mentioned ECJ principles are also applicable when solely applying German competition law, i.e. Sec. 1 GWB, the equivalent of Article 101 (1) TFEU.

The BGH further noted that these principles are consistent with its previous case-law. In this regard the Court emphasized that its "*1 Riegel extra"* ruling related to a case in which the promotional activities of a manufacturer restricted its dealers' freedom to charge higher resale prices, whereas the current case dealt with the setting of minimum resale prices.

After having laid out this legal framework the Court concluded that Almased's offer to provide discounts in return for maintaining minimum resale prices had an anti-competitive object and therefore constituted an appreciable restriction of competition regardless of its concrete effects. Subsequently, the BGH – albeit not decisive in this case – continued to assess the effects of Almased's promotional campaign on competition and concluded that this behaviour was indeed capable of appreciably affecting competition.

Comment

It is welcomed that the BGH has at last overruled the outright erroneous decision of the OLG which neither complied with EU case-law nor with the German judicature.

It follows from case-law of the ECJ that the setting of minimum resale prices has an anti-competitive object and constitutes, by its nature and independently of any concrete effects, an appreciable restriction of competition pursuant to Article 101 (1) TFEU.

By emphasizing that this principle also has to be complied with within the scope of Sec. 1 GWB, i.e. the German equivalent of Article 101 (1) TFEU, the BGH confirms that the setting of minimum resale prices is *per se* appreciable under German law as well.

The BGH was also right to emphasize that from a competition law perspective the (*de facto*) setting of maximum resale prices (as in the "*1 Riegel extra*" case) and of minimum resale prices (as in the case at hand) are treated differently. This is indicated by Article 4 VBER according to which minimum resale pricing constitutes a hardcore-restriction whereas maximum resale pricing does not.

A fly in the ointment, however, is that the BGH conducted an assessment of the effects of Almased's behaviour which – pursuant to the above principles – was not material for its decision. An explanation could be that the BGH did not decide on a (consensual) *agreement* between Almased and its dealers on minimal resale prices but on Almased's *unilateral* offer to provide discounts in return for maintaining minimum resale prices which is prohibited under Sec. 21 (2) GWB in conjunction with Sec. 1 GWB. Under EU law, however, a provision equivalent to Sec. 21 (2) GWB does not exist. In addition, in the context of its "precautionary" assessment of appreciable effects, the BGH should have refrained from referencing old case-law from the time before the harmonization of German law to the EU regime in 2005: its historic appreciability considerations are not reconcilable with the current status and reading of German and EU competition law, in particular not after the ECJ's "*Expedia"* ruling.

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