Supplier terms and pricing issues under German competition law

Introduction

As a matter of principle, market participants in Germany are free to set their own prices based on supply and demand. However, pricing can be subject to regulatory intervention under competition and consumer protection laws, in order to protect competition and/or consumers. In addition, sector-specific pricing regulation applies for certain goods and services which are deemed important to the general public interest, such as books, pharmaceuticals, press products and tobacco.

What is the basic position under German competition law regarding resale price maintenance (RPM)?

As under EU competition law, RPM is illegal in Germany and is a restriction by object under the prohibition on anti-competitive agreements in Section 1 of the Act against Restraints of Competition (Gesetz gegen Wettebewerbsbeschrankungen, "ARC"). While German competition law allows suppliers to recommend resale prices for branded products and to agree with distributors on maximum resale prices, the direct or indirect imposition of fixed or minimum prices on resellers is prohibited.

As an exception to the general rule, RPM is permissible for a small number of products which are subject to special pricing regimes, such as books, press products and tobacco products. In the absence of specific price regulation, RPM can only be justified in exceptional cases and can be difficult to defend in practice.

Exemptions from the *per se* prohibition have been accepted by the Federal Cartel Office (FCO) or by the German courts for the launch of new products, for short-term promotional campaigns by resellers and for temporary

promotional activities in franchise or selective distribution systems. In a judgment of 7 April 2016, the Higher Regional Court of Celle held that a minimum price advertising policy, where a specific group of resellers received discounts for observing minimum retail prices in a promotion activity, did not constitute an appreciable restriction of competition and was therefore not in breach of competition law, provided the promotion period was reasonably short and the discount was a one-time offer for very small quantities of the product.

Are there any recent developments on RPM

Against the backdrop of an increasing number of proceedings initiated by the FCO, it has in recent years become more difficult for businesses to distinguish between permitted pricing practices and illegal RPM. In an effort to provide some clarity, in July 2017 the FCO issued a guidance note on RPM in the food retail sector ("Guidance Note"). The aim of the Guidance Note is to enable business "to walk the thin line between necessary communication processes on the one hand and illegal behaviour on the other" and may provide useful guidance for other sectors beyond food retail.

According to the Guidance Note, the FCO will typically deem the following practices as RPM imposed by a supplier on its resellers:

- Guaranteed distribution margins for resellers
- The publication of (non-binding) RRPs in combination with pressure and incentives on the resellers to observe the RRPs, for example through kick-backs, rebates, threatening to terminate supplies etc.
- Demands for compensation and re-negotiations where revenue expectations have not been met
- Termination of an existing business relationship with a reseller over its pricing policy

How are online sales restrictions treated?

Are platform restrictions permitted?

Most of the national cases involving online platform restrictions are German cases and the CJEU ruling in the *Coty* case results from a preliminary ruling on the issue made by a German court. The FCO has typically taken a strict approach to online platform bans and held that third party platform bans and the prohibition to use price comparison websites infringe German and EU competition law. According to the FCO such prohibitions undermine the visibility of the online offering of small and medium sized resellers, and the ban on the use of price comparison websites reduces incentives for price competition between authorised resellers.

The FCO's position seems to contradict the Commission's vertical agreements guidelines (in para 54), which provide that suppliers may lawfully ban sales overt third party platforms in selective distribution systems by requiring that customers do not visit the retailer's website through a site carrying the name or a logo of the platform, but the FCO has made public announcements to the effect that the guidelines are outdated and that it will continue to apply its restrictive approach.

The CJEU ruling in *Coty* confirmed that third party platform restrictions can be justified in the context of a selective distribution system, but after the ruling Germany's head of competition commented that "the ruling will have only limited effects on our decisional practice" and that in his preliminary view suppliers of luxury goods had not received carte blanche to impose blanket bans on selling via platforms.

In January 2018 Germany's Supreme Court dismissed Asics' request for leave to challenge the finding that its ban imposed on resellers from using price comparison websites was in breach of the competition rules. The Supreme Court held that there was no uncertainty over the fact that a general ban on the use of price comparison websites is a hardcore restriction, and there was therefore no need to allow Asics' appeal, as the case did not raise a legal question that required further clarification. The Supreme Court also concluded that its findings were consistent with the CJEU ruling in Coty and held that Asics' case can be distinguished from the Coty case on two points:

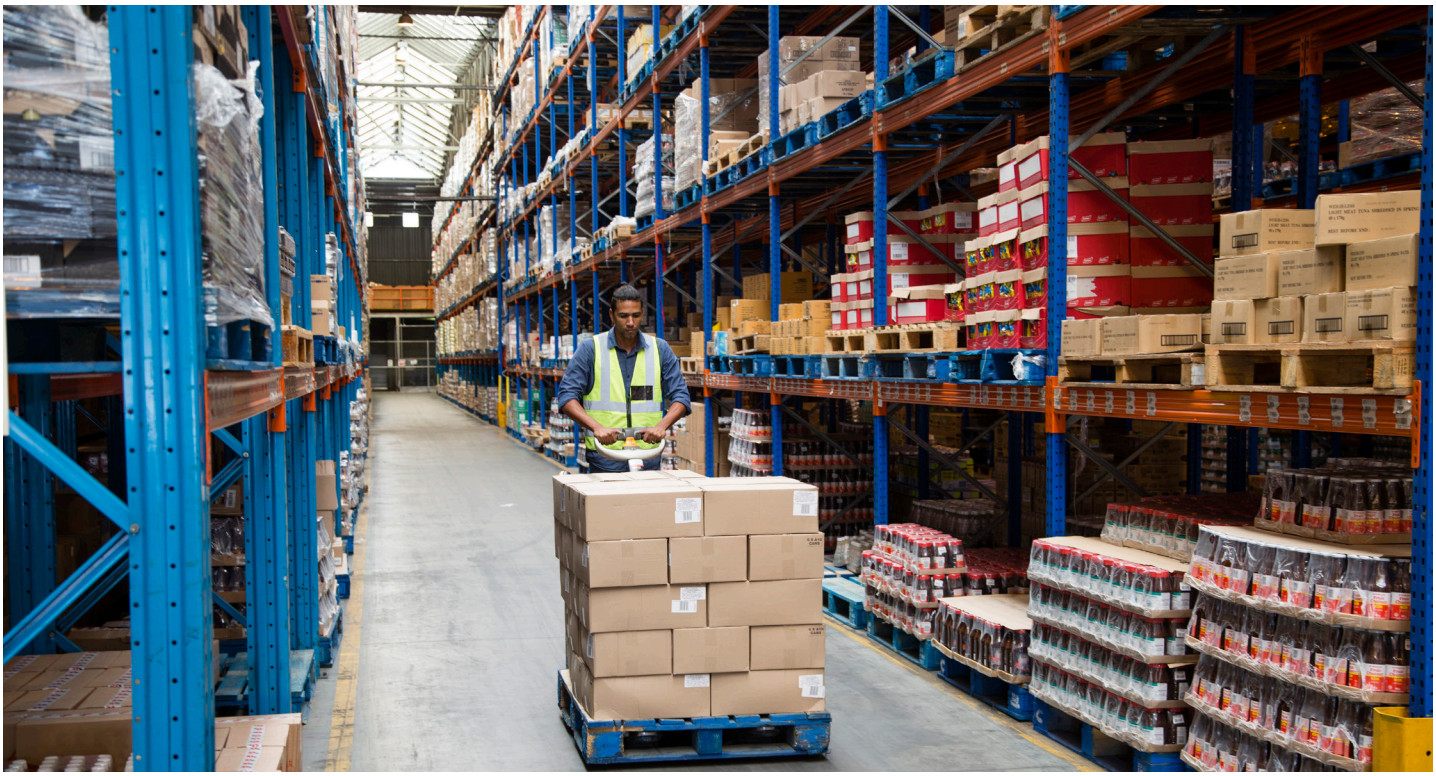
- Asics' distribution system did not concern luxury goods
- Asics imposed a combination of restrictions on its authorised retailers with the consequence that, in contrast to the *Coty* case, it was not guaranteed that interested consumers had access to the products online to a sufficient degree

The latest developments in the Asics case demonstrate that the issue of online platform restrictions raises a number of difficult and unresolved questions and further litigation in this area can be expected.

What about online pricing restrictions?

The FCO takes the position that the application of dual pricing strategies for online and offline sales are a *per se* infringement of Section 1 ARC. Suppliers should therefore seek advice before introducing strategies that favour one particular sales channel over another.

Under dual pricing systems, resellers are granted different purchase prices or discounts depending on whether the reseller intends to sell the product online of offline. The FCO has held in past cases that dual pricing strategies resulting in higher prices or lower discounts for online sales constitute a breach of Section 1 ARC if the strategy puts online retailers at a disadvantage. For example a discount that is linked to the type of distribution channel through which the products are sold would be in breach of the competition rules. Pricing systems must therefore be structured in a way that does not favour one sales channel over another. In a recent decision the FCO confirmed that this also applies where price rebates do not expressly differentiate between online and offline sales, but are de facto only available for functions that can only be carried out in a physical store (e.g. reserving shelf space for products etc.). The decision has been criticised as the FCO did not consider whether there was an objective justification for the difference in treatment of online and offline sales.



What is the approach to discounts and rebates under German competition law?

Loyalty rebates, defined as rebates granted by the supplier only on condition that a customer purchases all or almost all its demand from a single supplier, may be in breach of Section 1 ARC if they are included in a supply agreement and prevent customers from obtaining part of their requirements from a competing supplier. Their compatibility with competition rules will depend on the parties' market shares and the duration of the supply agreement. Where the terms of the agreement do not exceed five years and the market shares of both parties remain below 30% on each relevant market, the agreement will benefit from the EU vertical agreements block exemption Regulation (VABER).

Where the supplier has a dominant position, loyalty rebates will need to be assessed very carefully. The FCO considers that loyalty rebates which create an incentive to purchase all or almost all requirements from the dominant company are in breach of Sections 19 and 20 ARC, the prohibition on abuse of a dominant position. It is important to note that the scope of the German prohibition on abuse of dominance is considerably wider than Article 102 TFEU. The German prohibition covers single and collective dominance, but also applies to undertakings that have a "superior" market position vis-à-vis certain customers or suppliers (the so-called concept of *relative dominance*, set out in Section 20 ARC).

In a 2015 decision the FCO held that Deutsche Post AG had abused its position on the market for the provision of postal services by agreeing on postal tariffs and discounts with four large customers that could not be matched by other postal service providers. The FCO concluded that the loyalty rebates were a per se abuse and that proof of specific foreclosure effect was not required.

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