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German FCO publishes draft notice on RPM in the food retail sector

Silke Heinz (Heinz & Zagrosek Partner mbB, Germany) · Monday, January 30th, 2017

On January 25, 2017, the FCO published its long-awaited draft notice with guidance on resale price maintenance (RPM) related questions in the food retail sector in Germany. The draft is up for public consultation, and interested parties can submit comments by March 20, 2017. It is available on the FCO's website, including in English, see [link to FCO's draft notice](#).

The draft summarizes the position the FCO has taken and developed throughout various prominent and lengthy RPM proceedings in the sector in the past years, including in confectionary products, coffee and beer. The first proceedings started in 2009. The latest proceedings have been terminated in 2016, and the FCO now aims at clarifying the scope of RPM in the food retail sector, including for smaller and medium-sized companies which may not get specific antitrust law advice. This is a welcome step in creating transparency of the enforcer's position in RPM, a field that the FCO pursues as one of its top priorities.

Previous 2010 note

In the early proceedings, the FCO had published a note to cooperating companies in 2010 on how to effectively terminate the infringements and to meet their full cooperation duty. The note ("*Handreichung*") received broad attention, not only in the food retail sector. While the note was aimed at a specific situation in specific proceedings, it created some confusion on whether it contained general guidance on RPM. The current draft notice explicitly states that it renders the previous note obsolete.

Overview of current draft

A general section deals with the legal and economic framework of RPM and provides background on the rather concentrated food retail sector in Germany. It is followed by the most interesting section on the FCO's antitrust assessment of certain scenarios in which RPM may occur and did occur in the proceedings, including minimum and fixed price agreements, recommended resale prices (RRPs), quantity management and promotions planning, guaranteed margins and renegotiations, termination of and refusal to supply, and data exchange between retailers and suppliers. Each of these subsections sets out the rules and provides various examples and short "case studies" to illustrate the FCO's approach, sometimes with risk-minimizing recommendations. The draft notice ends with explanations on enforcement priorities and the choice between different proceeding types, *i.e.*, administrative vs. fine proceedings.

Comparison to 2010 note

This draft notice is more comprehensive and seems to reflect an increased effort to be in line with the European Commission's Vertical Guidelines under Article 101 TFEU. (Presumably the draft was coordinated within the ECN.) For example, unlike the 2010 note the draft does not consider MFN clauses between manufacturers and retailers as typically prohibited. The draft notice also explicitly refers to the Vertical Guidelines, clarifying that it complements these with respect to the food retail sector in Germany. And the draft notice – like the Vertical Guidelines – covers the possibility to get an individual exemption under Article 101(3) TFEU for RPM, even though such an exemption has not played any role in the FCO's practice so far. However, the draft notice states that there are typically less restrictive means than RPM in order to achieve certain efficiencies (such as resolving a free rider problem) – so it seems unlikely that an exemption will play a role in the FCO's practice in the future.

Special rules under German law

But the draft notice also clarifies that in contrast to Article 101 TFEU that only prohibits RPM agreements or concerted practices, i.e. bilateral conduct, under German law even a manufacturer's unilateral attempt to induce retailers to adhere to RPM may be an infringement of national competition law. This would be an infringement of Section 21 ARC, a specific provision under unilateral conduct rules, an area in which national law may be stricter than EU law. The FCO has indeed enforced the provision in practice.

Guidance beyond the food retail sector?

Even though the draft notice explicitly only covers the (stationary) food retail sector, the guidance may well be useful beyond that. The topics covered in the assessment section may also be relevant for other industries. Here it is important to bear in mind, however, that some of the practical recommendations may be driven by the specific circumstances that the FCO found in the food retail proceedings at the time and should not be applied 1:1 to other areas. It would be useful to get some more clarity in the notice's final version on which recommendations the FCO considers to be food retail specific and which could be of broader application.

For example, the RRP's subsection contains guidance that seems to be of general applicability: A manufacturer may not only recommend resale prices but also communicate his reasons, as long as this does not undermine the non-binding nature of the recommendation or provide retailers with additional information intended to influence their decisions to adhere to the RRP. The draft notice provides useful practical examples that highlight when a communication goes too far – but also the interplay between manufacturer communication and retailer reaction for the legal assessment.

On the other hand, the subsection on quantity management and promotion planning provides practical recommendations that retailers should not communicate the promotional price to manufacturers at the planning stage; and if they nevertheless do so in order to get an estimate on likely quantity effects, they should then communicate various alternative resale prices so as not to suggest guaranteeing a specific promotional price. While this is certainly risk reducing, it is also rather strict and seems largely driven by the specific facts the FCO found in the food retail proceedings at the time. (In the proceedings manufacturers reportedly often intervened at the stage of promotion planning when they considered the planned promotional price as too low.)

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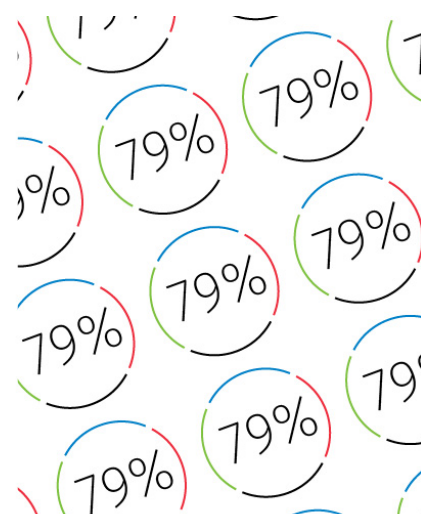
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