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No toying around – the FCO makes Lego change its discount system to better accommodate online sales

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The German Federal Cartel Office (“FCO”) terminated antitrust proceedings against toy manufacturer Lego on July 18, 2016, following Lego’s agreement to change its current rebate system. Lego will enable online retailers to obtain in practice the same amount of discounts as available for brick and mortar shops.

The FCO had opened proceedings against Lego based on complaints from retailers. Lego’s discount system apparently provides for various “discount points” to reflect and reward certain functions carried out by retailers. Some of these points are *de facto* only available for functions carried out by physical stores, such as the shelf space reserved for Lego products in meters. The FCO qualifies this as a “structural disadvantage” for online retailers, because they would in practice never be able to obtain the same total amount of discounts as their brick and mortar shop counterparts, to the detriment of the competitiveness of online sales (for which the purchase price is vital). Based on the press release, the FCO seems to qualify this as a form of dual pricing system for online and offline sales, which constitutes an infringement of Article 101 TFEU and a hardcore restriction pursuant to Article 4b of the Commission’s Vertical Block Exemption Regulation (“VBER”).

The Commission Guidelines on Vertical Restraints indeed refer to dual pricing systems in the context of Article 4b VBER in para. 53 lit. d, where the Commission explains that it considers the following as a hardcore restriction of passive sales:

“an agreement that the distributor shall pay a higher price for products intended to be resold by the distributor online than for products intended to be resold offline. This does not exclude the supplier agreeing with the buyer a fixed fee (that is, not a variable fee where the sum increases with the realised offline turnover as this would amount indirectly to dual pricing) to support the latter’s offline or online sales efforts.”

The FCO has previously pursued dual pricing systems, when it brought cases against Dornbracht (December 2011), Gardena (November 2013) and BSH (December 2013) for operating such pricing systems. In those cases, however, the dual pricing seemed more obvious: for example, there were significant rebates available if selling on to installers with the (publicly expressed) purpose to curb online sales (Dornbracht), or the (same) functional rebates differed between turnover achieved with online or offline sales (Gardena and BSH). Lego’s system seems to be different in that certain retail functions, which are indeed meaningful and established in the context of physical stores, are

rewarded with discounts, while these functions simply do not exist in the context of online sales. The FCO thus seems to have taken the theory of harm a step further to a sort of *de facto* discrimination. However, it is debatable whether rewarding the function in question would indeed qualify as discrimination (for example under abuse of dominance rules), given that there seems to be an objective justification for a different treatment of the two situations.

The FCO has already expressed the view in the past that rebate systems may qualify as dual pricing if online sales are not able to obtain the same absolute amount of discounts as offline sales. It seems that the FCO has now applied this approach very strictly in the Lego case in order to protect online sales, which are seen as the promoter of price competition. In fact, Lego will either have to abandon some functional rebates that are *de facto* only available for offline sales or introduce new and similar online-sales-targeted functional rebates. The FCO's approach may have far-reaching consequences: manufacturers/suppliers may wish to review their rebate systems and identify whether online sales can indeed achieve the same amount of discounts as offline sales. That is, at least, in Germany. It is an open and interesting question whether other NCAs and/or the Commission will follow a similar line on the interpretation of the notion of dual pricing system, or whether this is (yet another) area in which the FCO's approach in applying Article 101 TFEU in practice may differ.

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