

## Competition & Antitrust - Austria

### Resale price maintenance

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#### Introduction

In the course of its investigations in the past few years, the Federal Competition Authority (FCA) reported findings of prohibited agreements between suppliers and their respective distributors, primarily in the field of consumer prices. In the wake of these findings, following several drafts and discussions, on July 31 2014 the FCA published its final statement on its legal view on vertical restrictions, in particular regarding resale price maintenance. The statement serves as a guide, particularly for small and medium-sized enterprises to identify and avoid infringements of the cartel ban, especially regarding resale price maintenance. Although the statement is non-binding, it elaborates on which situations (according to the FCA's legal view) will, as a rule, fall under the cartel ban and thus will be prosecuted.

#### What is resale price maintenance?

In accordance with Austrian case law, the FCA's statement defines 'resale price maintenance' as an agreement or a concerted practice between enterprises on different levels of the supply chain that is intended to or has the effect of preventing (eg, by setting a minimum price level) enterprises from setting their own prices in an individual and autonomous way. While agreements can be binding or non-binding, concerted practices cover all forms of coordination between enterprises that have not reached the agreement level yet, but aim to or have the effect of restricting competition.

Due to its potential substantial effect on the market, which in a worst-case scenario can lead to significant distortion of competition, resale price maintenance is considered to be a serious restriction, resulting in a rebuttable presumption that an infringement has taken place and preventing the act from being exempt pursuant to the General Block Exemption Regulation. Generally in these cases, the application of the individual exemption of Article 101(3) of the Treaty on the Functioning of the European Union will not be possible. Since the FCA considers resale price maintenance as an intended restriction of competition, Article 101 of the treaty will be applied without the necessity to prove the negative effect on the market.

Resale price maintenance may not only affect the relationship between the parties of the agreement (ie, suppliers and distributors), but also has the potential to be used for indirect horizontal arrangements ('hub and spoke cartels') without direct communication among participants. Strong distributors may be able to force their suppliers to increase prices for the distributor's competitors and thereby enable those distributors to increase their profit margins without risking losing market shares.

#### Recommended retail prices

In general, a retailer must set prices on its own. An exemption to this rule is the supplier's choice to recommend non-binding retail prices. The Supreme Court interprets the criteria for non-binding retail prices strictly. The indicated prices may be suggestions only, which the distributor is free to accept if it wishes. As soon as suppliers exert at least appreciable pressure to push distributors to set their prices in the desired way, they risk infringing the cartel ban. In addition, if the supplier monitors whether the distributor adheres to the indicated prices and pushes the supplier to do so by systematic contact, the non-binding nature of such prices will be doubtful. Accordingly, under Section 1(4) of the Cartel Act, only suggestions that explicitly state their non-binding nature (the implementation of which exerts no actual, social, moral or legal pressure) are exempt.

#### Catalogue of conduct

In addition to the general discussion of practices considered to be illegal, the FCA's statement also contains a list of 11 practices that are regarded as generally inadmissible and thus will be

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prosecuted by the FCA, including:

- oral or written agreements on fixing resale prices, including promotional prices, if they restrict distributors from setting their prices in an autonomous way;
- bonuses or incentives for complying with pre-determined sales prices or recommended prices or penalties for not doing so; and
- agreements between a supplier and one or several distributors regarding trade margin neutrality, which is understood as the condition that a change in purchase prices has to result in a corresponding change in sales prices on the market.

The following typically occur in connection with vertical price maintenance or are deemed to be strong indicators for such:

- agreements that a competitor's price must remain within a certain pre-determined scope;
- disclosure of a distributor's price-relevant information by a supplier to a competing distributor (eg, time and extent of a price change);
- penalties by distributors against suppliers for failing to enforce identical or similar competitor prices; and
- increases in purchase price, only if competitors remain – with regard to a concrete product – within a specific sales price level.

Further, the statement also lists practices that are generally seen not to restrict competition, and therefore are not illegal:

- Recommended retail prices (if the suggestions are non-binding in an actual and legal way) are permitted. Suppliers can explain their marketing strategy and reasons for the indicated price as long as they do not exert pressure. Suppliers and distributors can even develop joint marketing strategies if they do not contain agreements regarding sales prices or result in a horizontal coordination of distributors ('hub and spoke cartel').
- Price ceilings are permitted if distributors are free to set their prices below that amount. Otherwise, it is a fixed price, which is illegal pursuant to the cartel ban.
- Accurate price monitoring of competitors is permitted. Similarly, a supplier may monitor price developments on the market; however, if a supplier continuously helps distributors to monitor prices, it could indicate a hub and spoke cartel.
- Communication between suppliers and distributors regarding prices that is essential for planning sales promotions is permitted, as long as the distributors set the price themselves and this price is not concerted or agreed on. The initiative for a sales promotion may even come from the supplier.

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