Distribution Law Center
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CASE CARD | 26 October 2021

Molkereiprodukte (Case 16 Ok 2/15b)

1. CASE SUMMARY

A. Summary of facts

SPAR regularly entered into agreements on sales prices to consumers with suppliers of dairy products. In this respect, SPAR regularly demanded "margin neutrality". Specifically, this meant that SPAR's margin should remain the same in the event of a purchase price increase. Moreover, SPAR required their suppliers to set "recommended retail prices" for their dairy products as target prices and to communicate these to SPAR's competitors. This was intended to ensure that SPAR's competitors would also increase their sales prices accordingly. As proof of the implementation, the suppliers had to provide SPAR with price lists or cash register receipts of the competitors.

B. Legal analysis

The Austrian Supreme Court emphasized that vertical price fixing is a restrictions of competition by object. With regard to the hub-and-spoke-aspect, the Austrian Supreme Court held that what mattered was whether the bundle of coordinated vertical contracts brought about a (horizontal) agreement between the parties involved.

In this context, horizontal coordination does not have to be the main purpose of the agreement; rather, it is sufficient that the vertical agreements are structured in such a way that it is impossible to enter into the vertical contractual relationship without agreeing to horizontally effective coordination. The Austrian Supreme Court therefore also spoke of vertical price coordination through pronounced horizontal elements or of vertical agreements with horizontal protection.

It is noteworthy that the Austrian Supreme Court increased the initial fine tenfold (!) in this case.

2. QUOTES

"[…] Agreed price recommendations may also be prohibited. Thus, an agreement between competitors to publish recommended prices was considered a violation of Art 101 (1) TFEU (ex Art 81 EC), although the actual final prices were fixed individually. Price maintenance by buyers is covered by Art 101 (1) TFEU if it has the object or effect of restricting competition […]"

"[…] One form of such price maintenance are the so-called most-favored-customer (MFC) clauses. A MFC-clause exists, for example, when a customer imposes on its supplier that the latter may not sell its goods or services to other customers at more favorable prices. This legally restricts the supplier in its price setting, which constitutes a violation of Art 101 (1) TFEU. However, a generally impermissible MFC treatment is also given if the supplier's commitment is only of an economic nature. Such an economic commitment - relating to the relationship with other customers - can be assumed if the supplier undertakes to always grant the customer binding him at least as favorable a price as any other customer. […]"

"[…] Non-binding price recommendations are generally permissible. However, a price recommendation may constitute a concerted practice in violation of Art 101 (1) TFEU. This is particularly the case if it has the effect of an indirect price fixing. The European Commission has considered an obligation of buyers by the supplier to recommend retail prices when reselling to retailers to be inadmissible. However, this must also apply to the case at hand here, where a customer persuades the supplier to impose a certain price level on other customers. […]"

"[…] Vertical price agreements are undoubtedly manifest restrictions of competition because they have a high potential of negative effects on competition, not least on competition between undertakings at the level of trade. This corresponds to the fact that vertical price maintenance ("resale price maintenance") is also classified as a generally impermissible hardcore restriction in Art 4 lit a) of Regulation 330/2010 (block exemption for vertical agreements) […]"

"[…] In its Guidelines on Vertical Agreements the European Commission explains in detail in which respects vertical price maintenance poses a threat to functioning competition and that vertical sales price agreements can also be enforced indirectly, e.g. via agreements on sales margins. The further danger that anti-competitive effects of vertical price maintenance may also consist in the favoring of collusive results between buyers, i.e. companies at the retail level, was also judged to be particularly harmful with regard to the danger of increased price levels at the consumer level. […]"

"[…] Vertical price maintenance is excluded from the benefit of the block exemption as a hardcore restriction. The horizontal or vertical price regulations associated with the constituent conduct (agreement, decision, concerted practice) are to be regarded as a restriction of competition "by object", so that further implementing acts and market effects are no longer relevant. Agreements containing price fixing also do not benefit from de minimis notice and are thus always appreciable. Article 101 (1) TFEU expressly prohibits the direct or indirect fixing of purchase or selling prices or other business conditions. Price agreements therefore per se violate the prohibition of cartels. The prohibition is to be interpreted broadly and concerns any agreement that is directly or indirectly likely to hinder price competition. It is not necessary that a cartel actually operates or does not provide for any exceptions […]"

3. RELEVANT LEGISLATION

- Article 101 TFEU
- Vertical Block Exemption Regulation
- Austrian Cartel Act

4. RELEVANT LITERATURE

See *Vertriebsverträge im Kartellrecht* (2019) Part III Chapter 4 paragraph 4.65

5. OTHER COMMENTS

The SPAR-judgement of the Austrian Supreme Court provides a prime example of hardcore restriction in a vertical context.

This was the first case in a series of vertical price fixing cases that was not resolved by a settlement between the FCA and the company concerned.

6. PRACTICAL SIGNIFICANCE

As the infringements discussed in the SPAR-judgment are evidently non-compliant with European and Austrian Competition law, the SPAR-judgment has mostly declaratory character. This notwithstanding, it shows that filing an appeal against a cartel decision can also lead to a fine increase.