Distribution Law Center
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German Federal Cartel Office acts against the setting of minimum advertised prices in online sales

Facts of the case

Orderman GmbH ('Orderman') offers mobile ordering and billing systems for the hospitality industry. According to its own statement, the company's distribution system includes more than 400 retailers. The complainant of the case which is based in Germany sells Orderman products online and uses public online platforms such as Ebay for this purpose. Orderman called on the complainant to exclusively observe Orderman's recommended resale prices when offering new goods online, in particular on public online platforms. Compliance with this requirement was a precondition for continued supply by Orderman. Orderman subsequently claimed *vis-à-vis* the retailer that it had only imposed minimum advertised prices.

Decision of the Federal Cartel Office

The Bundeskartellamt (the German Federal Cartel Office, 'FCO') has terminated the administrative proceeding against Orderman without issuing a formal decision. External lawyers engaged by Orderman to clarify the facts of the case were able to plausibly demonstrate to the FCO that with the exception of some individual cases, Orderman had at least not systematically violated the prohibition of anti-competitive agreements. Orderman undertook to provide its sales staff with further training on the compliance issues that were relevant to this case. Orderman also expressly clarified to all retailers that they are free to determine their own prices for advertising and selling Orderman products on all distribution channels.

A summary of the case is available here.

Commentary

A specific feature of the present case was that the supplier claimed vis-a-vis the distributor that they had merely imposed minimum advertised prices which in their view was permissible under competition law. However, the setting of minimum advertised prices is also covered by the hardcore restriction pursuant to Article 4(a) of the Vertical Block Exemption Regulation ('VBER') and can thus not be generally exempted either. Minimum advertised prices constitute an indirect restriction by object of the distributors' possibilities to determine their sales

prices. As they remove the possibility for retailers to advertise their own sales prices, minimum advertised prices remove a key parameter for price competition between retailers. The European Commission once again clarified this in paragraphs 187 and 189 of its Vertical Guidelines which were recently revised within the context of the evaluation and review of the VBER.