

NEWS | 18 March 2024

German Federal Cartel Office (FCO) acts against resale price maintenance

Facts of the case

Pfanner, an Austrian manufacturer of protective clothes and gear, agreed with several German retailers that they would adhere to Pfanner's recommended resale prices. In particular, they agreed that the retailers would not give any rebates on the recommended resale prices. The retailers were only allowed to give a small item for free when a customer places a particularly large order. The intention of the agreement was to protect resale prices from deteriorating.

The agreement was in place from 2016 to 2021. However, the Federal Cartel Office ('FCO') did not report how the agreement was achieved, or how Pfanner ensured that the retailers would adhere to it. It is only mentioned that a retailer reported the practice to the FCO.

The investigation was not directed against the retailers. No fine was imposed against the retailers while Pfanner must pay a fine of approx. 800,000 EUR.

Decision of the FCO

Very few details about the FCO's decision have become public so far. The FCO has not conducted any unannounced inspections. Instead it sent a formal information request ('RFI') to Pfanner who was suspected of resale price maintenance. As Pfanner is headquartered in Austria, the RFI was served with the help of the Austrian competition authority.

The legal reasoning behind the FCO's fine decision is not disclosed but should be straightforward. Resale price maintenance has been prohibited in Germany since the 1970s. Nevertheless, it would be interesting to learn about the evidence that the FCO found. For example, how did Pfanner make the retailers observe its recommended resale prices.

Commentary

This decision of the FCO fits within the authority's strict enforcement of resale price maintenance. This type of vertical restraint has been a focus of the FCO for many years. Until to date, the FCO has not accepted any

economic defences for resale price maintenance but rather treats it as a per se infringement.

The case came to the FCO's attention through a cooperation request of one of the retailers. This shows that the leniency programme is effective, not only in relation to horizontal cartel agreements but also with regard to restrictive vertical practices. To encourage parties to voluntarily disclose restrictive vertical agreements, the FCO did not impose any fines on the retailers but only on the supplier. The decision to impose fines is a discretionary power of the FCO. The retailers were surely parties to the anti-competitive agreement as much as the supplier was.

In conclusion, participation in resale price maintenance appears riskier for the supplier than for the retailers. This is consistent in view of the FCO's decision-making practice regarding resale price maintenance.