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Vertical Price Coordination and Brand Care

Interdisciplinary Perspectives on the Prohibition of Resale Price Maintenance

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Vertical Price Coordination and Brand Care

Interdisciplinary Perspectives on the Prohibition of Resale Price Maintenance

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ISSN 2191-5482 ISSN 2191-5490 (electronic)
ISBN 978-3-642-35569-1 ISBN 978-3-642-35570-7 (eBook)
DOI 10.1007/978-3-642-35570-7
Springer Heidelberg New York Dordrecht London

Library of Congress Control Number: 2013933301

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Printed on acid-free paper

Springer is part of Springer Science+Business Media (www.springer.com)

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Chapter 1
Introduction to the Current Problem

Cartel-law intervention is intended to prevent restraints of competition, not to cause them. Therefore, for *all regulations governing freedom of action in business*, the universally acknowledged principle applies that they *must be reviewed with a view to de-regulation at regular intervals*.[1] There is an acute need for review particularly when—as in the case of coordinated price management between manufacturing and retailing—the enforcement by the authorities of restrictive legal provisions may be tightened up further. However, groups of experts at national and international levels, at the same time, disagree increasingly as to whether such legal restrictions can be justified in terms of the underlying principle. There is a risk that any further restriction of freedom to contract will tend to stifle innovation and competitive diversity rather than sustainably improve consumer welfare.

In January 2010, one of the largest investigations in the history of the Federal Cartel Office (Germany) caused considerable uproar. This occurred not only in the food sector but also generally in the consumer-goods sector—at the latest with similar investigations at mattress companies. Manufacturers and distributors were suspected of collusion with regard to the formation of final consumer prices. In an explanatory recommendation document[2] and at numerous information events and in press publications, the Federal Cartel Office made it clear that not merely classic 'resale price maintenance', but all conceivable forms of vertical price and brand care within the value chain may be risky for cartel-law purposes, even if they are only remotely concerned with coordinated pricing.

This raises the question of whether *vertical price coordination within a value chain*, as seen from the perspective of competition or welfare economics, is

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[1] Cf. on the mode of operation of such a test bench in the field of conflict between regulation and deregulation Müller (2003) and Ahlert et al. (1988), pp. V f.

[2] The Federal Cartel Office (Germany) has published, as a guide for the companies affected by the investigation of vertical price agreements, a provisional evaluation referred to as a recommendation (*Handreichung*) which distinguishes between clearly prohibited situations and practices possibly to be classified as critical. The content of the "Handreichung" of particular relevance for the subject matter of our investigation can be seen in *Annex 1* of this article.

D. Ahlert and B. Schefer, *Vertical Price Coordination and Brand Care*,
SpringerBriefs in Business, DOI: 10.1007/978-3-642-35570-7_1,
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fundamentally capable of causing severe negative effects that justify high fines as in the case of horizontal price cartels. If this is not the case per se, but *only in exceptional cases* (under certain conditions), the next question that arises is whether cartel law as it currently applies should be amended.[3] This question extends to restrictive legal provisions[4] and the practical intervention of the cartel authorities, as well as to case law in Germany and in the EU. The question arises in particular whether it can be shown that vertical price coordination in the normal case does not inhibit the operation of horizontal processes of competition (i.e. inter-brand competition). To the contrary, it can help to eliminate distortions of competition (market failure).

The obviously stricter approach of cartel-law practice is not undisputed from the perspective of business practice and management theory.[5] Some marketing experts point out the following problems: cartel-law intervention may be *aimed at* vertical price maintenance, but it *impacts* on almost all modern vertical-marketing tools and strategies to the extent to which these *could*, even if merely indirectly, have any bearing on vertical price management.[6] There is already talk of considerable collateral damage in business practice.

Particularly criticised by competition law is the *exchange of information along the value chain* (extending beyond mere business exchange between suppliers and their sales agents). This applies firstly to the modern IT-aided forms of cost-effective data exchange insofar as they (*could*) include so-called price-sensitive data. Also affected are the strategic coordination of the market-launch concepts of manufacturing and retailing at the consumer level and, resulting from the same processes, the explicit formulation of mutual expectations of the conduct of business partners with respect to brand positioning ('strategic brand coordination'). This is because brand positioning without price positioning is inconceivable.

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[3] Cf. also as examples the articles by Haucap and Klein (2012), Schwalbe (2012), and Wey (2012).

[4] The 7th amendment of the German Act against Restraints of Competition [*Gesetz gegen Wettbewerbsbeschränkungen* (hereinafter "GWB")] of 1 July 2005 radically changed German cartel law and adapted it to European cartel law. This led to the abolition of the express prohibition of vertical price fixing (as per sec. 14 GWB former version). Pertinent legal provisions, in which the resale price maintenance prohibition (hereinafter referred to as 'RPM prohibition' for short) is entrenched, are secs. 1 and 2 GWB, Art. 101 TFEU and, additionally, the new Vertical Block Exemption Regulation of the European Commission which came into force on 1 June 2010 and the guidelines for vertical restraints published thereon of 10 May 2010. If the RPM prohibition were to be abolished, this would require amendment of several provisions of German and European cartel law. Also relevant to our analysis are the unilateral use of so-called 'pressure and incentives to enforce vertical restraints' [sec. 21 (2) GWB] and "inequitable obstruction in value systems" (sec. 20 GWB); here, in particular, so-called passive discrimination (granting of advantages without objectively justified reason, sec. 20 (3) GWB) (translated from German).

[5] Cf. as examples also the articles by Greipl (2012), Kenning and Wobker (2012), Lademann (2012), Mocken (2012), Sanktjohanser (2012), Schröder (2012) and Olbrich and Grewe (2012).

[6] More information on this in Ahlert et al. (2011) and the literature specified therein.