The prohibition of restrictive agreements in Art. 101 TFEU

European and German Competition Law I

RA Dr. Jochen Bernhard
Würzburg, 19 November 2015
Overview

A. Horizontal agreements
B. Horizontal concerted practices
C. Vertical restraints
Art. 101 para 1 TFEU

The following shall be prohibited as incompatible with the internal market:

- all agreements between undertakings,
- decisions by associations of undertakings and
- concerted practices

which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trade conditions;
(b) limit or control production, markets, technical development, or investment;
(c) share markets or sources of supply;
(d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competition disadvantage;
(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
Art. 101 para 1 TFEU (simplified)

Subject:
- agreements between undertakings (e.g. price fixing)
- decisions by associations of undertakings (e.g. boycotts) and
- concerted practices (e.g. information exchange)

Result:
prevention, restriction or distortion of competition within the European Union

Causal relationship:
- restriction of competition as an object (= willful intent or foreseeable consequence) of the agreement or concerted practice or
- restriction of competition as an effect (= economic effect in a particular case, even if not intended) of the agreement or concerted practice
A. Horizontal agreements
Five German brewers fined €106.5m for price-fixing

By Alice Ross in Frankfurt

It is one of Germany’s best-known exports. But for the locals, the national pastime of drinking beer has been costing rather more than it should.

Five major breweries have been fined more than €100m by the German antitrust watchdog amid a nationwide beer cartel that has also drawn internationally recognised brands into the scandal.
Cartels are not just about price-fixing...
Bid-rigging (collusive tendering) between competitors as a horizontal agreement

- Companies informed each other of calls for tender
- Companies coordinated their rebates on bids according to pre-agreed cartel quotas
- Cover bids were set at a higher price or with a lower rebate
- Prices of the successful bidder were higher than the normal market price
- Members of the cartel communication in a „soccer language“: München 4:0 meant that a company with registered seat in Bavaria awarded a rebate of 4 % on its offer

German Federal Cartel Office: Turntable ladder vehicles (fire engines), B12 – 12/10 (2011)
B. Horizontal concerted practices
There is no need for an „agreement“ – a mere exchange of sensitive information can be treated like a cartel

T-Mobile Netherlands and other phone operators exchanged confidential information on their prices without having any agreement on price fixing (ECJ, judgment of 4 June 2009, Case C-8/08 – T-Mobile)

- „Information exchanges may constitute a device for facilitating either the co-ordination [by companies] of their commercial behavior or the adoption of a common industry response to market indicators.“ (European Commission, Horizontal Guidelines 2011/C 11/01)

- „The criteria of coordination and cooperation must be understood in the light of the notion according to which each economic operator must determine independently the policy which he intends to adopt on the internal market.“ (ECJ, judgment of 4 June 2009, Case C-8/08 – T-Mobile)
Information exchange between competitors will be treated like a cartel if

- Data is commercially sensitive (e.g. prices, rebates, conditions)
- Data is individualised (and not aggregated)
- Data is private (and not genuinely public)
- Data is recent (and not outdated)
- Exchange is typical for collusive behavior (e.g. frequency)

=> Information exchange can be a restriction “by object”

Following the T-Mobile-judgment, the prohibition on cartels has to be seen as comparable to “risk offences” (Gefährdungsdelikte)
C. Vertical restraints
Prohibition on cartels applies on horizontal and vertical restraints

- Agreements with competitors (horizontal) (restriction of inter-brand-competition)

- Agreements with dealers (wholesalers/retailers) on their prices (restriction of intra-brand-competition between dealers)
Three levels of competition

Manufacturers
- Manufacturer M
- Manufacturer S
- Manufacturer C
- Manufacturer B
- Manufacturer F

Wholesalers
- Wholesaler Paul
- Wholesaler Ben
- Wholesaler Leon
- Wholesaler Lukas
- Wholesaler Elias

Retailers
- Retailer Anna
- Retailer Emma
- Retailer Sophie
- Retailer Leonie
- Retailer Marie
Resale price maintenance as a vertical agreement with a horizontal restriction of competition

- Entering into agreements on resale prices between a manufacturer and a dealer (wholesaler/retailer) may restrict competition between dealers

- „Fixing of a resale price affects competition because it enables all the participants to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors [on the level of wholesalers or retailers] will be.“
  (ECJ, judgment of 17 October 1972, Case 8-72 – Vereeniging van Cementhandelaren)

- Resale price maintenance is considered as a restriction of competition „by object“
  (European Commission, Guidance on restrictions of competition by object, SWD(2014) 198 final)
Thank you for your attention

Dr. Jochen Bernhard
Rechtsanwalt / Compliance Officer (Univ.)

E-Mail: jochen.bernhard@menoldbezler.de
Telefon: (0711) 86040-611

- Kartellrecht
- Compliance
- Antikorruptionsrecht
- Externer Ombudsmann