

STANDPOINT on Resale Price Maintenance



Federal Competition Authority

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DISCLAIMER: Please note, that in case of deviations between the German and English version the German version prevails.

I. Introduction

Stemming from observations of competition law infringements in several industries in recent years, this standpoint is meant to facilitate the detection of anti competitive conduct, especially **for small and medium-sized enterprises (SMEs)**. Over the course of its investigative activities in the past few years, the Federal Competition Authority (BWB) has become aware of prohibited restrictive agreements—some industry-wide—between suppliers and dealers (the term "dealers" is to be understood here as encompassing both retail and wholesale), particularly in the realm of retail prices (**for more on resale price maintenance, see below**). Previous proceedings and current investigations concern international corporations as well as SMEs. The above-referenced inquests have already led to a series of Cartel Court (KG) decisions imposing fines against companies from various industries.¹

Therefore the present standpoint aims to provide information and foster prevention, as well as to facilitate compliance with competition law, especially for SMEs.

The BWB invited consumers, advocacy groups, consumer protection organisations, businesses, and other interested parties to submit their opinions. Diverse input was received from various organisations, enterprises, advocacy groups, and consumers, and the present standpoint was debated in a series of lectures and discussions.

➤ Is this standpoint legally binding?

No. The following standpoint is **not legally binding** on Austrian courts, the Federal Cartel Prosecutor,² other national authorities and courts, or European institutions, and it does not encroach upon the interpretational sovereignty of either the Austrian Supreme Court as Supreme Cartel Court (KOG) or the Court of Justice of the European Union (ECJ). In this regard in particular, the BWB points to the Vertical Block Exemption Regulation ("VBER"³), by which Austria is bound, and to the Guidelines issued by the EU Commission ("Guidelines on Vertical Restraints"⁴) regarding vertical restrictions and their permissibility under competition law.

¹ For more detailed information, please refer to the homepage of the Austrian Competition Authority (<http://www.bwb.gv.at>) or the Edicts Archive of the Cartel Court (<http://www.edikte.justiz.gv.at>).

² More information about the functions and personnel of the Federal Cartel Prosecutor can be found at <http://www.justiz.gv.at/web2013/html/default/8ab4a8a422985de30122a92c3e89637f.de.html>.

³ Regulation No. 330/2010 of 20 April 2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union (TFEU) to categories of vertical agreements and concerted practices, OJ L 102/1.

⁴ European Commission Guidelines on Vertical Restraints, OJ 2010 C 130/01.

Nevertheless, the following standpoint of the Authority **makes clear which cases, as a general rule, the BWB considers questionable from an antitrust point of view.**

The **BWB** was established on 1 July 2002 on the basis of the Austrian Competition Act⁵ and EC Regulation 1/2003. It is an autonomous and independent authority responsible for investigating breaches of the Austrian Cartel Act and European competition law. The protection of competition in Austria has a pivotal regulatory function in a market-based economy.

➤ **What is the object of this standpoint?**

The handbook focuses on vertical agreements, and in particular resale price maintenance.

Vertical Agreements are agreements or concerted practices between undertakings at different levels of the production or distribution chain.

Among the most serious restrictions on competition in the area of vertical agreements are the so-called "hardcore restrictions" under Article 101 of the TFEU and § 1 of the Cartel Act.⁶ These hardcore restrictions include resale price maintenance, which hinders free pricing by independent undertakings (e.g. by setting a minimum resale price). Resale price maintenance can also be used for **horizontal coordination** between competitors via their suppliers.

Horizontal coordination through resale price maintenance ("star cartels" or "hub and spoke cartels"): vertical agreements can have the additional object (or effect) of creating horizontal agreements between retailers, which can operate without any direct contact between them. This is the case when, for example, in the context of a triangular relationship among a supplier and multiple retailers, vertical agreements have the object or effect of achieving horizontal coordination concerning the fundamental competition parameters between retailers (by object or effect) and there is a concurrence of wills between the retailers. This "information triangle" may lead to conscious and joint conduct of the retailers in violation of antitrust law.

⁵ Federal Act on the creation of a Federal Competition Authority (Austrian Competition Act - WettbG), Original Version: Federal Law Gazette I No. 62/2002 (NR: GP XXI RV 1005 AB 1047 S 97. BR: 6612 AB 6618 S 686).

⁶ Competition Act of 2005, Federal Law Gazette I 61/2005, last amended through the Cartel Act and Competition Act Amending Law of 2012 (KaWeRÄG), Federal Law Gazette I 13/2013.

➤ **Resale price maintenance as a hardcore restriction**

Minimum and fixed resale prices (resale price maintenance) are considered, as restrictions on competition by object, **prohibited "hardcore restrictions" under Article 101 of the TFEU and § 1 of the Cartel Act.**⁷ This also follows from Article 4(a) of the new Vertical Block Exemption Regulation (VBER) from 2010. Hence there is a rebuttable presumption that these violate Article 101 of the TFEU and § 1 of the Cartel Act.

Hardcore Restrictions: These are restrictions on competition through agreements or commercial practices which most jurisdictions consider particularly serious and which normally result in no benefits for consumers. Therefore, there is a presumption that they constitute a violation of competition law. An agreement containing such restrictions, which are also known as "black clauses", does not benefit from the Vertical Block Exemption Regulation (see above, pages 3-4). Agreements containing "black clauses" rarely fulfil the requirements for individual exemption under Art 101(3) TFEU.

➤ **Why are these practices considered problematic under European and Austrian law?**

In general, restrictions on competition with a direct influence on price competition are of particular concern. The free market economy entails **a general principle of freedom of competition at all economic levels** and for all forms of competition. This principle applies not only to the relationship between the brand of one manufacturer and a competing product (inter-brand competition) but also between different, competing distributors of the same manufacturer (intra-brand competition).

Competition authorities consider resale price maintenance to have negative effects on competition both through the reduction of intra-brand price competition (i.e. higher prices) and the increased transparency of prices (planned for the future), which may subsequently serve as a means of horizontally coordinating prices between suppliers or retailers. It is assumed that **minimum or fixed prices** reduce — or in the case of particularly successful coordinations, eliminate — intra-brand price competition.⁸ This is especially problematic in cases of highly concentrated sectors (e.g. the Austrian food retail sector). Generally, price maintenance systems result in disadvantages to the consumer in the form of higher prices.

⁷ EC Guidelines on the application of Article 81(3) of the Treaty, OJ 2004 C 101/97, Margin Note 111.

⁸ EC Guidelines on Vertical Restraints, OJ C 130/01, Margin Note 224.

Resale price maintenance can also facilitate indirect horizontal coordination between purchasers (i.e. at the distribution level). Strong and well-organised retailers may pressure their suppliers to set inflated resale prices for their competitors, thereby enabling the largest retailers in the market to achieve higher margins without a loss in market share. Thereby, both retail prices and market shares are stabilised, thus preventing competitors from gaining market shares with attractive prices. The European Commission also considers resale price maintenance as particularly problematic for trade since it can be assumed that the collective horizontal interests negatively impact the consumer.⁹ Therefore price maintenance actions are an even more serious infringement when they have additional horizontal coordination aspects.

In its investigations concerning resale price maintenance, the BWB places an emphasis on configurations with horizontal elements since these have a significantly more damaging effect than resale price maintenance without elements of horizontal coordination, in particular when at least one of the participating undertakings (at the production or distribution level) has a certain size and market power.

II. How may an undertaking proceed if violations exist?

Within the framework of the leniency programme, undertakings have the opportunity to cooperate with the Authority as **leniency applicants** (<http://www.bwb.gv.at/KartelleUndMarktmachtmissbrauch/Kronzeugenregelung/Seiten/default.aspx>)

Through the Competition Act Amendment of 2005 (improvements through Federal Law Gazette I 2013/13 - Competition Act 2013), a **leniency programme** was enshrined in Austrian competition law. Under Article 11(3) of the Competition Act, the BWB may, in return for the cooperation of an undertaking toward detecting a cartel, suspend the imposition of a fine or, if the requirements set out in the Competition Act are not met, move for a reduced fine.

Moreover, there is also the possibility of cooperating with the Authority within the scope of a consensual conclusion of the proceedings ("**settlement**"). The precise amount of the

⁹ See EC Guidelines on the application of Article 81(3) of the EC Treaty (now Article 101(3) of the TFEU), Margin Note 224.

reduction depends upon, among other things, the time of the agreement and the quality of the cooperation. A consensual conclusion of the proceedings may also occur alongside the process of the leniency programme, but this applies only in cases where merely a reduction of the fine (as opposed to a complete suspension of the fine) is being considered.

Individuals who are aware of a violation may notify (**even anonymously**) the BWB at any time.

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III. Legal Framework

<p>An underlying principle for the relationships between suppliers/producers and dealers (both wholesale and resale) which must be adhered to is that the dealer/retailer itself has to set the prices.</p>

➤ Which law is applicable?

Every business operating in Austria is required to conduct its commercial activity in conformity with competition law, which arises, on the one hand, directly under European competition law (Articles 101 and 102 of the TFEU) and, on the other hand, under domestic legislation, above all the Cartel Act (KartG).

➤ When does an agreement or concerted practice exist?

The prohibition against cartels under § 1 of the Cartel Act and Article 101 of the TFEU includes competition-impairing

- agreements between undertakings,
- decisions between associations of undertakings, and
- concerted practices.

All three of the above acts each require an element of preventing or restricting competition.

The term **agreement** fundamentally includes every "meeting of the minds" between undertakings about their behaviour on the market. It is immaterial whether an agreement was concluded **orally or in writing**. The agreement **also need not be legally binding**. In the legal practice of the European Union, an "agreement" may also refer to infringements in horizontal and vertical relationships.¹⁰ It **does not matter whether the undertaking committed itself—legally, factually, or morally—to behave as agreed, as long as a "meeting of the minds" was achieved**.¹¹

In addition to agreements and decisions, concerted practices are also covered by the prohibition against cartels. The case law of the European Court of Justice (ECJ) consistently holds that a concerted practice is **any form of** coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risks of competition. ¹² This may encompass **any direct or indirect coordination** between undertakings which has the purpose or effect of influencing the conduct on the market of the undertakings concerned.¹³ European Union case law holds that a concerted practice which violates competition law may also arise through vertical infringements between suppliers and customers—that is to say that an agreement also need not be present here, but rather simply a concerted practice is enough.¹⁴

¹⁰ European Commission COMP/35.587 -- PO Video Games, COMP/35.706 -- PO Nintendo Distribution, and COMP/36.321 -- Omega-Nintendo, OJ L255/33, Margin Note 323.

¹¹ ECJ T-53/03, BPB/Commission, Margin Note 82.

¹² This formula was developed by the ECJ in its decision of 14 July 1972, ECR 172, 619, ICI, and has since been adopted by the European Commission.

¹³ Cf. ECJ Rs 40/48, ECR 1975, 1663, Commission/Suiker Unie.

¹⁴ Cf. ECJ Rs 100/80, ECR 1825, Musique Diffusion Française/Commission, Margin Notes 72-80.

➤ **Resale price maintenance is a restriction by object**

Under Article 101(1) of the TFEU, a restriction of competition by object arises when the restriction by its nature may affect competition. This concerns restraints which, in view of the objectives pursued by the competition rules, have such a great potential for negatively impacting competition that it is not necessary to apply Article 101(1) of the TFEU to demonstrate their actual impact on the market (for example, following concerted sales price).¹⁵

In this sense and according to the European Commission's Guidelines on the application of Article 101(3) of the TFEU, restrictions by object include, in the realm of vertical agreements, fixed and minimum resale price maintenance.¹⁶

➤ **When does a non-binding price recommendation exist?**

If a supplier and a dealer discuss retail prices vis-à-vis consumers, this should—at most—take the form of **non-binding price recommendations**, and by no means should elements of horizontal coordination be involved. The Austrian Supreme Court (OGH) requires a high threshold to show such a non-binding nature. The exertion of pressure or even the existence of positive incentives may stand in the way of any possibility of proving a non-binding nature.

An explicit, unambiguous declaration of the non-binding character of a price recommendation exists when it demonstrates, not by mere conclusion, but in a way which leaves no room for doubt that the price recommendation is neither a legal "must" nor a commercial "ought" but rather a voluntary "may", which in no way restricts the addressee's freedom of choice.

¹⁵ European Commission Guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) of the TFEU), Margin Notes 19-21.

¹⁶ European Commission Guidelines on the application of Article 81(3) of the Treaty (now Article 101(3) of the TFEU), Margin Note 23: "Non-exhaustive guidance on what constitutes restrictions by object can be found in Commission block exemption regulations, guidelines and notices. Restrictions that are black-listed in block exemptions or **identified as hardcore restrictions** in guidelines and notices are generally **considered by the Commission to constitute restrictions by object**. [. . .] As regards vertical agreements **the category of restrictions by object includes, in particular, fixed and minimum resale price maintenance** and restrictions providing absolute territorial protection, including restrictions on passive sales."

According to the Austrian Supreme Court, price recommendations which are stated as "preferable" do not fulfill the criterion of being non-binding.¹⁷

In this regard, the German Federal Cartel Office has rightly said that "the mere handing over of a list of resale prices by a supplier to a commercial enterprise" does not in itself constitute anti-competitive resale price maintenance.¹⁸ In this context, suppliers may also explain their marketing strategies and their reasons for the price recommendations.¹⁹

Indeed, unilateral specification of non-binding price recommendations is generally permissible; however, the non-binding nature of a non-binding price recommendation is called into question when such recommendations go beyond mere notification to the distributors, such as where compliance is monitored and pushed for through targeted contacting.

The targeted and **repeated "processing"** of distributors with the goal of creating uniform compliance with the price recommendation therefore exceeds the scope of "non-binding".

➤ **Even unilateral actions may violate competition law**

If in the absence of an agreement or concerted practice (see above), there is no anti-competitive conduct under either Article 101(1) of the TFEU or § 1(1) of the Austrian Cartel Act and no effect on trade between Member States fulfilling the conditions of Article 101 of the TFEU is present, it is necessary to check whether unilateral anti-competitive conduct under § 1(4) of the Cartel Act is present. Under § 1(4) of the Cartel Act, adherence to maintaining certain prices, price limits, calculation guidelines, trade margins, and discounts (any of which have as their object or effect the restriction of competition) are all the equivalent of a cartel ("recommendation cartels"). Under §1(4) of the Cartel Act, the only recommendations which are allowed are those which explicitly state that they are non-binding and that they will not and should not be enforced through either economic or social pressure.

¹⁷ Cf. Austrian Supreme Court 12 Os 320/62 from 20 February 1963.

¹⁸ Cf. the so-called "Helping Hand" ("Handreichung") of the German Federal Cartel Office, 13 April 2010, B 11-13, 16 and 19/09, 12/10.

¹⁹ See below, Code of Conduct point 17.

IV. Code of Conduct

Below, the BWB sets forth a code of conduct for suppliers and dealers (which hereinafter refers in general to all levels of trade, to be understood as both wholesale and intermediate trade). This code of conduct should be an orientation guide for small and medium-sized enterprises in particular. This is not a conclusive code of conduct but rather an illustrative list of behaviours, identified over the course of the Authority's practice, which the Authority would generally consider as questionable from an antitrust point of view and would prosecute:

➤ **Conduct prohibited as a general rule**

1. The written or oral coordination or fixing (e.g. in an annual agreement) of retail prices. This can arise through fixed prices or minimum prices. The prohibition covers standard prices as well as promotional prices.
2. The agreement upon bonuses, discounts, or other perks or incentives for compliance with certain retail prices or retail price recommendations.
3. The agreement upon penalties or other disadvantages for non-compliance with certain retail prices or retail price recommendations. Unilateral actions such as suspending deliveries for non-compliance with a certain retail price or retail price recommendation may be an indication that a fixed price was agreed upon.
4. Resale price maintenance can also be agreed upon in an indirect way. Examples include arrangements between suppliers and dealers on sales margins and agreements under which certain discounts may only be granted to a specified price level.
5. An agreement in connection with price-fixing measures that a sales channel (e.g. internet sales) may not be used constitutes a serious violation of antitrust law. That is to say that with price competition at the retail level already being restricted, any further prevention of attractively-priced competition is all the more serious.

6. Agreements on margin neutrality between dealers and suppliers: this refers to the condition that with a change in the purchase price between suppliers and dealers a corresponding change in the retail price on the market be implemented, therefore keeping the dealer's existing margins unchanged. Trade enterprises are to perform their margin calculations independently and to bear the economic risks of their pricing policy on their own.

The following paragraphs describe behaviours which are typically associated with resale price maintenance and considered strong indication of the existence of resale price maintenance (or even horizontal coordination). In any case they should be refrained from if they strengthen, support, or enforce prohibited actions. The same is true if they are pooled together, which overall may constitute an agreement or concerted practice within the meaning of Article 101(1) of the TFEU or §1(1) of the Cartel Act or prohibited pressure or advantage-granting in the sense of §1(4) of the Cartel Act.

7. The involvement of trade enterprises in the monitoring of resale prices by suppliers and, conversely, the involvement of suppliers in the monitoring of the retail price by trading companies: on the one hand, this includes measures which oblige (or encourage) trade enterprises to notify their suppliers when the recommended retail price or the minimum retail price set by the supplier is deviated from, and also measures which grant incentives, such as compensation, for such compliance.
8. The agreement that a competitor's retail price must remain within a certain range.
9. The disclosure of price-related information that a supplier has acquired through its contractual relationship with a dealer and which the supplier conveys to other dealers: this may include, for example, advance information about the timing and amount of changes in a dealer's retail price being conveyed by a supplier to other dealers.
10. The dealer's imposition of penalties upon the supplier for failure to enforce identical or comparable retail prices as to competitors. The same can apply for threatening to reduce purchase prices for failing to enforce identical or comparable retail prices for competitors. Particularly concerning in this context is the retroactive reduction of purchase price.

11. The increase of the purchase price being made conditional upon the competition complying with a certain retail price level: this excludes the possibility of the dealer accepting a purchase price increase conditioned upon the supplier implementing a competitor's retail price increase.

➤ **Conduct permitted as a general rule**

12. **Retail price recommendations:** price recommendations from suppliers to dealers must be legally (de jure) and effectively (de facto) non-binding. A consideration of the non-binding nature of recommendations is made on a case-by-case basis. A supplier using the designation "MSRP" or referring to the price as "non-bindingly recommended" does not conclusively demonstrate a non-binding nature; other factors that demonstrate a binding nature may be present (incentives, sanctions, emphatic insistence). The mere handing over of a list of recommendations from a supplier to a dealer does not in itself constitute antitrust activity.

13. **Explanation of marketing strategy (especially regarding pricing):** the supplier may explain and clarify the reasons for retail price recommendations, such as the strategy it pursues with regard to the positioning and marketing of its products. This can also be developed through a joint marketing strategy, as long as this does not include any agreement or coordination as to retail prices. Suppliers may explain their marketing strategy, but the explanation of the strategy should not be used as a means of coordination of retailers/dealers (such as, in the context of explaining of the strategy, the supplier disclosing to the dealer plans for the timing and retail price of each promotion).

14. **Promotional prices:** it is not prohibited by antitrust law for a dealer to notify a seller of planned retail prices, for instance because volume planning may be required in some industries (usually done by the producer). Additionally, a supplier can propose to a dealer the initiative for a promotion, for instance as part of a marketing strategy. However, the promotional retail price must be determined by the retailers/dealers and may not be coordinated or agreed upon.

15. **Independent price monitoring:** a detailed observation of the price behaviour of trade competitors is not prohibited by antitrust law. The supplier can also monitor its prices to see how retail prices are developing. However, when a supplier routinely promotes price monitoring (e.g. by forwarding receipts from competitors), this can indicate that dealers and suppliers have formed a "star" or "hub and spoke" cartel.
16. **Maximum retail price:** as a general rule, it does not violate antitrust law for a supplier to oblige a dealer to not exceed a certain maximum price, so long as this is not, for example, subsequent to the granting of incentives or the exertion of pressure so as to operate as a de facto fixed price or minimum retail price. A supplier has the right to make any financial support of promotions conditional upon a certain maximum price not being exceeded during the promotion. However, in this context it is necessary to ensure that the maximum price is not so low as to make it, from an economic point of view, a minimum or a fixed price target.
17. **Pricing by the manufacturer:** in some situations, a dealer will assign pre-labelled prices to a supplier. This especially pertains to bulk items (e.g. cheese with a price per kilogram) or seasonal products. For pre-labelled products, one should bear in mind that the published retail price is calculated independently by the dealers/retailers enterprise and is communicated to the supplier only on the price tag.

V. Special Issues

Agency agreements

In the scope of a true sales representative relationship, a dealer sells goods without any commercial risk to the account of the supplier. In this case, the manufacturer is entitled to set the retail price exactly as it sees fit. However, when a sales representative relationship exists only on paper, serving merely to circumvent competition law prohibitions, and there is actually a supplier-dealer relationship at play, in which the typical contractual trade risks (e.g. assuming costs of transport, market risk, products liability, contributing to marketing costs, warranty obligations, etc.) are borne by the "sales representative", then this is referred to as a "phony" sales representative relationship. In such a case, the coordination of prices between supplier and dealer is prohibited.²⁰

²⁰ European Commission Guidelines on vertical restrictions, OJ 2010 C 130/01, Margin Notes 12-21.

➤ Franchising

Additionally, the agreement or coordination of retail prices is prohibited within the relationship between franchise partners. As regards franchising and fundamental compatibility with competition law, reference should be made to the Communication of the Commission on the Guidelines on Vertical Restraints (2010/C 130/01), Margin Note 189 et seq.

➤ Unfair Trading Practices

In a series of opinions, the BWB has pointed out that, from the perspective of suppliers, sometimes unfair trading practices prevail in the relationship between dealers and suppliers. The present Standpoint does not address the issue of unfair trading practices in the relationship between suppliers and dealers. However, in this regard the BWB points out the possibility of submitting a complaint (even in anonymous form) to wettbewerb@bwb.gv.at.

The present list of permissible and impermissible actions is **not exhaustive**; we reserve the right to supplement this list, should the need arise. The existence of this list also does not imply that behaviours not mentioned herein are unproblematic. Assessments do not particularly depend on the label—in competition law, a perspective based on economic realities applies—but rather they depend on the purpose or effect of the actions taken or to be taken.

VI. Examples

Example 1: "Classical" resale price maintenance

Supplier X agrees with Dealer A that A will not sell the delivered products below a certain retail price (for example, "A will not fall below a retail price of €1.99 per unit" or "A will sell the delivered product at €1.99 per unit"). X threatens to suspend delivery if Dealer A sells for less than this retail price.

The agreement to not fall below a stated retail price constitutes an **anti-competitive agreement**. The pressure exercised by the supplier is not required for this legal classification, but it can be considered with regard to establishing that X acted with an aggravated degree of fault.

Advice: Even if an agreement or concerted practice between A and X were not identifiable or traceable, the pressure exercised by X upon A to vertically coordinate retail prices could qualify as anti-competitive unilateral action by X under § 1(4) of the Cartel Act.

Example 2: Margin-neutral purchase price increase

Supplier X informs Retailer A about a significant rise in the prices of raw materials, which necessitates an increase in A's purchase prices. X and A reach an agreement whereby the purchase price will be raised so as to be "margin-neutral".

In this context, the "margin-neutral" agreement means that an increase in the retail price by a certain amount goes hand in hand with the increase of the purchase price so that the dealer's margins remain the same. This results in an **anti-competitive vertical agreement** on a certain retail price.

Example 3: Triangular coordination

Supplier X agrees with Dealer A that the delivered products are not to be sold below a certain retail price. A requests of X that Dealers B and C also not sell the concerned products below the retail price agreed upon between A and X. Then, Supplier X also agrees upon retail prices with B and C.

As in Example 1, Dealer A has to set its prices independently; this also applies for B and

C. Therefore, there is an **infringement of competition law** in the form of resale price maintenance as regards the vertical price coordination between X and B or C. To that effect, there is also the possibility of pressure being exerted by Dealer A, such as through demands for retroactively reducing purchase prices if the Supplier cannot prove the retail price increase of the other Dealers, for example through receipts, invoices, or other evidence of prices (in this context also referred to as "conditional purchase price increases"). These additional elements would not change result of this being an infringement of competition law. A's goal to secure vertical price agreements but also encompassing the horizontal relationship between different dealers through X's parallel vertical agreements with B and C, may be considered for purposes of establishing **aggravating circumstances** when determining fines.

Advice: If an agreement or concerted practice of the above-mentioned dealers to reach parallel vertical agreements with Supplier X can be proven, a so-called "star cartel", "trilateral price fixing" or "hub & spoke cartel" is present. As horizontal violations, they are therefore **grave violations of competition law** and are routinely punished with high fines.

Example 4: Promotional price agreement (here with "horizontal element")

Dealer A informs Supplier X that its competitor, Dealer B, has a promotion which is undercutting the retail price agreed upon between A and X, that A has always upheld the promotional retail price and that B's price would harm the image of the product as well as A's sales volume. Supplier X responds to A that this promotion is not desirable and demands of Dealer B not to fall below a certain promotional retail price, otherwise X will not participate in any more promotions with B for half a year. B promises that future promotions for this product will maintain a certain promotional retail price. Supplier X shares B's pledge with A.

Dealer A's communication of this information to Supplier X is a sign that **anti-competitive price maintenance agreements have been made and implemented** ("A has always maintained the promotional retail prices"). Supplier X's demand of Dealer B to maintain promotional retail prices functions as "horizontal hedging" of the resale price maintenance with Dealer A; the threat to cease promotions with B may be considered for determining aggravating circumstances. The pledge of Dealer B to maintain certain promotional prices in the future results in anti-competitive resale price maintenance between X and B.

Advice: Already the communication from Supplier X to Dealer A that B would no longer have certain promotional prices—independent of any of the other communications—indicates **horizontally-hedged resale price maintenance** between X and A.

[As of July 2014]