



Watch out ... price breakers, dead ahead!

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Imagine...

You have just developed a new product that you are eager to launch as a 'premium' quality product. To do so, you join forces with an established network of independent distributors. These distributors should give your product the necessary visibility and will be responsible for providing top-quality customer service.

Your only concern is that this expectation will be thwarted by a small number of 'price breakers' inside the network. They have the reputation of winning over customers with an attractive price (discounts, promotion prices, tie-in sales, etc.). But they can only offer this price by *not* investing in your brand or assuring the service level you want. This harms the image of your product, and it also discourages the better distributors from investing long-term in your brand...

In order to put the price breakers out of action, the commercial team proposes compelling all distributors to apply a specific price level. In this way, the distributors are sure to get their margin and their investments in your brand are certain to be rewarded.

The system is rolled out and quickly looks to be highly effective. The product is flying off the shelves

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and your company confirms its reputation as a top-quality brand. You are successfully competing with the established brands.

You are very surprised when the competition authority informs you that it has initiated an investigation after receiving a complaint. Supposedly, your company has committed a serious violation of the competition rules and runs the risk of a heavy fine.

You struggle to wrap your head around all this. The customers *love* the luxury image of your product. The distributors are happy and are investing in your brand, which is successfully standing up to the established players on the market. So... how can this practice be in conflict with the competition rules?

A brief clarification.

Suppliers cannot simply make agreements on the prices that independent distributors have to charge on the sales to *their* customers.

A **fixed or minimum resale price** is generally prohibited. This is 'vertical price fixing' and a so-called 'hardcore restriction' of competition.

Vertical price fixing covers a whole spectrum of *direct* and *indirect* practices. For example, a supplier is also not allowed to set the *margins* or *discounts* of his distributors, or to prohibit them from *advertising* prices below a certain price level. Nor can the supplier pay his distributors for complying with a specific price or a certain price level. Conversely, he also may not *penalise* them for failing to comply with them.

The supplier can **recommend** a resale price or impose a **maximum resale price**, on condition that the distributor is actually free to depart from the recommended resale price and may go below the maximum resale price. If the supplier seeks to limit this freedom of movement, we are right back to prohibited vertical price fixing.

If a supplier does *not* comply with the prohibition on vertical price fixing, he risks being hit with a **heavy fine**. Both the European Commission and the national competition authorities take such violations especially seriously. For example, in October 2017 the Greek competition authority imposed more than 18 million euros in fines on six wholesalers of luxury cosmetic products, including such major names as Estée Lauder, L'Oréal and Christian Dior. They had instructed retailers to grant uniform discounts on sales to consumers. Earlier, the German competition authority in the candy cartel levied more than 60 million euros in fines on Edmund MÜNSTER and six retailers due to vertical price fixing of Haribo products. Vertical price fixing has been fined by other national competition authorities as well, including in Belgium (5.5 million euros in March 2017 against Algist Bruggeman) and the UK (2.7 million pounds in June 2017 against The National Lighting Company).

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Concretely:

- In principle, an independent distributor must be able to freely set his resale price.
- A supplier is prohibited from imposing on his distributors *minimum or fixed* resale prices. This constitutes prohibited vertical price fixing.
- The prohibition on vertical price fixing also applies for the establishment of a *price level or other price elements* (sales margin, discounts, price increases, payment conditions, etc.).
- The prohibition applies for both *direct* and *indirect* measures. Thus, a supplier is not allowed to remunerate a distributor for maintaining a specific price or a certain price level. Nor may he sanction a distributor for *not* complying with them.
- Recommended prices and maximum resale prices are authorized, but always on condition that the distributor is free to depart from the recommended resale price or to go below the maximum resale price.

Want to know more?

- Article 4 (a) of Commission Regulation 330/2010 of 20 April 2010 on the application of article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices (<http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=celex:32010R0330>).
- The European Commission's guidelines on vertical restraints, nos. 223-229 ([http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:52010XC0519\(04\)](http://eur-lex.europa.eu/legal-content/NL/TXT/?uri=CELEX:52010XC0519(04))).
- Greek competition authority, see <https://www.epant.gr/en> under "04/10/2017 Prohibition of competition law by wholesalers of luxury cosmetics".
- German competition authority, see http://www.bundeskartellamt.de/SharedDocs/Entscheidung/EN/Fallberichte/Kartellverbot/2017/B10-40-14.pdf?__blob=publicationFile&v=2.
- Belgian competition authority, see our earlier *In the Picture* <https://www.contrast-law.be/publications/in-the-picture/breakingnews-19/>.
- UK competition authority, see <https://www.gov.uk/government/news/lighting-company-fined-27-million-for-restricting-online-prices>.
- The third edition of Frank Wijckmans and Filip Tuytschaever, 'Vertical Agreements in EU Competition Law', which contains a chapter on vertical price fixing, can now be ordered via <https://global.oup.com/academic/product/vertical-agreements-in-eu-competition-law-9780198791027?cc=be&lang=en&>.