

**Unclassified****English - Or. English**

22 November 2019

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Hub-and-spoke arrangements – Note by Austria**

4 December 2019

This document reproduces a written contribution from Austria submitted for Item 7 of the 132<sup>nd</sup> Competition Committee meeting on 3-4 December 2019.  
More documents related to this discussion can be found at  
<http://www.oecd.org/daf/competition/hub-and-spoke-arrangements.htm>

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**JT03455182**

## *Austria*

1. In the past few years the FCA has investigated and sanctioned numerous **RPM cases**. The affected sectors were **food retail, electronic consumer goods, franchise systems and insulation materials**. In total, **51** RPM cases were brought before the Cartel Court in the years 2011 to 2019.
2. Since 2011, 25 inspections regarding **RPM (with significant horizontal elements)** were conducted by the FCA in the **food sector**. The investigations started after investigations into horizontal collusion in the brewery sector. The RPM cases in the food sector were extensively characterized by the **RPM being enforced at the request of the retail side**.
3. Fines were imposed against 6 **food retailers**, including:
  - **REWE** (~35% market share): EUR 20.8 Mio (numerous products; settlement in 2013)
  - **SPAR** (~30% market share): EUR 30 Mio and EUR 10.2 Mio (dairy products, confirmed by Supreme Court decision in 2015; further products, in particular beer and non-alcoholic beverages, settlement in 2016)
  - 4 smaller retailers: overall EUR 888,750 (numerous products)
4. Furthermore, fines were imposed against 20 **suppliers**, including:
  - Dairy producers: Berglandmilch (EUR 1.125 Mio), NÖM (EUR 583,200), Kärntner Milch (EUR 375,000), Emmi (EUR 210,000)
  - Breweries: Stieglbrauerei (EUR 196,875), Vereinigte Kärntner Brauereien (EUR 195,000)
  - Producers of non-alcoholic beverages: Rauch (1,7 Mio)
5. In general, the anti-competitive behaviour included "classical" **RPM clauses** in annual agreements and e-mail correspondence on promotional sales (1), the fact that during negotiations of purchase prices, retailers required that producers ensure that **identical or similar resale price increases** were implemented by competing retailers (horizontal element) (2), suppliers informing retailers **in advance** about time and extent of resale price increases of other retailers (3), suppliers **monitoring and reporting** to retailers on competitor's price increases (4) and **retailers exercising pressure** on suppliers failing to implement identical or similar resale prices with competing retailers (5).
6. Amongst them there were indeed cases where **hub and spoke arrangements were suspected**, but during the investigations the FCA decided to focus on the outweighing RPM evidence. Furthermore, the evidentiary standards for proving a hub-and-spoke arrangement are higher than for "classic" RPM. Thus, until today there hasn't been any exclusive hub-and-spoke case that had been thoroughly investigated and brought before the Cartel Court. However, concerning overall **investigations, dawn raids and the applicability of the leniency programme there wouldn't be any difference in the handling** of a RPM case and a hub-and-spoke case.

7. In its decision (*8.10.2015, 16 Ok 2/15b*) against SPAR, a leading food retailer in Austria, which resulted in a EUR 40 million fine (see above), the Supreme Court explicitly referred to hub-and-spoke arrangements in the reasoning.

8. The RPM cases concerning **electronic consumer goods** were mainly characterised by the supplier-driven RPM. Fines were imposed by the Cartel Court against **manufacturers, wholesalers and retailers**.

9. In particular, the anticompetitive behaviour sanctioned in these cases included **RPM** by the collusion on minimum prices and suspending deliveries as long as a certain price level is not implemented (1), **restrictions of online sales** by either a total ban or a ban to sell selected products online (2), the **restriction of parallel trade** (3) and the **ban of price comparison websites** (4).

10. In its decision (*14.11.2016, 25 Kt 7/16*) against De'Longhi Kenwood the **Cartel Court referred explicitly to hub-and-spoke arrangements**. The company had entered into vertical price fixing arrangements with various retailers, effectively setting minimum resale prices. It had also concluded agreements with retailers restricting cross-border sales as well as generally restricting internet sales. De'Longhi-Kenwood staff checked several times per week that these minimum prices were being observed and, if the price had fallen below the minimum level, immediately contacted the retailer (by phone or e-mail) to request that the prices be realigned with those of other retailers. Various methods were used to ensure that this price cartel, which De'Longhi-Kenwood referred to as a "European minimum price system", worked as intended. Some retailers were forbidden from appearing on price comparison sites, while others were no longer supplied until they complied with the agreed prices again. In other cases De'Longhi-Kenwood threatened to no longer pay its share of advertising costs as previously agreed. In some cases, employees working at partner companies in neighbouring countries were contacted and asked to demand price discipline from retailers that were not charging the agreed minimum prices to ensure price stability even outside Austria. The price arrangements involved the setting of a uniform minimum sales price at the horizontal level of retailers.

11. In 2014, the FCA published guidelines entitled 'Standpoint on Resale Price Maintenance' based on the business practices it had observed in the framework of the above mentioned enforcement activities.

12. The guidelines are **non-binding** but they provide a **useful overview of the FCA's likely enforcement practice** and clarify which cases, as a general rule, the FCA considers questionable from an antitrust point of view. Different interest groups, consumer protection organisations, businesses and other interested parties were provided with the draft of the guidelines beforehand and all interested parties were invited to comment on the draft.

13. The handbook focuses on **vertical agreements**, and in particular **RPM. Hub-and-spoke arrangements** are covered as well. The guidelines deal with the applicable legal framework, RPM as hard-core restrictions and the question why these practices are considered problematic under competition law. The guidelines provide answers to questions like: When do potentially problematic agreements or certain behaviours typically occur? What are the characteristics of a non-binding price recommendation? Which kinds of behaviour are in principle impermissible/permissible? What should a company do if violations occur? In addition, there are a **few selected examples illustrating various anticompetitive behaviour** to provide additional value to undertakings.

14. The main aim is **to give (non-exhaustive) guidance to suppliers and retailers (at all trade levels)**, and to small and medium-sized businesses in particular. The guidelines explain both clearly problematic behaviour and generally