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Luxembourg Competition Council imposes highest ever fine for resale price maintenance agreements

Luxembourg Competition Council imposes highest ever fine on Bahlsen and supermarket chains Cactus, Auchan and Delhaize for resale price maintenance agreements

On 18 November 2020, the Luxembourg Competition Council issued decisions against German biscuit manufacturer Bahlsen, as well as against the Luxembourg supermarket outlet Cactus and the internationally active Auchan and Delhaize groups for engaging in resale price maintenance agreements and distorting competition on the Luxembourg market. The decisions impose fines of in total EUR 3,3 million and mark the end of a five year long investigation process.

Legal Framework

Art. 101 (1) of the EU treaties as well as Art. 3 of the Luxembourg Competition Act prohibit agreements between companies that have as their object or effect the prevention, restriction, or distortion of competition within the market. This does not only apply to direct competitors, but also extends to vertical agreements (such as distribution contracts) between parties on different levels of the supply chain.

So-called resale price maintenance refers to vertical agreements between suppliers and distributors, in which the latter commit not to deviate from a certain retail price. Agreements in which the retailer is no longer free to determine his own pricing policy are considered to be resale price maintenance agreements that have as their object the distortion of competition. Non-binding price recommendations on the other hand are typically not caught by this prohibition, as long as the retailer is free to set a price lower than the respective recommendation.

Legal test applicable in Luxembourg

The Competition Council has investigated a number of recommended resale price maintenance arrangements in the past and typically resorts to a three tier test in determining whether such practices may constitute a competition law violation. In its recent Luxlait decision, the Competition Council considered that

resale price maintenance is likely to distort competition, where (i) there has been a discussion between supplier and distributor on resale prices, (ii) a pricing policy has been put in place (featuring also price supervision at retail level), and (iii) the discussed retail prices have been effectively applied in practice.

While the first condition is easily met where a supplier communicates recommended resale prices, the second element requires – in addition to mere supervision of prices at retail level – an element of ensuring that the recommended prices are also applied throughout the distribution network. With respect to the third criterion, the Competition Council has not provided concrete guidance as of when it considers that discussed retail prices have also been significantly applied in practice.

Decision

In 2015, the Competition Council launched – on its own initiative – an investigation into the pricing policy of Bahlsen and certain members of its distribution network. After seizing evidence during dawn raids on the premises of Bahlsen and Auchan in 2015 and 2016 respectively, a five year long investigation ensued, at the end of which the Competition Council imposed a fine of in total approx. 3,3 million against the members to the distribution network.

While the text of the decision and the legal qualification of the three-tier test is not yet in the public domain, the Competition Council communicated that Bahlsen set out “non-binding” pricing recommendations while financially rewarding those distributors that respected and abstained from undercutting such recommendations. The Competition Council argues that this action permitted Bahlsen as well as the involved distributors to protect profit margins and removed an important element of competition. By effectively imposing retail prices among the supermarkets (all three of which holding a significant presence in Luxembourg), consumers were bound to pay a higher – supra-competitive – price to the benefit of the members of the distribution system.

The decision also gives insight into the fine setting practice of the Competition Council: whereas Bahlsen has received a reduction in its overall fine due to pro-active cooperation with the Competition Council, the fines for the supermarket chains Auchan and Delhaize were increased due to the global size of the companies. The third involved supermarket chain, Cactus, faces the largest fine at retail level due to a significant volume of sales of the affected products.

Implications for companies with distribution agreements

The decision has important implications for businesses with a Luxembourg retail or distribution presence. The Council underlined that it will prosecute not only suppliers but also retailers forming part of a resale price maintenance mechanism that distorts competition on the Luxembourg market. The decision of the Luxembourg authority must be understood as clear signal to companies that resort to or abide by resale price recommendations to act within the confines of applicable competition law. In this respect, multinational companies with a Luxembourg presence are warned that fines may not proportionally correlate to the volume of sales on the Luxembourg market, but can be increased for deterrence.

The Competition Council also reiterated that its leniency or “whistleblowing” procedure is open to companies that wish to denounce the existence of illicit resale price maintenance arrangements and benefit from immunity or at the least very significant fine reductions.

The expertise and service of Arendt & Medernach

As Luxembourg’s leading law firm with a vast European reach and expertise, we can assist in understanding EU and national applicable legal frameworks and review distribution agreements with a focus on their compliance with applicable Competition law rules.

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