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Bulgaria: Two fines imposed for Resale Price Maintenance on the market of trade with baby and mothercare products

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The two recent resale price maintenance (**RPM**) cases before the Bulgarian Commission for Protection of Competition (**CPC** or **Commission**) concern prohibited agreements between the only importers of baby products with brands Medela and Canpol (**SMART SM**) and Philips Avent (**IVENTAS**) on one side, and the retailers of baby and mothercare products acting on the Bulgarian market on the other side.

The prohibited agreements relate to the maintenance of resale prices of baby products and the maintenance of identical price reductions by almost all participants on the market of baby products and mothercare.

Based on the conducted dawn raids, collected documents, statements by market participants and other information, CPC concluded that SMART SM and IVENTAS were part of prohibited agreements by means of Art. 15 of the Bulgarian Competition Protection Act (**BCPA**) – verbatim adoption of Art. 101 of TFEU.

SMART SM was sanctioned with a fine of BGN 434 634 (approximately EUR 217 000).

IVENTAS was fined BGN 522 966 (approximately EUR 260 000)

The decisions are not final and are subject to appeal in two instances.

Medela/Canpol case

First, CPC identifies SMART SM and its partners as independent undertakings. The role of SMART SM on the market is dual – once the company acts as an importer and wholesaler of baby and mothercare products and at the same time the company operates its own retail website, where CPC considers it as a participant on the downstream market. Between 2012 and 2019 this function is conducted by the company itself, whereas after 2019 SMART SM acts through a subsidiary.

CPC defined the duration of the violation starting from 6 February 2012 – the earliest action related to the breach found during the conducted dawn raid until the present. Commission's market definition is wholesale trade with baby and mother products on a national level.

The Commission found that the majority of the business partners of SMART SM are long-lasting clients of the company, where the latter conducted its business relations with them through recommended resale prices. The Commission accepts that setting a recommended price is not a breach of competition law itself and usually aims to fix the maximum resale price avoiding extremely high prices hindering the market realization of a product. However, in this case, the setting of recommended prices was seen as a tool for RPM.

In the course of the dawn raids, CPC found e-mail exchange between SMART SM and its clients related to communication on recommended prices, margin percentage, wholesale prices, profit formulas, the ratio between the wholesale price and retail price, etc. The entire style of communication leads to the impression that SMART SM's recommended prices are actually mandatory end-prices for its business partners, e.g., the e-mail correspondence contains information where SMART SM in an imperative manner informs its business clients about the price increase of products valid as of a certain date.

CPC found a table, where against the name of the business partner there is information on whether the respective company wants recommended price or not. The Commission interprets this fact as evidence that SMART SM is very much interested in the levels of resale prices and if not, the company would have never kept any information dedicated to resale prices, margin levels, etc.

CPC takes into consideration the statements of small size retailers of baby products evidencing that in order to sell Medela and Canpol products, they need to comply with SMART SM recommended prices since the company is the only importer of these two brands and they are with high demand among the end consumers and defined by CPC as must stock brands.

SMART SM's business strategy is confirmed by the fact that the company organizes the biggest course for pregnant women in 7 cities in Bulgaria and collects personal data of hundreds of future moms and sends them periodical bulletins promoting its brands. In its business communication, SMART SM highlights this as a competitive advantage.

In addition, the Commission found pre-contractual communication between SMART SM and Nestle – potential partner, where SMART SM explicitly demonstrates its will to be the exclusive distributor of Nestle's products and this fact is of crucial importance for the determination of its market behaviour. CPC accepts this as a clear indication for SMART SM's business strategy – exclusive distribution aiming to maintain end prices.

CPC rejects one of the main SMART SM's arguments related to its low market share arguing that the low market share is compensated by the character of SMART SM as the exclusive or almost exclusive distributor of the two must stock brands, i.e., Medela and Canpol.

Based on the above, CPC considers that SMART SM sees its recommended prices as end prices on the retail market and that the company controls the ratio between wholesale and end price. CPC accepts that the market behaviour of SMART SM affects the price levels of the baby products that would have been different if controlled by the natural supply and demand needs of the market. Along with this, CPC accepts that such market behaviour has a negative impact on intra-brand competition and leads to the elimination of any price competition.

Philips Avent case

As in Medela/Canpol case, CPC considers IVENTAS and its partners as independent undertakings. The company participates in both – wholesale and retail markets of baby products and mothercare.

CPC defined the duration of the violation starting from 30 July 2012 – the date on which a retailer requested an offer by IVENTAS until the present. Commission's market definition corresponds to those under the previous case, i.e., wholesale trade with baby products on a national level without the need of further segmentation of the market.

Concerning the RPM aspects, the factual and legal circumstances are almost similar to those under Medela/Canpol case, i.e., RPM through recommended price, exclusive distribution, margin control, etc.

The additional element of the anti-competitive behaviour of IVENTAS includes discount management policy, i.e., formation of the trade discount as a deduction of the recommended end price of IVENTAS's products combined with a discount for turnover. This way the focus is not on the delivery price as per the normal economic logic but the end resale price. Such discount policy stimulates the retailers to sell on recommended prices in order to keep the discount level and margin ratio.

Another side of the anti-competitive behaviour of IVENTAS includes sending information to potential clients that all counterparts of IVENTAS comply with the recommended prices. With this, the company aims to persuade the potential client that the price is fixed and the only possible resale price is indeed the recommended one. An additional persuasive element in this regard is the information that IVENTAS in its own outlets uses the same resale prices. Once this stimulates the clients to sell at the same price and second this constitutes sharing of sensitive commercial information concerning pricing policy.

In order to preserve its market position, IVENTAS identifies retailers with independent pricing, approach them and offer them discounts in order to sell on recommended prices, directly requests corrections of end prices if differing from the recommended one, etc.

Many other elements of IVENTAS behaviour leads the CPC to the conclusion that there is a breach of Art. 15 of the BCPA. As a consequence of this behaviour, the price and intra brand competition is eliminated.

Conclusion

The two RPM cases concern the market sector that is very sensitive – baby products and mothercare products, where the end consumers are willing to pay more in order to get the best products for their babies. This consumer's approach is used by SMART SM and IVENTAS in order to maintain high prices and eliminate price and intra brand competition. Apparently, the strategy has successfully worked for almost 10 years.

It is hard to predict the outcome of a potential appeal since the only published versions by the CPC are the confidential ones and third parties normally have no access to any evidence under both cases. However, the prediction might be seen as optimistic in favour of CPC due to the detailed approach and the efforts in the economic and legal analysis of the responsible Commission's experts.

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