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HORTENDAHL

CASE CARD | 29 October 2024

Hugo Boss, Kaufmann and Ginsborg v Danish Competition Council (BS-30903/2021-SHR and BS-30782/2021-SHR)

Information exchange in dual distribution scenarios

1. CASE SUMMARY

A. Summary of facts

This case concerns an unlawful exchange of information in a dual distribution scenario.

In Denmark, HUGO BOSS is both a supplier of products under the brand and a retailer selling the brand in two major department stores. Kaufmann and Ginsborg are retailers of clothing, including the brand HUGO BOSS. Thus, HUGO BOSS has a vertical relation with Kaufmann and Ginsborg in the form of distribution agreements and a horizontal relation as a retail competitor.

Over a period from January 2014 to November 2017 resp. December 2014 to April 2018, Hugo Boss Nordics exchanged information on prices, discounts, and volumes in relation to future sales on the retail market with Kaufmann and Ginsborg.

The Danish Maritime and Commercial High Court considered that the exchange of information concerned Hugo Boss Nordics' retail business rather than its wholesale business, rendering the exchange an unlawful exchange of sensitive information between competitors. The Danish Maritime and Commercial High Court thereby upheld the decisions of the Danish Competition Council and the Danish Competition Appeals Board.

B. Notes on case history

On 24 June 2020, the Danish Competition Council decided that Hugo Boss Nordics, Kaufmann and Ginsborg had entered into an unlawful exchange of information on prices, discounts and volumes, contrary to Section 6 of the Danish Competition Act and Article 101(1) TFEU.

The Danish Competition Council found that the concerted practice was horizontal and therefore the practice did not fall within the scope of the block exemption regulation for vertical agreements. The concerted practice also did not fulfil the conditions for individual exemption under Section 8(1) of the Danish Competition Act or Article 101(3) TFEU.

Hugo Boss appealed the decision to the Danish Competition Appeals Board on 22 July 2020. On 23 June 2021, the Danish Competition Appeals Board upheld the decisions of the Danish Competition Council finding that the exchange of information on prices, discounts, and volumes in relation to future sales on the retail market constituted a competition law infringement by object in violation of Section 6 of the Danish Competition Act and Article 101(1) TFEU.

The cases were appealed to the Danish Maritime and Commercial High Court. On 6 May 2024, the Danish Maritime and Commercial High Court assessed that the information exchange was a concerted practice with the object of restricting competition in violation of section 6(1) of the Danish Competition Act and Article 101(1) TFEU. Thus, the Danish Maritime and Commercial High court upheld the decisions of the Danish Competition Council and the Danish Competition Appeals Board.

On 23 May 2023, Kaufmann paid a fine of 6 million DKK. In addition, two senior Kaufmann employees have each paid a fine of 120,000 DKK.

C. Legal analysis

The Danish Maritime and Commercial High Court first assessed whether the disputed exchange of information between Hugo Boss and Kaufmann respectively Ginsborg was of a horizontal or vertical nature. The court assessed that the information exchanged was of a horizontal nature, and therefore the exchange could not be block exempted. The court emphasized that the information concerned prices, size of discounts, times of sales, quantities, and specific items on sale. The information made it possible to deduce which products would not be on sale.

The court went on to assess whether the relevant information exchanges should be considered as "by object" infringements of competition. The court found that the exchange of information had such a potential to influence Kaufmann's and Ginsborg's pricing of Hugo Boss products to the detriment of consumers that it is not necessary to demonstrate actual harmful effects. The court found that information exchanges should be considered as a "by object" infringement.

Finally, the court assessed whether the information exchange was one continuous infringement or a series of isolated infringements. Even though in some cases there was up to one year between the information exchanged, the court found that the information exchange was one continuous infringement. The court reasoned, inter alia, that the individual emails had the same anti-competitive purpose between the same parties about the same type of goods and that the method of exchanging emails about prices, size of discounts, times of sales, quantities, and specific items on sale was continuously the same.

Thus, the Danish Maritime and Commercial High court upheld the decisions of the Danish Competition Council and the Danish Competition Appeals Board concluding that the information exchange constituted a competition

law infringement by object in violation of Section 6 of the Danish Competition Act and Article 101(1) TFEU.

2. QUOTES

"*It can, thus, be concluded that it was confidential information prices, size of discounts, times of sales, quantities and specific items exchanged specific items that were exchanged between Hugo Boss and Kaufmann and Ginsborg respectively Ginsborg on a horizontal level. [...] Already as a result, the concerted practice is not a vertical agreement covered by the block exemption rules in the current Article 2(4)(a), cf. Article 1(1)(a) of Commission Regulation (EU) No 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).*" (free translation)

"*The disputed information exchange was not public and concerns prices, size of discounts, times of sales, quantities and specific items on sale in Hugo Boss' own stores. By its nature, it is strategic, individualized and prospective information of significant importance for how Kaufmann and Ginsborg could design their own offer strategy, including which products were to be on offer and which products Kaufmann and Ginsborg could refrain from discounting, as well as when sales were to be held, which did not correspond to the normal competitive conditions on the market.*" (free translation)

"*In both cases, the individual emails pursue the same anti-competitive purpose between the same parties for the same type of goods, and the method of exchanging emails regarding prices, size of discounts, times of sales, quantities and specific items on sale is continuously the same. In addition, for obvious reasons, the disputed information was only exchanged in connection with upcoming sales outside the summer and winter sales periods. Against this background, the court finds that in both the relationship between Hugo Boss and Kaufmann and Hugo Boss and Ginsborg there is such a connection between the individual emails that it can be assumed that in both cases there is one coherent infringement in each case, regardless of the fact that there have been periods of up to 1 year between the exchanged emails."* (free translation)

3. RELEVANT LEGISLATION

- Section 6 of the Danish Competition Act
- Article 101 TFEU
- Regulation 330/2010
- Regulation 2022/720

- Vertical Guidelines

4. PRACTICAL SIGNIFICANCE

The case reminds suppliers selling goods or services both directly and through independent distributors to carefully consider the type of information exchanged with distributors. This is particularly the case when it comes to information that relates to current and future market dispositions.

The case provides many concrete examples of illegal information exchange, which can be used in compliance training.

The case was assessed under Regulation 330/2010 (the former vertical block exemption regulation). Article 2(4) of Regulation 2022/720 provides a block exemption for certain dual distribution scenarios. The conditions under which information exchange in dual distribution may be block exempted, are now covered by in Article 2(5) of Regulation 2022/720.

The new Vertical Guidelines, as adopted under Regulation 2022/720, also provide further guidance on information exchange in dual distribution. Paragraph 99 of the Vertical Guidelines provides a non-exhaustive list of examples of information that may be directly related to the implementation of the vertical agreement and necessary to improve the production or distribution of the contract goods or services. Paragraph 100 of the Vertical Guidelines holds examples of information that is generally unlikely to fulfil the two conditions set out in Article 2(5) of Regulation 2022/720 when exchanged between a supplier and a buyer in a dual distribution scenario.