Competition - Switzerland

Competition Commission prohibits information exchange in luxury cosmetics industry

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On October 31 2011 the Competition Commission prohibited several undertakings active in the luxury cosmetics sector from exchanging information on prices, turnovers, advertising expenses and sales terms.(1) The commission held that the information exchange between the undertakings involved – all of which were members of the Geneva-based Association of Manufacturers, Importers and Suppliers of Cosmetic and Perfumery Products (ASCOPA) – infringed the Competition Act, because the exchanged information allowed the participants to adjust their market behaviour to one another. However, the commission considered that the information exchange could not be regarded as a hard-core cartel within the meaning of the Competition Act and, therefore, did not impose a penalty on the undertakings involved. The decision also provides guidance on the commission's practice in relation to information exchange.

The investigation, which was launched after the information exchange was reported by an ASCOPA member to the secretariat of the Competition Commission, was directed against Swiss subsidiaries and distributors of leading manufacturers of luxury cosmetic products, including Chanel, Clarins, Coty, Estée Lauder, L'Oréal Produits de Luxe, Parfums Christian Dior, Procter & Gamble Prestige Products, Richemont and Yves Saint Laurent Beauté. For years, these undertakings had been exchanging, within the ASCOPA, information on:

- gross sell-in prices charged to their respective retailers;
- sales figures and turnovers;
- marketing channels;
- advertising expenses; and
- general sales conditions.

The exchanges on gross sell-in prices and marketing expenses occurred on a semi-annual basis, while those on sales figures and turnovers occurred, with a different level of detail, on a monthly, quarterly and annual basis.

The commission found that the information on gross sell-in prices allowed the ASCOPA members to adapt their own gross prices to accord with those of their competitors and, by doing so, to restrict competition on net sell-in prices (ie, the prices after discounts). The commission further found that, with respect to turnovers, the exchanged data was so detailed that each participant was in a position to calculate the volume of products supplied by the others and, as a result, to control the evolution of its own market share in relation to those of its competitors. As far as marketing expenses were concerned, the commission considered that the information was sufficiently detailed to provide information on the budget allocated by each participant for the promotion of its specific product lines, thereby allowing the other participants to compare such budget with the relevant undertaking's turnover. The ASCOPA members could then integrate this data into their cost analyses when assessing the opportunity to launch a new product; they were also in a position to adjust their pricing policies in response to the other members' strategies. The commission considered that this information exchange went beyond a normal 'benchmarking' activity, defined by the commission as an activity whereby the relevant undertaking researches market information on its own, without any possibility to control the relevance of the information found based on data provided by competitors. According to the commission, by exchanging such information, the ASCOPA members could adjust their market behaviour relative to one another. This adjustment led to significant restrictions of competition on the markets for luxury fragrances, make-up and body-care products, which could not be deemed as justified on the grounds of economic efficiency. Therefore, the commission held that such an information exchange amounted to an unlawful agreement within the meaning of Articles 5(1) and 5(2) of the Competition Act.

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The commission did not fine the undertakings involved, considering that their conduct did not fall within the category of behaviour for which fines may be imposed under Swiss competition law. In particular, the commission found that the information exchange on gross sell-in prices could not be deemed as a price-fixing agreement within the meaning of Article 5(3) of the Competition Act, because:

- the exchanged information allowed the undertakings to compare only certain referenced products against each other; and
- the investigation did not show that the undertakings had agreed on the gross prices of certain products.

Nevertheless, the undertakings will be liable to a fine if they do not comply with the prohibition imposed on them by the commission.

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Endnotes

(1) The text of the decision (in German) is available at http://www.weko.admin.ch/index.html?lang=fr.

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