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NEWS | 22 November 2023

The winds of change? The annulment judgment in the Baby Direkt case upheld

In October 2019, Baby Direkt, a Czech company active in the baby supplies sector, was fined ca. 40.8 million CZK (1.66 million EUR) for resale price maintenance ('RPM') by the Office for the Protection of Competition (the Czech Competition Authority or the 'CCA').

According to the CCA, Baby Direkt monitored its buyer's compliance with its recommended resale prices and threatened with sanctions or even imposed sanctions (e.g. in the form of refusal to deal) if its products were offered at prices lower than the recommended resale prices. The CCA decision was upheld by the Chairman of the CCA upon appeal by Baby Direkt.

As reported earlier, the Regional Administrative Court in Brno annulled the CCA decision. According to the judgment, the CCA failed to prove the existence of an RPM agreement in each individual supplier-buyer relationship concerned. The Court stated that the CCA was not allowed to simplify its investigation by assuming that the prohibited practice concerned the entire relevant market(s).

The first-instance judgment was upheld at the beginning of November 2023 by the Supreme Administrative Court. The Supreme Administrative Court agrees that the CCA must prove RPM in each supplier-buyer relationship which it considers to be affected. In other words, the CCA must include in the operative part of its decision a description of each partial infringement thereby showing that there was a concurrence of wills between the supplier (addressee of the decision) and each individual buyer, which resulted in the conclusion and execution of various RPM agreements.

The Supreme Administrative Court relied on the recent *Super Bock* decision in which the ECJ ruled that competition authorities are obliged to properly examine the "concurrence of wills" element in their investigation. According to the Supreme Administrative Court, the CCA failed to include in its operative part a description of each individual vertical agreement from which it was evident that there had been a concurrence of wills between the supplier and its buyers. Furthermore, the Court held that the description of the individual RPM agreements is also important to assess the proportionality of the fines imposed by the CCA.

The judgement of the Supreme Administrative Court is final.

Commentary

We consider the judgment an important development and a welcome addition to the scarce Czech case law on vertical agreements. As we have pointed out in our previous article, the CCA's strong incentivization to cooperate during an investigation (leniency, settlement) has led to an erosion of the judicial review of the its RPM cases. As a result, the CCA has pushed the boundaries of what type of conduct constitutes RPM to the limit and, according to the Supreme Administrative Court, cut corners when it came to the standard of proof.

It is striking that the CCA publicly stated on several occasions that it does not intend to follow the Regional Court's judgment in its decisional practice as it categorically disagrees with it. However, the Supreme Administrative Court's judgment is likely to result in the CCA having to respect the Regional Court's ruling and thus accept EU standards in its RPM enforcement. The CCA will have to reflect the judgment in its ongoing and new investigations. We hope that this will lead to a more reasonable and proportionate enforcement of RPM.