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The HUGO BOSS case: Information exchange in dual distribution was illegal

In the much-followed Danish case regarding information exchange between HUGO BOSS and its retailer the judgement of the Danish Maritime and Commercial High Court of 6 May 2024 (hereafter the 'Judgement') has meanwhile been published. The Judgement sets a precedent for the assessment of information exchange in dual distribution.

In Denmark, HUGO BOSS serves a duale role as both a supplier of products under its own brand and a retailer selling these products in two major department stores. Kaufmann and Ginsborg, retailers of clothing, also sell the brand HUGO BOSS. Consequently, HUGO BOSS maintains a vertical relationship with Kaufmann and Ginsborg through distribution agreements, and a horizontal relationship as a retail competitor.

On 6 May 2024, the Danish Maritime and Commercial High Court has upheld the Danish Competition Council's decisions regarding HUGO BOSS, Ginsborg and Kaufmann. The court found that the exchange of information between HUGO BOSS and the retailers Kaufmann and Ginsborg, pertaining to prices, discounts, and future sales in HUGO BOSS' own retail stores, constituted an illegal information exchange between competitors.

The Danish Competition Authority has sent the case to the prosecution with the purpose to sanction the behaviour. On 23 May 2023, Kaufmann accepted an out-of-court fine of 6 million DKK (approx. 804, 491 EUR). Additionally, two members of Kaufmann's management each agreed to a fine of 120,000 DKK (approx. 16, 089 EUR).

Horizontal or vertical?

Before the Danish Maritime and Commercial High Court, the parties argued that the information exchange related to the distribution agreements between HUGO BOSS and the two retailers. However, the court found that the information exchange was of a horizontal nature as the information exchange pertained to prices, discounts, sales etc. in HUGO BOSS' own stores, rather than the sale of HUGO BOSS products to the two retailers.

'By object' infringement

The Danish Maritime and Commercial High Court further determined that the information exchanged was strategic and individualized. Therefore, it significantly influenced how Kaufmann and Ginsborg could structure

their own pricing, sales, and overall strategy. The court concluded that Kaufmann and Ginsborg, utilizing the information provided by HUGO BOSS, were able to strategically decide which products to put on offer and when to schedule sales in their respective stores.

Therefore, the conduct was an infringement by object, as it could have influenced Kaufmann's and Ginsborg's pricing of HUGO BOSS products, to the detriment of consumers.

Commentary

The cases underscore that companies engaged in dual distribution must exercise considerable caution and awareness in their communications. In the context of dual distribution, discussions between the manufacturer and the retailer should not concern areas where they operate as competitors. This is particularly relevant to information pertaining to current and future market strategies, of which the cases show several examples.