German Competition Authority Imposes EUR 2.4 Million Fine on Haribo for Illegal Information Exchange

On August 1, 2012, the German Federal Cartel Office (FCO) fined confectionary manufacturer Haribo EUR 2.4 Million (approximately US$ 3 Million) for illegally sharing competitively sensitive information with a competitor. The fine is significant insofar as it was imposed for a "stand-alone" information exchange violation.

Overview

According to the FCO’s press release¹, the German competition authority opened proceedings against German-based Haribo and two further confectionary manufacturers following a leniency application by Mars.

The FCO found that senior sales executives of the four manufacturers met regularly during the years 2006 and 2007 for informal talks. During these meetings the competitors informed each other about requests from their customers for discounts and rebates. They also discussed how they would intend to deal with such customer requests. Andreas Mundt, the FCO’s president clarified that while such conduct does not amount to classic hard-core violations of competition law, the sharing of information between competitors can be illegal as well.

The FCO also noted that the fine was reduced since Haribo cooperated during the investigation and that the proceeding was terminated by way of a settlement.

Assessment

Exchanges of competitively sensitive information between competitors are deemed illegal under EU and German competition rules (rules in this area are harmonized across the EU territory). While information exchanges are typically viewed as a means of facilitating further anti-competitive practices such as price fixing or customer allocation, the information exchange in itself constitutes an infringement. In this regard, it should be noted that comparable US antitrust rules on illegal information exchange are slightly more lenient. This is because, under US rules, information exchange is viewed under a rule of reason analysis which allows companies to justify

¹ FCO, press release of August 1, 2012 (in German), available at http://www.bundeskartellamt.de/wDeutsch/aktuelles/presse/2012_08_01.php
certain exchanges. By contrast, it is usually not possible to justify an exchange of competitively sensitive information among competitors under EU/German competition rules. Moreover, under US rules a finding of an agreement is required whereas in the EU competitors engaging in a concerted practice (which essentially requires just a showing of a competitor contact plus a subsequent marked conduct that is based on such contact) can infringe competition rules.

The fine level of EUR 2.4 Million is significant considering that Haribo “only” exchanged information with competitors without engaging in price fixing, market allocation or similar hardcore violations. Also, proceedings by the FCO against the two other competitors who were involved in the informal talks are still pending. In March 2011 the FCO levied a record fine of EUR 38 Million (approximately US$ 47 Million) against three consumer goods manufacturers, Kraft Foods, Unilever and Dr. August Oetker for exchanging information on negotiations with customers. Interestingly, it was Mars – now and also in March 2011 – that blew the whistle.

Companies conducting business in the European Union and Germany should be mindful of this decision and ensure that proper compliance programs are in place that regulate and govern contacts and communication with competitors.

* * *

Authors:

Alasdair Balfour Barry A. Nigro Tobias Caspary

Contacts:

This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. If you have any questions about the contents of this memorandum, please call your regular Fried Frank contact or the attorneys listed below:

Alasdair Balfour Partner +44.20.7972.6274
Barry A. Nigro Partner +1.202.639.7373
Peter Guryan Partner +1.212.859.8477
Richard C. Park Partner +1.202.639.7064
The information and materials offered in this publication are for general informational purposes only; it does not constitute legal advice and is presented without any representation or warranty whatsoever, including as to the accuracy or completeness of the information.

Fried Frank Antitrust & Competition Law Alert® is published by the Antitrust & Competition practice group of, and is a registered trademark and servicemark of Fried, Frank, Harris, Shriver & Jacobson LLP.

Fried Frank Antitrust & Competition Law Alert® is provided free of charge to subscribers. If you would like to subscribe to this email service, please send an email message to Antitrust_Alert@friedfrank.com and include your name, title, organization or company, mail address, telephone and fax numbers, and email address.

To view copies of previous Fried Frank Antitrust & Competition Law Alerts®, please visit our archives on the Fried Frank website.

To view previous Antitrust & Competition To Our Client Memoranda, please visit our archives on the Fried Frank website.

To unsubscribe from all Fried Frank email Alerts and electronic mailings send a blank email to unsubscribe@friedfrank.com.