DE BRAUW BLACKSTONE WESTBROEK

Candy bar war at petrol stations: anti-competitive effect of a bonus programme

October 10, 2013

Beware of the competition rules when introducing incentive programmes. A district court recently assessed the anti-competitive effects of a bonus programme by Mars, where Mars enticed vendor petrol stations to prominently display its products. The practice was compared to a category management agreement to assess its anti-competitive effects. Expert advice is needed before reaching conclusions on their appreciability.

Candy bar producer Mars introduced an incentive programme to independent petrol stations offering them compensation relative to their turnover in Mars products. The programme also included a one-off bonus for a more prominent display of Mars products. Competitor Nestlé argued that the incentive programme breached competition rules, as it could not match Mars' incentive programme without suffering structural losses.

The District Court of East Brabant compared the incentive programme to a category management agreement, looking at its impact on product placement and the promotion of chocolate products at petrol stations. In line with the European Commission's guidelines on vertical restraints, the Court observed that category management agreements do not have an anti-competitive object, but may have anti-competitive effects, particularly where the category captain is able, due to its influence over the distributor's marketing decisions, to limit or disadvantage the distribution of products of competing suppliers. Significant anti-competitive effects may arise for final products at the retail level if a non-dominant supplier ties 30% or more of the relevant market. For a dominant company, even a modest tied market share would suffice.

The Court found the incentive programme to have these anti-competitive effects, not only because of Mars' market share of at least 50.6% in the out-of-home market for chocolate products, but also because of its ability to use its incentive programme to increase its market share at competitors' expense. Equally efficient competitors would not be able to match the Mars incentive programme without suffering structural losses. It would be impossible for Nestlé, for example, to recoup its variable costs if it introduced a similar incentive programme. Before the Court can issue a final ruling, an expert opinion will need to establish whether these anti-competitive effects can be considered appreciable. This will be done by comparing Mars' and Nestlé's chocolate product sales and market shares at petrol stations that participated in the incentive programme with those that did not.