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Global Forum on Competition

CARTEL CASE STUDIES

Case submitted by Italy

-- Session III --

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BABY MILK CASE

1. General introduction

1. In October 2005 the Italian Competition Authority closed proceedings against seven suppliers of baby milk in Italy (Heinz Italy, Plada, Nestlé Italy, Nutricia, Milupa, Humana Italy and Milte Italy) concluding that they had put in place a price agreement contrary to Art. 81 EC Treaty.

2. This was not the first anticompetitive agreement that the Authority sanctioned in the baby milk market. Already in March 2000 Nestlè, Heinz, Nutricia, Milupa, Humana and Abbott were found to have agreed not to sell baby milk outside of the pharmacy sector, a sector characterized in Italy by widely regulated retail margins and by a very low degree of price competition. By distributing only through pharmacies this baby milk producers were able to better control each other and to maintain high prices, in the face of very inelastic demand.

3. In May 2003 and March 2004 the Authority received several complaints by single consumers and by a number of their associations that prices of baby milk were very high in Italy if compared to the prices in other European countries and in particular to those in the Euro area. A preliminary market investigation by the Authority confirmed those complaints. In May 2004, at the same time as this preliminary investigation was carried out, the Ministry of Health made a public announcement that, after an invitation by the Minister, baby milk suppliers had agreed to reduce retail prices by 10%. Consequently, in July 2004 the Authority decided to start a formal investigation in order to assess whether the high prices and the subsequent reductions originated from a restrictive agreement under the meaning of art. 81 EC.

4. In particular the Authority noticed: 1) a significant difference in the prices for baby milk in Italy and those observed in other European countries (for the same brand/quantity); 2) the absence of a valid justification for such high prices; 3) the use by all producers of recommended prices for pharmacies and the wide availability of these lists on the web; 4) that all suppliers had agreed all together to reduce prices at the invitation of the Health Minister; 5) the very limited amount of sales by large-scale distributors; 6) the total absence of parallel imports from low price EU countries.

5. The absence of parallel imports led the Authority to suspect that there was a wider coordination between the national affiliates of the companies involved aimed at impeding the opportunities of price arbitrage. As a consequence the Authority considered it useful to ask for the cooperation of the Member States' Competition Authorities as provided by EC Regulation 1/2003. This Regulation, while making it mandatory for Member State Authorities to bring cases under Community antitrust law whenever applicable, promotes a stricter cooperation among national competition authorities and the Commission, both vertically and horizontally. In particular Regulation 1/2003 provides the possibility for an authority to request the cooperation of another authority in the carrying out of its proceedings. Article 22 '*Investigations by competition authorities of Member States*' provides that '*The competition authority of a Member State may in its own territory carry out any inspection or other fact-finding measure under its national law on behalf and for the account of the competition authority of another Member State in order to establish whether there has been an infringement of Article 81 or Article 82 of the Treaty. Any exchange and use of the information collected shall be carried out in accordance with Article 12. 2*'.

6. Applying this provision the Italian Authority asked the French, German and Spanish antitrust authorities to inspect the premises of some of the firms against whom the proceeding had been opened, in order than to share the relevant documents that were to be found.

7. Although the cooperating authorities were very efficient in their inspection activities and solved many problems related to the delivery of the documents seized (the baby milk case was the first case of cooperation among the authorities concerned), a documentary proof of the existence of a general agreement to impede parallel imports was not found.

2. The relevant market

8. Three relevant product markets were defined in the case: the newborn infant formula market, the follow-on milk market and the special baby milks market. Newborn infant formula and follow-on milks address the needs of un-weaned babies at different age, the newborn infant formula being used up until a baby is four months old, while follow-on milk until they switch to regular animal milk. Therefore they cannot be substituted one for the other. Special milks address the needs of babies in pathological situations both in the first months and after the 4th month of life.

9. From a geographic point of view, these markets have a national dimension because distribution is local, internet sales are not developed, baby milk producers follow a national pricing policy (the extent of the relevant market is not smaller than national), baby milk boxes need to have explanations in Italian.

3. The market structure

10. The baby milk sector is characterized in Italy by the presence of a few big operators and a fringe.

11. The largest firms in the marker, Heinz, Plada, Humana, Mellin, Milte, Nestlè, Nutricia and Milupa, hold together more than 90% of all the three markets. Their individual shares are quite stable in time. In terms of market participants, all these firms operate in most other EU member States and there are no other potential entrants. As already mentioned parallel imports from other member States are absent, even though the differences in price are high. Specifically, the prices of baby milk in Italy were in most cases 150% higher than those in other EU member States. In the case of new born formula prices were three times as high with respect to the lowest price country while for follow-on products they were twice as high (see Tables 1-7).

12. The degree of competition in the market was weakened by a number of features. First of all according to Italian law advertising of baby milk is prohibited, even though only for new born formula milk. Producers have autonomously extended this prohibition on all baby milks. Furthermore, a 1994 law allows hospitals to ask baby milk producers to supply them for free. Hospitals have to a large extent benefited from this opportunity and have usually organized a system of shifts where each (major) producer had a two-week exclusivity. Finally the demand of consumers is mainly driven by their paediatricians and it is quite insensible to price savings considerations. As a consequence, producers do not have many incentives to compete aggressively.

4. The results of the investigation

13. The investigation showed that Heinz Italy, Plada, Nestlé Italy, Nutricia, Milupa, Humana Italy and Milte Italy had set up an anti-competitive arrangement, which has had a number of features.

14. First of all, throughout the whole period under investigation, suppliers recommended their retail prices to pharmacists (who all followed) and maintained these price lists on the web sites of pharmaceutical wholesalers, making them available to all suppliers. Furthermore, in 2004, following a request by the Minister of Health to reduce baby milk prices, baby milk producers acted in concert and adopted a common approach aimed at maintaining as far as possible the pre-existing high price regime, making sure that price reductions were coordinated. Indeed during March and April 2004 in special meetings at the heard-quarters of the manufacturers' Association, following the Health Minister's first

invitation to reduce prices, each manufacturer informed everyone else on what they thought of doing. They then evaluated together the best way to reduce prices, but on condition that this would not have disrupted the 'stability' of the market. As regard the individual answer to give to the Minister, the investigation proved that producers agreed that nobody would reduce prices by more than 10%.

15. As already mentioned, the absence of parallel imports from other EU member States could not be attributed to a wider collusionary strategy among baby milk producers. In any case the consumer benefits from parallel imports would have been marginal: the exclusive use of pharmacies as baby milk distributors would not have allowed low price imports to reach directly consumers, leaving final prices more or less unchanged.

5. The evaluation of the Authority

16. The Authority considered that the direct contacts among producers in the case of the Health Minister's invitation to reduce prices and the fact that they agreed not to reduce prices by more than 10% was a direct proof of collusion. Furthermore the fact that in their meetings to discuss how to reduce prices baby milk producers referred to the notion of market disruption convinced the Authority that the wide availability of retail prices information on the web was an important instrument for checking on everybody else's conduct, lending to these high price practices their 'concerted' character.

17. The parties defended themselves by underlying some specific characteristics of the Italian market (low demand, high cost of distribution, high promotional costs) but were not able to explain the relatively high profits they nonetheless had gained on the Italian market.

18. Finally, since the Authority started its proceedings in July 2004, and following several interventions by the Minister, prices in the baby milk market fell by about 25%, while firms continued to be profitable. Along with these price reductions, the decision by some supermarket chains to introduce their own brand low price baby milk and a larger presence of branded baby milk in the large supermarket chains contributed to further reductions.

6. Sanctions

19. The concerted practices by all major baby milk producers had the effect to maintain Italian prices at very high levels. Furthermore producers were able to maintain stable their market shares all throughout the 2003-2004 period. Consumers suffered extensively from this artificial restriction of competition. The Authority issued a cease and desist order and decided to fine the companies concerned around 10 million Euros in total. The appeal to the case is pending.

APPENDIX

Tab. 1 Retail prices for newborn infant formula (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austrian	Holland	UK
Abbott*		25,19				10,17	
Chiesi**		25,65					
Heinz-Plada							*[5-10%]*
Humana				n.a. (9,32)	n.a. (9,32)		
Mellin***	*[15-20] ([15-20])*						
Milte		*[20-25]*					
Milupa		*[15-20] ([15-20])*	*[15-20]* (n.a.)	n.a. *([10-15])*	*[15-20] ([10-15])*		
Nestlé	23,89 (19,81)	17,22 (14,17)	11,24Beba 14,36 Nan (n.a.)	n.a. (11,13)	19,40 (10,60)	n.a. (9,86)	
Nutricia			*[10-15]* (n.a.)			*[10-15] ([5-10])*	

Tab. 2 Retail prices for follow-on milk (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott*		18,97				10,17	
Chiesi**		24,05					
Heinz-Plada							*[5-10]*
Humana				n.a. (9,28)	n.a. (9,28)		
Mellin***	*[10-15] ([10-15])*						
Milte		*[15-20]*					
Milupa		*[10-15] ([10-15])*	*[10-15]* (n.a.)	n.a. *([10-15])*	*[15-20] ([10-15])*		
Nestlé	21,26 (16,46)	14,07 (12,95)	11,24 Beba 10,7 Nan (9,99 Beba e Nan)	n.a. (11,03)	19,40 (10,60)	n.a. (9,72)	
Nutricia			*[10-15] ([10-15])*			*[10-15] ([5-10])*	

Tab. 3 Retail prices for special milks (euro/kg) in Europe - 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott*		33,61				n.a.	
Chiesi**		33,04					
Heinz-Plada							*[10-15]*
Humana				17,0 (14,61)			
MJ	*[40-45]*	*[65-70]*	*[35-40]*	*[55-60]*		*[45-50]*	
Mellin***	*[15-20] ([15-20])*						
Milupa	*[15-20]* (n.a.)	*[20-25] ([15-20])*	*[15-20]* (n.a.)				
Nestlé	24,96 (n.a.)	22,36 (21,13)	13,42 (n.a.)	n.a. (16,51)	26,20 (18,30)	n.a. (16,91)	
Nutricia				n.a. *([15-20])*	*[15-20]* (n.a.)		

Tab. 4 Newborn infant formula: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott (i)		+*[40-50%]*				+*[250-270%]*	
Chiesi		+*[40-50%]*					
Heinz Plada (ii)							+*[320-350%]*
Humana (iii)				+*[320-350%]*			
Mellin (iv)	+*[130-150%]*						
Milte (v)		+*[60-70%]*					
Milupa (vi)		+*[130-150%]*	+*[150-170%]*	+*[200-220%]*	+*[150-170%]*		
Nestlé (vii)	+*[40-50%]*	+*[100-120%]*	+*[150-170%]*	+*[200-220%]*	+*[70-80%]*	+*[230-250%]*	
Nutricia (viii)			+*[150-170%]*			+*[200-220%]*	

Tab. 5 Follow on milk: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Abbott (i)		*+[80-90%]*				*+[230-250%]*	
Chiesi		*+[30-40%]*					
Heinz Plada (ii)							*+[230-250%]*
Humana				*+[200-220%]*	*+[200-220%]*		
Mellin (iii)	*+[100-120%]*						
Milte (iv)		*+[80-90%]*					
Milupa (v)		*+[80-90%]*	*+[100-120%]*	*+[100-120%]*	*+[60-70%]*		
Nestlé (vi)	*+[5-10%]*	*+[50-60%]*	*+[100-120%]*	*+[100-120%]*	*+[10-20%]*	*+[130-150%]*	
Nutricia (vii)			*+[100-120%]*			*+[120-140%]*	

Tab. 6 Special milks: % difference in pharmacy retail prices with respect to Italy – 2004

	France	Spain	Belgium	Germany	Austria	Holland	UK
Nestlé	*+[80-90%]*	*+[100-120%]*	*+[250-270%]*	*+[180-200%]*	*+[80-90%]*	*+[180-200%]*	*+[80-90%]*
Nutricia				*+[230-250%]*	*+[150-170%]*		
Milupa (ii)	*+[130-150%]*	*+[100-120%]*	*+[130-150%]*				*+[130-150%]*
Plada							
Star Mellin*	*+[120-140%]*						*+[120-140%]*
Humana				*+[150-170%]*			
Abbott**		*+ [30-40%]*					
Chiesi		*+[40-50%]*					
MJ	*+[20-30%]*	*-[10-20%]*	*+[40-50%]*	*-[1-5%]*		*+[15-20%]*	*+[20-30%]*

Tab. 7 Median price for newborn infant formula 2002

	Italy	Portugal	France	Belgium	Germany	Spain	Austria	Holland	UK
Price	33,4	14,4	14	13,1	12,2	11,4	10,1	9,5	8,8