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Site contribution

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Prepared by: Dr. Urs Weber-Stecher
Dr. Michael Tschudin

Wenger & Vieli Ltd
Dufourstrasse 56
P.O. Box 1285
8034 Zurich

Phone: +41 58 958 58 58
Fax: +41 58 958 59 59
E-Mail: u.weber@wengervieli.ch
m.tschudin@wengervieli.ch

I. Summary

The goal of Swiss Anti-Trust law is to ensure effective competition between market participants in order to prevent the harmful economic effects of cartels and other restraint of competition. Swiss anti-trust law is highly influenced by the European Union's competition law: The legislature followed a similar approach to that adopted by the EU and the Swiss Competition Commission (the ComCo) regularly invokes European Law.

Public enforcement of Anti-trust law is predominant in Switzerland, in contrast to the US. To date, private litigation has been very rare. The ComCo exercises its enforcement powers in the public interest and independently of the Government. Typically, the Competition Authorities investigate complaints, which are reported by businesses, consumers and leniency applicants. However, cases that are likely to have a substantial impact on the Swiss economy, such as market foreclosure by restrictions on parallel trade, are more likely to be investigated.

II. Applicable Law

- Federal Act on Cartels and other Restraints of Competition of October 6, 1995.
- Ordinance on the Control of Concentrations of Undertakings of June 17, 1996.
- Ordinance on the Sanctions for Unlawful Restrictions of Competition of March 12, 2004.
- Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws, signed on May 17, 2013.
- Several circulars of the Competition Commission regarding, among others, vertical agreements, car dealers industry and small businesses.

III. Detailed Information

A. Introduction

Anti-trust law in Switzerland is based on the Federal Act on Cartels and other Restraints of Competition of October 6, 1995 (CartA). While the CartA meets the highest global anti-trust standards, it has important differences to the corresponding law in the US. For example, in relation to vertical restraints (e.g. distribution agreements) the Swiss ComCo relies heavily on the strict EU law so that vertical agreements are under closer scrutiny in Switzerland than in the US. However, cartels (horizontal and vertical) are only subject to direct financial sanctions in Switzerland if they qualify as hard-core cartels, i.e. horizontal agreements regarding price, quantities, territories or costumers, and vertical agreements regarding re-sell price maintenance and restrictions on (parallel) passive imports. Other cooperative agreements may be prohibited, but without the imposition of a financial sanction. Swiss merger control is also less stringent than in the EU and most neighboring countries, since the thresholds for the notification of mergers are relatively high.

B. Horizontal Agreements

All legally binding and non-binding agreements (such as contracts, arrangements and gentlemen's agreements) and concerted practices between competitors, which restrict competition significantly and cannot be justified, breach the CartA. Such justification may be granted on the grounds of economic efficiency, including where the agreement is considered necessary to:

- reduce production or distribution costs;
- improve products or production processes;
- promote research into or dissemination of technical or professional know-how; or
- to exploit resources more rationally.

Horizontal hard-core cartels, i.e. horizontal agreements, which fix prices, restrict quantities, or allocate markets geographically or relating to certain customers, are presumed by law to eliminate effective competition. This presumption can be rebutted if an undertaking can provide evidence that effective competition exists. Otherwise, such an agreement cannot be justified.

Although only hard-core cartels (such as price-cartels) are subject to direct fines, the scope of the corresponding provision is interpreted rather widely by the ComCo: Price fixing between competitors can occur directly or indirectly, for example, defining profit margins or even an agreement not to lower prices, is considered a price cartel. An agreement on how to deal with a price rise resulting from an external cost factor is also viewed as price-fixing, eliminating effective competition.

Against this background, an exchange of sensitive information between undertakings can be risky. A single unilateral transfer of information, for example with respect to a planned price rise, could be considered as price-fixing. Equally, an exchange of information within a trade or industry association, could also be viewed as concerted practices regarding price or quantity and consequently, in breach of the CartA.

C. Vertical Agreements

All legally binding and non-binding agreements (such as contracts, arrangements, gentlemen's agreements) and concerted practices between companies at different levels of the production and distribution chain, which restrict competition significantly and are not justified on grounds of economic efficiency, are illegal. However, only agreements relating to re-sell price maintenance or restrictions on (parallel) passive sales are subject to fines.

Agreements relating to prices: Similar to horizontal agreements, direct sanctions may also be applied to price fixing in vertical relations; for example, when a producer prescribes the retail prices of its distributors. It is generally lawful to define a ceiling price or to determine a special offer price for a limited period of time. Recommended re-sell prices are considered as price fixing, if they have the same effect as fixed re-sell prices or minimal prices, imposed by the producer. For this reason, price recommendations should always clearly indicate their non-binding nature.

Agreements relating to strict exclusive allocation of territories: In a distribution system, it is in general permitted for a producer to allot specific territories to each of their retailers, and active sales outside the allotted territory can be forbidden. However, any constraint of passive sales is unlawful and subject to sanctions. Passive sale means taking orders of costumers from outside the allocated territory, so retailer must be free to fulfill a request from any costumer, regardless of the allocation of territory. Online sales are, in principal, considered as passive sales.

The ComCo has indicated that if a distribution system is legal under European law, one can assume that it is also lawful under Swiss law. Due to the presently strong Swiss Franc, it is likely that the ComCo will investigate more vigorously vertical restrictions, which are implemented to sustain price differences between Switzerland and other countries.

D. Abuse of a Dominant Position

Companies are considered to be dominant when they are able to behave, to an appreciable extent, independently of other market participants. This is where a dominant company is in a position to take decisions on prices or quantities of goods irrespective of the reactions of suppliers, purchaser or competitors. To have a dominant position as such is not unlawful but the behavior of a dominant undertaking can become unlawful if it hinders other companies from competing with it, or discriminates against trading partners.

As a result of the rather vague and broad language of the legal provisions on abusive activities by dominant companies, it is relatively difficult to advise undertakings on the legality of their behavior, even though there is a provision listing some examples of problematic behavior. These include the refusal to deal with a party, predatory pricing, discrimination between trading partners in relation to prices or other trading conditions, and any determination of unfair prices or other unfair trading conditions.

Since the introduction of sanctions in 2004, some particular companies in certain markets, which were formerly regulated by the state, have been subject to investigation, for example the telecom provider Swisscom AG. It should be noted that an international company with a rather small market share on the international or European market might be considered as dominant in the Swiss market, due to a narrow interpretation of the market definition by the ComCo.

E. Merger Control

Concentrations of companies of a certain size must be notified to the ComCo prior to their implementation. Under the CartA, concentrations are mergers of two or more previously independent companies, and also any transaction by which one company acquires direct or indirect control of another previously independent company. There are two alternative sets of thresholds:

Turnover thresholds: an aggregate annual turnover of all undertakings involved, of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs; and additionally, an annual turnover in Switzerland of at least 100 million Swiss francs by at least two of the undertakings involved.

Dominance threshold: if, in a previous investigation, the ComCo had found that a specific undertaking holds a dominant position in a certain market, every concentration involving that undertaking in that market, or in a neighboring, upstream or downstream market, is subject to the notification requirement. The Federal Administrative Court specified in a recent decision, that a neighboring market includes (i) markets concerning products which are to some extend substitutes or (ii) markets concerning products with parallel demand.

If the examination of the concentration by the ComCo shows that a market-dominant position eliminating effective competition would be created or strengthened by the concentration, the ComCo may prohibit the transaction or allow it only subject to obligations or conditions.

To date, the ComCo has seldom prohibited a proposed concentration, but on several occasions it has imposed obligations and conditions. And where the EU Commission has already permitted a transaction under European competition law, a corresponding expeditious clearance from the ComCo is highly likely.

Regarding auxiliary restraints, the ComCo's practice has relied heavily on the corresponding provisions in the EU.

F. Sanctions

Direct sanctions were introduced by the CartA in 2004. The administrative sanction against undertakings violating the CartA in relation to a hard-core cartel or the abuse of a dominant position, is a maximum fine of 10 per cent of the turnover of that undertaking in Switzerland in the preceding three financial years.

It is clear from previous decisions that the ComCo is prepared to impose high fines: In 2012, it imposed a fine of CHF 156 million on BMW (approx. USD 152 million). This case is particularly interesting, because it concerned restrictions of direct and parallel imports of cars from the countries of the European Economic Area (EEA), into Switzerland. Some of BMW's distribution agreements contained a clause prohibiting authorized dealers within the EEA from selling cars to customers outside this area. Because Switzerland is not part of the EEA, this restriction also applied to customers located in Switzerland. The ComCo considered that the Swiss market was affected by the restriction, and that the CartA was applicable.

Since 2004, the ComCo has issued approximately 25 decisions sanctioning about 100 undertakings. However, a large number of these decisions, in particular those which had imposed high fines, are still subject to judicial review following appeals.

G. Leniency

A leniency program was introduced by the CartA along with direct sanctions although it increased the risk of disclosure of anti-trust violations considerably. To date, about 50 leniency applications have been filed.

The first company cooperating with the ComCo in revealing a restraint of competition is normally granted total immunity from sanction. Further companies may benefit from a reduction of up to 50%.

A reduction of up to 80% of the fine may be possible, if an undertaking provides information or submits evidence on further infringements of competition (leniency plus).

H. Settlements

During investigations, the Secretariat of the ComCo may propose an amicable settlement on ways how to eliminate restraints by the undertakings involved. The Secretariat regularly employs such settlements, which must be approved by the ComCo. Through settlements, which include commitments of the undertakings involved regarding their future conduct, a direct and often immediate effect on the relevant market can be achieved. Settlements can also lower the risk of an appeal, avoiding time-consuming litigation before the Federal Administrative Court and, potentially, before the Federal Supreme Court.

Generally, an undertaking cannot avoid a fine by entering into an amicable settlement but this cooperative behavior has been regularly rewarded with a reduction of the level of the fine, in some cases up to 20%.

I. EU-Swiss Cooperation Agreement: Information Exchange

On 1 December 2014 an agreement between Switzerland and the EU on cooperation and the exchange of information between their respective competition authorities came into force. This agreement allows the Swiss and EU competition authorities to mutually exchange specific case-related, confidential information. However, authorities are not obliged to provide requested information. This agreement is procedural only and does not change the material provisions of the CartA.

The significant difference between this agreement and earlier agreements between the EU and non-EU member states is that confidential information can now be transmitted without the parties' consent. There are still limitations on the information to be exchanged and the use of it. For instance, only information in the possession of an authority may be requested by the other authority, and information received under a leniency or settlement procedure must not be transmitted. Exchanged data may only be used for administrative competition investigations into the same or related conduct or transactions by undertakings, and may not be used for civil or penal procedures. The same principle applies if parties agree to exchange information, which contains personal data.

IV. Frequently Asked Questions

- *What can happen to me personally as person in charge, if the ComCo discovers an unlawful restraint against competition in my company?*
  The CartA does not provide for a personal liability of officers in charge of undertakings. However, such liability can arise from provisions in the Swiss Code of Obligations, such as those on the responsibility of members of the Board of Directors. Also, a person who willfully violates an amicable settlement or a final, non-appealable decision (including rulings regarding the obligation to provide information) may be sanctioned with a fine of up to CHF 100'000.-.
- *How can the ComCo be approached in order to benefit from total leniency?*
  Preliminary anonymous reporting is possible. In this way, one can find out, whether or not the ComCo is already aware of the critical behavior. Notifications may be submitted by e-mail or other information channels. Since only the first company applying for leniency can benefit from total immunity, a time-marker should be placed. The marker will have priority even if the Secretariat of the ComCo requests additional information to complete the filing.
- *Is in-house legal advice protected by the rules of privilege?*
  The advice of in-house lawyers is not protected by legal privilege in Switzerland. Therefore, under the present applicable law, undertakings may not rely on an attorney-client privilege with respect to in-house lawyers and internal compliance officers.
- *Is cartel conduct outside Switzerland covered by Swiss Anti-trust law?*
  The CartA is based on the effects doctrine – it applies to practices that have an effect in Switzerland, even if they originate in another country. Cartels concluded outside of Switzerland may therefore be subject to a Swiss Anti-trust investigation (see case regarding BMW mentioned above).
- *Are joint ventures subject to merger control?*
  The acquisition of joint control by two or more undertakings over an undertaking that was previously not jointly controlled is a transaction that has to be notified, if the corresponding threshold is met. In order to qualify as a joint venture, the undertaking must perform all functions of an economic entity on a lasting basis. Newly formed joint ventures are only subject to merger control if, in addition, some business activities of at least one of the controlling undertakings are included in the newly formed undertaking.
- *What is generally the timeframe for a merger proceeding?*
  Following the notification, the ComCo has one calendar month (Phase 1) in order to decide whether or not the transaction raises any competition concerns. If this question is answered in the affirmative the subsequent in-depth investigation (Phase 2) must be completed within four months.
- *Does Switzerland have a reputation for attracting claimants' applications to seize jurisdiction?*
  To date, there have been only a very few civil competition law cases in Switzerland. From a claimant's perspective, Swiss courts are not particularly attractive as filing a claim is relatively costly. For example, the defendant's costs have to be secured at the beginning of the procedure in case the claimant loses its case. Furthermore, the standard of proof is relatively high and obtaining evidence from the other party is a burdensome process.

Useful Links

- Federal Competition Commission

Literature

- Michael Tschudin, Frank Scherrer, Urs Weber-Stecher, Switzerland Chapter in: The Public Competition Enforcement Review, London 2015.

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