

Competition - Switzerland

Competition Commission publishes annual report

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The Competition Commission has published its 2010 annual report. According to the report, 2009 saw increased activities aimed at combating significant distortions of competition. In the case of horizontal agreements, special attention was paid to the issue of bid rigging in the construction industry. As far as vertical agreements are concerned, the focus remained the foreclosure of the Swiss market by preventing parallel and direct imports.

In a decision of June 28 2010 the commission modified its notice on the competition law treatment of vertical agreements to bring it into line with recent case law and developments in the European Union. As a result, it ensured that the rules which are applied in Switzerland in relation to vertical agreements are the same as those which apply across the European Union, and that the foreclosure of the Swiss markets can thus be prevented. The commission is also endeavouring to increase awareness and thus encourage the use of the leniency programme (ie, whereby entities can report cartel activity in return for leniency).

Regarding merger control, the commission has focused on concentrations that may be detrimental to competition in the Swiss market specifically. Last year was marked by the *Sunrise/Orange* case, in which the planned concentration between Sunrise (Tele Denmark Communications A/S) and Orange (France Télécom Group) – two Swiss mobile network operators – was prohibited by the commission. The commission argued that the proposed concentration would have created a situation of collective dominance of the merged entity and the only other remaining operator – Swisscom, the incumbent telecommunications provider – in the retail market for mobile telecommunications services and in the wholesale market for access to mobile networks. The case was only the second time that the commission had prohibited a merger. The first prohibition (*Berner Zeitung/20 Minuten* case) was overturned by the appellate courts.

Among the main topics discussed in the 2010 annual report is the growth in international cartels that has resulted from increasing globalisation and that represents an important issue of concern for the Competition Commission. The latter would like to facilitate the prosecution of cartels in Switzerland, notably through closer cooperation between the Swiss competition authorities and their EU counterparts. In view of this, in August 2010 the commission welcomed the decision of the Swiss government to approve a mandate to negotiate an agreement with the European Union. The commission is convinced that such a cooperation agreement would enable Switzerland to make a more significant contribution to the prosecution of international cartels, and would provide further evidence of Switzerland's credibility as a reliable partner in the prosecution of cartels, which has considerably increased in recent years.

In the report, the commission also deals with an issue that in 2009 gave rise to a large number of enquiries to its secretariat and a major public debate: the increasing strength of the Swiss franc against the euro and the dollar. The report presents a number of arguments, based on both theory and practical observations, which might explain the incomplete (or not immediate) pass-through of changes in the exchange rate in Switzerland. For example, the cost-reducing effect of a stronger Swiss franc is felt in many sectors only after a certain time and only where there are lasting exchange rate benefits, because the import of goods is first of all often based on long-term contractual arrangements that take account not of the current exchange rate, but of a rate that was fixed in the past. Also, certain companies take hedging measures against foreign exchange risks. In these cases, a change in exchange rates has no immediate effect on procurement costs. In view of these circumstances, the report notes that the commission's power to intervene is limited, because the pass-through of currency benefits follows specific economic patterns and these cannot be influenced by competition policy. It is conceivable, the report states, for competitors to enter into an

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agreement whereby they do not pass on any exchange rate benefits to customers or consumers. An arrangement of this type would result in direct or indirect price fixing and would accordingly be presumed to remove effective competition.

According to the report, a further scenario that would be relevant to competition law could arise where a vertical agreement existed on the non-pass through of exchange rate benefits in a sales network (eg, between foreign producers/manufacturers and their national dealers). However, the commission noted that an arrangement of this type is not covered by the Competition Act if it is made within a group of companies. However, it cannot be excluded that Article 7 of the Competition Act (unlawful practice by a dominant undertaking) could come into play – notably in the case of a vertically integrated company (a foreign producer/manufacturer with its own distribution network in Switzerland), which holds a dominant position in relation to its products.

On July 1 2010 Professor Vincent Martenet took over as president of the Competition commission from Professor Walter A Stoffel. According to the new president, this change is very much a sign of continuity and will not affect the way the commission operates.

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