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Investigation into Healthcare Tariffs Discontinued

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On October 17 2008 the Federal Competition Commission decided to discontinue its investigation into the so-called 'tariff agreements' entered into by all the public hospitals in Lucerne Canton and some insurance companies active in the supplementary health insurance segment. The commission considered that insurers may, in certain conditions, organize themselves into groups in order to form a countervailing power against the dominant position held by the public hospitals. The commission further decided formally to assert the dominant position of the public hospitals although there was no evidence that such entities had abused their market power.

Background

Basic health insurance (ie, the insurance which covers all basic health benefits) is compulsory for all persons domiciled in Switzerland. By contrast, supplementary insurance products (eg, outpatient supplementary insurance or hospital supplementary insurance products) may be purchased on an optional basis. A few insurance companies which were active in the private and semi-private health insurance sectors had been involved in collective bargaining when negotiating the healthcare service tariffs with Lucerne public hospitals. On February 7 2006 the commission decided to initiate an investigation into those collective negotiations. The principal concerns were over (i) the legitimacy of price-fixing arrangements that might arise from collective bargaining, and (ii) whether the hospitals were abusing their dominant position in the healthcare services market.

Decision

Under the Competition Act 2004, agreements between competitors are prohibited if they significantly restrict competition (Article 5(1)), unless they can be justified on grounds of economic efficiency (Article 5(2)). Pursuant to Article 5(3), horizontal agreements are also prohibited if they eliminate competition. Horizontal agreements are deemed to eliminate competition wherever they include direct or indirect price-fixing (eg, agreements on discounts or tariffs). The commission held that collective bargaining among insurers with regard to parameters of competition such as tariffs amounts to a price-fixing arrangement, but that the existence of numerous competitors in the relevant markets was sufficient to rebut the presumption of elimination of competition. The commission further held that collective negotiations among insurers were not illegal pursuant to Article 5(1) of the act, since they could be justified on grounds of economic efficiency.

The commission followed a two-step analysis and found that the public and publicly subsidized hospitals in Lucerne Canton have an altogether dominant position in the cantonal markets for private and semi-private healthcare cover. Indeed, the Lucerne government had negotiated on behalf of all those hospitals the terms of their agreement with the health insurers (in particular, the tariffs at which private and semi-private healthcare services would be provided). Furthermore, health insurers had been under a factual obligation to enter into an agreement with the public hospitals because supplementary insurance offers would not have been attractive if they had included a limitation on the choice of hospital.

It further found that collective bargaining among health insurers was justified on grounds of economic efficiency (Article 5(2)), in that it helped the insurers to create a 'countervailing power', enabling them to extract price concessions from healthcare service providers. This finding was based, among other things, on recent studies made in the healthcare sector in the Netherlands.

Pursuant to a decision rendered by the Appeals Commission for Competition Matters in 2003, it was unclear whether the health insurers were allowed to organize themselves into groups with a view to negotiating tariffs with hospitals in the segment of supplemental health insurance. The act typically excludes the creation of groups covering the entire market, while bilateral negotiations between individual hospitals and individual health insurers are permitted. As in the case under review all public and publicly subsidized hospitals were represented during the negotiation of the tariffs agreements by Lucerne Canton itself (as the hospitals' owner), conditions were met to allow the health insurers to organize themselves into groups in order to form a countervailing power. However, the commission specified that this way of negotiating tariffs for healthcare services cannot be used in all insurance markets, but only where it can be shown that, notwithstanding collective bargaining, competition in the downstream insurance market still functions (ie, where there are no negative consequences for insureds).

Consequences

This decision contains a number of dicta which are of importance for practitioners.

Joint purchase agreements
The commission expressly held that joint purchase agreements concluded among competitors (as tariffs agreements entered into by health insurers as a consequence of collective bargaining) come under Article 5(3) of the act and are hence deemed to eliminate competition. Referring to the guidelines on the applicability of Article 81 of the EC Treaty to horizontal cooperation agreements, the commission added that, for the purpose of assessing the effects on competition of a buyers' cartel, substitutability has to be defined from the viewpoint of supply and not from the viewpoint of demand. In other words, suppliers' alternatives are decisive in identifying competitive constraints on purchasers.

Market dominance
Although the commission found that there was no abuse of a dominant position by unfair pricing or price-squeezing, its decision expressly asserted that public and publicly subsidized hospitals in Lucerne have a dominant position in the relevant markets. In so doing, the commission followed a view already expressed by the Appeals Commission for Competition Matters in *Swisscom Directories*, according to which decisions of competition authorities may formally assert the existence of a dominant position although there is no evidence that the undertaking concerned has abused its market power. Such a formal assertion has consequences on the future conduct of the dominant undertaking. Indeed, under Article 9(4) of the act, a planned concentration must be notified to the commission even if it does not reach the notification thresholds, wherever it appears that (i) the commission has already made a decision which asserts the undertaking's dominance in Switzerland, and (ii) the concentration relates to a market in which the undertaking holds a dominant position or to a neighbouring market.

Dependency relationships
Finally, the commission indicated that the act is not applicable to collective bargaining among public hospitals, since the latter form a unit that operates as a single undertaking in the market. The commission thus confirmed a view already expressed in a decision dated September 8 2006, rendered by the commission at an early stage of the investigation. In this preliminary decision, the commission ruled that the act does not apply to internal relationships between public hospitals in Lucerne. The fact that such relationships fall outside the act is inherent in the term 'undertaking'. Indeed, pursuant to Article 2(1*bis*), the act applies to all private and state-owned undertakings which independently participate in the economy on either side of the market.

The commission confirmed that under competition law, the term 'undertaking' must be understood as designating an economic unit for the purpose of deciding whether an undertaking falls within the scope of law. The existence of a legal personality or independence is not a condition for applying the act. Rather, the act is based on a functional concept – it is not the legal but the economic organization that establishes whether a person can be viewed as an undertaking within the meaning of Article 2 (1*bis*). According to the commission, the decisive criterion is economic control. Wherever the parent company can exercise control over its subsidiaries and for as long as such power is actually exercised, the subsidiaries must be regarded not as

independent companies, but as dependent entities within the same group of companies. Undertakings belonging to the same group form an economic unit within which subsidiaries have no real independence, since the parent company imposes a centralized decision-making process. The commission inferred the following consequences from this analysis: (i) an agreement between members of the same group of companies does not qualify as 'an agreement affecting competition' within the meaning of Article 4(1); and (ii) since the members of the group form an economic unit, the conduct of each member shall be taken into consideration and such unit must be treated as a whole when determining whether it holds a dominant position in the relevant market.

Comment

It follows from this decision that an agreement between a parent company and its wholly owned subsidiary, or between companies controlled by the same undertaking, falls outside the material scope of the act (intra-group exemption). However, difficulties may arise in the case of partly owned subsidiaries, since the commission did not expressly set the criteria for assessing the level of economic control required.

Whether the conduct of a subsidiary would be regarded as an abuse of a dominant position to be imputed to the parent company is a question of fact in each case. The evidence may show that the parent and subsidiary acted together in the commission of the infringement, or that the parent exercised control over the subsidiary (eg, through ownership rights) or otherwise decisively influenced the activities of the subsidiary (eg, through board membership). In such cases the parent and subsidiary form an economic unit when determining whether it holds a dominant position. Any abuse may then be attributed to the parent. Accordingly, the commission can impose penalties on the parent wherever the subsidiary has no real assets or staff and lacks indepedence.

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