

Competition - Switzerland

Revision of Competition Act: new consultation process

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September 08 2011

On March 30 2011 the Swiss government opened a public consultation on the partial revision of the Competition Act, which is a complementary consultation to that launched in 2010. This consultation follows a motion that was introduced in 2010 by Rolf Schweizer – a member of Parliament. The aim of the motion is to improve compliance with the Competition Act by reducing administrative fines imposed on companies that have implemented compliance programmes of a high standard in cases in which their employees violate competition laws. The motion also proposed to penalise directly those individuals who are accountable for breaches of the competition rules.

In accordance with the Schweizer motion, the government is keen on the idea of reducing fines for undertakings that have implemented effective compliance programmes. However, the government is still opposed to penalising such undertakings' officers or employees who are accountable for reaching a cartel agreement, as was proposed in the motion.

On this point, two proposals have been submitted for consultation. Under the first proposal – Variant A – those found to be involved in cartel activity would be partially or totally prevented, for a limited period, from working at any of the undertakings that took part in the cartel activity. Under the proposal the proceeds of the cartel activity would be seized and confiscated. The second proposal – Variant B – provides for criminal penalties in the form of fines or imprisonment of up to three years. In cases where one of the undertakings involved has voluntarily reported the restriction of competition, that undertaking would benefit from a penalty exemption. In order to ensure that the leniency programme currently in place remains effective, Variant B provides for the possibility of extending the penalty exemption to officers and employees. However, a total exemption would conflict with the general principles governing criminal law – a further reason why the government is opposed to this proposal.

On July 10 2011 the commission gave its written opinion on the consultation. It rejected the Schweizer motion and therefore welcomed the position of the Swiss government. In doing so, the commission put forward several arguments:

- The proposal to reduce the administrative fines imposed on companies that have implemented compliance programmes should not be introduced in the Competition Act, because such a reduction in fines is already possible based on the Ordinance of March 12 2004 on Sanctions Imposed for Unlawful Restraints of Competition. The reduction in fines should be seen as a mere possibility for the authorities, rather than an obligation.
- The proposed prohibition on professional activity (Variant A) should be seen as a last resort and be used only rarely, taking into account the difficulties involved in investigating such cases and the serious consequences for individuals and companies involved. Thus, the commission is of the opinion that such an amendment of the act would contribute little towards the improved enforcement of competition law.
- The seizure and confiscation of the proceeds of infringements of competition rules (Variant A) might be appropriate, but would be difficult to implement in practice.
- The commission rejected the introduction of criminal penalties against individuals (Variant B) and the fact that criminal proceedings against individuals could depend on the administrative proceedings against the company. The prosecution of individuals could lead to confusion regarding levels of responsibility within companies, thereby reducing the willingness of employees to cooperate and of the company to report infringements voluntarily. In addition, the proceedings against the company would be delayed and become a lot more expensive.
- Criminal penalties would often be imposed on the wrong individuals, considering that it is usually the undertakings rather than their employees which benefit from

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violations of competition law.

- Finally, the commission argued that the timing of the proposal was inappropriate, since the possibility of imposing penalties against companies is yet to be fully exploited.

Balancing the penalty mechanism and making it more efficient, as required by the Schweiger motion, was not the subject of the first consultation process, which ran from the end of June to the end of November 2010. The key elements of the partial revision project presented in Summer 2010 consist in an effort to strengthen the competition institutions in order to reinforce the rule of law. The previous consultation also included material improvements to strengthen the principle of competition to serve the general economic interest. Among other improvements, it is proposed that the legal presumption of illicit practice in case of minimum or fixed price setting or allocation of absolute territorial protection (as set forth in Article 5(4) of the Competition Act) be abandoned; a case-by-case analysis would avoid market foreclosure, without impeding the implementation of economically legitimate distribution agreements.

Regarding concentrations, the Swiss merger control regime should be strengthened and simplified. On the one hand, the criteria through which to assess mergers should be strengthened to avoid harmful concentrations of the market; on the other, there should be an administrative simplification to reduce multiple examinations of international concentrations.

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