

## NATIONAL COMPETITION LAW REPORT – Q1 2009 – SWITZERLAND

### INVESTIGATIONS

#### *Drug makers and distributors receive statement of objections regarding selling of impotence drugs*

On February 10 2009 the Secretariat of the Competition Commission (FCC) issued a decision proposal to charge the manufacturers and distributors of male impotence drugs with price fixing. Following an investigation opened in 2006 into prices charged for erectile dysfunction medication (which includes Viagra, Cialis and Levitra), the Secretariat came to the conclusion that Bayer (Schweiz) AG, Eli Lilly (Suisse) SA and Pfizer AG made unlawful vertical competition agreements that maintained a recommended public selling price.

Under Article 5(4) of the Competition Act (ACart), vertical agreements are deemed to eliminate competition if they include retail price-fixing. Criteria according to which price recommendations may be deemed as vertical agreements falling under Article 5(4) ACart have been set out by the FCC in its Communication of July 2 2007 on the Assessment of Vertical Agreements<sup>1</sup>. According to the FCC, in the case of price recommendations by manufacturers or suppliers to resellers or distributors, it must be established on a case-by-case basis whether there is an unlawful agreement affecting competition within the meaning of Article 5 ACart. In making this determination, the following factors are of special importance:

- Were the price recommendations communicated openly or only to resellers or distributors?
- Were the price recommendations combined with pressure or with the granting of specific incentives?
- Were the price recommendations in Swiss francs indicated by the manufacturers or suppliers on the products, packages or catalogues, but not expressly stated to be non-binding?
- Were the price levels for the products subject to the price recommendations considerably higher than those in neighbouring countries despite similar product or service specifications?
- Were the price recommendations adhered to by a large number of resellers and distributors?

Considering that the price recommendations in this case were followed by a large majority of drug stores and physicians, the Secretariat concluded that the publication and observance of

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<sup>1</sup> DPC/RPW 2007/4 675.

the recommended retail prices for the medicines Viagra, Cialis and Levitra represented illegal vertical collusion between the producers and distributors. The FCC has now to decide whether to follow the Secretariat's recommendation to impose penalties on the undertakings concerned or prohibit them from suggesting prices for the medication.

## PROPOSAL FOR REFORM

### *Evaluation of the Competition Act*

On January 14 2009, the Swiss Federal Government (Federal Council) was presented with a Synthesis Report<sup>2</sup> issued by the Task Force Cartel Act, a panel formed during the winter 2006/2007 by the Head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the ACart. The Task Force stated that the ACart together with the legal instruments that were introduced upon its last revision in 2003 (leniency program, raid, opposition proceedings) have demonstrated their ability to serve their purposes. However, according to the Task Force, further modifications are necessary to improve the efficiency of the FCC and its Secretariat, international cooperation, and enhanced control of mergers and vertical restraints. Complementary recommendations concern the procedure, civil law, and sanctions.

The ACart was significantly amended in 2003. Amongst other things, the amendment provided for a system of non-mandatory preliminary notification of potentially unlawful agreements and practices, the power of the FCC to impose direct administrative fines on participation in a hardcore cartel and on undertakings abusing their dominant position, as well as the power to reduce or omit fines when cooperation with hardcore cartel members allows the cartel to be discovered or suppressed (leniency programme). The amendment also sought to ease the burden of proof for the FCC by introducing specific presumptions concerning vertical restraints.

Article 59a ACart requires the Federal Council to evaluate the efficiency and conformity of any proposed measure under the ACart before submitting a report and recommendation to Parliament in relation to such measure. After 5 years of application, the effectiveness of the system of the revised ACart has been assessed through an evaluation procedure conducted by the Task Force Cartel Act under the lead of the Director of the Secretariat of the FCC. The Task Force issued a Synthesis Report based on 15 reports and studies, which formulates a series of recommendations. The main observation of the evaluation is that the underlying concept of the ACart as introduced in 1995 and revised in 2003 should be maintained. Globally, it is not necessary to amend the instruments added in 2003 (direct sanctions, leniency program, and raids). In contrast, the following improvements are considered to be priorities:

- Competition authorities must be fully independent of political influences and business, and their decision making-members must be professionals. The FCC and its Secretariat must merge into a single entity.

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<sup>2</sup> A summary in English of the Synthesis Report is available at <http://www.weko.admin.ch/dokumentation/00216/index.html?lang=en>.

- Switzerland must conclude cooperation agreements with its main trading partners allowing for formal exchange of confidential information between competition authorities. Moreover, it is necessary to amend Swiss formal law in order to enable the competition authorities to cooperate under certain conditions with their counterparts.
- Switzerland must harmonize its merger control regime with the corresponding EU regulations, including the SIEC-test, efficiency defence, and dynamic consumer welfare standards.
- Regarding the restrictions on vertical agreements, Switzerland must abandon the legal presumption of illicit conduct. However, the ACart should keep direct sanctions available in case of minimum or fixed price setting and restrictions with respect to territorial agreements.
- Once this revision is completed, the civil aspects of antitrust law, the civil and administrative procedure, and the system of sanctions should be improved, or further evaluated. It would also be worthwhile to enhance the implementation of the ACart.

Based on those recommendations, the Federal Council submitted a report to Parliament on March 25 2009<sup>3</sup>. In substance, the Federal Council proposed to maintain the current design of the ACart on the basis on its three pillars (prohibition of harmful cartel agreements, fight against abuse of dominant position and merger control) and the new instruments introduced in 2003 (direct sanctions, leniency program, raid and opposition proceedings). Pointing to certain shortcomings of the ACart, it instructed the Federal Department of Economic Affairs to submit concrete proposals by spring 2010 with a view to adjusting the ACart. These proposals shall include measures to strengthen the FCC as an independent authority, adapt the control of mergers, introduce a differential treatment of vertical agreements and expedite the proceedings. The Federal Department of Economic Affairs is also expected to consider in detail other improvements suggested by the Task Force Cartel Act and to propose, if appropriate, their implementation, as well as to carry out investigations to enable the Federal Council to determine, particularly in view of its European policy, the desirability of negotiations on a cooperation agreement with the EU on the formal exchange of confidential information between competition authorities.

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<sup>3</sup> The report of the Federal Council in French, German and English is available <http://www.news-service.admin.ch/NSBSubscriber/message/fr/26072>.