

Swiss Competition Report

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PARALLEL TRADE

Judgment of the Swiss Supreme Court concerning the sale of imported “preventative dental medicinal” toothpaste Colgate Dentagard

On October 19, 2006, the Swiss Supreme Court issued a judgment in the Colgate Dentagard case. This judgment indicates a concern to favour the levelling of barriers to the free movement of goods from the EU into Switzerland, and a receptiveness to EU law “soft” influence in appropriate areas of Swiss law. This judgment may also significantly effect the way toothpaste and other oral hygiene consumer products are marketed in Switzerland.

The Swiss discount retailer Denner AG had been sourcing Colgate Dentagard toothpaste in Germany at a significantly lower price than that available to it in Switzerland, and reselling it on the Swiss market. On March 2, 2005 the Zurich Cantonal Laboratory ordered Denner to discontinue selling that toothpaste as of June 30, 2005. It was of the view that the indication which the toothpaste tube bore, “preventative dental medicinal”, with an Asclepius rod (snake and staff) design next to it, was in violation of Swiss consumer goods legislation and therefore could not be sold in Switzerland. Several appeal instances prior to the Supreme Court confirmed this position, which was consistent with prior Swiss case law in this area, albeit not on identical facts. The Swiss Supreme Court reversed.

By virtue of a 1972 convention between Switzerland and the EU, in principle all goods placed in circulation within the EU may also be sold in Switzerland. An exception to that principle is that such goods must be in conformity with the provisions of relevant Swiss law. It was undisputed that the toothpaste at issue fell to be classified as consumer goods and therefore the Swiss legislation on food and consumer goods was applicable, and not Swiss legislation on medicines. Swiss legislation on food and consumer goods prohibited references of all kinds to effects of healing, alleviating or prevention of sickness unless such references were based on verifiable facts and did not deceive the public. The legislation also provided a specific more permissive regime for oral care products: references exclusively to cavity prevention effects were permitted.

Clearly, the indication on the Colgate Dentagard was broader than a mere claim to cavity prevention, since it extended to all conditions affected by the surfaces brushed, namely, the palette, the teeth and the gums.

The Supreme Court recalled its approach to statutory interpretation: not only are the words of the regulation to be considered, but also its purpose and context. One of the purposes of the regulation which the Supreme Court considered was to ensure the harmonisation of Swiss law with EU law, to prevent the Swiss market from becoming isolated. The Supreme Court referred to the EU directive relevant to consumer goods including toothpaste (76/768/ECC), and a decision of the European Court of Justice interpreting it according to its purpose. This was the promotion of free movement of goods by virtue of the harmonisation of packaging and labelling. The directive stipulated a requirement that packaging and labelling contain no

elements which may deceive consumers and a prohibition on EU Member States impeding the flow of goods satisfying the directive.

The Supreme Court took this concern to prevent deception of consumers also to be the purpose behind the Swiss regulation. It then found that medical experts accepted that toothpaste was an effective oral hygiene agent. On that basis the Supreme Court held that the references to oral and dental care were permissible. Since the medicinal claims were permissible, so too was the Asclepius rod design, which the Court noted was traditionally understood as a symbol of healing.

This decision vividly finds the Court straining to make a new departure as regards the parallel trade of oral care products. Indeed, its reasoning reaches beyond mere toothpaste, and permits founded medicinal claims to be made more broadly for the entire range of products in this area. It may be as well that this decision signals a broader judicial disposition to erode exceptions to the movement of goods from the EU into Switzerland.

INVESTIGATIONS

Mobile phone termination charges

On November 20, 2006 the Federal Competition Commission (the ComCo) issued its expert's report on wholesale mobile call termination charges. This report was commissioned by the Federal Communications Commission (the ComCom) as part of its investigation into mobile telephone operators under the Federal Telecommunications Act.

In its expert's report the ComCo concluded that each of Swisscom, Orange and Sunrise has a dominant position in relation to its own network. Mobile call termination charges in Switzerland are high as compared with rates prevailing generally in Europe.

Under the Federal Telecommunications Act, this conclusion permits the ComCom to fix these operators' future rates for call termination on a costs basis.

On October 17, 2002 the ComCo launched its own investigation into call termination charges. This latter investigation concerns not only dominance but also potential abuse of dominant position. Unlike with the ComCom's investigation, the ComCo's could result in fines and penalties. It is expected to be completed shortly.

Preliminary Investigation against FIFA

Pending a decision by the European Court of Justice, the ComCo secretariat has decided to suspend its preliminary investigation into the requirement in the FIFA regulation that soccer clubs make their players available free of charge to play for national teams in matches organised by FIFA.

The European Court of Justice was requested by the Commercial Court of Charleroi, Belgium, to issue a preliminary ruling on the compatibility of this aspect of FIFA's regulation with EC competition law. The ComCo will resume its proceedings as necessary in light of the European Court of Justice's ruling.

ComCo discontinues investigation into complaint against Elektra Baselland

On November 6, 2006 the ComCo discontinued its proceedings in response to a complaint made by the largest Swiss retailer Migros against Elektra Baselland (EBL) that it was abusing its dominant position in not permitting competitors access to its electricity distribution network.

In 2000, Migros had directed such a complaint against three electricity suppliers, EBL, Entreprises Electriques Fribourgeoises (EEF) and Services industriels de Renens (SIR). In March 2001 the ComCo issued a “decision on principle” as regards the complaint against EEF finding the latter’s refusal of access to be an abuse of dominant position. The Swiss Supreme Court upheld this decision in June 2003, and thereby a measure of liberalisation of the Swiss electricity market was introduced, after the failure of legislation on the matter.

This decision on principle, as confirmed by Switzerland’s highest court, led first to SIR and now to EBL agreeing with Migros to permit third party suppliers to access its network upon market conditions usual in the industry.

Competition Commission closes TicketCorner Investigation

TicketCorner is Switzerland’s largest supplier of ticket distribution services for tickets to cultural and sporting events. By decision of 1 December 2003, the Competition Commission (ComCo) found that TicketCorner’s practice of imposing exclusivity clauses in contracts with organisers of cultural and sporting events constituted an abuse of dominant position in the market for ticket distribution systems.

TicketCorner challenged this decision before the Appeal Commission, which in 2005 sent the file to the ComCo for a determination on whether, in view of market developments since the decision, there were grounds to revisit the finding against TicketCorner.

The ComCo renewed its enquiry, and concluded that, since the December 2003 decision, TicketCorner had altered its conduct by discontinuing its imposition of exclusivity clauses. Moreover, the ComCo’s analysis demonstrated that since its decision the market had evolved significantly. In particular, the internet now plays a central role, and has facilitated market entry, and new ticket sales systems were in the process of development.

By a new decision of 18 December 2006 therefore, the ComCo closed its enquiry into TicketCorner’s practices.

Completion of the ComCo Secretariat’s Enquiry into the Ticino Asphaltting Sector

On 8 April 2005 the ComCo initiated an investigation into the market for road asphaltting in the Canton of Ticino. It acted on a complaint from the cantonal department responsible for road works, which had detected signs of market sharing in the way tenders for road works were submitted, as well as in a sort of “rotation” of awards for asphaltting works on both federal and cantonal roads. The subjects of this enquiry were all asphalt producers and all undertakings active in road surfacing in the Canton of Ticino.

On 9 January 2007 the Secretariat of the ComCo completed its evidence gathering work and submitted its proposed decision to the parties, who will now have an opportunity to comment on it. The ComCo will then make a final decision on the matter, having considered both the Secretariat's proposed decision and the parties' comments. At all events, there will be no administrative fines imposed, since any infringement would have taken place prior to 1 April 2005, the expiry date for the grace period following amendments to the Swiss Competition Act, opening the way for direct fines. Prior to these amendments, the only fines for substantive violations of Swiss competition law related to the violation of an order from a competition authority certain conduct.

This case is also significant in that it recalls the principle, already well established, that private law restrictions of competition in relation to public procurement, such as these agreements between tenderers, are within the ComCo's jurisdiction.

COMPLAINTS

Digital Television

On 27 November 2006, the Swiss-German consumer protection agency Stiftung für Konsumentenschutz (SKS) filed a complaint with the ComCo against Cablecom, Switzerland's leading cable television operator. The complaint alleges that, in violation of the terms of its licence, Cablecom regularly ties the purchase of digital television subscriptions to the purchase of a set-top box, and that this constitutes an abuse of dominant position.

The Federal Communications Office is currently investigating similar allegations against Cablecom. In lodging this complaint with the ComCo SKS seeks to have a more rapid determination of the matter.

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