NATIONAL COMPETITION LAW REPORT – Q4 2008 – SWITZERLAND

INVESTIGATIONS

Swiss Supreme Court acknowledges limited privilege for in-house solicitors

On October 28, 2008, the Swiss Supreme Court handed down an important ruling in which it extended in some way the scope of legal professional privilege to communications between parties and their in-house solicitors in the context of Swiss competition law[1]. The Swiss Supreme Court confirmed the view, already expressed by some commentators, according to which privilege extends to protect internal communications involving in-house solicitors from disclosure during competition investigations by the Federal Competition Commission (FCC), provided that such communications have not been made available by the company's corporate bodies to other persons within the company and have been subject to steps by the solicitor concerned to keep the information under his control. That protection only applies to communications with in-house "solicitors", which is deemed to exclude lawyers having not completed a bar exam.

In contrast, the Swiss Supreme Court refused to extend the scope of privilege to correspondence and advice from off-counsels, whenever such correspondence is kept in the company's premises.

The power to order house searches and seizures is one of the substantial amendments of the Competition Act of April 1, 2004 (ACart). Under this investigative power, the Secretariat of the FCC conducted its first dawn raids in 2006 and 2007. However, one issue that remained to be clarified was the protection of documents subject to professional privilege during house searches. Based on precedents in criminal proceedings, the Secretariat considered that privileged documents are excluded from seizure, provided that they relate to the current investigation; the Secretariat was also of the opinion that in-house lawyers were not subject to lawyers' professional secrecy.

Off-counsels and their clients will no doubt be disappointed at the Swiss Supreme Court's refusal to extend the scope of legal privilege to correspondence held by the client in the context of Swiss competition law. However, the Swiss Supreme Court's findings in respect of the procedure to be followed by the FCC during an investigation will provide some comfort.

CARTELS

Unlawful agreements to be held null and void

[1] Swiss Supreme Court, Judgment of October 28, 2008, 1B_101/2008, http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=28.10.2008_1B_101/2008.

In a decision dated June 12, 2008, the Swiss Supreme Court confirmed the view of many commentators that unlawful agreements under the ACart are, in principle, entirely null and void. The Swiss Supreme Court also ruled that, if either party has obtained any service or other benefit from the other on the basis of such an agreement, then the beneficiary shall make restitution to the benefactor in accordance with the unjust enrichment rules of the Swiss Code of Obligations[2].

FCC opens investigation against members of the perfumery industry

On December 1, 2008, the FCC opened an in-depth investigation against the Geneva-based Association of Manufacturers and Suppliers of the Cosmetic and Perfumery Industry (ASCOPA) for possible price fixing. Members of ASCOPA include, amongst others, Chanel SA Genève, Clarins SA, L'Oréal Produits de Luxe Suisse SA, Parfums Christian Dior AG and Coty (Schweiz) AG.

The FCC said it had received a complaint that pricing information could have been exchanged among members of ASCOPA.

The investigation has to show whether the sharing of information between ASCOPA members has an impact on the competitiveness of the members and whether it may constitute an unlawful agreement under the ACart.

FCC opens investigation against distributors of door components

On December 8, 2008, the FCC opened an investigation against distributors of doors components (doorknobs, hinges, locks, etc.). Those undertakings are suspected of having concluded agreements on prices, discounts and price conditions. The investigation has to show whether such agreements between distributors actually existed and what effects they may have in the Swiss market.

In July 2007, the FCC had already opened an investigation in the field of hardware for windows, doors and gates. During this procedure, information on a new cartel has been brought to the attention of the competition authorities. Under the ACart, if undertakings voluntarily provide information or evidence regarding a second, still-hidden, hard-core cartel, they are likely to enjoy a reduction of fines by up to 80%.

FCC conducts searches and opens investigation against undertakings active in the sanitation, heating and air conditioning sectors

On December 16, 2008, the FCC opened an investigation against several undertakings active in the field of sanitation, heating and air conditioning products. Following a self-denunciation, the FCC conducted searches and found indication that the undertakings concerned may have exchanged information on prices, contemplated price increases, discounts and sales turnovers for various products.

ABUSE OF DOMINANT POSITION

[2] Swiss Supreme Court, Judgment of June 12, 2008, 4A_16/2008, http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=12.06.2008_4A_16/2008.

Wide-reaching new decision of the Competition Commission terminates investigation into tariffs imposed by public hospitals to insurance companies

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

In Switzerland, the basic health insurance (i.e., the insurance which covers all basic health benefits) is compulsory for all persons domiciled in Switzerland. By contrast, supplementary insurance products (*e.g.*, 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 with the public hospitals of the Canton of Luzern the tariffs of the health care services. On February 7, 2006, the FCC decided to initiate an investigation into those collective negotiations. The principal concerns were the price-fixing arrangements that might arise from collective bargaining and the abuse of dominant position that the public hospitals could have been involved in by imposing tariffs for health care services.

Under the ACart, agreements between competitors are prohibited if they significantly restrict competition (Article 5(1) ACart), unless they can be justified on grounds of economic efficiency (Article 5(2) ACart). Pursuant to Article 5(3) ACart, horizontal agreements are also prohibited if they eliminate competition. Horizontal agreements are deemed to eliminate competition whenever they include direct or indirect price-fixing (such as agreements on discounts or tariffs). In the above decision, the FCC 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 FCC further held that collective negotiations among insurers were not illegal pursuant to Article 5(1) ACart, since they could be justified on grounds of economic efficiency. The FCC followed a two-step analysis:

- The FCC found that the public and publicly subsidized hospitals of the Canton of Luzern have altogether a dominant position in the cantonal markets for private and semi-private health care cover. Indeed, the government of the Canton of Luzern 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 health care 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 could not have been attractive if they had included a limitation in the choice of hospitals.

- Referring, *inter alia*, to recent studies made in the health care sector in the Netherlands, the FCC then held that collective bargaining among health insurers was

justified on grounds of economic efficiency (Article 5(2) ACart), in that it helped the insurers building a "countervailing power" which would enable them to extract price concessions from providers of health care services.

Since 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 ACart typically excludes the building of groups covering the entire market, whilst 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 the Canton of Luzern itself (as the owner of such hospitals), conditions were met to allow the health insurers to organize themselves into groups in order to form a countervailing power. However, the FCC specified that such a way of negotiating tariffs for health care 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 works (i.e., where there are no negative consequences for the insured persons).

More generally, the above decision contains a number of *dicta* which are of practical importance for practitioners.

First, the FCC 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) ACart and, hence, are deemed to eliminate competition. Referring to the EC Guidelines on the applicability of Article 81 of the Treaty to horizontal cooperation agreements, the FCC 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 the competitive constraints on purchasers.

In addition, although the FCC 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 the Canton of Luzern have a dominant position in the relevant markets. In so doing, the FCC followed a view already expressed by the Appeals Commission for competition matters in the "*Swisscom Directories AG*" case, 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 important consequences on the future conduct of the dominant undertaking. Indeed, under Article 9(4) ACart, a planned concentration must be notified to the FCC, even if it does not reach the notification thresholds, whenever it appears that the FCC has already made a decision which asserts the existence of a dominant position of the undertaking in Switzerland and the concentration relates to the market in which the undertaking holds a dominant position or to a neighbouring market.

Finally, the FCC indicated that the ACart is not applicable to collective bargaining among public hospitals, since the latter form a unit that appears as a single undertaking in the market. The FCC thus confirmed a view already expressed in a decision dated 8 September 2006, rendered by the FCC at an early stage of the above-mentioned investigation. In this preliminary decision, the FCC ruled that the ACart does not apply to internal relationships

between public hospitals of the Canton of Luzern. The fact that such relationships fall outside the ACart is inherent in the term "undertaking". Indeed, pursuant to Article 2(1^{bis}) ACart, the ACart applies to all private and state-owned undertakings which independently participate in the economy on either side of the market. The FCC confirmed that in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of deciding whether an undertaking comes or not within the scope of law. The existence of a legal personality or independence is not a condition for applying the ACart. The ACart is much more based on a functional concept: it is not the legal but rather the economic organization that establishes whether a person can be viewed as an undertaking within the meaning of Article 2(1^{bis}) ACart. According to the FCC, the decisive criterion is the economic control: whenever the parent company is able to exercise a power of control on the subsidiaries and for as long as such power is actually exercised, the subsidiaries must not be regarded 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 freedom to determine their course of action in the market, since the parent company imposes a centralised decision-making process. The FCC drew the following consequences from his analysis:

- 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) ACart.

- 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.

It follows from the above decision that an agreement between a parent company and wholly owned subsidiary, or between companies controlled by the same undertaking, falls outside the material scope of the ACart (intra group exemption or "*Konzernprivileg*"). Difficulties may arise, however, in the case of partly owned subsidiaries, since the FCC 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 parent and subsidiary acted together in the commission of the infringement, or that the parent exercised control over the subsidiary (e.g., through ownership rights) or otherwise decisively influenced the activities of the subsidiary (e.g., through board membership). In such a case, the parent and the subsidiary form an economic unit when determining whether it holds a dominant position. The abuse and its consequences, if any, may then be attributed to the parent. Accordingly, the FCC could impose sanctions on the parent whenever the subsidiary has no real independence, nor real assets or staff.

Draft decision against Swisscom alleges abuse of dominant position and requests fine in the amount of CHF 237 million

On November 12, 2008, the Secretariat of the FCC issued a draft decision against Swisscom, alleging an abuse of a dominant position in the area of ADSL services. The draft envisages sanctions in the amount of approximately CHF 237 million as a result of allegedly overpriced ADSL setup services.

According to the Secretariat, the investigation has shown that Swisscom has abused its dominant position for wide-band internet network capacity by means of a price or margin squeeze. The allegation is that the prices its subsidiary Bluewin charges final consumers are set at such a low level, and the prices which Swisscom charges to ISPs for access to the network are at such a high level, that it is not possible for ISPs to remain in the market in competition with Bluewin.

A Secretariat's draft decision is a procedural step in the investigation, in which the Secretariat communicates its preliminary view with respect to a possible infringement of Swiss competition laws. The draft is submitted to the parties concerned for comment. Both the draft decision and the parties' comments are then submitted to the FCC. Before concluding the investigation, the FCC may either conduct hearings with the parties to the investigation and instruct the Secretariat to take additional steps in view of the requirements of the investigation, or require that the reasoning on which the draft decision is based be amended. Any final decision of the FCC (including any fines that may be assessed under the decision) is subject to appeal to the Federal Administrative Court.

FCC opens preliminary investigation against the Swatch group in the market for movement blanks

On November 24, 2008, the FCC opened a preliminary investigation against ETA SA Fabrique d'Ebauches, a company of the Swatch group specialized in the production of watch components and movements blanks. ETA had recently notified its customers of price increases and changes in payment terms for movement blanks in 2009. Following this notification, several complaints were filed with the Secretariat of the FCC. The preliminary investigation has to show whether ETA's actions might constitute an abuse of a dominant position in the market for movement blanks.

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