

NKF Client News

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Competition Law – COVID-19 Update

1. Overview

The Corona crisis has led to changes in regulations and practice of the authorities in various areas. This newsletter outlines the most relevant consequences in competition law, with a focus on Cooperation (Section 2), Excessive Pricing (Section 3), Time Limits (Section 4), State Aid (Section 5), and Compliance (Section 6).

The Swiss Competition Commission (COMCO) announced on 26 March 2020 that the special situation due to the Corona crisis did not justify competition law infringements. In particular, the economic situation must not be abused to form cartels and to fix prices. If the government and authorities order measures to combat the Corona crisis that restrict competition, competition law is not applicable. Apart from such cases, however, private undertakings must comply with competition law.

2. Cooperation / Agreements

COMCO announced that private undertakings must comply with competition law, even if the crisis may lead to an increased need for cooperation. COMCO intervened, for example, against an association which wanted to align the services of its members and also to coordinate price-fixing agreements via a reporting system. Since the association stopped its behavior after being contacted by COMCO, COMCO waived sanctions and did not name the association. However, COMCO stressed that price-fixing agreements are in any case unlawful. With other agreements COMCO seems to be more flexible, e.g. when it comes to the fair distribution of critical goods, but without specifying criteria for this.

In contrast, the European Commission announced on 8 April 2020 (Temporary Framework for assessing antitrust issues related to business cooperation) that a closer cooperation between pharmaceutical undertakings in order to meet the demand for essential medicines will be permitted, provided that this is objectively necessary and temporary in nature. Thus, there is a risk that agreements justified in the EU could be considered unlawful in Switzerland. According to the new practice (GABA/GEBRO), it is sufficient if the Swiss market is potentially affected by the agreement originating outside of Switzerland, even if no specific effects can be established. COMCO announced that it was available to provide information and that it was seeking the dialog with associations, undertakings and other authorities on the competition law compliant design of measures to combat the Corona crisis. It is therefore advisable for undertakings planning a cooperation in the EU under the Temporary Framework to examine the potential risks under Swiss competition law at an early stage.

3. Excessive Pricing

COMCO has informed that, like other authorities, it receives enquiries about so-called "exorbitant prices" ("*Wucherpreise*"), for example for masks or disinfectants. Here, interventions under competition law are only possible if illegal price-fixing agreements have been made or if a dominant

market position is abused. COMCO coordinates with other authorities, as in particular the Price Supervisor.

It is to be expected that excessive pricing will be one of the topics to be dealt with by COMCO and other authorities in the coming months. Undertakings that could be considered dominant (especially those operating in sensitive sectors such as the pharmaceutical sector) should mitigate this risk, in particular by:

- Careful consideration of all significant deviations from the "normal" and previously applied pricing;
- Documentation of the reasons and facts for setting new prices;
- Application of objective criteria or procedures (e.g. auctions) to set prices for scarce goods or services;
- Possible consultation with COMCO in case of uncertainties.

4. Time limits in merger control proceedings and other proceedings

Switzerland:

According to statements by some of its employees, COMCO does not intend to ask the undertakings concerned of concentrations to delay or postpone the submission of new merger control notifications. However, it is realistic to assume that the Corona crisis may lead to delays in the regularly recommended pre-notification of merger control notifications and in responding to any requests for advice in advance of merger control notifications. Since the pre-notification can be decisive for the conclusion of the merger control proceeding in Phase I and since COMCO is not bound by any time limits in the pre-notification, sufficient time must be taken into account in the present situation. This also because the undertakings concerned generally do not want to jeopardize their good relationship with COMCO and a conclusion in Phase I.

COMCO expects notified concentrations to be processed on time, while it expects delays in other areas, as in particular, in investigation proceedings concerning possible competition law infringements. Certain hearings had to be cancelled, which may delay the proceedings concerned.

Other jurisdictions:

If concentrations have to be notified in other jurisdictions, it is necessary to examine what restrictions currently apply as a result of the Corona crisis. In many jurisdictions, delays in merger control proceedings are to be expected. To some extent authorities have also requested that the merger control notification of non-urgent concentrations be postponed.

5. State Aid

Swiss federal law does – with the exception of the Subsidies Act of 1990, which lays down general rules at federal level – not contain any effective provisions concerning state aid. The direct or indirect financial aid to undertakings currently being examined or provided by Switzerland (as well as by other countries) because of the Corona crisis, however, potentially fall under the Free Trade Agreement between Switzerland and the EU of 1972 as state aid. In this respect, the granting of direct or indirect financial assistances by Swiss Post to the companies of CarPostal France SAS was recently qualified by the Tribunal de Commerce de Lyon as state aid within the meaning of Art. 23 para. 1 (iii) of the Free Trade Agreement, and Swiss Post or its French subsidiaries, respectively, were ordered to pay damages to their French competitors. The decision of the Tribunal de Commerce de Lyon was challenged; subsequently, the parties settled the dispute extrajudicially. State-affiliated undertakings and undertakings which receive state aid (in particular non-repayable grants, interest-

free loans, tax reductions) and which pass on financial aid within the group, should therefore examine the possible legal consequences.

In addition, in particular the Agreement between Switzerland and the EU on Air Transport of 1999, which contains rules on state aid, must be observed.

6. Compliance

The economic impact of the Corona crisis and the widespread "home office"-policy can put a strain on undertakings' existing compliance guidelines and increase the risk of competition law infringements. Uncertainty about job security and a less close involvement in the structure of the undertaking can induce employees to behave in ways that go beyond the limits of competition law. To mitigate this risk, the following steps should be considered:

- Undertakings should remind employees in an internal communication that the principles of competition law remain in force and that even the Corona crisis is no excuse for competition law infringements. This may be particularly important in the light of news about a relaxation of competition law provisions in other jurisdictions.
- When working in "home office", employees may be tempted to use new means of communication (e.g. alternative communication software), which may entail various risks. Undertakings should examine the risks of such alternative means of communication and, if necessary, remind employees to use the prescribed means of communication.
- Undertakings should regularly review the developments in competition law and communicate any amendments to the compliance guidelines to their employees. Amendments may concern both possible relaxations of provisions in certain areas (none in Switzerland to date) and increased risks (e.g. due to a shift in COMCO's focuses or as a result of other working conditions).

Due to the rapidly developing situation, further adjustments to the practice summarised above are possible. A periodic review is therefore strongly recommended.

If you have further questions and suggestions on this topic, please contact your regular NKF contact or the authors. We will be pleased to support you.

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