Major revision of the Swiss Cartel Act

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The Federal Act on Cartels and Other Restraints of Competition of October 6, 1995 (the "Cartel Act") will be amended in 2004. The amendments have already been approved by parliament and will become effective in spring or summer 2004. Key features of the amendments are the introduction of direct sanctions in case of certain gross breaches of competition law, the introduction of a presumption that effective competition is eliminated in case of price fixing arrangements or allocation of exclusive territories in vertical agreements, a new definition of merger control thresholds for banks and insurance companies and enhanced enforcement procedures (leniency programme, whistle blowing, "dawn raids").

The current system

Three Cartel Acts have been enacted in Switzerland in 1962, 1985 and 1996, respectively. Switzerland cannot be said to have an old competition law tradition; only the most recent of the three acts contains stringent provisions against cartels and other restrains of competition. The structure of the Act in force follows to a large extent the structure of EU competition law, although there are important differences.

Anticompetitive agreements and concerted practices which substantially restrain competition in a market for specific goods or services and cannot be justified by reasons of economic efficiency as well as agreements leading to the elimination of effective competition are unlawful under the Cartel Act. To provide guidance on the interpretation of theses broadly worded clauses, the Swiss Competition Commission issued certain interpreting notices, i.e. the notice on the qualification of vertical agreements of February 18, 2002 and the notice on the qualification of vertical agreements in the field of motor vehicle trade of October 21, 2002.

There is a presumption under the Cartel Act whereby horizontal agreements on price fixing, on limitation of production, supply or purchase quantities and agreements on the sharing of markets or customer groups eliminate effective competition and are, therefore, unlawful. In the notice on the qualification of vertical agreements, the Competition Commission set out similar presumptions for vertical agreements.

The Cartel Act, furthermore prohibits undertakings having a dominant position on the market to abuse their market position by preventing undertakings from entering into or competing in the market or when they injure trading partners. Such types of practices may include in particular the refusal to enter into business relationships and to deal, the discrimination of commercial partners with regard to prices or other business conditions, the imposition of unfair prices or unfair business conditions, the under-cutting of prices or other business conditions against particular competitors, the limitation of production, sales or technical developments and tying. Again, the undertaking having a dominant position may justify its behaviour on the ground of legitimate business reasons.

Finally, concentrations of undertakings need to be notified to the Swiss Competition Commission prior to closing the transaction, if certain thresholds are met. The threshold is met if the undertakings concerned had either an aggregated minimum turnover of SFr2bn worldwide or a minimum turnover attributable to Switzerland of SFr500m and if at least two of the undertakings concerned had a minimum turnover in Switzerland of SFr100m each in the business year preceding the concentration.

Special thresholds apply to undertakings in the media sector and for insurance companies and banks. In case of insurance companies, the turnover is replaced by the annual gross premium receipts and for banks by 10% of their total assets.

In case of breaches of the Swiss Cartel Act, the clauses of the agreement breaching the Cartel Act may be held invalid and the infringer may become liable to any third party that suffered damage. Fines may only be imposed by the Swiss Competition Commission if the infringer either is in breach of an enforceable decision of the Swiss Competition

Commission or infringes his concentration notification obligations.

The revision: background

Soon after its implementation, the limited enforcement tools of the Swiss Cartel Act were found to be insufficient. In particular the Hofmann-La Roche case led to considerable political pressure in Switzerland to enhance the enforcement mechanisms under the Cartel Act. Hofmann-La Roche was fined €462m by the European Competition Authorities for participating in market sharing and price fixing cartels affecting vitamin products; similar proceedings were initiated in the US.

In spite of the evidence against Hofmann- La Roche and in spite of the fact that Hofmann-La Roche is domiciled in Switzerland (and that the Swiss market was also affected by the cartel) the Swiss Competition Commission was not able to impose any fines against Hofmann-La Roche, as the company did not infringe an enforceable specific decision of the Swiss Competition Commission issued against such company but only the provisions of the Cartel Act.

Direct sanctions

Key element of the revision is, therefore, the introduction of direct sanctions for certain infringements of the Cartel Act. Direct fines may be imposed for hardcore restrictions in agreements or concerted practices between competitors (horizontal agreements) on prices, output, purchase and supply quantities or the partitioning of territories or customer groups.

Furthermore, direct fines may also be imposed in case of vertical agreements on fixed or minimum resale prices or on the allocation of exclusive territories in distribution agreements if sales by other distributors into these territories are prohibited. Finally, direct fines may be imposed in case of abuse of a dominant position by an undertaking.

Fines may be imposed up to a maximum amount of 10% of the turnover in Switzerland during the last three years. The amount of the fine will be determined based on the duration and the extent of the anticompetitive practice and based on the proceeds made through the anticompetitive practice. Personal elements on the infringer's side

may be taken into consideration to mitigate or increase the fine.

No fines will be imposed if the agreement or concerted practice was terminated at least five years prior to the beginning of investigations by the Swiss Competition Commission or if the undertakings involved notify the agreement to the Swiss Competition Commission prior to its entering into effect.

Presumption of unlawfulness in case of vertical agreements

Under the present act, there is only a presumption that effective competition is eliminated in case of certain hard-core clauses in horizontal agreements. Under the revised act, the elimination of effective competition will also be presumed in case of vertical agreements on minimum or fixed prices and in case of distribution agreements with allocation of territories, if sales by distributors into another territory are prohibited.

Other arrangements in vertical agreements are not covered by these presumptions and are also not subject to direct fines.

New concentration notification thresholds for banks and insurance companies

The revised Swiss Cartel Act will no longer base the calculation of the concentration notification thresholds for banks and insurance companies on the turnover or the balance sheet total (which was, in particular for banks, often an arbitrary criterion) but instead for insurance companies on the yearly gross premium income and for banks and for other financial intermediaries (which up to now did not have a special calculation mode) on the yearly gross proceeds.

New enforcement instruments

As mentioned, the Swiss Competition Commission did not feel comfortable with its investigation powers under the current Cartel Act. The revised Cartel Act will explicitly refer to other federal acts on civil and criminal procedures which will grant the Competition Commission the necessary powers for investigation measures like the search of homes, the seizure of documents, etc. This may lead to dawn raids at the premises of companies in Switzerland similar to the ones made by the European competition authorities in the EU.

Furthermore, the revised Cartel Act provides for a leniency rule, whereby the Competition Commission can partially or totally refrain from imposing a fine on an undertaking that is contributing to the discovery and/or to the clearance of an anticompetitive practice (whistle-blowing).

Other changes

Further changes include a clarification of the definition of market dominance, a provision indicating that an ordinance or a notice with special rules for small and medium-sized undertakings may be issued by the Competition Commission or by the Federal Council respectively, certain clarifications and a reference to the Swiss-European agreement on air traffic.

Transitory provisions

According to the transitory provisions for the amendments, no fines will be imposed if the undertakings involved either notify or terminate any anti-competitive agreements or concerted practices within one year of the entering into force of the revised Swiss Cartel Act. The transitory provision only applies to agreements and restrictions existing at the date of the revision becoming effective and will not apply to new agreements or restrictions.

Other recent developments: extraterritorial application of the Swiss Cartel Act

The Swiss Cartel Act will be applied to restrictive practices if their effects are felt in Switzerland, even if they originate in another country. Under this provision, the Competition Commission held that two undertakings domiciled abroad with no physical presence in Switzerland can breach the Swiss Cartel Act by not filing a notification prior to the closing of a merger, provided they meet the turnover thresholds with counterparties in Switzerland.

Furthermore, and of even more importance for international distribution systems, the Competition Commission held (in its notice on the qualification of vertical agreements in the field of motor vehicle trade of October 21, 2002) that limitations of the possibility of Swiss buyers to purchase motor vehicles in the EEA will infringe the Swiss Cartel Act. Hence, a clause in an EU standard distribution agreement for distributors in the EU and in the EEA stipulating that the distributor is not allowed to sell the goods in question to persons outside the EU and the EEA may be found to breach the Swiss Cartel Act.

Consequences for undertakings doing business in Switzerland: what to do

It is to be expected that the revisions of the Swiss Cartel Act will have a major impact on both Swiss undertakings and foreign undertakings doing business in Switzerland. Undertakings should conduct a full competition compliance review of their current agreements with Swiss counterparties, of concerted practices and of their own and their counterparties' positions on the relevant markets. Undertakings must take a decision on whether to terminate or to notify existing agreements within

the transitory period of one year (starting in spring or in summer 2004).

If new agreements are negotiated, undertakings may consider to notify the agreements, thereby avoiding the risk of fines. Finally, to reduce the risk of direct sanctions against the undertakings, undertakings should initiate competition law compliance programs with their managers and employees and document their efforts to ensure compliance of their undertakings with Swiss competition law.

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