Pitfalls for foreign undertakings

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The Swiss Federal Act on Cartels and other restrains of Competition of October 6, 1995 (the "Cartel Act") was amended as per April 1, 2004. Key features of the amendments were 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 and enhanced enforcement procedures (leniency programs, "whistle blowing", "dawn raids"). Recent statements of the Swiss Competition Commission furthermore indicate that the Cartel Act will also be applied against foreign undertakings based on the effects doctrine.

The current system

Switzerland cannot be said to have an old competition law tradition, but with the most recent Cartel Act (enacted in 1996 and amended in 2004), it adopted the European standard. The structure of the Act follows to a large extent the structure of EU competition law although there are important differences.

Anti-competitive agreements and concerted practises which substantially restrain competition in a market for specific goods or services and which cannot be justified by reason of economic efficiency are unlawful under the Cartel Act. The Competition Commission issued certain interpreting notices such as the notice on the qualification of vertical agreements (of 18 February 2002) and the notice on the qualification of vertical agreements in the field of motor vehicle trade (of 21 October 2002). Horizontal agreements on price fixing, on limitation of production, supply or purchase quantities and on the sharing of markets for customer groups are presumed to eliminate effective competition; the same applies to vertical agreements on minimum or fix prices and in case of distribution agreements with territorial exclusivity if sales by the distributors into other territories are prohibited.

Undertakings having a dominant position on the market are prohibited to abuse their market position by preventing other undertakings from entering into or competing in the market or when they injure trading partners. The Cartel Act specifies certain activities as abusive; the list corresponds to the one in EU law. However, such behaviour may be justified on grounds of legitimate business reasons.

Concentrations of undertakings need to be notified to the Competition Commission prior to closing of the transaction if certain thresholds are met, i.e. if the undertakings concerned had either an aggregate minimum turnover of CHF 2 billion worldwide or a minimum turnover attributable to Switzerland of CHF 500 million and if at least two of the undertakings concerned had a minimum turnover in Switzerland of CHF 100 million each in the business year proceeding the concentration. For insurance companies, the yearly gross premium income and for banks and other financial intermediaries the yearly gross proceeds apply instead of the turnover.

Sanctions

In case of breaches of the Cartel Act, clauses of an agreement may be held invalid and the infringer may become liable to a third party that suffered damage. The Competition Commission may impose fines for any agreement or concerted practice which falls under the above presumptions or in case of abuse of a dominant position by an undertaking. Fines may also be imposed if a company is in breach of an enforceable decision of the Competition Commission or infringes its concentration notification obligations. The amount of the fines may be up to a maximum of 10% of the cumulative turnover in Switzerland during the last three years and will be determined based on duration and extent of the anti-competitive practice, on the proceeds made through the anti competitive practice and on personal elements on the infringer's side may. The Competition Commission has powers for investigation measures like the search of business premises and of homes of managers, the seizure of documents, etc. This may lead to dawn raids similar to the ones made by the European competition authorities. The Competition Commission can partially or totally refrain from imposing a fine if an undertaking is contributing to the discovery and/or to the clearance of anti competitive practice ("whistle blowing"). Sanctions may be avoided if a behaviour or agreement is notified to the Competition Commission prior to its implementation (and, for already existing agreements and behaviours, within the transitory period ending on 31 March 2005).

Recent developments

On November 22, 2004, the Competition Commission issued the draft of a new Notice on Agreements of Small and Medium Sized Undertakings which should help to identify agreements having a minor impact on competition and not falling within the prohibition on restrictive agreements. However, under the draft notice, hardcore restrictions cannot be justified even if between small or medium sized undertakings.

In a decision rendered on December 6, 2004, the Competition Commission provided guidance on exclusive distribution agreements between a brewery and restaurant owners. Such agreements exceeding a term of five years were only held to be lawful if they are linked to loan, a leasing or other financial commitment of the brewery and if the restaurant is entitled to terminate the agreement at any time against payment of the outstanding dept after the initial period of five years. The decision could have a significant impact on the assessment of vertical and finance agreements under Swiss competition law.

Extraterritorial application

The Cartel Act will be applied if effects of restrictive practices are felt in Switzerland, even if such practices originate in another country. The Competition Commission held that two undertakings domiciled abroad with no physical presence in Switzerland can breach the Cartel Act by not filing a notification prior to the closing of a concentration, provided they meet the thresholds for turnover (or, in case of banks, yearly gross proceeds) with counterparties in Switzerland. Limitations of the possibility of Swiss buyers to purchase motor vehicles in the European Economic Area (EEA) were also held to infringe the Swiss Cartel Act. Therefore, a clause in an EEA standard distribution agreement for distributors in the EEA stipulating that the distributor is not allowed to sell the goods in question to a person outside the EEA may be held to breach Swiss competition law.

Consequences for undertakings doing business with Swiss counterparties

Undertakings outside of Switzerland doing business with Swiss counterparties should be aware of the fact that Switzerland is not part of the EU or of the EEA and that Swiss competition authorities will apply the Swiss Cartel Act. If there is a risk that an undertaking reaches the thresholds relevant for concentration notification requirements, Swiss notification obligations must be investigated prior to any merger, restructuring or (as has been argued by representatives of the Competition Commission) even in case of far-reaching outsourcing arrangements. Furthermore, undertakings should assess compliance of their European distribution systems and of their behaviour on the Swiss market and include Swiss competition law in their compliance programs. cf

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