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TalkingPoint

SWISS ANTITRUST INVESTIGATIONS

REPRINTED FROM EXCLUSIVE ONLINE CONTENT PUBLISHED IN:
JANUARY 2016

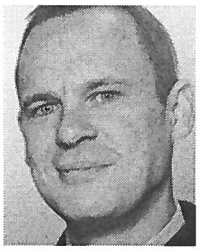
FINANCIER WORLDWIDE corporatefinanceintelligence

FW speaks with partner Philipp Zurkinden and counsel Bernhard Lauterburg at Prager Dreifuss about Swiss antitrust investigations.

Philipp Zurkinden
Partner

Prager Dreifuss

Prof. Dr. Philipp Zurkinden is a partner at Prager Dreifuss. He is the head of the firm's Competition & Regulatory Matters team and advises local and international clients in various sectors in cartels procedures and regularly works together with international law firms in multi-jurisdictional merger filings. Mr Zurkinden lectures Swiss and European competition law at the University and the European Institute of Basel. He is also vice-chairman of the competition group of the Swiss Bar Association, member of the board of ASAS and a member of the Studienvereinigung Kartellrecht and the IBA competition group. He can be contacted on +41 31 327 5454 or by email: philipp.zurkinden@prager-dreifuss.com.



Bernhard Lauterburg
Counsel

Prager Dreifuss

Bernhard C. Lauterburg is a counsel at Prager Dreifuss and a member of Prager Dreifuss' Competition & Regulatory Matters team. He concentrates on antitrust and merger proceedings of domestic and foreign clients. He also works on public procurement matters and regularly advises foreign clients in contractual disputes (litigation & arbitration) involving Swiss law. He can be contacted on +41 31 327 5454 or by email: bernhard.lauterburg@prager-dreifuss.com.

FW: Could you provide an overview of antitrust developments in Europe over the last 12-18 months? What have been the overriding themes?

Zurkinden: From a Swiss perspective, we consider there to be two themes which have emerged over the last 12 to 18 months. First, there have been complex problems when assessing information exchanged under Article 101 TFEU. This is in particular true with regard to certain sectors where market transparency, regulatory systems and traditional sector specific market behaviour must be taken into account when considering information floods between market players. The proactive attitude of the European Commission might lead to lengthy and expensive procedures like those currently pending in the financial sector and might provoke interventions by the European Court, leading to significant legal uncertainty. A second remarkable topic in the EU seems to be the still increasing importance of leniency applications. The fear of sanctions and reputation loss linked with antitrust investigations leads companies to disclose facts also in such cases where the relevance under competition law is at least unclear, causing investigations heavily affecting other market players, namely competitors.

FW: Have there been any notable legislative developments affecting antitrust in Switzerland over the last 12-18 months?

Zurkinden: In a wise decision in autumn 2014, parliament did not enter into discussions on an amendment of the Cartels Act (CA) which would, in some important points, such as the introduction of a supply obligation for international suppliers and of a stricter assessment of so called hard core agreements, have brought great uncertainty to companies. Despite this proposal having failed, immediately thereafter a parliamentary initiative was launched to introduce a provision on relative market power and dependency, aimed at counteracting high import prices. Furthermore, a popular initiative was launched aiming at entitling the Swiss government to impose measures to reduce prices in Switzerland, and to ensure that Swiss buyers are free to procure in Switzerland and abroad.

FW: Looking specifically at Switzerland, how would you describe the country's antitrust enforcement activity? How does this compare to Europe-wide trends?

Lauterburg: In many instances, Switzerland follows Europe-wide legal trends and tries to coordinate with the European Commission. With regard to sectors, it still focuses on the construction industry and, much like the European Commission, on the banking sector. Switzerland is regularly involved in investigations that are being conducted in parallel with other jurisdictions, most notably such led by the European Commission. In this context it should be noted that the gathering of evidence in such parallel investigations with the EU is facilitated by the cooperation agreement in competition matters between the EU and Switzerland, which entered into force in December 2014. An important issue recently posed, and heavily discussed, is whether the authorities, when assessing agreements including core restrictions – horizontal agreements on prices, quantities, territories or customers and vertical agreements on resale prices or allocation of territories – must analyse the quantitative effects or whether these may be considered – similarly to the EU concept of restrictions by object – 'per se' to significantly affect competition. The judgments of the Federal Administrative Court in the last two years were incoherent on this point, some saying that the quantitative effects need not be examined – as in *Gaba* and *BMW* – while others saying the opposite – as in *Baubeschläge* and *Altimum*. The competition community in Switzerland is now waiting for the Supreme Court to clarify this situation of legal uncertainty.

FW: What are some of the key issues on which the Swiss Competition Commission is focused? Is there a clear effort to target certain areas or address particular issues?

Lauterburg: There are currently three focus areas: financial services, construction and parallel imports. The latter is in focus mainly because Switzerland is an absentee from the European Union's common internal market and the alleged 'Switzerland surplus' – that is, charging higher prices in Switzerland than in neighbouring countries – is a big issue in politics. Apart from these issues the 'ComCo', in recent months, dealt mainly with vertical resale prices maintenance, horizontal price agreements and with merger cases in the media sector.

FW: Have there been any recent legal and regulatory developments affecting antitrust investigations in Switzerland?

Zurkinden: There have been no legal or regulatory developments in the last 12 to-18 months affecting antitrust investigations in Switzerland. The bilateral cooperation agreement in competition matters between the EU and Switzerland does, however, influence antitrust investigations in Switzerland as it facilitates the fact finding of the ComCo and its Secretariat respectively. Primarily, this is because the Swiss Competition Authority and the European Commission, in parallel proceedings with similar or linked objectives, are entitled to exchange confidential information even if the party concerned does not agree to the exchange. The incoherent jurisprudence of the Swiss Federal Administrative Court, at least indirectly, affects antitrust investigations with the ComCo saying that as long as the Federal Supreme Court has not cleared this issue, the Secretariat had to prove the concrete effects of the agreements in question.

FW: Could you highlight any recent antitrust cases in the country, and explain their significance?

Zurkinden: Currently, there is uncertainty regarding the question of the extent to which the ComCo must establish that agreements on price, quantity or territory affected effective competition. The incoherent judgments of the Swiss Federal Administrative Court regarding *Gaba, Baubeschläge, BMW* and *Altimum* constitute, without any doubt, the most discussed antitrust decisions in Switzerland. In a controversial merger decision the ComCo allowed a joint venture between the TV and radio company SRG and Swisscom, both state owned undertakings, and the media group Ringier, establishing an advertising platform. Although this merger leads to a very strong position in the TV advertising market, the ComCo approved this transaction without imposing any remedies. This decision shows again the difference of the Swiss merger assessment criteria to criteria in the EU.

FW: In terms of antitrust investigations, could you outline the typical, general procedures that Swiss authorities would follow when pursuing a potential case?

Lauterburg: It should be noted that the ComCo may only sanction certain conduct – agreements on price, quantity, territory and abuse of dominance – while other conduct significantly affecting competition may only be prohibited. The law prescribes two types of investigations – preliminary and formal. The preliminary investigation serves to determine whether the conduct in question was likely unlawful. If so, a formal investigation shall be launched. In practice, however, the preliminary investigation is frequently used to resolve such matters which the Secretariat of the ComCo, the Commission's investigation branch, is reluctant to formally investigate, namely cases which are not of such gravity that a sanction may likely be imposed. Due to limited party rights in the preliminary stage – namely, there is no right of access

to the case file – the company under investigation is in fact denied proper defence rights. Only in a formal investigation, however, does the authority have available the full spectrum of investigatory means – interrogations and searches of premises – while in a preliminary investigation, the authority may only send out written questionnaires. A preliminary investigation concludes with a final and non-appealable report setting out the authority's findings and the measures the company agreed to impose. In a formal investigation, the company under investigation is served with a draft of the motion, similar to a Statement of Objection in EU law, on which it can file a reply. After the company files its reply to the draft motion, the Secretariat will incorporate the company's reply as well as its reply into the draft and submit it to the ComCo for consideration and decision. A decision of the Commission can be appealed to the Federal Administrative Court whose decision can be further appealed to the Federal Supreme Court. Similar to the sector inquiries of the EU Commission, the Secretariat has started to launch, in the last years, informal market observations with questionnaires being sent to market participants. Such market observations may result in ordinary investigations.

FW: If a company in Switzerland becomes the target of an antitrust investigation, what steps should it take to defend itself while cooperating with authorities?

Lauterburg: Most importantly, the company should immediately begin its own internal investigation and – if it does not have internal procedures – establish clear communication channels. An important and often complex question is whether to apply for leniency. Often, when premises are searched, staff of the Secretariat will conduct formal interrogations. Although cooperation is important, one should bear in mind that it may be better to not provide an answer rather than provide a wrong – or speculative – answer. Note that according to recent jurisprudence, leniency applications do not constitute an admission of involvement in illegal conduct. With regard to certain procedural issues in the course of investigations, the ComCo has very recently issued a notice.

FW: What internal procedures and controls should companies adopt to maintain compliance with competition law? In your experience, can companies improve in this area?

Zurkinden: As has been demonstrated by recent investigations, compliance with competition law in Switzerland is a very important issue. To begin with, compliance is not solely training of people, this is only one aspect. Compliance is about establishing – and changing if necessary – corporate culture. Implementing a compliance programme, whether in a large multinational or an SME, should be seen as a project – not detached from the organisation within which it is to be implemented but involving the people concerned. Simply designing an online tool with some slides will not suffice. Regular education programmes for the staff that are in their operative activity exposed to the risk of getting involved in unlawful behaviour is paramount. Importantly, employees should have a contact person with whom they can communicate in case of doubt, not only prior to, but also after the fact. Organisations needs to have a culture encouraging people to challenge their own conduct, and with that, helping to uncover potential problems. Compliance efforts are also important because they might be taken into consideration when calculating fines against the company concerned. This possibility has been confirmed – on a corresponding parliamentary query – by the Federal Council, but has, to our knowledge, not been implemented in practice yet.

FW: Looking ahead, what developments do you expect to see in Switzerland's antitrust landscape over

the coming months and years? What final advice can you offer to companies on meeting their regulatory obligations?

Zurkinden: Future developments are quite difficult to foresee. There are currently two initiatives pending, which are very similar in scope. On the one hand, we do have a motion of a member of parliament aimed at the introduction of a supply obligation of undertakings with relative market power. According to this motion, undertakings do have relative market power if other companies depend on their products or services for which there are no reasonable alternatives. If adopted by parliament, Switzerland would probably be one of the only jurisdictions to have a general supply obligation in its Competition Act, independent from market dominance. The parliament commission in charge of the initiative is expected to submit a first draft amendment of the CA before summer 2016. The second initiative pending intends to enable the Swiss legislator to enact measures guaranteeing freedom of procurement in Switzerland and abroad and stopping corresponding competition restrictions of undertakings with market power. After the last reform of the CA failed in September 2014, there are rumours that the government would be keen to launch a further attempt to amend the CA. At the end of January 2016, discussions between the competent legislative commission of the States Council of parliament and the competent member of the Swiss Federal Council will take place. It is not known yet what potential reform topics will be discussed. It is, however, true that some topics of the failed reform project are still worth discussion, such as the alignment of Swiss merger control with the EU's, the amendment of the opposition proceeding in cases of cooperative ventures and the improvement of civil antitrust enforcement. ■