Competition & Antitrust - Switzerland

Federal Administrative Court annuls Competition Commission decision

Contributed by **CMS von Erlach Poncet Ltd**

February 12 2015

On September 23 2014 the Federal Administrative Court annulled a 2010 Competition Commission decision in which the commission had fined several companies active in the window and window-door mountings business for allegedly coordinating price increases in 2006. Three companies had appealed the commission's decision.

The court concluded that there was insufficient proof of a violation of the Cartel Act – both of the existence of an agreement and of a significantly restrictive effect of the parties' behaviour on competition. The court found that it was unclear whether the parties' price increase announcements in 2006 were the result of a meeting between them or an earlier agreement between the manufacturers at the EU level, which included the enforcement of the agreement in Switzerland and led to an investigation by the European Commission and a fine.

The court's decision is significant for its application of Article 5 of the Cartel Act. According to Article 5 (1), an agreement is unlawful if:

- it significantly restricts competition and is unjustified on grounds of economic efficiency; or
- it eliminates effective competition.

Article 5 further contains a rebuttable presumption that certain hardcore horizontal agreements (Paragraph 3) and vertical agreements (Paragraph 4) eliminate effective competition. In two earlier decisions (*Gaba v Competition Commission* and *Gebro v Competition Commission*, both December 19 2013) regarding the prohibition of parallel imports of Elmex toothpaste into Switzerland, the court decided that the mere existence of a vertical agreement for which the act contains such a presumption of elimination includes, by its nature, an irrefutable presumption that it leads to a significant restriction of competition within the meaning of Article 5(1), regardless of its actual effects on competition or the parties' market shares.

However, in the window decisions allegedly relating to horizontal rather than vertical hardcore agreements (Article 5(3)), the court did not apply its reasoning from *Gaba* and *Gebro*. The court instead confirmed the view generally accepted before *Gaba* that, regardless of an agreement's nature, certain behaviour is inadmissible only if the authority can prove that it leads to an actual significant restriction of competition.

Both *Gaba* and *Gebro*, as well as two of the three window judgments, have been appealed and are pending before the Federal Court.

For further information on this topic please contact Marquard Christen at CMS von Erlach Poncet Ltd's Zurich office by telephone (+41 44 285 11 11), fax (+41 44 285 11 22) or email (marquard.christen@cms-vep.com). Alternatively, contact Pascal G Favre at CMS von Erlach Poncet Ltd's Geneva office by telephone (+41 22 311 00 10), fax (+41 22 311 00 20) or email (pascal.favre@cms-vep.com). The CMS von Erlach Poncet Ltd website can be accessed at www.cms-vep.com.

The materials contained on this website are for general information purposes only and are subject to the disclaimer.

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at www.iloinfo.com.

Authors

Marquard Christen

Pascal G Favre

Online Media Partners

© Copyright 1997-2015
Globe Business Publishing Ltd