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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Switzerland --

15 June 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Introduction

1. In Switzerland, the Secretariat of the Swiss Competition Commission (hereafter Secretariat) is the investigative body and the Swiss Competition Commission (hereafter Competition Commission) is the decision-making body (together the Competition authorities). The relevant legislation is the Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (Cartel Act; CartA). This contribution deals with three main topics suggested by the OECD in its call for contributions: the decision-making process (I.), the confidentiality issues (II.) and the judicial review and interim relief (III.).

2. Decision-making process

2. Internally, the statement of objections prepared by a case-team of the Secretariat goes through a two-tier "control" before it is sent to the parties and decided by the Competition Commission: firstly, the Chief economist and the Head of legal, who are not involved in the investigation, comment on the draft orally or in writing. Secondly, the drafted statement of objections is discussed within the board meetings including the director of the Secretariat and the three vice-directors. .

3. In order to ensure a sound decision-making, the Competition Commission can assign external experts (Article 12 of the Federal Act on Administrative Procedure (Administrative Procedure Act). The external expert can give its opinion in writing and can also be heard by the Competition Commission in presence of the parties. External experts were used in antitrust as well as in in-depth merger control proceedings.

3. Confidentiality

3.1 Confidentiality – disclosure to other parties and to the public

4. As mentioned in the contribution for the previous roundtable, the right to be heard grants the parties to take notice of all essential documents on the proceedings (Article 30 Administrative Procedure Act) but at the same time the parties and other persons participating in the proceedings may request a restriction to access to the documents or to the making of copies or to the taking of notes thereof, with reference to the need of protection of business secrets. These leads to the legally demanding and important question whether and to what extent documents will be disclosed, which the Competition Commission as the decision-making body has to adopt (see below).

5. Regarding business secrets in civil procedures Article 16 CartA addresses to the judge in civil litigation cases that "the parties' manufacturing or business secrets shall be preserved in all disputes concerning restraints of competition". Evidence that could reveal such secrets shall only be made available to the opposing party to the extent that it is compatible with the preservation of the secrets." And Article 25 para. 4 CartA addresses to the competition authorities clearly that "publications shall not reveal any business secrets."

6. The duty to keep "manufacturing or business secrets" applies to all evidence provided to the Competition authorities, with no difference made between parties to the proceeding and third parties.

7. In analogy to Article 162 Swiss Criminal Code and in accordance with the case-law[1], a fact must fulfill the following conditions to be qualified as a business secret:

[1] Distribution of veterinary products; publication of the Swiss Competition authorities (DPC) 2002/4, p. 698-730.

- The fact is not **publicly known**, i.e. it is only known to the person providing it or to a limited number of persons. A fact that is accessible on a website or published by the media does not fulfill this condition.

- The person providing the fact has a **subjective interest to keep this information secret**, i.e. that he considers that the information is not known, he wants to keep it secret and has informed the agency thereof.

- There is an **objective interest to keep the information secret**. This interest is examined on a case by case basis by the agency. An interest to keep an information secret exists if:

  – this fact has an economic value for this enterprise, also is important for its economic success and

  – this fact concerns only one enterprise and not a group of enterprises. This fact enables others to draw some conclusions about the enterprise in question.

8. The Competition authorities ask automatically all parties providing information in a proceeding to submit a version without business secrets which will be part of the file accessible to the parties. However, the Competition authorities can decide about the way to eliminate the business secrets in advance in the answers of third parties in order to avoid a discussion on business secrecy with each respondent, in case of a very large amount of questionnaires.

9. When the Competition authorities decide that a fact which was claimed as a business secret is legally relevant (that is it want to use it as evidence against a party), it contacts the provider of the information and decides with him about the way to **circumscribe the piece of information**, i.e. for instance a range for market shares, turnover, etc, or a more general description. This general description should enable the accused undertaking to exercise its rights of defense. This way of doing was upheld by the former Appeals Commission in a leading case in 2002.[2] Since then, the Competition authorities have rarely encountered difficulties to reach an agreement with a provider of information. If there is a limited number of undertakings in a certain market and it is therefore very easy to identify the enterprise which provided the information, the Competition authorities usually aggregate the information.

10. Before publication, the Competition authorities always give the parties the opportunity to review the publication text in order to eliminate any business secrets. In the recent past, the Competition authorities have more frequently encountered problems with the disclosure of business secrets in publication of decisions because these decisions include facts that lead to pecuniary sanctions. The parties claiming business secrets are in reality afraid from disclosure of information due to follow-up civil actions or reputation damage. If there is a disagreement about the qualification of a business secret or the manner a business secret should be circumscribed and if the disagreement cannot be settled informally, the Competition Commission makes **a separate decision on this specific point**. **This decision then is subject to the ordinary way of appeal.** In order to avoid undue postponement of publications, in this case the Competition authorities will publish their decisions in a temporarily manner on its website. This published version will include no business secrets in the way as mentioned by the parties until the appeal decision is rendered.

[2] See footnote 1.

3.2 Confidentiality – disclosure of information to other authorities

11. The provisions of the Cartel Act on confidentiality protect the party concerned not only from disclosure to competitors, but also from transmission to other authorities.

12. In addition, disclosure of business secrets, violation of official secrecy as well as communication of business secrets to foreign bodies are prohibited under the Swiss Penal Code (Art. 162, 320 and 273)[3]. In the past, Article 273 has been interpreted broadly by the Federal Supreme Court in the field of competition[4]. However, today, Swiss commentators insist on a restrictive interpretation and application of that provision.

13. The provisions of the Criminal Code limit the ability of the Competition Commission to communicate information to foreign competition authorities. The transmission of confidential information is thus only possible if there is a legal basis for it, or if the enterprise concerned authorises it. Presently, in the absence of a specific provision in the Cartel Act and of international agreements allowing for the exchange of confidential information on competition matters, the Competition Commission is not entitled to provide a foreign competition authority with business secrets, unless the enterprise concerned grants a waiver. Waivers are often granted in relation with mergers, but rarely in proceedings on unlawful agreements.

14. Recognising the limited possibilities for information exchange, the Evaluation Group that comprehensively assessed the Cartel Act between 2007 and 2008 recommended the creation of a provision on information exchange in the Cartel Act and the conclusion of cooperation agreements with major partner countries. A provision on information exchange is currently under consideration in the context of a possible revision of the Cartel Act.

15. As to the transmission of information to other national authorities, according to Article 25 para. 3 CartA the Competition Commission may communicate information to the Price Supervisor (the authority who controls prices and may recommend or order price reductions), if such information is necessary for the fulfillment of his or her tasks.

4. Judicial review and Interim relief

16. According to Article 17 Cartel Act in order to protect the rights arising from a restraint of competition, the courts may order any necessary interim measures at a party's request. Besides the civil judge, according a settled case-law, the Competition Commission can grant at a party's request or ex officio interim relief. The Competition Commission has used this possibility many times. Both the Federal Administrative Tribunal and the Federal Supreme Court may also grant interim measures.

17. An independent judicial body has the opportunity to review the conclusions of the agency as to whether a violation of the law has occurred at the end of the proceedings. For specific procedural issues, which can be judged separately as for instance the lack of competence, a separate decision can be required before the end of the proceedings, which is separately challengeable.

18. An appeal against a decision of the Competition Commission has to be lodged with the Federal Administrative Court . The Federal Administrative Court is the ordinary appeals court for federal

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3 See Articles 162 and 320 PC.

4 BGE 104 IV 175. In that case dating from 1978, the Federal Supreme Court considered that the transmission of information on anticompetitive practices by an employee of a company to a foreign authority was punishable under Article 273.

administrative matters, which include, but are not limited to, competition matters. The Federal Administrative Court has the same power of decision as the Competition Commission, which means that it can review and, if necessary, re-establish the relevant fact, review the application of the law, and review the way the Competition Commission has used its discretionary power. Decisions of the Federal Administrative Tribunal are subject to appeal to the Federal Supreme Court. The Federal Supreme Court can only review the application of the law and, as a matter of principle, not the relevant facts.

19. Pending judicial reviews against the decisions of the Competition Commission have suspensive effect unless the agency has removed this effect. The appellate body can re-instore the suspensive effect at the party's request. However, and this is important, appeals against pecuniary sanctions have always suspensive effect (with no possibility to remove the suspensive effect, see Article 55 Administrative Procedure Act).