



Recent developments in Swiss competition law

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1. Introduction

- Main issues of interest to in-house counsel
- Evaluation of Swiss competition law under way
- Human resources and financial means of Comco: a problem?

DPC/RPW 2007/2, p. 174 « *TARMED* »

- Private enforcement in Switzerland: a remedy?

DPC/RPW 2007/3, p. 495 « *Cheesemaker* »



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2. Arbitration

- **ATF/BGE 118 II 193** (1992) *G. S.A. vs V. S.p.A.*
Arbitrability and jurisdiction issue
- **ATF/BGE 130 III 35** (2003) *A. vs. B. Ltd et al.*
Ex officio and right to be heard
- **ATF/BGE 128 III 234** (2002) *X. Ltd contre Y. BV*
Arguments to be presented to and addressed by the arbitration tribunal and the Federal Court
- **ATF/BGE 132 III 389** (2006) *X. S.p.A. contre Y. S.r.l.*
Competition law is not part of (international) public policy





3. Dominant positions: *Publigroupe*

- Different conditions applied to similar transactions by an undertaking holding a dominant position should in principle be considered as an abuse
- However, this may be admitted in limited cases, e.g. when an intermediary receives a double fee
- Reaching an amicable settlement does not rule out sanctions

DPC/RPW 2007/2, p. 190 « Guidelines »



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4. Dominant positions: *Swisscom*

- **Market:** wholesale mobile termination rates
- Dominant position of **Swisscom**
- On the other hand, at least until May 2005, no dominant position of **Orange** and **Sunrise** according to Comco
- Abuse of Swisscom's dominant position sanctioned by a CHF 333,365,685 fine => appeal pending (1st)

DPC/RPW 2007/2, p. 241 Swisscom



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5. Computation of fines

OSLCart 6
(Mit. circ.)

Setting

**Leniency:
Immunity/
Reduction**

OSLCart 5 (Agg. circ.):
up to 10% TO CH in the
relevant markets, 3 years

49a II:
collaboration in
detection
+ suppression

OSLCart 4 (add.):
Practice lasts 1-5 years:
up to 50%,
over 5 years:
+10% / add. year

49a III:
-Disclosure
-Statute of limitation
-Exc. authorisation

OSLCart 3 (basic amount):
up to 10% TO CH in the
relevant markets, 3 years

Max.
10%
TO
CH,
3
years

Practices

5 III
5 IV
7



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6. Merger control: *Swissgrid*

- **Swiss law is merger-friendly:**
 - rather high thresholds
 - EC standard (Reg. 139/2004, Art. 2) : « ...not significantly impede effective competition in the common market or in a substantial part of it »
 - Vs. Swiss standard (LCart/KG, Art. 10): « ...able to eliminate effective competition »
- **ATF/BGE 133 II 104 *Swissgrid*:**
 - test stricter for merger control than for (existing) dominant positions





7. Merger control: *retail distribution*

- **Most recent decisions**, in particular:
 - DPC/RPW 2006/1, p. 131 *Denner/Pickpay*
 - DPC/RPW 2008/1, p. 129 *Migros/Denner*
 - *Coop/Carrefour* (to be published)
- **One trend:** market consolidation and concentration
- **Several risks (only?):**
 - Collective dominance in three segments of local markets
 - But also in upstream markets (buying power)
- **However, corrective measures considered as sufficient**





8. Procedural questions

- No right to obtain the opening of a **formal investigation** according to LCart/KG, Article 27
DPC/RPW 2007/3, p. 478 « *Credit cards* »
- No right to obtain a « **declaratory** » **decision** in relation to abstract situations relating to an indefinite number of persons or undertakings
Idem
- Comco's new Notice on **business secrets**
www.weko.admin.ch/publikationen/00213/Merkblatt_Geschaeftsgeheimnisse-f.pdf?lang=fr&PHPSESSID=951c

