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Swiss Competition Commission rejects liability of a natural person with a controlling shareholding in companies under cartel investigation

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On November 18, 2013, the Swiss Competition Commission (ComCo) closed proceedings without further action against a Swiss individual with a formerly controlling stake in companies investigated for a possible abuse of a dominant position under the Swiss Cartel Act (CartA).

The decision clarifies the applicability of Swiss competition law to individual personal shareholders in an undertaking. According to the ComCo, if an individual exercises control over a company and, in addition, is actively involved in its management, this, on its own, does not entail qualification as an undertaking within the meaning of the CartA. For the CartA to apply, the ComCo held that the natural person must engage in its "*own economic activity*" ("*eigene Wirtschaftstätigkeit*") as a private person.

In April 2013, the ComCo opened an investigation after it has received complaints of an abuse of a dominant position. One of the addressees of the investigation was the individual (*X*) which in the past jointly controlled the allegedly dominant company.

In line with EU competition law, the Swiss CartA is only applicable to "undertakings" which are broadly defined as natural or legal persons that carry out an economic activity. Following *Akzo Nobel and Others* v *Commission*, it is recognized that liability may be imputed to a parent company for the conduct of its subsidiary where the latter does not decide independently upon its own conduct on the market. In view of the above, the preliminary question arose whether shareholder *X* could be held personally liable for the competition law violations allegedly committed by the company he had so far jointly controlled.

In its formal and rather tersely reasoned decision not to pursue the matter further (not yet published), the ComCo came to the conclusion that neither in Switzerland nor in the EU there is settled case law on whether individuals as controlling shareholders must be treated differently from legal entities. More specifically, it noted that while for holding companies it has been established both under Swiss and EU competition law that it is irrelevant whether they engage in economic activity on their own, this is still unresolved with respect to individuals. In the case at hand, the ComCo found that shareholder *X*, besides his involvement in the jointly controlled company, pursued no autonomous economic activity. Since *X*, therefore, did not act as an undertaking, *X*

could be no longer part of the ongoing investigation.

The European Commission and EU courts have repeatedly qualified natural person as undertakings and also addressed decisions directly to them (see, inter alia, Case 42/84, *Remia BV and Others v Commission* [1985] ECR 2545, para. 50). Importantly, however, to the best of the authors' knowledge, they have yet refrained from fining individuals, even in cases where the controlling influence was clearly established (see, inter alia, Joined Cases C-189/02 p, C-202/02 p et al, *Dansk Rørindustri and Others v Commission* [2005] ECR I-5425, para. 103ff.). Not least against the background of the latest ComCo decision, it is unlikely that this case practice will change in the foreseeable future.

There are several reasons for this assessment. First, extending the reach of competition law to individuals with controlling shareholdings would add a considerable administrative burden further increasing the already substantial workload of competition authorities. They could not content themselves with establishing the ultimate parent company, but also would have to scrutinize their internal shareholding structure. Second, considering the past case practice, the imposition of sanctions on individuals with controlling shareholdings would arguably infringe their legitimate expectations to be excluded from the scope of investigations. In any event, the Commission would have to make a prior announcement of such a shift in policy setting out the reasons to depart from its former practice. Finally, as opposed to corporate fines, sanctions against individuals may be viewed to form part of the hard-core criminal law. In this regard, GA Kokott observed in her opinion in *Schindler Holding Ltd and Others* (Case C?501/11 P, not yet published, para. 35) of April 18, 2013 that in determining the criminal law character of competition law sanctions, also a qualitative approach must be adopted. Consequently, the criminal law character of the contested decision was, inter alia, rejected by the GA on the grounds that Regulation No 1/2003 does not provide for "*criminal or quasi-criminal penalties against natural persons, and in particular penalties involving detention*". If sanctions addressed to individuals because of their particular impact were to be considered to belong to the traditional categories of criminal law, this would necessitate strict adherence to the guarantees of the ECHR. In particular, this would preclude a 'penalty' from being imposed by an administrative authority in the first instance as stipulated by Article 6 ECHR. It appears rather doubtful that the Commission is prepared to walk down such a rocky path that potentially opens Pandora's Box of applying a fully-fledged Human Rights standard in competition proceedings.

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