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Landmark judgements of Swiss Courts on the protection of business secrets and access to files in cartel cases

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In two recent landmark judgements, Swiss Courts have provided important clarifications on the protection of business secrets and access to files in cartel cases.

Harmful internal business communication subject to publication

In 2011, the Swiss Competition Commission ("ComCo") imposed a fine on Nikon for suspected violations of Swiss competition law[1]. Nikon appealed the decision[2] and in a separate proceeding also its publication[3] before the Swiss Federal Administrative Court. The publication contained verbatim quotes of self-incriminating and partly pejorative e-mail communication between employees as well as between employees and external partners. Nikon was concerned about possible negative effects on its reputation and its future business.

The Swiss Federal Administrative Court's decision to largely dismiss the appeal against the publication was now upheld by the Swiss Federal Court[4]. The Swiss Federal Court found in the last instance that facts serving to prove or substantiate anti-competitive practices are neither protected as business secrets under Swiss competition law nor as sensitive personal data under Swiss data protection law[5]. According to the Court, damage to the public reputation that normally follows a sanction by ComCo must be accepted even if its decision is later reversed on appeal. *E contrario*, and as explicitly confirmed by the Federal Administrative Court, internal communication that is not necessary for the reasoning of a decision, notably if the respective facts do not constitute anti-competitive practices, may not be published or only by way of a non-confidential description.

The Court gave short shrift to an alleged infringement of the presumption of innocence under Article 6 ECHR. It emphasized that Article 6 does not prevent authorities from informing the public about ongoing criminal investigations and even allows disclosure of the suspect's identity if there is a legitimate interest. According to the Court, this is generally the case in competition matters also considering that ComCo, when publishing the opening of a cartel investigation, is legally required to name the companies involved. In this respect, the Court stressed that competition proceedings are only similar to criminal law so that criminal-law guarantees under Article 6 ECHR need not necessarily apply with full stringency.

The case did not involve leniency applications. Therefore, the protection of information provided by leniency applicants remains open. However, some indication was provided in another recent

case before the Swiss Administrative Court[6].

Only conditional access to files in cartel proceedings

ComCo had granted access to certain data of a closed cartel investigation imposing sanctions on various construction companies for instances of bid rigging to two municipalities seeking civil damage claims. The data concerned redacted parts of the ComCo decision and a piece of evidence on which the decision was based.

On appeal by three construction companies affected by the decision of ComCo, the Swiss Federal Administrative Court ruled that municipalities had a right to access ComCo files to ensure a careful management of tax payers' money and to reverse the harmful effects on competition (inter alia by filing civil damage claims against cartel members).

However, the Court limited access to ComCo files in various respects: first, data may only be accessed to the extent necessary for the execution of the public tasks as mentioned above, meaning that access is to be limited to information on anti-competitive practices that "directly affect" the requesting party and that access for the purpose of data retention alone is not allowed. Second, access may only be granted and data may only be used to serve the purpose disclosed in the access request and a legal obligation must be imposed on the requesting party to that effect. Third, access to ComCo files must not include data of companies that were involved in the investigated conduct but which are not addressees of the decision in order to protect their right to be heard.

Although the Court did not have to decide on information requests of private undertakings, it would appear that the conditions applied by the Court would be all the more relevant. Neither did the Court formally decide on the issue of accessing leniency application data. However, the Court explicitly endorsed the practice of ComCo to completely deny third parties access to leniency information. It stipulated that the relevant files should not contain data disclosed by or relating to the leniency applicant. The Court's wording does not point to a distinction between requests by public and requests by private third parties.

In a further obiter dictum, the Court indicated that bid rigging does not incur criminal liability under the statutory offence of fraud since the element of damage cannot be established with a sufficient degree of certainty.

The case may be appealed to the Swiss Federal Supreme Court.

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[1] See decision of ComCo of 28 November 2011.

[2] See judgement of the Swiss Federal Administrative Court, B-581/2012 of 16 September 2016 (the case is still pending).

[3] See judgement of the Swiss Federal Administrative Court, B-3588/2012 of 15 October 2014.

[4] See judgement of the Swiss Federal Court, 2C_1065/2014 of 26 May 2016.

[5] Provided that the names of the employees mentioned in the e-mail communication concerned are anonymised.

[6] See judgements of the Swiss Federal Administrative Court, A-6315/2014, A-6320/2014, A-6334/2014 of 23 August 2016.

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