Kluwer Competition Law Blog

Recent Swiss Developments on Leniency

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Introduction

Most recently, the Swiss Federal Administrative Court (the "Appeals Court") rendered a series of judgments on the Swiss leniency regime. All cases handle suspected unlawful agreements affecting competition in the construction industry in Engadin, a mountainous region in South East Switzerland. Besides common geographic roots, the cases share another feature: they all concern appellants opposing the Competition Commission's ("COMCO") conception of the leniency regime – however, as will be discussed below, with little success before the Appeals Court. Nonetheless, one has to bear in mind that all of the judgments of the Appeals Court discussed hereafter are now before the Swiss Federal Supreme Court.

This contribution outlines the latest developments regarding leniency through recent case law of the Appeals Court and presents three key take-aways.[1]

Recent Case Law of the Federal Administrative Court: Key Take-Aways

Scope of a leniency application: Undertakings shall disclose as much as possible

On October 30, 2012, the Competition Authorities opened an investigation targeting 19 construction companies for suspected collusion in the construction industry in the Engadin region (the "initial investigation"). The scope of the initial investigation involved coordinating bids for tenders and potentially dividing construction projects and clients among themselves. Dawn raids took place in parallel at 13 locations from October 30 to November 1, 2012. On November 23, 2015, COMCO split the initial investigation into ten separate sub-proceedings, including among others the investigations Engadin IV, Engadin VI, and Engadin VIII.

During the dawn raids conducted by the Competition Authorities on November 1, 2012, the appellant was the first company to submit a leniency application. Following its first submission, the appellant submitted several supplements to the leniency application in order to provide further evidence. Other companies followed and also applied for leniency.

On October 23, 2015, the Competition Authorities requested the appellant to supplement its leniency application with regard to alleged competition agreements in connection with the tenders for two specific construction projects ("project A" and "project B"). The appellant supplemented

its leniency application accordingly, stating that there were irregularities in the tendering process for both projects A and B.

In its sanction decision, COMCO stated that the appellant was not the first undertaking to submit a leniency application in the proceedings regarding project A and project B. Consequently, COMCO did grant the appellant only partial immunity. The appellant appealed against COMCO's decision to the Appeals Court.

In both judgements Engadin VI[2] and Engadin VIII[3], the Appeals Court conducted a two-step examination regarding the appellant's eligibility for full immunity. Firstly, the Appeals Court assessed the split of the initial investigation into ten separate sub-proceedings, finding that the relevant infringements in the Engadin VI and Engadin VIII sub-proceedings were specific to calls for tenders for projects A and B. The Appeals Court thus approved the split for reasons of procedural efficiency.

Secondly, the Appeals Court evaluated whether the appellant was the first to provide evidence regarding project A and project B. The Appeals Court determined that another party to the proceedings was the first to mention these projects explicitly in its leniency application. Additionally, in the Appeals Court's opinion, the appellant's leniency application explicitly excluded building construction activities in the Engadin region, further diminishing its eligibility. Consequently, the Appeals Court ruled that the appellant did not meet the criteria for full immunity, but only received partial immunity.

In summary, the Appeals Court's findings make it rather difficult for immunity applicants to keep their status, especially in proceedings with many potential infringements and various relevant markets. Certainly, it is advisable to stay broad in such immunity applications. However, the Appeals Court's judgments will risk to chill undertakings to step forward and disclose their involvement in unlawful agreements affecting competition remains questionable at this point.

Amnesty Plus: No connection between reported infringements

In both judgements Engadin VI and Engadin VIII, the Appeals Court additionally proceeds to evaluate the possibility of granting the appellant partial immunity under the Amnesty Plus regime. This provision, which is specific to Swiss competition law, allows for a sanction reduction of up to 80% if an undertaking provides information or evidence on *further* competition infringements.[4]

The Appeals Court emphasizes that for partial immunity under Amnesty Plus, the secondary agreement must be entirely independent of the primary agreement in the main proceedings, with no connection between them. Additionally, the Competition Authorities must not have prior knowledge of the further infringement. Although the appellant did provide evidence on alleged bid-rigging, the Appeals Court determines that the prerequisites for partial immunity under Amnesty Plus are not met. The reported infringements outside the subject matter of the proceedings still related to construction projects in the Canton of Graubünden, creating a connection with the main proceedings. Therefore, the Appeals Court concludes that the appellant cannot be granted partial immunity under the Amnesty Plus regime due to the connection between the subject matter of the main proceedings and the reported infringements.

In summary, the Appeals Court finds that under the Amnesty Plus regime, the secondary

agreement must be independent of the primary agreement in the main proceedings, i.e. it must have independent content. In addition, the *further* infringements of competition an undertaking has to submit in order to be granted partial immunity under the Amnesty Plus regime may not have any connection whatsoever to the conduct examined in the original proceedings.

While it is true that Amnesty Plus requires that *new* infringements of competition law be reported – in other words, the submission under Amnesty Plus must relate to a matter not already covered by the agreement under investigation – the absence of any connection between the infringements is not a prerequisite for granting a sanction reduction under Amnesty Plus, even according to Swiss literature.[5] The Appeals Court's understanding also contradicts simple procedural logic: after all, facts relevant to the Amnesty Plus regime are usually uncovered precisely because an undertaking initiates an internal investigation in connection with the main proceedings.

Furthermore, the alleged requirement of the lack of connection is not in line with COMCO's previous practice. In its decision *Flügel und Klaviere* dated December 14, 2015, COMCO stated that a second infringement, even in the same markets and with practically identical course of events as the primary infringement, is considered a *further* infringement under the Amnesty Plus regime, as long as it is based on different agreements between the undertakings involved.[6]

Finally, the requirement that information on further infringements submitted under the Amnesty Plus regime must have no connection with the primary agreement is extremely difficult to implement in practice. Especially in the case of Amnesty Plus, undertakings most often report further infringements that have a certain connection to the infringement already being investigated. Once again, the findings of the Appeals Court may have a potential chilling effect on undertakings willing to submit a leniency application.

Full cooperation: Subsequent factual and legal objections prove to be risky in light of leniency applications

During the investigation in another sub-proceeding stemming from the initial investigation, the appellant submitted a leniency application. However, in a further statement submitted to COMCO, the appellant then questioned the existence of an agreement affecting competition, citing a lack of interest in winning the contract regarding the relevant construction project. Nevertheless, upon further inquiry by the Competition Authorities, the appellant once again acknowledged the potential anti-competitive effects of her actions.

According to COMCO, despite being the first to apply for leniency and provide crucial evidence, the appellant's stance on certain facts led to a reduction in immunity. Therefore, COMCO did not grant the appellant full immunity. Consequently, the appellant appealed COMCO's decision to the Appeals Court. In its judgement Engadin IV discussed hereinafter, the Appeals Court examines the impact of legal and factual objections from leniency applicants and the relationship between leniency and the right against self-incrimination.[7]

The Appeals Court states that full immunity under the leniency regime requires *full cooperation* of the undertaking in question – the exercise of elementary rights of defence remains reserved. On these grounds, the Appeals Court further argues that full immunity is generally out of question if an undertaking raises either legal or factual objections against an unlawful agreement affecting competition after having submitted a leniency application.

However, according to the Appeals Court, objections by an undertaking do not exclude a reduction of the sanction per se. Rather, like in the appellant's case, a partial reduction of the sanction may be appropriate if the undertaking has made a significant contribution to uncovering the unlawful agreement affecting competition despite any objections. Nevertheless, especially when it comes to legal objections, undertakings that have submitted a leniency application need to proceed cautiously when addressing the legal assessment of the facts of the case in their statement to the Competition Authorities as well as in potential appeals.

This judgment contradicts earlier precedents of the Appeals Court. Up until recently, legal objections – i.e. as part of an appeal to the Appeals Court – did not influence the assessment of the undertaking's cooperation under the leniency regime. In its judgment *SFS unimarket[8]* dated September 23, 2014, the Appeals Court even stated that it was admissible for an undertaking to fully cooperate with the Competition Authorities *and* subsequently dispute the legal assessment of the facts of the case in the context of an appeal – and still be granted full immunity. In its *SFS unimarket* judgement, the Appeals Court found that

> "*the willingness of a party to cooperate must not per se be considered as an admission of guilt, and the* ***submission of a leniency application has no influence on the party's rights of defence****. Rather, the information and evidence provided to the Competition Authority as part of the leniency application* ***merely relates to the facts of the case****. The* ***legal assessment*** *of a reported offence is therefore not the subject of the statement of facts made on the occasion of the leniency application. (…) "Cooperation" (…) must therefore* ***not exclude the possibility of a divergent legal opinion*** *being expressed at a later stage of the proceedings. Consequently, the legal assessment can be contested by means of an appeal*." [9]

Circling back to the Appeals Court's recent judgment, the outlook is now quite different for undertakings that submitted a leniency application to the Competition Authorities. Since both legal and factual objections may now jeopardize full immunity, the Appeals Court's newest case law will oblige undertakings to decide early in the process as to whether they will question COMCO's factual and legal assessment. Certainly, it is difficult to reconcile this judgment with the *nemo tenetur* principle.

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[1] The three recent judgments of the Federal Administrative Court to be discussed hereafter are the following: B-716/2018 of November 23, 2023 (Engadin VI), B-697/2018 of November 28, 2023 (Engadin VIII) and B-645/2018 of August 14, 2023 (Engadin IV).

[2] Judgement of the Federal Administrative Court B-716/2018 of November 23, 2023 (Engadin VI).

[3] Judgement of the Federal Administrative Court B-697/2018 of November 28, 2023 (Engadin VIII).

[4] Cf. Article 12(3) of the Cartel Act Sanctions Ordinance ("CASO", SR 251.5): "*The reduction shall amount to up to 80 per cent of the sanction calculated in accordance with Articles 3–7 if an undertaking voluntarily provides information or submits evidence on further infringements of competition in accordance with Article 5 paragraph 3 or 4 Cartel Act.*"

[5] Cf. Tagmann/Zirlick, BSK-KG; Art. 49a N 148 et seq.; Krauskopf, Dike Kommentar KG, Art. 49a Abs. 1-2 N 98; Roth/Bovet, CR LCart, Art. 49a N 74; Babey/Canapa, Die Bonusregelung im Schweizer Kartellrecht, in: SJZ 112/2016, p. 513 et seq., p. 520.

[6] Law and Policy on Competition (LPC/RPW) 2016/3, p. 714 margin nos. 435 et seq. – *Flügel und Klaviere*; German Version available under <https://www.weko.admin.ch/weko/de/home/praxis/recht-und-politik-des-wettbewerbs–rpw-.html>.

[7] Judgement of the Federal Administrative Court B-645/2018 of August 14, 2023 (Engadin IV).

[8] Judgement of the Federal Administrative Court B-8404/2010 of September 23, 2014 (SFS unimarket).

[9] Judgement of the Federal Administrative Court B-8404/2010 of September 23, 2014 (SFS unimarket), C. 4.9 (emphasis added by the author).

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