e-Competitions
National Competition Laws Bulletin

December 2012

The Swiss Competition Commission joins the US DOJ, the EU Commission and other antitrust authorities in imposing fines to domestic and foreign freight forwarders (Kuehne + Nagel International, Panalpina Welttransport, Agility Logistics International, Deutsche Bahn, Deutsche Post, Spedlogswiss)

Switzerland, Anticompetitive practices, Agreement, Price fixing, Leniency, Transports

Swiss Competition Commission, 10 December 2012, Kuehne + Nagel International AG, Panalpina Welttransport AG, Agility Logistics International BV, Deutsche Bahn AG, Deutsche Post AG, Spedlogswiss

Dominique Guex, e-Competitions | N° 52238, www.concurrences.com

Introduction

After a five and a half years long investigation, the Swiss Competition Commission (COMCO) eventually joined US and EU antitrust authorities in sanctioning price fixing agreements related to a variety of fees charged to clients purchasing international freight forwarding services for cargo freight destined for air shipment to various countries [1]. The decision, announced in December 2012, has been recently published. That the Swiss COMCO stepped in is not particularly surprising considering the fact that two Switzerland based companies – *Kuehne + Nagel International AG and Panalpina Welttransport AG* – were already investigated and sanctioned by US and EU enforcers [2]. In addition, three foreign based forwarders, *Agility Logistics International BV* in Amsterdam, *Deutsche Bahn AG* in Berlin and *Deutsche Post AG* in Bonn were also condemned by the COMCO [3]. Altogether, the five companies were hit with a total of about CHF 6 mio in fines. The investigation also involved a sixth party, the trade association *Spedlogswiss*, which proved to be the main national forum used by the cartel members to decide upon the introduction and amount of several surcharge fees. The whole procedure was triggered by a leniency application by *Deutsche Post*, which was granted full immunity. The decision made by the COMCO includes the ratification of amicable settlements entered into by the five concerned forwarders as well as *Spedlogswiss* on one side and the Secretariat of the COMCO (investigative body) on the other side. Beyond the facts of this case,

the investigation led by the Swiss authorities and their final decision raise several interesting points regarding the single and continuous infringement theory, access to leniency materials, and international cooperation.

The decision

The COMCO found that between 2003 and 2007 the concerned freight forwarders (i) discussed together the opportunity to introduce specific surcharge fees to pass on new arising external costs to their clients, and (ii) on several occasions set up the amount of the minimal fee to be collected. Among the fees at stake was the so called "Air Automated Manifest System Fee" (AAMS), that was supposed to cover the extra costs for freight forwarders triggered by the introduction and use of a new compulsory electronic system to register goods going through US customs. Discussions among freight forwarders shipping goods to the US took place at both the international and the national level. The resulting infringement of competition laws was the main subject of investigations in the US and in the EU [4]. Another fee investigated by the COMCO was the "Surcharge Collection Fee" (SCF) that was introduced in Switzerland by Swiss freight forwarders to make up for the extra costs resulting from fuel and security surcharges charged by airlines [5]. Further, the COMCO also investigated the so-called "Security Fee Agent" (SFA) covering costs triggered by new security measures at European airports following the implementation of new EU regulation, the so-called "E-dec" fee covering costs triggered by the introduction of a new electronic platform by the Swiss Customs, as well as a "Tax Introduction Fee" decided already more than fifteen years ago to cover the costs related to the introduction of the VAT in Switzerland [6].

The COMCO considered that there was a clear and global consensus among international freight forwarders to collectively deal with new exogenous costs and cooperate about the way they should be passed on to clients. To reach this conclusion, it could rely on numerous "hot documents" concerning meetings and discussions among freight forwarders regarding the introduction, the passing on to the clients, and sometimes the level of the above mentioned fees. Based on this evidence, the COMCO did not try to prove the existence of an unlawful agreement about each above mentioned fee or surcharge. And it did not establish the various degrees of participation of each defending firm in relation with the different surcharges. Instead, the COMCO relied on the existence of a "single complex and continuous infringement" (SCCI) with a single goal as far as those fees were concerned, namely replacing competition by cooperation [7].

Upon this finding of a global price fixing agreement, the COMCO went on analyzing its effects. It considered that the presumption of suppression of competition set forth in Article 5 Section 3a of the Cartel Act could be rebutted based on the existence of some remaining external and – especially – internal competition (agreements on surcharges but not on the end/total prices, not systematically implemented by all the parties) [8]. It however found that the global agreement significantly impeded effective competition pursuant to Article 5 Section 1 Cartel Act, both in a qualitative (agreement affecting prices) and quantitative way (at least 50% market shares, new entrants tending to join the agreement rather than challenging it). Thus, it was found unlawful.

Three particular issues of interest

First, although the COMCO previously relied on similar constructions to hold a series of concerted

practices unlawful “as a whole” [9], or to consider a bid-rigging scheme that took place over several years as an unlawful “global agreement” [10], it is the first time it clearly embraces the SCCI theory, relying heavily on EU case law [11]. Interestingly, it chose to do so in a case where the European Commission itself did isolate various agreements and calculated the fines with regard to each type of surcharge fee [12]. While the different finding of the COMCO is probably due to the fact that all parties entered into amicable settlements (significantly lowering the burden of proof carried by the authority), it remains to be seen how it will apply the SCCI theory in future cases. Obviously, not determining with precision the degree of actual participation of a firm in an alleged global agreement can raise serious substantial and procedural issues – for example if that firm is held accountable for agreements in which it did not participate or of which it did not even have knowledge – notably in relation with the calculation of fines, potential follow-on civil actions or even the statute of limitation. It is therefore to be hoped that the COMCO will adopt a cautious and restrictive approach to the SCCI theory. In this respect, one may wish the COMCO will not stick to the "intent and awareness" test developed in the EU case law [13] but will adopt a more stringent concept such as the "knowing interdependence" test [14].

Second, the opening of the investigation was triggered by a leniency application by *Deutsche Post*. In the course of the investigation, the Secretariat of the COMCO set forth the conditions of access to leniency material by the other parties. Basically, transcripts of the hearings could not be photocopied or obtained electronically (although notes could be taken or dictated), but the voluminous annexes to these transcripts could be consulted electronically (on a CD handed out to the parties), whereby the parties were informed that these data could only be used to prepare their defense in the Swiss procedure and that they could neither be forwarded to third parties or other authorities, nor be used in other procedures without the authorization of the Secretariat [15]. Such safeguards are probably sufficient as long as the only parties to the proceedings are the cartel members, like in this case. But they would probably not be enough to prevent cartel victims who would also be parties to the proceedings (Article 43 Section 1a Cartel Act) from using them in civil follow-on actions, thus potentially significantly reducing the interest of the leniency program for involved undertakings.

Third but not least, this international cartel involving Swiss firms, and the investigations carried out in parallel in several other jurisdictions, especially in the EU, demonstrated the need for a better cooperation between European and Swiss competition authorities. The lack of legal framework allowing the exchange of information gathered as part of their respective investigation process tends to delay investigations and increase their costs. In cross-border cartel infringements such as those illustrated by this international freight forwarding case, the COMCO has often no other choice but to wait for an EU decision in order to be able to clearly delimit its jurisdiction as well as the relevant facts [16]. From this point of view, the bilateral agreement recently signed by Switzerland and the EU Commission, which sets the framework for the future cooperation between DG COMP and the COMCO (including the exchange of confidential information), will certainly be very useful once entered into force [17].

[1] See Decision of the COMCO from December 10, 2012, available (in German) at http://www.weko.admin.ch/index.html...

[2] In the US, Panalpina agreed to a guilty plea involving a $ 11,947,845 criminal fine, see Plea Agreement filed on November 4, 2011, available at http://www.justice.gov/atr/cases/f2.... Kuehne +

Nagel agreed to a guilty plea involving a $ 9,865,044 fine, see Plea Agreement filed on November 4, 2011, available at http://www.justice.gov/atr/cases/f2.... In the EU, Panalplina was charged with a EUR 46,484,000 fine, while Kuehne + Nagel was hit by a EUR 53,674,000 fine (see Summary of the Commission Decision of March 28, 2012, JOCE 2012/C 375/05, available at http://eur-lex.europa.eu/LexUriServ...).

[3] In the EU, Deutsche Post was also under investigation by DG COMP but was granted full immunity in application of the 2006 Leniency Notice. Deutsche Bahn and Agility Logistics were fined (see Commission Decision of March 28, 2012, available at http://eur-lex.europa.eu/LexUriServ...).

[4] The conspiracy to impose an AAMS fee on international air shipments of cargo to the US, as well as the conspiracy to impose an AAMS fee on shipments from Switzerland to the U.S., were two of the conspiracies charged by the US Department of Justice that led Panalpina, respectively Kuehne + Nagel, to plead guilty in the criminal procedure launched in the US. (see http://www.justice.gov/atr/public/p...). The agreement on the introduction of the AMS surcharge and some exchanges about its intended levels were also sanctioned by the EU DG COMP (see http://eur-lex.europa.eu/LexUriServ...).

[5] This occurred after endeavors to obtain a commission from the airlines directly, which were carried out at the international level, failed. See Decision, at 117-127.

[6] Other international fees investigated and charged by the US and EU authorities, such as the "Peak Season Surcharge Fee" (PSS) or the "Currency Adjustment Factor" (CAF) were merely considered by the COMCO as supplementary evidence of the existence of a global conduct model/scheme among freight forwarders to coordinate the passing on of new arising costs to their customers.

[7] See Decision at 73-75.

[8] See Decision at 236 and 256.

[9] Meetings during trade fairs, regular phone conferences, publication of prices, see RPW 2004/3 739 at n. 41, available at http://www.weko.admin.ch/dokumentat....

[10] Master "rotation" agreement and then series of agreements regarding each public or private tender above a certain amount, see RPW 2008/1 95 at n. 81, available at http://www.weko.admin.ch/dokumentat....

[11] See Decision at 74 as well as footnotes 50 and 52.

[12] See EU decision, available at http://eur-lex.europa.eu/LexUriServ...).

[13] According to the ECJ, "if an undertaking has directly taken part in one or more of the forms of anti-competitive conduct comprising a single and continuous infringement, but it has not been shown that that undertaking intended, through its own conduct, to contribute to all the common objectives pursued by the other participants in the cartel and that it was aware of all the other offending conduct planned or put into effect by those other participants in pursuit of the same objectives, or that it could reasonably have foreseen all that conduct and was prepared to take the

risk, the Commission is entitled to attribute to that undertaking liability only for the conduct in which it had participated directly and for the conduct planned or put into effect by the other participants, in pursuit of the same objectives as those pursued by the undertaking itself, where it has been shown that the undertaking was aware of that conduct or was able reasonably to foresee it and prepared to take the risk." See judgment from December 6, 2012 in the case C-441/11 P ("Coppens"), available at http://curia.europa.eu/juris/docume....

[14] In brief, "sub-arrangements should only be combined into a single infringement where the different components are interdependent. A minor player that takes part in a sub-arrangement of a cartel should not be held liable for the whole violation unless it had a knowing stake in the outcome of the overall venture". See Julian Joshua, Single continuous infringement of article 81 EC : Has the Commission stretched the concept beyond the limit of its logic ?, in : European Competition Journal, Vol. 5, August 2009, pp.451-478.

[15] See Decision at 41.

[16] See Annual Report of the COMCO for the year 2010, pp. 22, available at : http://www.weko.admin.ch/dokumentat....

[17] See http://eur-lex.europa.eu/LexUriServ....

Dominique Guex | dguex76@gmail.com