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Is this the End for Price Fixing in the Swiss Book Trade?

by Nicola Benz and Jörg von Felten

Factual Background

Approximately 90% of all books published in the German language and sold in Switzerland are subject to a price fixing system. Individual book sellers undertake towards individual publishers to sell books at the prices the publishers prescribe, thus giving rise to numerous vertical price fixing agreements. The publishers also undertake towards each other to adhere to these price fixing practices, which gives the system an additional horizontal element. This arrangement has been the subject of a long-running procedure before the Swiss competition authorities. The Competition Commission has recently decided that the system is unlawful. The days of fixed book prices appear to be numbered. However, an appeal against the Competition Commission decision has already been filed.

Legislative Background

According to Article 5 para. 1 of the Swiss Cartel Act, agreements are unlawful if they significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency. Likewise agreements that lead to the suppression of effective competition are unlawful. This second category of unlawful agreements can never be justified by reasons of economic efficiency.

Pursuant to Article 5 para. 2 of the Cartel Act an agreement may be justified on grounds of economic efficiency when *inter alia* it is necessary to improve products or a production process or to reduce production or distribution costs. This is always under the condition that the agreement does not allow the enterprises concerned to eliminate effective competition altogether.

History of the Proceedings

The Competition Commission has found the book price fixing agreement unlawful once before. This was on the basis that the agreement suppressed effective competition (a category two agreement) and so could not be justified. However, this first decision was appealed and ultimately overturned by the Swiss Federal Supreme Court. We reported on the Court's judgement in our IP & Competition Briefing of June 2003. The Court ruled that the price fixing system might be justifiable on grounds of economic efficiency. Therefore,

the matter was referred back to the Competition Commission for an analysis of the possible justifications. The decision on this point was issued on 21 March 2005.

The March 2005 Decision

The Competition Commission's decision contains a detailed consideration of the full range of possible justifications for book price fixing. The main focus is on the argument that price fixing improves the range and number of books for sale. This argument was ultimately rejected *inter alia* for the following reasons:

- Although a fixed price may prevent one dealer profiting from the service and advice offered by another dealer, the risk of such free riding activities with regard to book sales is low. This is because the time needed for the customer to seek out a dealer that sells the requested book at a lower price is disproportional to the saving made.

- The argument was made that buying from a dealer with a good reputation is a guarantee for the customer that the book will also be of good quality. However, the Commission concluded that the customer does not consider the reputation of the dealer to give any indication of the quality of the book.

- Price fixing was claimed to lead to a greater variety and choice of publications. However, the Commission refuted this argument, concluding that there was no direct link between book prices and the range of new publications. This was backed up with comparative evidence from other countries. This showed that around 80,000 new titles are published annually in the UK where the price fixing agreement was formally terminated in 1997, compared to 15,000 new titles in France where price fixing is still in place.

An appeal against the Competition Commission's decision has been lodged with the Appeals Commission.

A Final Remark

In the press release that accompanied the decision, the Competition Commission specifically mentioned the cultural importance of books. In its decision, it acknowledges that it has no competence to take into account public interests other than the interest in a free market economy. Therefore, it is not able to consider whether the book price fixing agreement is of cultural value, for example as a means of protecting the economically inefficient small book shop against larger book dealers and internet sellers. The Commission points out that Article 8 of the Cartel Act gives the Swiss Federal Council the power to authorise an otherwise unlawful agreement where necessary to safeguard compelling public interests. It may well be that the Federal Council is called on to exercise this power at a later stage. So the end of price fixing in the Swiss book trade is not yet here, but the Competition Commission decision may have taken Switzerland a step closer to that end.

Competition Commission Closes Investigations into Prepayable Recycling Fees

by Alexander Krausz

On 21 March 2005, the investigation into the disposal and recycling of electric appliances was closed by the Competition Commission, without any negative consequences for the parties concerned.

The Competition Commission found that the regulations issued by the Swiss Economic Association of Information, Communication and Organisation Technologies (Schweizerischer Wirtschaftsverband der Informations-, Kommunikations- und Organisationstechnik, Swico) and the Swiss Disposal Foundation (Stiftung Entsorgung Schweiz, S.EN.S) on the recycling fees levied at the time of purchase of electric consumer goods were beyond reproach under cartel law. This brought to an end a very thorough investigation which had lasted for several years.

Swico, represented in the proceedings before the Competition Commission by Froriep Renggli, is composed of the major importers and manufacturers of electric and electronic goods in Switzerland such as e.g. Hitachi, Philips, IBM and Hewlett-Packard.

The legal background to the investigation was as follows:

Dealers in and manufacturers and importers of entertainment electronics, of office, information and communication devices as well as of domestic appliances are legally obliged to take back discarded units for free and to dispose of them properly, i.e. to recycle as many components and materials as possible. Many manufacturers, importers and dealers have commissioned Swico and/or S.EN.S to carry out this duty for them. Swico and S.EN.S. organise the collection, transport, sorting and recycling of the discarded units, the costs of which are financed by charging a small recycling fee on new goods sold to consumers, which fee is payable on purchase. Thus, these fees are not used for the recycling of the individual unit sold but for the treatment of goods discarded contemporaneously.

The investigation by the Competition Commission, abandoned on 21 March 2005, has shown that the manufacturers, importers and dealers, after having entered into an agreement with Swico and/or S.EN.S, still remain free to decide whether or not to shift the costs of recycling to the consumer. The agreement on shifting a relatively minor segment of the price does not amount to a price-fixing agreement, as long as this does not cause the harmonisation of end prices in the retail market. No such effect was found in the case at hand. Further, there are no signs that competition is ineffective in the market for new goods. The Competition Commission therefore came to the conclusion that there exists a legally required internalisation of one cost factor but not an agreement on a price element. Therefore, the agreement is not a competition agreement in the sense of the Swiss Cartel Act.

Further, Swico and S.EN.S have agreed that S.EN.S is responsible for the recycling of certain types of devices and Swico for others. This was not considered to be an agreement on the division of the market, but possibly on its organisation. The Competition Commission left open the question of whether this agreement was materially restricting competition, as it was anyway justified by economic efficiency arguments. In particular, the agreement cuts transaction costs and enables the recycling enterprises to take advantage of economies of scale. Because of sufficient potential competition, there is no possibility for them to exclude competition altogether. For this reason, this agreement was found admissible.

At the same time, the Competition Commission has found that Swico and S.EN.S may collectively have a dominant position in the relevant market and that there might thus be a potential for discriminating against other recycling enterprises. The Secretariat of the Competition Commission will therefore continue to monitor this segment of the disposal and recycling market and will report to the Competition Commission on possible further measures.

Also, an appeal against the Competition Commission decision of 21 March 2005 has now been filed with the Appeals Commission. We expect, however, that the well founded decision of the Competition Commission will withstand this test.

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