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First Dawn Raids of Swiss Competition Authority – A Reason to Worry?

by Boris Wenger

Until recently, no dawn raids have ever been conducted by the Swiss competition authority. This was partly because Swiss competition law did not provide for a sufficient legal basis. The 2003 amendment of the Swiss Federal Act on Cartels and Other Restraints of Competition (ACart) filled this gap. Now, for the first time, the Swiss competition authority has made use of the amended dawn raid provisions.

The Dawn Raids

On February 13, 2006, the Secretariat of the Swiss Competition Commission (ComCo) opened a formal investigation against a number of foreign and Swiss airlines. Parallel investigations have been opened by the EU and the US competition authorities. The authorities are investigating whether there has been collusion in the air cargo industry to fix prices on surcharges for fuel, security and insurance.

The Swiss air cargo investigation is somewhat exceptional in that it is not subject to the substantive provisions of the ACart. It is subject to the Agreement on Air Transport (AAT), one of seven bilateral agreements between the EU and Switzerland that entered into force on 1 June 2002. The AAT contains substantive competition law provisions identical to Articles 81 and 82 of the EC Treaty. This means that the ComCo is conducting its air cargo investigation based on substantive EU competition law.

On February 14, 2006, as part of the air cargo investigations, dawn raids were conducted at the offices of several airlines in the EU and the USA. Simultaneously, the Swiss ComCo conducted, for the first time ever, dawn raids in Switzerland. Although the Swiss investigation is based on AAT (i.e. EU) substantive competition law, the dawn raids were based on the amended dawn raid procedure of the ACart. This makes these dawn raids a general precedent for dawn raids in Switzerland.

A Reason to Worry?

The precedent shows that the ComCo is willing and able to conduct dawn raids based on the amended ACart. In other words, the Swiss "white spot" on the map of dawn raids has disappeared. Since inter-

national enterprises are used to the possibility of dawn raids, this in itself is no reason to worry. However, as in other jurisdictions, corporate counsels should ensure that the Swiss offices are compliant with Swiss competition law and sufficiently prepared for possible dawn raids. While doing so, a counsel should keep in mind some Swiss peculiarities. The following provides some guidance:

1. *Establish a document creation/retention policy*. Documents such as memorandums, notes, e-mails and calendars are important, often crucial evidence in cartel investigations. Therefore, each officer and each employee in a potentially sensitive position should know when to create a document, when not to create a document and what wording to avoid. Furthermore, it must be clear how to react if sensitive mail or documents from competitors, associations, contract partners etc. are received. Finally, guidelines should provide clear rules for the retention of documents.

2. *Watch any communication with internal and external counsels*. The ComCo made it clear that it will follow an extremely narrow definition of legal privilege. Documents stored in the office of an external counsel are privileged. For documents stored anywhere else (e.g. in Swiss offices of an enterprise), the following applies: Communications with and work products of in-house counsels are not covered by the legal privilege. Communications with and work products of external counsels are privileged only if they were drafted after the opening of a formal investigation and if they serve the defence in this investigation. Since an investigation is usually opened simultaneously to the dawn raid, as a rule no documents stored outside of the offices of external counsels are protected by the legal privilege. As a result, no sensitive documents such as competition law assessments or compliance reports should be stored – in hard-copy or electronically – in the Swiss offices of an enterprise.

3. *Know your risk.* Since the 2003 amendment of the ACart, Swiss competition law provides for harsh direct sanctions of hard-core cartels and abuses of a dominant position (fines of up to 10 % of the turnover achieved in Switzerland during the last three years). Furthermore, it is conceivable that in a foreign competition law action, the plaintiff would apply for discovery of information the ComCo gathered in the course of a dawn raid. The Board of Directors of a company has a general obligation to assess and minimize this risk, for example through the use of audits, guidelines, staff training or “whistle-blower hot-lines”. Considering the Swiss notion of legal privilege and the complexity of competition law, it is advisable to retain an external competition law specialist.

4. *Know how to react in case of a dawn raid*. Officers and employees of an enterprise should know how to react in case of a dawn raid. Every person potentially involved in a dawn raid must know whom they must inform, how they should behave during the raid and to what extent they need to cooperate with the authority. In particular, officers and employees must know whether they can refuse, if being interrogated during the raid, to give answers

which incriminate the enterprise. In Switzerland, this is relatively important since, unlike the EU, the Swiss competition authority does not wait for the enterprise's external counsel before it starts searching and questioning. Furthermore, the Swiss authority's lack of experience means it is important for the company's representatives to control whether the authority stays within its legal powers when carrying out a raid.

The End of Guarantee Marks in Switzerland?

by Elmar Meyer

The Swiss Federal Supreme Court has recently issued an important decision with regard to guarantee marks. In the decision "Felsenkeller", the court had the opportunity to clarify a basic question of Swiss trademark law: the question whether or not the requirement of distinctiveness must also be applied to guarantee marks.

The Case

On 27 June 2001, the Organisation "Emmentaler Switzerland" filed an application with the Swiss Federal Institute of Intellectual Property for the registration of the word "Felsenkeller" - which is the German word for a cellar in a rock wall - as a guarantee mark for cheese. By decision of 29 September 2003, the application was rejected on the grounds that the mark would be descriptive, non-distinctive and that the word "Felsenkeller" belongs to the public domain. Emmentaler Switzerland appealed against this decision to the Appeal Board of Intellectual Property and won. Finally, the question of registrability of the guarantee mark "Felsenkeller" was brought before the Swiss Federal Supreme Court.

According to Art. 21 Sec. 1 of the Swiss Trademark Act, a guarantee mark is a sign that is used by several enterprises under the control of the owner of the mark and that serves to guarantee the quality, geographical origin, type of manufacture or other characteristics common to goods or services of such enterprises.

The Swiss Federal Supreme Court's decision was in line with the majority of legal commentators, who argue that a guarantee mark – like an individual mark - must be distinctive. However, the court stated that the level of distinctiveness is lower than for individual marks because these two types of marks serve different purposes. Unfortunately, the court did not give any further guidance on evaluating when the lower distinctiveness threshold is met.

Having stated that a guarantee mark must be distinctive in general, the court cited Art. 2 lit. a of the Swiss Trademark Act which deals with the absolute grounds for exclusion of trademark protection. According to this provision, signs that belong to the public domain are excluded from pro-

tection unless they have become accepted as a trademark for the goods or services for which they are claimed. The court restated its practice that signs which only deliver information about the composition of the goods or services in question do not possess the necessary distinctive character for trademark identification of such goods or services and therefore lack distinctiveness.

The word "Felsenkeller" in connection with cheese indicates that such cheese has been stored in a cellar in a rock. Therefore, the court held that "Felsenkeller" is a descriptive sign which is easily understood by the average German speaking customer. The court stated that, in order to be descriptive, it is sufficient that the sign may be interpreted as descriptive in one single language area in Switzerland, which was clearly the case here.

Based on the foregoing, the court ruled that the word "Felsenkeller", being descriptive, lacks the necessary distinctiveness, even though the level of distinctiveness is lower with regard to guarantee marks than for individual marks. Hence, the word "Felsenkeller" was not eligible for trademark protection for cheeses.

This decision of the court, that guarantee marks generally have to be distinctive, may mean the end of the guarantee mark in Switzerland. In order to distinguish the goods of a particular group of enterprises, a guarantee mark will almost always be descriptive at some level. It still remains to be seen whether the lower level of distinctiveness hinted at by the court will be interpreted in such a way as to give guarantee marks a future.

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