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**Global Forum on Competition**

**ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT**

**Contribution from Switzerland**

-- Session II --

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## **PROCEEDINGS AGAINST CARTELS WITHOUT PROOF OF DIRECT AGREEMENTS**

### **1. Introduction**

1. The existing law on cartels and other restraints of competition came into force in 1996. It rests not on the principle of prohibition but on that of abuse, implying that a cartel agreement is not unlawful in itself, but only when the effects it has on competition are taken into account. It follows that, where cartel agreements are concerned, proof has to relate both to the existence of an agreement and to its effect. Originally, the law sanctioned firms not for behaviour that breached it, but only for re-offending.

2. Under an amendment to this law, which came into force on 1 April 2004, it is possible to sanction illegal agreements directly, and this also applies to abusive behaviour. The amendment also contains a leniency mechanism whereby a firm denouncing a cartel to which it belongs can be exempted from any sanction. Lastly, firms have the opportunity to check with the competition authorities whether certain of their projects might not be liable to sanctions.

### **2. Generalities concerning Swiss law**

3. Switzerland is acquainted with the abuse system. It follows from it, in particular, that a cartel agreement is not illegal (or therefore null and void) in itself, but only if it constitutes an abuse by virtue of its object.

4. Swiss law contains standards for countering agreements in the field of competition and abuses of dominant position and for controlling business concentration.

5. Where agreements in the field of competition are concerned, both horizontal and vertical agreements are covered.

6. The rule is that cartel agreements, which in themselves are legal, can become illegal if they significantly restrict competition, are not justified for reasons of economic efficiency or eliminate effective competition.

7. Hard core cartels are assumed to eliminate effective competition on the market. Hard core cartels are either horizontal agreements which directly or indirectly set prices; restrict the quantities of goods and services to be produced, purchased or supplied or which divide markets up geographically, or they are vertical agreements which impose a minimum or fixed sale price, or else they are agreements for allocating customers geographically.

8. The LCart does not therefore really have a “per se rule” – either for horizontal or vertical agreements – but an amended “per se” rule for Arts. 5 §3 and 4, in the sense that there is only a presumption of illegality, which may prove unfounded.

### **3. Proof required for measures to combat cartels**

#### **3.1 *Object of proof***

9. As noted above, an agreement is considered to be illegal only if it eliminates competition or affects it significantly without being warranted for reasons of economic efficiency.

10. The first thing, therefore, is to prove the existence of an agreement and then prove that it has an effect on competition. Presumption of the elimination of competition, as provided for in the case of hard core cartels, does not reverse the burden of proof, it being up to the competition authorities to show that the presumption cannot be reversed. The parties involved are nevertheless required to help in establishing the facts.

11. Prior to the amendment to the law and the introduction of direct sanctions, agreements could be described as naïve in the sense that they were often known to the public so that it was not hard to prove their existence (e.g. Internet publication of price recommendations by trade associations). Even so, the effect of such agreements had still to be proven. Since the amendment to the law came into force, agreements have become less easy to detect, whence the introduction of a leniency programme which encourages exposure.

#### **3.2 *Type of proof***

12. As mentioned above, direct proof of the existence of a cartel is not in itself sufficient to justify sanctions. It still has to be proved that the agreement eliminates effective competition or significantly restricts it, without being warranted on grounds of economic efficiency.

13. Proof that a competition-related agreement has negative effects is usually provided by economic analysis. This involves drawing up statistics on, for example, the prices applied on a market, the frequency with which such prices are applied, the frequency of application by non-cartel firms, etc. The object of the analysis will be to make the existence of an agreement's significant impact on competition highly probable. Such economic analysis is usually carried out on the basis of information obtained by means of a questionnaire sent to firms active in the industry under investigation, or else by means of surveys.

14. Proof can also be furnished by an extremely diverse set of indices, as the following case shows.

#### **3.3 *Case of the National Library bidding cartel***

15. In March 1999, the Federal Construction and Logistics Office called for tenders for work on renovating the façade of the National Library. A selection procedure was put in place and four companies were invited to submit bids. This resulted in the receipt of bids totalling SF 2 222 916.--, SF 2 029 380.--, SF 2 000 040.-- and SF 1 911 472.--. However, an independent expert had put the cost of the work at SF 900 000.--. A new call for tenders sent to another company resulted in a bid worth SF 1 294 039.--, i.e. SF 617 422.-- less than the lowest bid submitted previously. The case was brought to the attention of the competition authorities since there was some doubt as to whether the first four companies might have colluded when drafting their tenders. In the meanwhile, the Federal Office cancelled the selective bidding procedure and awarded the contract by mutual agreement to the last-mentioned company.

16. The first four companies denied during the enquiry that they had colluded on prices. The competition authorities presented them with a draft amicable agreement which stated that a price agreement had been concluded. The representative of one of the companies agreed to sign, but the other three companies proposed a counter amicable agreement in which the existence of a price agreement was

denied. In the end, the fourth company rejected the competition authorities' draft and rallied behind that of the other companies.

17. In the end, the Competition Commission handed down a decision in which it concluded that the four companies had set up a bidding cartel. Its conclusion rested on the following pieces of evidence:

- There was a big difference in price between the expert's estimate, the bid put in by the company selected and those submitted by the first four companies.
- Notwithstanding the above point, the difference between the highest and lowest bids tendered by the four companies was small.
- None of the four companies attacked the decision to cancel the selective bidding procedure.
- One of the four companies had previously agreed to the amicable agreement, whereas it was expressly stated that an illegal agreement had been concluded.
- The four companies had learnt of each other's existence when reconnoitring the site.

18. The decision was initially rescinded by the Appeals Board for reasons of form. In addition, the decision of the Appeals Board mentioned that the evidence was sufficient to prove indirectly that there had been an agreement, but it had not in this case been sufficiently well established. The Federal Tribunal, for its part, sided with the Competition Commission where the formal aspect was concerned, but did not comment on the Appeals Board's observations. The judgement was referred back to the Appeals Board for a fresh decision.

#### **4. Conclusion**

19. Where cartels are concerned, the competition authorities have first of all to prove the existence of an agreement between companies. Proof of the existence of a cartel agreement can derive from a series of pieces of evidence that make it likely. This can, however, be difficult to establish.

20. Secondly, proof has still to be provided as to the effect of the agreement. This usually stems from economic analysis of the case in question, which is carried out by means of questionnaires or surveys.