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Access to information from antitrust proceedings

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Introduction

The Swiss courts have recently issued several decisions regarding access to information from antitrust proceedings. On the one hand, these decisions clarify the criteria for the publication of potentially confidential information in decisions. On the other hand, the courts decided for the first time on access to the files of an antitrust proceeding by other government authorities. These decisions are particularly relevant for potential civil damages claims, where access to information is often crucial for the success of the claim.

Publication of emails

In a May 26 2016 judgment regarding a procedure against camera manufacturer Nikon, the Federal Supreme Court dealt with whether original excerpts from emails used as evidence could be published (for further details please see "International distribution systems under fire").

In 2011 the Competition Commission (ComCo) fined Nikon for restricting parallel imports of products into Switzerland by a combination of export restrictions for dealers abroad and import restrictions for dealers in Switzerland. Nikon appealed to the Federal Administrative Court. Besides challenging the substantive aspects of

the decision, in a separate procedure Nikon also challenged the publication of certain facts and email communications in the non-confidential version of the decision. The Federal Administrative Court subsequently redacted several facts in the decision that were irrelevant to the penalty. However, it approved the publication of various emails that supposedly reflected Nikon's unlawful behaviour. These emails contained statements regarding the protection of the Swiss market, attempts to reduce exports into Switzerland and degrading comments regarding parallel importers. Nikon appealed to the Supreme Court and claimed the redaction of all these emails.

The Supreme Court confirmed the Federal Administrative Court decision and held that the publication of the ComCo decision, including quotes from the emails, was lawful. The court recognised that there was public interest in disseminating the competition authority's decision practice. According to the court, the authorities enjoy some discretion as to whether they publish their decisions and ComCo had not violated its discretion in this case.

The Supreme Court confirmed that the parties' business secrets were protected under the Cartel Act. However, no legitimate interest existed to keep unlawful anti-competitive acts confidential. In the court's view, the Cartel Act aims at protecting competition and therefore information on anti-competitive behaviour does not enjoy the act's protection. To the extent that information is required to evidence anti-competitive behaviour and explain and justify a decision by the competition authorities, it may therefore be published. The court held that a case-by-case assessment is necessary to determine what information is relevant for the public to understand competition authority decisions.

However, even if information does not qualify as a business secret, its disclosure may still be prohibited by data protection law. Data protection law provides for an additional layer of protection for information, as it requires that each step of data processing (and particularly its publication) be proportionate. It is therefore necessary to assess whether the data is narrowly linked to the unlawful behaviour and must be published so that the authority's decision can be understood. Swiss data protection law also protects data of legal entities.⁽¹⁾

Access to investigation files by public authorities

In three related judgments from August 23 2016, the Federal Administrative Court decided for the first time about access of government authorities to the files of a competition law procedure. The background of these three judgments was a bid-rigging cartel by several road construction and civil engineering companies in public and private tenders. The companies were penalised by ComCo for price agreements and project allocation among each other. In the published version of the decision, information regarding the individual affected projects was redacted.

The canton of Zurich and a municipality, which had both purchased from the companies, claimed disclosure of the information regarding the specific projects affected by the unlawful behaviour. They requested this information in order to issue penalties under public procurement laws and to claim damages under civil law for the (potentially) artificially inflated prices that they had paid for some projects.

The Federal Administrative Court held that the Federal Data Protection Act provided sufficient grounds for the disclosure of information to public authorities. Based on the act, disclosure is lawful if:

- it is made for an individual case (ie, not routinely), unless granted by a specific legal provision;
- it is indispensable for the recipient of the information; and
- it serves the authority to perform a statutory task.

In the present case, the Federal Administrative Court considered disclosure of the information to be necessary for the authority to issue penalties under procurement law and to assess and potentially claim damages against the companies. However, the court limited the disclosure to projects in which the individual claimants were actually involved. In addition, the court mentioned that no access to information provided by or relating to the leniency applicant must be included. However, given that the original decision by the authority already excluded such information, there was no further discussion of this aspect.

The court also examined whether the complainants had alternative options to obtain the information needed. In the court's opinion, they were acting as consumers, who are typically not allowed to participate during an investigation (Article 43 of the Cartel Act). A criminal procedure for bid-rigging fraud would have been possible, although

unlikely to succeed due to inherent difficulties in determining the damage in bid-rigging fraud cases. It would therefore be disproportionate to require potential claimants to initiate a criminal procedure only in order to obtain information for a potential civil claim. However, according to the court, the fact that the relevant information would have been available in a criminal procedure indicated that access to the files would be granted.

The Cartel Act allows ComCo to grant cartel victims access to files, as long as such data is exclusively disclosed and used for antitrust purposes and if no substantial private interests (eg, business secrets) prevent the disclosure. In the present case, the court therefore granted access to the file only with regard to the specific relevant projects and for use only according to the purposes of the Cartel Act. The complainants were, as a result, not allowed to disclose the information to other authorities.

The subject of this case was the disclosure of one authority to another, which is a form of administrative assistance. While the Federal Data Protection Act does not in general distinguish whether the recipient of the information is an individual, a company or a government authority, in the present case the canton as well as the municipality had to show that the information was required for the fulfillment of their respective statutory task. If information is to be disclosed to a person governed by private law, who does not need the information for the fulfilment of a statutory task, the applicable legal framework may vary.

The judgments may be appealed to the Federal Supreme Court.

Comment

Access to relevant information from antitrust proceedings is often crucial for the success of civil claims. However, competition authorities must be careful not to harm competition or future procedures by disclosing sensitive business secrets of entities involved in antitrust proceedings, particularly leniency applicants.

While these decisions must be interpreted in their individual context, they still offer some general guidance with regard to the disclosure of business secrets and access to files:

- First, both decisions point out that the protection of business secrets under the Cartel Act is strong, as business secrets are a crucial element of competition.

- Second, facts (even if considered business secrets) relating to or evidencing unlawful antitrust behaviour are generally not protected. However, the authority must show that the information to be published is essential to explain and justify its decision. Therefore, the information to be published must be relevant for and closely related to the unlawful behaviour.
- Third, data protection law plays an important role in the disclosure of data and may offer a layer of additional protection for the confidentiality of data.

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Endnotes

(1) However, an ongoing revision of data protection law aims to remove protection for the data of legal entities. It remains to be seen where this revision is going and what effects the changes will have on the protection of data in antitrust proceedings. The revision is not expected to enter into force before the next two years.