ATTORNEYS AT LAW

SCHELLENBERG WITTMER

JUNE 2018

Newsletter

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COMPETITION LAW

Business Associations and Competition Law

The primary addressees of competition law are companies. However, the recent ComCo decision concerning agreements in the Grisons construction industry shows that associations may also fall within the scope of competition law. This newsletter examines the competition law risks of two typical association activities and provides information on competition law compliance for associations and companies.

1 BUSINESS ASSOCIATIONS ON THE RADAR OF THE COMPETITION AUTHORITIES

Business associations regularly play a role in investigations of the Swiss Competition Commission (**ComCo**). At the end of April 2018, the **ComCo** issued its **decision "Engadin I"** concerning alleged anti-competitive agreements in the construction industry in the Grisons, which was broadly covered in the media. The investigation was directed both against construction companies and against the construction industry association of the canton of Grison (Graubündnerischer Baumeisterverband, "GBV"). In the view of the authority, the **association** had organized and chaired meetings from 1997 to 2008, during which the allocation of individual construction projects and bid amounts had allegedly been discussed. Although the GBV was not sanctioned for this, it has been obliged to bear costs of the proceedings in the amount of approximately CHF 35'000 to 40'000 due to being a **co-originator** of the proceedings.

The Secretariat of the ComCo had already pointed out in earlier statements that "a cooperation within associations carries the risk that the companies involved will commit unlawful restrictions of competition. After all, associations may bring together all the major competitors in an economic sector, which can facilitate the formation of cartels" (RPW 2017/2, p. 272, para 8). Even if a general suspicion of a cartel agreement with regard to business associations is clearly not justified, the statement shows that the competition authorities are aware of the activities of and within associations.

2 COMPETITION LAW ASSESSMENT OF ASSOCIATION ACTIVITIES

2.1 GENERAL REMARKS

Competition law is aimed at companies. This results directly from Art. 2 Cartel Act (**CartA**). Potential unlawful agreements affecting competition are defined as **agreements** and **concerted practices** between undertakings operating at the same or at different market levels which have as their object or effect a restraint of competition (Art. 4 CartA). Unlike in some foreign competition law systems, decisions of business associations are, therefore, not expressly covered by the CartA. However, if the members of the association are companies, the **activities of the association** may nevertheless **come under investigation**. Under certain circumstances, the affected association may indirectly come into the focus of the competition authorities as a "**platform**" for possible competition law violations by member companies or because of **supporting activities** (e.g. in the "Engadin I" case in the form of organizing and chairing meetings), which could be qualified as an anticompetitive agreement. If the association itself acts as a company, i.e. it acts on the market as a buyer or supplier of goods or services, it cannot be excluded that it may be considered as a company itself. The CartA applies directly in such cases and the association can become the subject of an investigation.

"Associations may bring together all the major competitors in an economic sector, which can facilitate the formation of cartels."

Regardless of whether an association is directly or indirectly affected by an investigation, it is evident that association activities cannot escape falling under competition law. Even if the association itself does not necessarily face a sanction, e.g. in the case of a competition law violation committed by its members, the mere fact that the association is involved in an investigation procedure carries the risk of **reputational damage**. And beyond that, as the "Engadin I" case shows, there is the risk that the competition authority will try to partially impose the costs of the proceedings on the association due to supporting activities.

In the following, the competition law relevance of certain activities of associations will be illustrated with **two typical examples**.

2.2 ASSOCIATION MEETINGS

One of the most important fields of activity of a business association is the organisation of association meetings, e.g. annual meetings, board meetings, committee meetings etc. A characteristic feature of association meetings of any kind is that **competitors meet each other** during such meetings. Even if the actual motive for attending such meetings is generally not the participation in anti-competitive behavior, there is always a risk of anti-competitive conduct in such situations. As Adam Smith wrote in The Wealth of Nations (1776): "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Company representatives from the same industry meeting each other may carry the risk that the lawful discussion of publicly accessible market data turns into a **potentially problematic exchange of information** or agreements on competition-relevant aspects. This applies, in particular, to discussions during the coffee break or in a "relaxed atmosphere" **before and after the official part** of the association meeting. In principle, all information that is suitable for reducing uncertainty about the market behaviour of competitors can be regarded as competition-relevant aspects. This could include, in particular, information regarding prices, price increases, price components, delivery areas, customers and quantities.

Practical experience shows that the competition law risks during association meetings are not limited to the possibility that potentially problematic discussions could take place outside of the meeting. It is also possible that committees, working groups and comparable **association bodies are used** by the company representatives **to reach agreements that violate competition law**, in some cases without even being aware that this could be unlawful conduct.

As cases in practice have shown, competition law relevant aspects have - knowingly or unknowingly – been made **an item of the agenda** of an association meeting. A typical example of this is the question of how to deal with an increase in commodity prices that affects the entire industry. Here it must be avoided that the date and amount of the price increase are openly discussed or even subject to a decision at the association meeting. Depending on the constellation, even the mere exchange of information on or the unilateral disclosure of corresponding **future behaviour** can be considered as problematic by the competition authority, depending on the constellation.

A frequently found phenomenon is that invitations or agendas to association meetings and minutes of meetings prepared by the association contain **misleading wording** (e.g. "*reaction to the euro shock*" or "*prevention of the price war through parallel imports*"). Even if the discussion was in fact allowed from a competition law point of view, such wording can attract the attention of the competition authorities and in the case of an investigation lead to additional **clarification efforts**.

2.3 PRESS RELEASES, MEMBER NEWSLETTERS AND RECOMMENDATIONS

Another typical activity of business associations is sending newsletters to members and the publication of recommendations or press releases. These could be problematic under competition law if they entail or bring about a **horizontal coordination** of the market behaviour of the member companies. Whether such a background exists depends on the **individual case** and requires critical scrutiny.

Recommendations by associations, particularly in the form of price recommendations or calculation aids, were in the past subject to investigations by the Swiss competition authority. While price recommendations of a vertical nature (e.g. from the manufacturer to the dealer) are generally admissible within the framework of the Verticals Notice and when their non-binding nature is apparent, the competition authority tends to consider **price recommendations by an association** not as a

recommendation of a vertical nature (association to members), but as a **horizontal issue**. From the perspective of the competition authority, an association is, therefore, nothing else than the sum of its members. Therefore, recommendations by associations regarding prices, price components and calculations, etc. carry an increased competition law risk.

An **example** for a press release that was problematic under competition law is the case of the so-called coffee roaster cartel in Germany. At the request of some members of a working group, the board of an association issued a press release, in which a shortly expected price increase due to increased commodity prices was communicated. It turned out that various members had agreed inter alia on price increases and used the association to communicate a price agreement to the market. The example shows that a behaviour which is critical under competition law may hide behind a press release.

3 BEST PRACTICE: COMPETITION LAW RELEVANT BEHAVIOUR

3.1 COMPETITION LAW APPLIES TO ASSOCIATIONS

The involvement in an association and the activities of the association are not protected from competition law. The **competition authorities** are **interested** in the activities of business associations and will, where there is suspicion of unlawful behaviour, not spare any effort in clarifying to what extent the activities of the association and its member companies comply with the legal requirements. The ComCo has, for example, in the past even raided the premises of associations and, following the current ComCo decision "Engadin I", the question will increasingly arise as to whether associations have participated in the unlawful coordination of its members with regard to competition law.

Basic principle: The behaviour within an association is not treated milder or stricter than the behaviour outside of an association. Whatever is a violation of competition law outside of the scope of association activities generally does not comply with competition law within association activities either. The following compilation of **Dos & Don'ts** for companies and associations contains initial practical tips for improving competition law compliance of association activities.

3.2 DOS AND DON'TS FOR ASSOCIATION ACTIVITIES

> When preparing and holding meetings, the limits of competition law must be observed. In case of doubt, the planned **agenda items** and topics of discussions must be checked in advance for their lawfulness under competition law.

> The possible competition law relevance of all oral and written statements made by the association must be examined in advance. **Misleading wording** in written statements such as press releases, member newsletters, invitations to association meetings, e-mails, etc. must be avoided.

> The topics of discussions in **association committees** are to be reviewed regularly. Discussing market topics relevant to competition law, such as prices, price increases, passing on of increased commodity prices, details of negotiations with customers or suppliers, delivery areas, delivery quantities, etc. can be unlawful.

> The members must be informed that the requirements of competition law must be observed in all activities of the association. This can be achieved, for example, by means of a **code of conduct** that is provided and accepted before each meeting.

"Association activities are not protected from competition law."

3.3 DOS AND DON'TS FOR COMPANY REPRESENTATIVES

> The items on the agenda of an association meeting must be **checked** in advance and must be observed.

> In case of concerns it must be ensured that an item on the agenda is checked beforehand or **postponed** by the association.

> If competition law concerns arise in an ongoing meeting, the discussion must be **suspended**. If the discussion is continued, **representatives must leave the meeting** and ensure that this is recorded in the minutes. A clear distancing is necessary. Passive participation may be interpreted as consent by the competition authority.

> Participation – even as a **mere listener** – in discussions on topics relevant to competition law such as prices, price increases, negotiations with customers or suppliers, etc. must be avoided.

> Participation in **informal discussions** at the occasions of association meetings, e.g. in the evening before at the hotel, during coffee breaks or at a cocktail, on topics relevant to competition law must be avoided.

> In the follow-up to the association meeting, the distributed minutes are to be checked for their competition law relevance. **Misleading wording** must be clarified.

> In all **cases of doubt**, the legal department or a lawyer specialized in competition law must be consulted.

4 OUTLOOK

The ComCo decision "Engadin I" shows that the activities in and by associations remain under scrutiny of the competition authorities. It is, therefore, all the more important for associations and companies to ensure that association activities, which are important for the economy, comply with what is allowed under competition law.

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The content of this Newsletter does not constitute legal or tax advice and may not be relied upon as such. Should you seek advice with regard to your specific circumstances, please contact your Schellenberg Wittmer liaison or any of the following persons:

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