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Telecommunication Newsletter Switzerland

Federal Supreme Court holds that public law entity may compete with the private sector, provided there is no cross subsidization from the monopolist activity

Decision

In a decision rendered on July 3, 2012[1], the Federal Supreme Court had to address the question of competition by a State owned insurance ("GlarnerSach") which according to State law was permitted to provide also insurance for goods and real property beyond the State monopoly. The State monopoly - which was not challenged - reserved insurance for insuring real property against fire and other natural hazards to the State institution.

Several private insurance companies challenged the Cantonal law and petitioned the Federal Supreme Court to annul the sections in the Cantonal law permitting the State insurance company to compete in the private *i.e.* non monopolistic sector.

The Federal Supreme Court rejected plaintiff's motion to have the clauses in the law permitting competition with the private sector annulled. Although the decision rendered by the Federal Supreme Court does not address the telecommunication market directly, the impact of the decision extends to all state activity in the private sector.

Reasoning

In essence, the plaintiffs claimed that the cantonal act which permitted GlarnerSach to compete with private insurance companies outside of the monopolistic area was in violation of the constitutional principle of the protection of freedom of commerce.

After a careful and diligent analysis of the history of the constitutional right of freedom of commerce, the prior cases decided by the Federal Supreme Court and the various legal treatise dealing with the freedom of commerce as well as the current situation existing in Switzerland, namely that a variety of public law entities are also engaged in commercial activity outside the monopolistic area, the Federal Supreme Court held that a commercial activity exercised by a public law entity does not *per se* constitute a violation of the constitutional principle of freedom of commerce. In particular the Federal Supreme Court rejected the argument that a State may only then become active, if and when there is no sufficient private competition in a particular sector ("Subsidiarity of State intervention").

The Federal Supreme Court also reasoned, amongst others, that the Swiss Competition Law explicitly applied to State owned enterprises, which presupposes that such activity is permitted. Several other newly enacted Federal laws also permit a commercial activity in addition to the monopolistic or public service sector.

The Federal Supreme Court also found that in the case at hand, where the activity of the private enterprises is not restricted by the law, they simply face an additional competitor, any public interest would suffice and no prevailing public interest in the activity which outweighs the private interest was required.

Under the concept of competition neutrality, the Federal Supreme Court confirmed the prevailing legal doctrine which demands that a public entity which is active in both the monopolistic area and the free market must have separate accounting for the two areas and may not systematically cross subsidize the free market activity from its monopolistic activity. However, it found the mere theoretical likelihood that a cross subsidization may occur not sufficient to annul the challenged provisions of the Cantonal law by way of an abstract review of these legal provisions. To the

[1] Decision of the Federal Supreme Court *2C_485/2010*

same, the fact that a loss incurred in the free market activity may have to be covered by the profits derived from the monopolistic activity was not found sufficient to conclude that there exists a forbidden systematic cross subsidization.

The Federal Supreme Court however, conceded that the combination of monopolistic and free market commercial activity may provide also non monetary advantages to the State owned enterprise, in particular where it has access to customer information through its monopolistic activity. However, the competition law remains applicable to the extent of the non-monopolistic activity.

Comment

The Federal Supreme Court's ruling makes it clear that a free market commercial activity by a state owned entity outside its monopolistic field is not per se illegal, provided there is a sufficient legal basis (i.e. law enacted by the competent body). It must however be assured that there is no cross subsidization of the free market commercial activity from the monopolistic activity.

With this decision, the Federal Supreme Court gives guidance on how the State law has to be interpreted in order to be compliant to Federal law. The core issue of systematic cross subsidization could not, however be dealt with in the abstract judicial review. It will be examined in detail once a claim will be lodged by a competitor. However, it is often difficult to prove a systematic cross subsidization and it appears that there always remains some doubt in that respect. Severe governance and cost transparency will be one of the consequences for the public utilities competing with the private sector.

Turning to the telecommunication sector, claims for examination of cross subsidization are likely to gain in importance as many public utilities have recently joined the race for fiber to the home by making use of their existing cable ducts, thus competing directly with the telecommunications service providers. Where cable ducts are financed from the monopolistic activity and are being used for the non monopolistic activity, the question of cross subsidization may not be easily over come and should be carefully analyzed.

One focus in cross subsidization that seems often to be left apart is the costs of raising capital. Compared to private enterprises, a State has virtually unlimited funds or access to such funds. This could be viewed as a forbidden systematic cross subsidization.

Thus, the chances for the competitors of public utilities entering into competition should not be overlooked: As public utilities are bound to the principle of non-discrimination, competitors should be entitled to receive the same services at the same conditions and prices as provided by the public utilities to their non monopolistic sector[2]. In that sense, looking at the telecommunication sector again, telecommunications service providers could benefit from the fibers laid by public utilities at attractive conditions.

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[2] See also the decision of the Federal Administrative Court A-3073/2011, where the Federal Administrative Court ruled that SWITCH had to provide its competitors with the same services to the same conditions as it provides its subsidiary with.