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## Federal Administrative Court confirms antitrust fine against SIX-Group - Publication of the reasoned judgment

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**The Federal Administrative Court recently published the reasoning of its decision of December 2018, where it confirmed the antitrust fine imposed on the SIX Group for having abused its dominant position.**

The considerations of the Federal Administrative Court in the more than 500-page judgment concern several controversial legal questions regarding Swiss antitrust law. Among others, the Federal Administrative Court decided (non-exhaustive list):

### 1. Applicability *ratione personae* of the Swiss Cartel Act

The mere possibility that a group parent company can control a group subsidiary is sufficient to assume a group fact and thus to qualify the group parent and subsidiary as a single undertaking in the sense of art. 2 para. 1bis CartA. Actual exercise of that control by the group parent is thus not a necessary requirement.

### 2. Applicability *ratione materiae* of the Swiss Cartel Act

The reservation of intellectual property rights stated in art. 3 para. 2 CartA is not to be understood as a reservation of application of the Swiss Cartel Act. Rather, the purpose of this provision is not to neglect the objectives of intellectual property law in the substantive examination of a violation of the Cartel Act.

### 3. Relevant period for the assessment of a market position

The determination of dominance in antitrust proceedings is purely declaratory and relevant for the period under investigation only. It has, in principle, no binding effect for a later period.

### 4. Intellectual property protection of the interface

The Court denies that the interface at hand of the SIX Group is protected by any intellectual property right. Notwithstanding this, a copyright at the interfaces does not constitute a reservation of application pursuant to art. 3 para. 2 CartA. The refusal to provide interface information could therefore be judged under the Cartel Act despite in case there would be a copyright law.

### 5. Refusal of interoperability as refusal to deal pursuant to art. 7 para. 2 let. a CartA

The Court confirmed the COMCO's decision whereas the SIX Group, as a dominant undertaking, abused its position by refusing to disclose interface information regarding interoperability of technical equipment that is not legally protected. The Court considered that there is no generally recognized examination scheme for all types of refusal to deal. Consequently, there is no conclusive list of elements that have to be fulfilled for an offence. The Court then summarized from the practice a

total of 11 possible elements and then considered the extent to which these apply to a refusal of interoperability and, if they do, whether they were fulfilled in the case at hand.

#### **6. Illegal conclusion of tie-in contracts according to art. 7 para. 2 let. f CartA**

The Court also confirmed the COMCO's statement whereas the SIX Group had excluded the freedom of choice of traders by means of illegal conclusion of tie-in contracts, i.e. a combination of various products without appropriate reason. In this context, the Court also recapitulated a total of 6 features as requirements for an illegal conclusion of tie-in contracts based on antitrust practice and subsequently explained why these were fulfilled in the case at hand.

#### **7. Limited significance of economic concepts**

In its judgment, the Federal Administrative Court pointed out repeatedly that all economic concepts are based on certain specifications and assumptions. Consequently, none of these concepts could claim absolute validity a priori and no concrete individual conclusion could generally be drawn from them.

#### **8. General clause according to art. 7 para. 1 CartA sufficiently determined for a cartel sanction**

The Federal Administrative Court affirmed the so far undecided question that the general clause constitutes a sufficiently determined basis for a cartel sanction. The Court thus confirmed its previous case law, according to which an antitrust regulation may be gradually clarified through interpretation. It remains to examine in each case whether the required degree of determination due to the respective circumstances is exceptionally not fulfilled for the specific economic conduct.

#### **9. Statute of limitations for investigations and enforcement in the case of qualified infringements of antitrust law**

The Court contradicted the COMCO's view that restraints of competition are not time-barred. The Court then examined and rejected the analogous application of several provisions of antitrust, administrative criminal, criminal and administrative law. It based the statute of limitations on the provisions of the Swiss Code of Obligations and considered that a statute of limitations of 10 years should apply as a general statute of limitations under antitrust law. The statute of limitations for investigations begins with the termination of the antitrust conduct and is interrupted by the opening of an investigation by the antitrust authorities. The limitation period for enforcement begins to run with the legally binding decision of the COMCO or of the appeal courts, respectively.

The Federal Administrative Court ruled on a total of about 60 legal issues, 20 of which were of a prejudicial nature.

The SIX Group has appealed against the decision of the Swiss Federal Administrative Court at the Swiss Federal Supreme Court.

The media release of the Federal Administrative Court can be found [here](#).

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