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SHARING OF INFORMATION ON SALARIES AND FRINGE BENEFITS AMONG EMPLOYERS VIOLATES SWISS COMPETITION LAW

The Secretariat (Secretariat) of the Swiss Competition Commission (COMCO) has published its closing report on its extensive preliminary investigation analyzing the conduct of more than 200 companies in relation to the exchange of information on salaries and fringe benefits. The Secretariat held that such an exchange could constitute an unlawful price cartel and be subject to fines. However, rather than opening formal investigations to impose such fines, the Secretariat decided to develop best practices in close cooperation with the relevant stakeholders such as employers, unions and agencies.

Procedural history

The Secretariat had opened a preliminary investigation against 34 banks in December 2022.[1] The preliminary investigation had been triggered by a leniency application disclosing the existence of an information exchange on salaries of trainees, career entrants and interns. The initiation of the preliminary investigation triggered further leniency applications, also of companies active outside the financial sector, uncovering further information exchanges. As a result of these leniency applications, more than 200 companies from various industries ended up being the subject of the preliminary investigation.

Competition law generally applies to labor markets

In its closing report of 27 June 2024,[2] the Secretariat first held that competition law would generally apply to the conduct of employers, with the exception of agreements with employees (such as collective labor agreements). The Secretariat rejected arguments that the competition law would generally not apply to labor markets. According to the Secretariat, the only area where competition law would generally not apply, would be agreements among employees and agreements between employees and employers.

Instances of unlawful information exchange

While reaching no final assessment, the Secretariat concluded that the exchange of, among others, the following information among employers would be likely to constitute an unlawful price fixing:

- Sharing of information on current salaries of individual employers for specific positions.
- Sharing of information on fringe benefits (like monthly meal allowances, discounts on REKA checks, conditions for discounted staff accounts and mortgages, family allowances, coverage of public transport costs, contributions to or offers for childcare, conditions for sabbaticals and compensation for long-service anniversaries) of individual employers.
- Sharing of information on planned general increases of salaries and on planned bonusses of individual employers.

[1] https://www.weko.admin.ch/weko/de/home/medien/medieninformationen/nsb-news.msg-id-92044.html

[2] https://www.weko.admin.ch/dam/weko/de/dokumente/2024/lohnabsprachen_schlussbericht_vom_27_juni_2024.pdf.download.pdf/Lohnabsprachen_Schlussbericht%20vom%2027.%20Juni%202024.pdf

Permitted information exchange

The closing report of the Secretariat, however, is less clear on the conditions under which benchmarking studies on salaries and fringe benefits are lawful. While most of the shared information that was the subject of the preliminary investigation was neither aggregated nor anonymized, the Secretariat also seemed to object to some anonymized exchange of detailed information of fringe benefits and employment conditions where companies were referred to as "client 1 to 14".

The Secretariat did not object to the sharing of information on HR specific topics such as the discussion of HR software, recruitment techniques and tools, pension fund-specific topics, certification of consultants and implementation of regulatory requirements. However, the Secretariat also noted that it was not clear what exactly the parties had discussed in these instances.

Development of best practices

Although the Secretariat found that most of the information exchanges were likely to be unlawful, it decided not to open a formal investigation and not to impose fines, but rather to develop best practices in close cooperation with employers, unions, agencies and other interested parties. This pragmatic approach is to be welcomed, as such guidelines will create legal certainty for the players in the labor markets more quickly and efficiently.

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