Restraints of trade and dominance in Switzerland: overview

Nicolas Birkhäuser
Niederer Kraft & Frey Ltd

global.practicallaw.com/5-558-5249

RESTRAINTS OF TRADE

Scope of rules

1. Are restrictive agreements and practices regulated? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) applies to practices that have an effect on competition in Switzerland, even if they originate in another country. According to the wording of the Cartel Act there are no agreements or practices that can be treated as automatically (per se) illegal (*Article 5, Cartel Act*).

The following agreements are presumed by law to eliminate effective competition (*Article 5(3) and (4), Cartel Act*):

- Horizontal agreements between actual or potential competitors:
  - agreements to directly or indirectly fix prices;
  - agreements to limit the quantities of goods or services to be produced, purchased or supplied;
  - agreements to allocate markets geographically or according to trading partners.
- Vertical agreements between undertakings at different levels of the production and distribution chain:
  - agreements regarding fixed or minimum resale prices; and
  - agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.

This legal presumption under Article 5(3) and (4), Cartel Act can be rebutted by establishing that competition is not eliminated by the agreement or practice in question. If the legal presumption can be rebutted, it must be assessed whether, according to Article 5(1) of the Cartel Act, such agreement or practice significantly restricts competition. Agreements (including hard-core restrictions) that do not significantly affect competition are lawful according to the wording of Article 5(1) of the Cartel Act and not subject to first-time infringement sanctions.

However, the Competition Commission (COMCO) persistently holds that agreements with no or hardly any quantitatively significant effect on competition are unlawful, basically arguing that a mere qualitative significance (assumed in the case of hard-core restrictions) is sufficient to assume a significant effect on competition. In consequence, COMCO aims to introduce a per se prohibition of hard-core restrictions (comparable to restrictions by object). Several decisions of COMCO have been appealed and are pending before the Federal Administrative Court and Federal Supreme Court. The Federal Administrative Court issued contradictory decisions, among others, regarding the requirement of significant effects on competition and the existence of per se prohibitions. The relationship between the earlier decisions and the latter decisions is unclear as the latter decisions do not refer to the previous decisions, and it is also unclear how the Federal Supreme Court will decide. Therefore, at the time of writing, it cannot be foreseen with certainty what the practice of the courts and, as a consequence, of COMCO will be.

Agreements that are found to significantly affect competition can be justified on grounds of economic efficiency if (*Article 5(2), Cartel Act*):

- They are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally.
- They will under no circumstances enable the parties involved to eliminate effective competition.

For the past couple of years, one of the main focuses of COMCO has been to investigate restrictions on parallel imports from the European Economic Area (EEA), or even from places such as the US or Hong Kong into Switzerland. Under Swiss law, the exhaustion of intellectual property (IP) rights is worldwide, except for patents where it is regional and limited to Switzerland and the EEA. However, the principles of competition law may also prevail in cases of the regional exhaustion of patents.

COMCO can issue ordinances or notices setting out the conditions under which agreements affecting competition are, as a general rule, deemed to be justified on grounds of economic efficiency. Guidance that reflects the practice of COMCO can be found in a few notices, such as regarding vertical restraints, agreements of minor importance (de minimis), agreements in the automobile sector, homology and sponsoring of sports goods, schemes for calculating costs (cost-calculation aids) (all available on COMCO's website, see box, *The regulatory authority*). In its Notice Regarding Vertical Restraints COMCO defines types of vertical agreements that are deemed to have a qualitatively significant effect on competition and sets market share thresholds of 15% and 30% (*see Question 3*).

The Cartel Act does not provide for any industry-specific substantive rules. However, the following limitations apply:

- The Cartel Act does, as a rule, not apply to effects on competition that result exclusively from the legislation governing IP. However, import restrictions and certain other restrictions based on IP rights are assessed under the Cartel Act.

- Statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of the Cartel Act. The statutory provisions include, in particular:
  - provisions that establish an official market or price system; and
  - provisions that grant special rights to specific undertakings to enable them to fulfil public duties.

Regulatory authority

The Competition Commission (COMCO) and the Secretariat of the Competition Commission (Secretariat) have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body, while the Secretariat conducts the investigations and prepares the cases.

See box, *The regulatory authority*.

2. Do the regulations only apply to formal agreements or can they apply to informal practices?

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) applies to both formal and informal practice. Agreements affecting competition are binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production that have a restraint of competition as their object or effect.

Exemptions

3. Are there any exemptions? If so, what are the criteria for individual exemption and any applicable block exemptions?

There are no block exemptions in Switzerland. However, there are notices and other publications by the Competition Commission (COMCO) and the Secretariat of the Competition Commission (Secretariat) that set out and explain their practice or views. COMCO issued, in particular, a Notice Regarding Vertical Restraints dated 1 August 2010, a Notice Regarding Vertical Restraints in the Automobile Trade dated 21 October 2002, and a Notice Regarding Agreements of Minor Importance (de minimis) dated 19 December 2005 (these notices and other publications issued by COMCO and the Secretariat are not binding on the courts).

The following agreements are considered to significantly affect competition and are, therefore, as a rule, unlawful (*section 12(2), litera a)-h), Notice Regarding Vertical Restraints*):

- The restriction of the buyer's ability to determine its sale price, without prejudice to the possibility of the supplier to impose a maximum sale price or recommend a sale price, provided that they do not amount to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties.
- The restriction of the territory into which, or of the customers to whom, a buyer party to the agreement, without prejudice to a restriction on its place of establishment, may sell the contract goods or services, except:
  - the restriction of active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, provided that passive sales are permitted without restriction;
  - the restriction of sales to end users by a buyer operating at the wholesale level of trade;
  - the restriction of sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier to operate that system;
  - the restriction of the buyer's ability to sell components, supplied for the purposes of incorporation, to customers who would use them to manufacture the same type of goods as those produced by the supplier.
- The restriction of active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment.
- The restriction of cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade.
- The restriction, agreed between a supplier of components and a buyer who incorporates those components, of the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods.
- Non-compete obligations, the duration of which is indefinite or exceeds five years; the time limitation of five years will not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier.
- Non-compete obligations after termination of the agreement; this does not apply if:
  - the obligation relates to goods or services that compete with the contract goods or services;
  - the obligation is limited to the premises and land from which the buyer has operated during the contract period;
  - the obligation is indispensable to protect know-how transferred by the supplier to the buyer; and
  - the duration of the obligation is limited to a maximum period of one year after termination of the agreement;
- A restriction on the use and disclosure of know-how, which has not entered the public domain, is permitted for an unlimited duration.
- Restrictions on multi-brand distribution in selective distribution systems that specifically relate to trademarks of particular competing suppliers.

The Notice Regarding Vertical Restraints stipulates two different market share thresholds:

- Agreements and practices that do not fall under section 12(2) litera a)-e) are, as a rule, deemed not to have a significant effect on competition (and therefore are lawful), if none of the parties to the agreement has a market share exceeding 15% on any of the relevant markets affected by the agreement and if there are no cumulative effects (*section 13*). This referral to litera a)-e) does not include non-compete obligations under litera f)-h), which is why, in particular, non-compete obligations of more than five years and after the termination of the contract are, as a rule, deemed to be lawful up to a market share of 15%.
- If both the seller and the purchaser have each a market share not exceeding 30% on the relevant market and if there are no cumulative effects, agreements and practices that do not fall under section 12(2) are, as a rule, deemed to be justified for economic reasons without case-by-case investigation and thus lawful. This time, the referral to section 12(2) includes the non-compete obligations, which is why they are not covered by this exemption.

The Notice Regarding Agreements of Minor Importance (de minimis) also stipulates certain market share thresholds that apply in combination with further criteria and, alternatively, certain thresholds concerning the size of the undertakings participating in an agreement or practice (*see Question 4, Exclusions*). If these criteria are met, the agreements are deemed to be lawful under Article 5 of the Cartel Act.

There is no obligation to notify agreements or practices to obtain an individual exemption or other clearance. However, it is possible to notify an agreement or practice. See *Question 5, Notification*.

Exclusions and statutes of limitation

4. Are there any exclusions? Are there statutes of limitation associated with restrictive agreements and practices?

Exclusions

Agreements that do not significantly affect competition are lawful (*see Question 1*). The Competition Commission (COMCO) issued a Notice Regarding Agreements of Minor Importance (de minimis) dated 19 December 2005. Agreements generally fall under the notice and are deemed to be lawful under Article 5 of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act), if the following conditions are met:

- The agreement aims to improve competitiveness by realising economies of scale, contributing to innovation, or creating sales incentives (for example, by agreements on production, financing and administration, research and development, advertisement and marketing, supply and distribution).
- The agreement has a limited effect on the market (which is presumed in case of horizontal agreements if the aggregate market share is below 10% or in case of vertical agreements if the market share of each party is below 15%).
- The agreement does not include any hard-core restrictions according to Article 5(3) and (4) of the Cartel Act (see *Question 1*).

The de minimis notice moreover stipulates specific rules for very small undertakings. Agreements between very small undertakings generally fall under the exception of the de minimis notice, provided that the agreement does not include any hard-core restrictions according to Article 5(3) and (4) of the Cartel Act (*see Question 1*). Very small undertakings are defined as having fewer than ten employees and an annual turnover in Switzerland not exceeding CHF2 million.

Statutes of limitation

Under the Cartel Act no sanctions are imposed if the restraint of competition has not been exercised for more than five years by the time an investigation is opened (*Article 49a(2), litera b, Cartel Act*). It is disputed whether and to what extent the general statutes of limitation rules of criminal law or administrative criminal law apply.

Notification

5. What are the notification requirements for restrictive agreements and practices?

Notification

There is no obligation to notify agreements or practices to obtain an individual exemption or other clearance. However, it is possible to notify an agreement or practice. No fine will be imposed if the undertaking itself formally notifies the agreement or practice before it produces any effects. The Competition Commission (COMCO) has issued a filing form for this purpose. A sanction may nevertheless be imposed if the Secretariat of the Competition Commission (Secretariat) communicates to the notifying undertaking the opening of a preliminary or in-depth investigation within five months from the notification of the agreement or practice if the undertaking does not suspend the implementation of the agreement or practice in question. In practice, the formal notification of agreements or practices does often not lead to the required legal certainty and should therefore be carefully evaluated.

Informal guidance/opinion

Aside the formal notification of agreements or practices, it is possible to request informal advice from the Secretariat on matters relating to the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act). The advice by the Secretariat does not formally bind COMCO. However, it can be expected that COMCO will normally take into consideration advice rendered by the Secretariat.

Responsibility for notification

Any undertaking that is a party to an agreement or practice can file a notification.

Relevant authority

The notification must be submitted to the Secretariat.

Form of notification

COMCO has issued a filing form, which can be downloaded from its website (German: *www.admin.ch/opc/de/federal-gazette/2014/8310.pdf*; French: *www.admin.ch/opc/fr/federal-gazette/2014/8141.pdf*; and Italian: *www.admin.ch/opc/it/federal-gazette/2014/7221.pdf*).

Filing fee

Both the formal notification of an agreement or practice and the informal advice provided by the Secretariat are subject to payment of fees calculated on a time spent basis. The hourly rates range from CHF100 to CHF400.

Investigations

6. Who can start an investigation into a restrictive agreement or practice?

Regulators

The Secretariat of the Competition Commission (Secretariat) can, at its discretion, initiate preliminary investigations based on the following grounds:

- On its initiative, for example, following market monitoring.
- Based on information obtained from third parties.
- At the request of undertakings concerned, for example, competitors.

If there are indications of an unlawful restraint of competition, the Secretariat, with the consent of one member of the Competition Commission's (COMCO's) presiding body, opens an in-depth investigation. Additionally, the Secretariat must open an investigation if it is requested to do so by COMCO or by the Department of Commerce of the Swiss government. The opening of an in-depth investigation must be announced by means of an official publication.

Third parties

Third parties have no right to demand that investigations are opened. However, third parties can provide information to the Secretariat and make informal complaints. The Secretariat has issued a form for the notification of incomplete exchange-rate pass-through, which is available on COMCO's website in German, French and Italian, with which any person can notify the Secretariat of any incomplete pass-through of benefits due to exchange rate

fluctuations (appreciation of the Swiss franc). Additionally, the Secretariat has issued an Explanatory Note and Form of the Secretariat on Leniency Programme. The Secretariat will decide, at its discretion, whether to initiate a preliminary or in-depth investigation.

7. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

Interested parties

In preliminary investigations, the parties concerned as well as third parties have no procedural rights, that is, the parties concerned have no right to consult files or to be heard and third parties have no right to join the preliminary investigation.

In in-depth investigations, the parties concerned, that is, the parties subject to the investigation, have the usual procedural rights. They can consult the files, have a right to be heard, can participate in hearings, can comment on minutes to hearings of other parties, can suggest witness statements. However, access to the file and other procedural rights are often granted at a late stage of investigations.

Affected third parties can join an in-depth investigation by making a request within 30 days of the publication that an in-depth investigation is opened. Third parties in the sense of Article 43(1), litera a)-c), Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) (that is, parties who as a result of a restraint of competition are hindered from starting or continuing to compete, as well as certain professional or trade associations and consumer protection organisations) have limited procedural rights. Third parties that fulfil the stricter conditions of Article 6 of the Administrative Procedure Act in connection with Article 48 (litera b) and c)) of the Administrative Procedure Act, that is, parties that are particularly affected by the order and have a legitimate interest in the cancellation or amendment of the order, have, as a rule, full (unlimited) procedural rights. However, the procedural rights are regularly disputed before the Competition Commission (COMCO) and the courts.

Representations

Depending on how they are affected and on the applicable legal basis, third parties have, as a rule, a limited or an unlimited right to make representations. See above, *Interested parties*.

Document access

Depending on how they are affected and on the applicable legal basis, third parties have, as a rule, a limited or an unlimited right to access to the file. See above, *Interested parties*.

Be heard

Depending on how they are affected and on the applicable legal basis, third parties have, as a rule, a limited or an unlimited right to be heard. See above, *Interested parties*.

8. What are the stages of the investigation and timetable?

The Secretariat of the Competition Commission (Secretariat) can, at its discretion, initiate preliminary investigations. If there are indications of an unlawful restraint of competition, the Secretariat, with the consent of one member of the Competition Commission's (COMCO's) presiding body, opens an in-depth investigation (*see Question 6*).

The Secretariat has wide investigative powers. It can collect information, for example, by conducting searches (dawn raids), ordering the seizure of documents, requesting information, sending questionnaires to the parties concerned as well as to, for example, competitors, asking for statements, holding hearings, and asking for testimony from witnesses (however, parties having allegedly infringed competition law can refuse giving witness testimony).

On the basis of this information, the Secretariat conducts its investigation. If the Secretariat concludes that the agreement or conduct in question constitutes an infringement of competition law, it will, as a rule, draft an order. The order will first be submitted to the parties concerned for their statement. It will then be brought forward to COMCO, together with the statements of the parties concerned, for COMCO to decide. For substantial statements of the parties concerned, the Secretariat may revise its draft order and re-submit it to the parties concerned.

Before drafting an order, which is submitted to the parties, the Secretariat may, on the initiative of the parties concerned or on its own initiative, propose settlement negotiations to the parties concerned with the aim of concluding an amicable settlement. An amicable settlement is directed at future behaviour and does not exclude or limit sanctions for past behaviour, which is the object of the investigation. However, an amicable settlement can be taken into account as a mitigating factor allowing reducing a sanction.

Based on the draft order and the statements by the parties concerned COMCO will review the case and will usually hold hearings. COMCO may intervene and ask for further investigative measures. On this basis COMCO will issue its decision, which may include amendments to the draft order brought forward by the Secretariat. In cases where an amicable settlement has been negotiated between the Secretariat and the parties concerned, COMCO needs to approve the amicable settlement as part of its decision.

As to the timetable, preliminary investigations may take from two to several months and in-depth investigations from roughly one year to two years or even significantly more.

Publicity and confidentiality

9. How much information is made publicly available concerning investigations into potentially restrictive agreements or practices? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The opening of an in-depth investigation must be announced by means of an official publication. The publication states the purpose of the investigation and the identity of the parties concerned. In addition, members of the Secretariat of the Competition Commission (Secretariat) and/or the Competition Commission (COMCO) may make certain statements at press conferences, other conferences or in the media, which are, however, generally limited in scope. Aside these statements, there are normally no further public statements until the end of the investigation and the COMCO decision.

COMCO decisions can be very detailed and, therefore, disclose a lot of information.

In addition, during the investigation proceeding, information of the parties concerned may be disclosed to the other parties concerned due to their right of access to the files, and, after the closure of the investigation proceeding, to third parties claiming access to the files (*see Cartel leniency in Switzerland: overview, Questions 15* and *16*).

Automatic confidentiality

COMCO and the Secretariat are bound by professional secrecy, which is why their publications may not reveal any confidential information, such as business secrets and personal data. The Secretariat published an explanatory note (*Explanatory Note*

"Business Secrets", 30 March 2008), which provides guidance on the handling of business secrets. Before publication, the Secretariat will eliminate confidential information, usually by consulting the parties beforehand.

Confidentiality on request

The parties concerned can ask that the Secretariat submits any draft publication text before publication to allow them to review and mark potential confidential information before publication. If the Secretariat does not agree with the qualification of certain information as confidential information, the parties concerned may ask for a formal order that can be appealed to the Federal Administrative Court. The decision of the Federal Administrative Court can be appealed to the Federal Supreme Court.

10. What are the powers (if any) that the relevant regulator has to investigate potentially restrictive agreements or practices?

The Secretariat of the Competition Commission has wide investigative powers. It can collect information, for example, by conducting searches (dawn raids), ordering the seizure of documents, requesting information, sending questionnaires to the parties concerned as well as to, for example, competitors, asking for statements, holding hearings, and asking for testimony from witnesses (however, parties having allegedly infringed competition law can refuse giving witness testimony).

Settlements

11. Can the parties reach settlements with regulators to bring an early resolution to an investigation? If so, what are the circumstances for doing so and the applicable procedure?

The Secretariat of the Competition Commission may, on the initiative of the parties concerned or on its own initiative, propose settlement negotiations to the parties concerned with the aim of concluding an amicable settlement to bring an early resolution to an investigation. An amicable settlement is directed at future behaviour and does not exclude or limit sanctions for past behaviour, which is the object of the investigation. However, an amicable settlement can be taken into account as a mitigating factor allowing reducing a sanction.

12. Can the regulator accept remedies (commitments) from the parties to address competition concerns without reaching an infringement decision? If so, what are the circumstances for doing so and the applicable procedure?

The parties concerned can propose remedies (commitments) to remove or avoid in the future infringements of competition law. If the Secretariat of the Competition Commission (Secretariat) deems these remedies as appropriate, it can include them in an amicable settlement. An amicable settlement is directed at future behaviour and does not exclude or limit sanctions for past behaviour. However, an amicable settlement can be taken into account as a mitigating factor allowing reducing a sanction.

According to the practice of the Secretariat and the Competition Commission (COMCO), it is possible to conclude an amicable settlement without accepting the statements regarding the facts and the legal assessment by COMCO. However, according to case law of the Federal Administrative Court, a party concluding an amicable settlement may be deemed to have acknowledged an infringement of competition law.

Penalties and enforcement

13. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice?

Orders

The Competition Commission (COMCO) issues its decisions in the form of formal orders. COMCO decisions state the facts of the case, the steps of the investigation proceeding, the arguments brought forward, the legal assessment by COMCO, the measures to remedy the restraints of competition, and fines, as the case may be. If the Secretariat of the Competition Commission (Secretariat) has negotiated and concluded an amicable settlement with the parties concerned, that amicable settlement needs to be approved by COMCO and will, if it is approved, form part of COMCO's decision.

Fines

Any undertaking (not individuals) that participates in an unlawful horizontal or vertical agreement under Article 5(3) and (4) of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) or that abuses a dominant position under Article 7 of the Cartel Act will be sanctioned with a fine of up to 10% of the turnover achieved in Switzerland in the preceding three financial years before the imposition of the fine. This is not limited to the relevant markets (maximum amount). Only these types of restrictions on competition can be sanctioned in the case of first-time infringements (that is, without violation of a prior order by, or settlement with, COMCO).

Depending on the seriousness and nature of the infringement, the basic amount of the sanction (the starting point for calculating the sanction) may amount to a maximum of 10% of the turnover achieved by the undertaking in the relevant markets in Switzerland during the three financial years before the end of the infringement (according to recent practice). In cases of horizontal agreements, the basic amount of the sanction usually amounts to between 7% and 10%, and in cases of vertical agreements, usually to 5%; however, the practice has developed and may yet develop further.

When calculating the amount of a sanction, in a first step, COMCO determines the basic amount. In a second step, it increases the basic amount based on the duration of the infringement: if the infringement has lasted for one to five years, the basic amount is increased by up to 50%, if longer, by up to 10% for each additional year. In a third step, COMCO increases and/or decreases the sanction taking into consideration the mitigating and aggravating circumstances (including co-operation other than in the form of a leniency application). This leads to a subtotal. In a fourth step, COMCO deducts from the subtotal the discount (that is, the percentage as applicable) granted to an undertaking for a leniency application.

Personal liability

There are no criminal sanctions against individuals for first-time infringements against the substantive law provisions of the Cartel Act. However, individuals (acting for an undertaking) who wilfully violate a settlement decision, a final and non-appealable order of COMCO or the Secretariat or a decision of an appellate body (courts) may be fined up to CHF100,000. Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to CHF20,000.

Immunity/leniency

Full immunity from administrative fines is granted, if an undertaking is the first to either:

- Provide information enabling COMCO to open an in-depth investigation under Article 27 of the Cartel Act, provided that COMCO did not have at the time of the notification sufficient information to open a preliminary or an in-depth investigation within the meaning of Articles 26 and 27 of the Cartel Act.
- Provide evidence enabling COMCO to establish a hard-core horizontal or vertical agreement, provided that:
  - no undertaking has already been granted conditional immunity from fines; and
  - that COMCO did not have, at the time of submission, sufficient evidence to establish the infringement of Swiss competition law.

However, immunity will only be granted if the undertaking fulfils a number of conditions (*see Cartel leniency in Switzerland: overview, Question 4*).

Impact on agreements

Agreements that contain provisions infringing competition law may be declared partially or entirely void. Basically an agreement is declared only partially void if it can be assumed that the parties would have concluded the agreement also without the void provision.

Third party damages claims and appeals

14. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

Third party damages

Behaviour infringing competition law may give rise to third party claims for damages and/or for restitution of illicitly earned profits. Claims need not to be based on an infringement decision of the Competition Commission (COMCO). However, it can strengthen the position of a claimant to base a claim on a COMCO decision holding that the defendant has infringed competition law. If the legality of a restraint of competition is questioned in the course of civil proceedings, the case must be referred to COMCO for an expert opinion, which is, however, not binding on the courts. Damage is limited to the damage incurred; no punitive damages are available under Swiss law. The burden of proof in proceedings before civil courts lies on the claimant. It is generally difficult to prove damage and a sufficient causal nexus between the infringing agreement or conduct and the damage.

Moreover, third parties affected by unlawful restraints of competition can claim before the civil courts for removal or cessation of a restraint of competition. Agreements infringing competition law will, as a rule, be partially or entirely void.

Special procedures/rules

Third party damages claims can generally be brought before any civil court, while the forum and the competent court must be determined based on the procedural rules according to the Swiss Code of Civil Procedures.

Claims for damages are subject to a limitation period expiring one year after the claimant became aware of both the damage and the identity of the party that caused the damage. However, in any event, the limitation period expires at the latest ten years after the restraint of competition ended. The same rules apply in relation to claims for restitution of illicitly earned profits. No limitation periods apply in relation to claims for removal or cessation of unlawful restraints of competition; these claims can be brought forward as long as the restraints exist or are threatening.

COMCO's ordinances and notes as well as its decisions are not binding on the civil courts.

Collective/class actions

Collective actions and class actions do not exist in Switzerland. However, simple dispute associations of several claimants, assignments of claims for damages to a third party, who will then bring all claims together as a claimant in its own name, and the right of collective appeal are possible to a certain extent.

15. Is there a right of appeal against any decision of the regulator? If so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

Rights of appeal and procedure

Decisions of the Competition Commission (COMCO) and Secretariat of the Competition Commission (Secretariat) are subject to appeal by the parties. Appeals must be filed with the Federal Administrative Court within 30 days from the notification of the decision of COMCO or Secretariat. The Federal Administrative Court basically applies the same provisions as COMCO. Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court, again within 30 days from the notification of the decision.

There are no time limits for the Federal Administrative Court and the Federal Supreme Court to render a decision on an appeal. The duration of the appeal proceedings can well be more than a year for each court (in certain cases significantly more).

Third party rights of appeal

Only parties that are particularly affected by a decision (that is, by an order) and have a legitimate interest in the cancellation or amendment of the decision, have a right to appeal it. As a rule, a party may be deemed to be affected by a decision if the agreement or conduct in question significantly affects this party. This is different to merger control proceedings where third parties have no procedural rights and no appeal rights.

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

16. Are monopolies and abuses of market power regulated under administrative and/or criminal law? If so, what are the substantive provisions and regulatory authority?

Regulatory framework

The relevant rules regarding monopolies and abuses of market power are stipulated in Article 7 of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act). The Cartel Act provides a definition of dominance (Article 4(2), Cartel Act). Additionally, provisions of the Ordinance on the Control of Concentrations of Undertakings 1996 (Merger Control Ordinance) are relevant, in particular, with regard to the definition of the relevant market. COMCO has not issued any guidelines on the substantive analysis of monopolies and abuses of market power. Case law is relevant for further guidance with regard to the practice of COMCO and the Secretariat.

Regulatory authority

COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body, while the Secretariat conducts the investigation and prepares the cases. The Secretariat is divided into four departments responsible for

proceedings concerning products, services, infrastructure and construction.

17. How is dominance/market power determined?

Under the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act), undertakings are deemed to have a dominant position if "one or more undertakings in a specific market (...) are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market" (*Article 4(2), Cartel Act*).

The remark in brackets "(competitors, suppliers or consumers)" was introduced in a partial revision of the Cartel Act in 2004. It is disputed whether the concept of market dominance was actually made broader with this addition. One part of the doctrine takes the view that the concept of market dominance was thereby supplemented by the categories of paramount market position and relative market power. Another part of the doctrine takes the view that the addition of the remark in brackets has not changed the concept of market dominance. There are good arguments for the latter view that the concept of market dominance has not changed and does, in particular, not include the categories of paramount market position and relative market power.

Relevant criteria for the assessment of market dominance include, among others, the following: market shares, actual competition, position of the opposite market side, barriers to entry and potential competition, characteristics of the undertaking in question, structure of the market and market phase. These criteria should not be applied without considering the specific facts of each case. The conditions on the market and competition between the undertaking in question and its competitors need to be assessed on a case-by-case basis.

Market dominance can be exerted not only by a single undertaking but by a number of undertakings collectively (*Article 4(2), Cartel Act*). Two different scenarios can be distinguished: either the collective market dominance of two or more undertakings is the result of an agreement affecting competition (here Article 5 and Article 7 of the Cartel Act may apply cumulatively) or it is the consequence of the market structure.

18. Are there any broad categories of behaviour that may constitute abusive conduct?

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) stipulates that dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners (*Article 7(1), Cartel Act*). The following practices can in particular be considered to be unlawful (*Article 7(2), Cartel Act*):

- Any refusal to enter into business relationships (for example, refusal to sell or purchase goods).
- The discrimination of trading partners in relation to prices or other commercial terms.
- The imposition of unreasonable prices or other business conditions.
- The undercutting of prices or other business conditions directed against other specific competitors.
- The limitation of production, sales or technical developments.
- Any conclusion of contracts on the condition that the contracting partners accept or provide additional services.

Article 7 of the Cartel Act is consequently split into a general clause (paragraph 1) and a non-exhaustive list of examples of potential abusive practices (paragraph 2). Even where there is a practice referred to as an example in paragraph 2, the three pre-conditions of the general clause must be fulfilled:

- There must be a dominant market position of an undertaking.
- There must be abuse by the undertaking of that dominant market position.
- The abuse of the dominant market position must hinder other undertakings from starting or continuing to compete or disadvantage trading partners.

It is therefore not dominance as such that is sanctioned but the abuse of it. Whether there has to be a causal nexus between the abuse and the dominance is still in dispute. Case law on the matter is divided; doctrine, in contrast, largely says that this nexus is needed.

As far as is evident, collective dominance has so far been affirmed only once in an investigation under Article 7 of the Cartel Act. During that process the Competition Commission gave an opinion, at least indirectly, on the interesting issue of whether all collectively dominant undertakings would have to act jointly or in the same way, or whether it is enough if just a single undertaking acted abusively. The case concerned a contract clause that could be found in the contracts of all dominant undertakings. The analysis revealed a market that was structured as an oligopoly with high market transparency, a constant market phase, a negligible risk of potential competition and strong product homogeneity. The dominant undertakings were as a result able to anticipate their mutual practices, which enabled them to behave in parallel naturally, and none of the dominant undertakings had an incentive to deviate from the parallel behaviour, in particular with regard to the contract clause in question. That it must be the behaviour of all dominant undertakings appears, therefore, appropriate. However, the specific situation must be assessed. For example, rising prices above a certain level may fall under Article 7(2), litera c, Cartel Act. In such a case, all collectively dominant undertakings would normally have to act jointly as otherwise the buyer would shift to another (collectively dominant) undertaking whose price is lower. Consequently, the conclusion must be that the undertaking behaving abusively cannot behave independently as its behaviour may be disciplined by the buyer switching to the competitor. However, in other cases it may be possible that the anti-competitive behaviour of only one of the collectively dominant undertakings could qualify as abuse of the collective dominant position, in particular, if it can be argued that it is done to protect all the collectively dominant undertakings. For example, it may be possible that only one of the collectively dominant undertakings under-cuts prices directed against a specific competitor in the sense of Article 7(2), litera d, Cartel Act, while the others remain passive.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

There are no exceptions specifically in relation to monopolies and abuses of market power. However, the following limitations apply:

- The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act), as a rule, does not apply to effects on competition that result exclusively from the legislation governing intellectual property. However, import restrictions and certain other restrictions based on intellectual property rights are assessed under the Cartel Act.

- Statutory provisions that, as a rule, do not allow for competition in a market for certain goods or services take precedence over the provisions of the Cartel Act. Such statutory provisions include, in particular:
  - provisions that establish an official market or price system; and
  - provisions that grant special rights to specific undertakings to enable them to fulfil public duties.

Notification

20. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, what is the applicable procedure?

There is no obligation to notify any conduct to obtain an individual exemption or other clearance. However, it is possible to notify a certain conduct. No fine will be imposed if the undertaking itself formally notifies the conduct before it produces any effects. The Competition Commission has issued a filing form for this purpose. A sanction may nevertheless be imposed if the Secretariat of the Competition Commission communicates to the notifying undertaking the opening of a preliminary or in-depth investigation within five months from the notification of the conduct if the undertaking does not suspend the implementation of the conduct in question. In practice, the formal notification of agreements or practices does often not lead to the required legal certainty and should therefore be carefully evaluated.

Investigations

21. What (if any) procedural differences are there between investigations into monopolies and abuses of market power and investigations into restrictive agreements and practices?

Investigations into monopolies and abuses of market power are conducted based on the same principles and rules as investigations into restrictive agreements and practices. See *Questions 1 to 15*.

22. What are the regulator's powers of investigation?

The Competition Commission's and the Secretariat of the Competition Commission's powers of investigation are the same as those in relation to restrictive agreements and practices. See *Question 10*.

Penalties and enforcement

23. What are the penalties for abuse of market power and what orders can the regulator make?

The rules applying with regard to penalties for abuse of market power and the respective orders of the Competition Commission are the same as those in relation to restrictive agreements and practices. See *Question 13*.

Third party damages claims

24. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, what special procedures or rules (if any) apply? Are collective/class actions possible?

The rules applying to third party damages claims for losses suffered as a result of abuse of market power are the same as those in relation to third party damages claims for losses suffered as a result of restrictive agreements and practices. See *Question 14*.

EU LAW

25. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?

Not applicable.

JOINT VENTURES

26. How are joint ventures analysed under competition law?

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) and the respective regulations do not provide for any specific substantive rules for joint ventures. The same rules as outlined under *Questions 1 to 25* apply. Joint ventures that are not covered by merger control are still subject to the rules applicable to agreements. For joint ventures covered by merger control, the co-ordinating effects between the parent companies as well as between each parent company and the joint venture are also subject to the rules applicable to agreements. However, with the exception of co-ordinating effects that result from the fact that every parent company has an interest in exercising its control in a way to maximise the profit resulting from its participation in the joint venture as well as the profit resulting from its own activity.

INTER-AGENCY CO-OPERATION

27. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?

A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. The co-operation agreement is a second-generation agreement. Information may be exchanged between the Competition Commission (COMCO) and the European Commission even if there is no consent of the undertaking concerned provided that both competition authorities are investigating the same or related conduct or transaction and that it is also unlawful under Swiss law. However, new provisions in the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) provide, among others, that the exchange of information or documents is not permitted if the information was made available in the context of a leniency or settlement procedure unless the leniency applicant has given its consent and if the data is used or made available by the foreign competition authority in criminal or civil proceedings. COMCO and the Secretariat of the Competition Commission (Secretariat) must notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

Apart from the co-operation agreement between Switzerland and the EU, there are currently no relevant agreements in force on mutual administrative assistance between Switzerland and other countries on competition, with two exceptions:

- Bilateral air services agreement between Switzerland and the EU.
- Bilateral trade agreement between Switzerland and Japan.

In this context, COMCO has successfully based requests on the Convention on the Taking of Evidence Abroad in Civil and Commercial Matters concluded on 18 March 1970 (Hague Evidence Convention) to obtain information from parties domiciled in a foreign jurisdiction (France). The Hague Evidence Convention allows judicial authorities in a contracting state, by means of a letter of request to be addressed to a central authority designated by such other contracting state (letter rogatory), to obtain evidence, or to perform some other judicial act.

COMCO's case-specific co-operation with other competition authorities will currently primarily consist of co-operation with the European Commission.

RECENT CASES

28. What are the recent developments or notable recent cases concerning abuse of market power?

Notable recent cases concerning abuse of market power include:

- The Competition Commission (COMCO) opened an investigation against the Swiss Press Agency (SDA) after its main competitor AP Schweiz had closed down its activities. COMCO's investigation revealed that SDA had concluded subscription contracts with five media undertakings in the German-speaking part of Switzerland. These subscription contracts provided for rebates of up to 20%, which were subject to the condition that the (German-language) basic news services were purchased exclusively from SDA and not, at the same time, from AP Schweiz. COMCO concluded that the exclusivity rebates were specifically directed against SDA's competitor AP Schweiz and that they had actively contributed to weakening the customer basis and the profitability of AP Schweiz. In addition, COMCO held that SDA's exclusivity rebates had also caused an unequal treatment of media undertakings, which had had the effect of a restriction of competition on the downstream media and advertisement markets. COMCO concluded that, by doing so, SDA had abused its dominant position on the relevant product market of German-language basic news services for Swiss media undertakings in the sense of Article 7 of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) and imposed a sanction of CHF1.88 million on SDA. COMCO approved an amicable settlement regarding SDA's future conduct that included the following: SDA commitment not to conclude exclusivity agreements; guidelines for granting volume discounts and overall turnover discounts; guidelines regarding the conditions of access to and use of the basic news services; guidelines regarding the tying of SDA's services with services of one of its subsidiaries in the field of sports information (because of an alleged foreclosure effects).
- COMCO issued an order dated 21 October 2013, which concludes the proceeding in the course of which, among others, an interim injunction was issued. The order approves a second version of an amicable settlement with The Swatch Group SA authorising The Swatch Group SA (including ETA) to reduce its supplies of movements to competitors in the following steps: 2014 to 2015: 75% of the reference quantity; 2016 to 2017: 65% of the reference quantity; 2018 to 2019: 55% of the reference quantity. After 31 December 2019 there will be no supply obligation. As opposed to the interim order and to a first draft of the amicable settlement, the order of COMCO applies to movements manufactured by ETA only, not to components for the escapement-regulator unit of watches (*Assortiments*) manufactured by Nivarox, another subsidiary of The Swatch Group SA. COMCO held that it was too early for any ruling allowing Nivarox to reduce supplies of Assortiments to the manufacturers of movements. However, COMCO left open whether a phasing-out may be possible in the future depending on how the market will develop. If The Swatch Group SA no longer has a dominant position on the market, it may request that the supply obligations be amended.
- Jaguar Land Rover Schweiz AG terminated a service agreement with an authorised automotive service garage. The authorised service garage filed a claim with the Commercial Court of Zürich with the request to order that Jaguar Land Rover Schweiz AG continue the service agreement, which had been terminated. The court rejected the request basically arguing that the sales of motor vehicles as well as the sales of spare parts and the provision of after sales and repair services form part of the same relevant product market. In the so defined relevant product market Jaguar Land Rover Schweiz AG had a market share of less than 5% (premium sport utility vehicle segment). The court explicitly held that a single brand cannot be held to be the relevant product market. As a consequence, Jaguar Land Rover Schweiz AG did not have a dominant position and was under no obligation to conclude a contract with the service garage.

Recent developments included a proposed reform of the Cartel Act, which was, however, rejected in Parliament in September 2014. See *Question 29*.

PROPOSALS FOR REFORM

29. Are there any proposals for reform concerning restrictive agreements and market dominance?

A proposed revision of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) was rejected in Parliament in September 2014. The reform included, among others, the following elements:

- The institutions should have been revised to include an independent competition authority competent for investigating potential infringements and for reviewing proposed concentrations (mergers), and a new chamber of the Swiss Federal Administrative Court competent for deciding on matters brought before it by the (new) competition authority.
- In addition, a motion was debated according to which a new provision would have been introduced into the Cartel Act, a new Article 7a, so that undertakings distributing their products outside Switzerland in an Organisation for Economic Co-operation and Development (OECD) country at lower prices than in Switzerland would have been deemed as infringing the Cartel Act if they refused to supply customers from Switzerland through their foreign distribution entities at the same prices and conditions, or if they took measures to prevent third parties from supplying into Switzerland. The Competition Commission opposed the introduction of this new provision mainly because it anticipated problems with regard to enforcement. However, there was significant political support for the introduction of this provision.

It is yet unclear which elements of the revision that was rejected in Parliament as a package will again be taken up separately in a future revision. A new motion has already been submitted in Parliament, according to which a new concept of relatively market-dominant undertakings would be introduced in the Cartel Act. The aim of the new concept is that suppliers outside Switzerland would be forced to supply customers (undertakings) in Switzerland at fair conditions.

ONLINE RESOURCES

Swiss Competition Commission (COMCO)

W www.weko.admin.ch

Description. This is the official website of COMCO where original language text of the legislation, case law, explanatory notes and forms referred to in this article, press releases, information and contact details of COMCO can be found. The website of COMCO is in the three official languages, that is German, French and Italian. Legislation is available in all three languages; case law is provided only in one of these languages. Unofficial English-language translations can be obtained for part of the legislation and some explanatory notes.

THE REGULATORY AUTHORITY

Swiss Competition Commission (COMCO)

Head. Professor Vincent Martenet (President of COMCO) and Rafael Corazza (Director of the Secretariat)

Contact details. Address until June 2015: Monbijoustrasse 43, 3003 Bern, Switzerland;
address from July 2015 onwards: Hallwylstrasse 4, 3003 Bern, Switzerland
T +41 58 462 20 40
F +41 58 462 20 53
E weko@weko.admin.ch (or for leniency applications: leniency@comco.admin.ch)
W www.weko.admin.ch

Responsibilities. COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body, while the Secretariat conducts the investigations and prepares the cases.

Procedure for obtaining documents. Acts, ordinances, notices, explanatory notes, forms as well as decisions and rulings are available on COMCO's website and published in COMCO's publication organ Law and Policy on Competition (*Recht und Politik des Wettbewerbs*). Additionally, requests for documents can be made to the Secretariat.

Practical Law Contributor profiles

Nicolas Birkhäuser

Niederer Kraft & Frey Ltd
T +41 58 800 8000
F +41 58 800 8080
E nicolas.birkhaeuser@nkf.ch
W www.nkf.ch

Professional qualifications. Basel Bar, Switzerland, 2000

Areas of practice. Competition law; intellectual property law.

Non-professional qualifications. LLM, University of Cambridge, 2003

Languages. German, English, French

Professional associations/memberships. Member of the Committee of the Swiss Competition Law Association (asas), which is the Swiss Group of the International League of Competition Law (LIDC); Swiss Bar Association; International Bar Association; American Bar Association; Studienvereinigung Kartellrecht e.V., and others.

Publications. Publications and speaking engagements, see *www.nkf.ch/en/people/birkhaeuser-nicolas.php*.