The Dominance and Monopolies Review

Second Edition

Editor
Maurits Dolmans

Law Business Research

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EDITOR'S PREFACE

Since the last (and indeed first) edition of this book, the law on monopolies and abuse of dominance has undergone evolutionary rather than revolutionary changes. Many of the sectors that regulators focused on in the past few years (most notably the digital economy, telecommunications and energy) unsurprisingly continue to be the subject of regulatory and judicial scrutiny. From the vantage point of 2014, the growing internationalisation of regulators' antitrust priorities and focus has continued, with intensifying enforcement in China and India and emerging economies. Books such as *The Dominance & Monopolies Review* make common trends both more apparent and capable of being comparatively analysed.

This editorial picks out three developments. First, while authorities in different countries may select similar or even the same cases, the substantive analysis may still diverge, and insufficient attention appears to be given to comity. Second, internationalisation of antitrust enforcement has given rise to globalisation of lobbying efforts, which can feed a potentially dangerous politicisation of antitrust policy especially in large and visible cases. Antitrust enforcement should be based on cold facts and the rule of law. Third, to end on a positive note, the means of resolving these types of case is shifting: settlements with, and commitments to, antitrust regulators are used increasingly to obtain more rapid and practical results where parties show an interest in avoiding protracted litigation.

As some of the more significant abuse cases in the past year underline, the European Commission and the US Federal Trade Commission (FTC), as well as authorities such as those in India and China, have a tendency to focus on similar issues and even the same cases. The *Google* case is one example; the issue of standard essential patents (SEPs) is another. This should be no surprise in an increasingly global and interdependent economy, in particular in worldwide markets for new technology, and where antitrust authorities exchange information and cooperate in the International Competition Network and organisations such as the OECD.

Despite the parallel focus, there remain divergences in analysis. This was thrown into relief by the different conclusions reached by the various authorities and courts in their analysis of Google's search business. In January 2013, after 19 months, the FTC

closed its investigation into Google's business practices. As to the most important issues, including the complaint that Google had changed its search algorithm to demote rivals, and Google's alleged practice of promoting its own vertical properties, the FTC found that Google's practices improved its products and were pro-competitive.[1] Indeed:

> *The totality of the evidence indicates that, in the main, Google adopted the design changes that the Commission investigated to improve the quality of its search results, and that any negative impact on actual or potential competitors was incidental to that purpose. While some of Google's rivals may have lost sales due to an improvement in Google's product, these types of adverse effects on particular competitors from vigorous rivalry are a common by-product of 'competition on the merits' and the competitive process that the law encourages.*

Also:

> *Google's primary goal in introducing this content was to quickly answer, and better satisfy, its users' search queries by providing directly relevant information.*

Given the huge political pressure on the FTC to bring a case, this was a courageous decision. Nor was the FTC alone, since courts in Germany and Brazil came to the same conclusion.[2] The European Commission took a different approach: it agreed on the first point, concluding that:

> *the objective of the Commission is not to interfere in Google's search algorithm.*[3]

In contrast, however, it raised preliminary concerns with regard to the allegedly favourable display of links to Google's specialised search services on the ground that these links might divert traffic from rivals,[4] and it extracted commitments from Google (see below). Some other antitrust authorities seem poised to go even further, and appear

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1 'Statement of the Federal Trade Commission Regarding Google's Search Practices, In the Matter of Google Inc. FTC File No. 111-0163 (3 January 2013)' (FTC Google Search Statement), at www.ftc.gov/system/files/documents/public_statements/295971/130103googlesearchstmtofcomm.pdf. 'FTC to Make Announcement Concerning Its Investigation of Google', FTC press release of 3 January 2013, at www.ftc.gov/news-events/press-releases/2013/01/ftc-make-announcement-concerning-its-investigation-google. While the author represented Google in the EU case, this analysis reflects personal views only and this editorial was not written at the client's request nor discussed with Google.

2 *Verband Deutscher Wetterdienstleister e.V. v. Google*, Reference No. 408 HKO 36/13, Court of Hamburg, 11 April 2013; *Buscape v. Google*, judgment of the 18th Civil Court of the State São Paulo – Case No. 583.00.2012.131958-7 (September 2012).

3 Commissioner Almunia, statement of 5 February 2014, http://europa.eu/rapid/press-release_SPEECH-14-93_en.htm.

4 Press release of 25 April 2013, 'Antitrust: Commission seeks feedback on commitments offered by Google to address competition concerns', IP/13/371.

determined to decide against Google on both points whatever the evidence. It is striking that leading antitrust authorities would come to such different conclusions, especially since the evidence of 'diversion' was thin, and the evidence that the goal is to improve search services is so clear. Where the FTC noted, for instance, that

> *other competing general search engines adopted many similar design changes, suggesting that these changes are a quality improvement with no necessary connection to the anti-competitive exclusion of rivals*

the EC or certain other authorities would counter simplistically that firms with a dominant position have a special responsibility and are not allowed to practise what non-dominant firms are free to do, ignoring the point that if non-dominant firms successfully engage in the same conduct, they cannot be found to leverage dominance, and *prima facie* seek to improve products or achieve efficiencies. Dominant firms should be allowed to do so too. Competition on product improvement is in the consumers' interest.

As the *Google* case unfortunately illustrates, manipulation of public opinion is increasingly a factor in highly visible and large antitrust proceedings. The global level and intensity of lobbying by complainants in this case is unprecedented, with competitors using trade associations to advocate views with an appearance of objectivity.[5] Publishers (with commercial goals that include objectives unrelated to the issues in the case, such as the quest for ancillary copyright for news snippets) are seen to use news fora they control to stir up public opinion and mobilise politicians. Lobbyists have long mustered support from US senators, but a new development is the lobbying of members of the European Parliament – including even its president – who may think that placating publishers or lobbyists helps them in elections. Parliamentarians are heard to speak out publicly with strong convictions, as if they have carefully evaluated the facts, the law, and the economic policies. But antitrust enforcement should be a cold-headed judicial or investigative process, with decisions based on facts, law and economics, not politics. If this politicisation continues (and if the European Courts do not curb it), it could muddy the boundary between consumer welfare and manipulated political goals, potentially turning important assessment tools such as marketing tests into opinion polls, and undermining the rule of law. That would not be in the consumer interest.

At the time of writing, at least, vice president Almunia has stood up against attempts to steer him away from confirming the *Google* commitments (see below). But in

5 Nick Mathiason, 'Microsoft in row over lobby tactics', *The Observer* (UK), 23 September 2007. www.theguardian.com/business/2007/sep/23/money.digitalmedia; Robert A Guth and Charles Forelle, 'Microsoft Goes Behind the Scenes', *Wall Street Journal*, 24 September 2007, http://online.wsj.com/news/articles/SB119059784609936938; www.telegraph.co.uk/technology/8184065/Dark-forces-gunning-for-Google.html; Vlad Saviv, 'What is FairSearch and why does it hate Google so much?' 12 April 2013, www.theverge.com/2013/4/12/4216026/who-is-fairsearch; Greg Keizer, 'Microsoft not fooling anyone by using FairSearch front in antitrust complaint against Google', 9 April 2013, www.computerworld.com/s/article/9238267/Microsoft_not_fooling_anyone_by_using_FairSearch_front_in_antitrust_complaint_against_Google.

highly visible cases, there is a concern that populist, political or protectionist temptations will cloud the clarity of analysis that should be the norm in antitrust investigations. In some countries, there are even more worrying hints of unreliable procedures, lack of protection of confidential information, potentially arbitrary process and decision-making and inadequate substantive analysis. Apart from political opportunism and a populist streak in policy choices, some authorities appear tempted to free ride on others' efforts and to outshine each other by extracting greater remedies than their colleagues whatever the merits of the case. There is in some cases also an apparent desire to protect local players against foreign firms, rather than focusing solely on consumer interest. These are dangerous developments. With the increasing proliferation of competition laws, greater attention to facts and the rule of law is required. The need for comity – and specifically greater respect for decisions by authorities in the country of origin of the defendant with respect to worldwide practices – is stronger than ever (provided of course that due process is followed, and national bias is avoided in the country of origin).

The *Google* case is interesting also in that it illustrates another trend – a positive one this time. To meet the EU concerns, Google offered commitments to resolve concerns and avoid long drawn-out proceedings and appeals. Having gone through three iterations, the commitments look likely to be adopted by the summer of 2014 (four years after the opening of formal proceedings).[6] Standards is another area where settlements played a significant role. In early 2013, the US FTC announced that Motorola LLC had agreed to a Consent Order to address allegations that it had reneged on its FRAND obligations not to pursue injunctions against users of Motorola's SEPs who were supposedly willing licensees.[7] The European Commission followed suit in early 2014, accepting commitments offered by Samsung (patterned on Google's agreement with the FTC).[8] The commitments lay out how SEP holders might approach their obligations with regard to willing licensees so as to avoid being found to have violated antitrust rules (as will, it is hoped, the Court of Justice's preliminary ruling in *ZTE v. Huawei*).[9] The common approach taken by both the FTC and the European Commission signals (as

6 Press release of 5 February 2014, 'Antitrust: Commission obtains from Google comparable display of specialised search rivals', IP/14/116.

7 'Agreement Containing Consent Order, In the Matter of Google Inc', FTC File No. 121-0120 (3 January 2013).

8 'Antitrust: Commission accepts legally binding commitments by Samsung Electronics on standard essential patent injunctions' (29 April 2014), available at http://europa.eu/rapid/press-release_IP-14-490_en.htm; EC MEMO/14/322, 'Antitrust decisions on standard essential patents (SEPs) – Motorola Mobility and Samsung Electronics – Frequently asked questions' (29 April 2014), available at http://europa.eu/rapid/press-release_MEMO-14-322_en.htm; 'Case Comp/C-3/39.939 – Samsung Electronics, Enforcement of UMTS standard essential patents, Final Commitments' (3 February 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1502_5.pdf; and Commitment Decision (29 April 2014), available at http://ec.europa.eu/competition/antitrust/cases/dec_docs/39939/39939_1501_5.pdf.

9 Case-170/13, *Huawei Technologies v. ZTE*, OJ 2013 C. 215/5.

vice president Almunia recently commented) a significant moment of convergence.[10] It is expected that this convergence will be mirrored in jurisdictions such as India and China, where issues around essential patents have recently also become the subject of investigation and litigation.[11]

The use of commitments and settlements in dominance and monopoly proceedings is to be welcomed, especially in dynamic markets, as it may lead to expeditious and efficient resolution of issues. In Europe, after the 'procedural modernisation' embodied in Regulation 1/2003,[12] the Commission has so far settled two-thirds of its abuse cases by way of commitments.[13] The advantages from the defendants' perspective (at the cost of trustee oversight and a binding decision that can be enforced even if breaches are technical and have no negative impact on competition) are that fines are avoided; there is no factual finding of abuse that can be used as a basis for private damage claims; no legal precedent is established; firms are not embroiled in decade-long appeal proceedings; and parties avoid disputes about implementation of otherwise vague and generally worded remedy orders that can poison the relationship with the authorities. From the plaintiffs' perspective, these points can be seen as disadvantages (especially the absence of precedent when new types of abuses are alleged), but this may be outweighed by the advantage that a solution is found relatively quickly. Consumers benefit as well.

This is not to say that settlements are always beneficial, as already mentioned in last year's editorial. There is a risk of regulatory hold-up, where an antitrust authority extracts concessions in unprecedented cases, using the threat of excessive fines, long and expensive proceedings, extensive discovery, political decision-making, absence of adequate judicial review and expensive follow-up private damage claims as leverage. Not all commitments are truly 'voluntary' in this light. This does not apply to the same extent in the US, where parties have a more real choice of whether to use a negotiated procedure, in view of the role of the courts in infringement proceedings.

In the past 10 years, commitments have thus come to occupy an important and generally efficient position in the enforcement process in both the United States and, particularly, the EU. The process is, however, far from perfect. In Europe, the Commission has in practice reversed the sequence of the procedure prescribed by Regulation 1/2003: instead of first issuing a preliminary assessment and then negotiating commitments, it

10 Speech of 20 September 2013, 'Competition Enforcement in the knowledge economy', SPEECH/ 12/629. For an overview of the minor policy differences, see Koren W Wong-Ervin, Federal Trade Commission, 'Global Approaches To Standard-Essential Patents', 6 May 2014.

11 In the recent case of *Huawei v. InterDigital, Inc*, and the NDRC's ongoing investigations of Qualcomm and Interdigital, Inc in China, and, in India, the CCI's investigation in *Micromax Informatics Limited v. Telefonaktiebolaget LM Ericsson (Publ)*, 50/2013, 12 November 2013; and *Intex Technologies (India) Limited v. Telefonaktiebolaget LM Ericsson*, 76/2013, 16 January 2014.

12 Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the EC Treaty (Regulation 1/2003), OJ L 1, 04.01.2003.

13 Of the 43 cases the Commission has dealt with since 1/2003 came into effect, 28 were settled by way of commitments and 15 by way of prohibitions.

tends to do the reverse. This has meant that defendants do not know the Commission's theory of harm in sufficient detail, and are more or less groping in the dark about how to address the Commission's concerns (although they will generally know at a high level from State of Play meetings what the overall issues are). Without a focused theory of harm, not only is legal certainty and clarity eroded, but there is also a risk that the Commission may move beyond what is strictly required to remedy its concerns, and instead seek to achieve political goals. On balance, however, the practice of accepting commitments is to be welcomed as a practical and realistic way of addressing concerns in the interest of consumers in a timely manner while reducing the expense and risks of full enforcement. It is hoped that authorities elsewhere will emulate this example, without succumbing to the temptation of regulatory hold-up.

I would like to thank all of the contributors for taking time away from their busy practices to prepare their insightful and informative contributions to this second edition of *The Dominance & Monopolies Review*. I am personally grateful for the assistance of my colleague Max Kaufman of the Brussels office. I look forward to seeing what evolutions or, indeed, revolutions, 2014 holds for the next edition of this book. Especially eagerly awaited are the European Court's judgment in *Intel* (conditional pricing) and the European Commission decision in *Gazprom*, and the US authorities' reviews of conditional pricing, and of the practices of patent assertion entities (PAEs) and privateers, which are directly relevant also for the EEA and other jurisdictions.

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Cleary Gottlieb Steen & Hamilton LLP
London
June 2014

Chapter 21

SWITZERLAND

Nicolas Birkhäuser and Andreas D Blattmann[1]

I INTRODUCTION

In addition to the prohibition of unlawful agreements affecting competition (Article 5 of the Cartel Act (CartA)), and the control of mergers (Article 9 et seq. CartA), the control of the behaviour of dominant undertakings pursuant to Article 7 CartA is one of the three basic pillars of Swiss cartel law. According to Article 7, Paragraph 1 CartA, dominant undertakings behave unlawfully when as a result of abusing their position on the market they hinder other undertakings from starting or continuing to compete or disadvantage trading partners (i.e., the opposite side of the market). Article 7, Paragraph 2 CartA then stipulates which practices can in particular be considered to be unlawful within the meaning of Paragraph 1:

a any refusal to enter into business relationships (e.g., refusal to sell or purchase goods);
b the discrimination of trading partners in relation to prices or other commercial terms;
c the imposition of unreasonable prices or other business conditions;
d the undercutting of prices or other business conditions directed against other specific competitors;
e the limitation of production, sales or technical developments; and
f any conclusion of contracts on the condition that the contracting partners accept or provide additional services.

Article 7 CartA is consequently split into a general clause (Paragraph 1) and a non-exhaustive list of examples of potential abusive practices (Paragraph 2), although

1 Nicolas Birkhäuser is a partner and Andreas D Blattmann is an associate at Niederer Kraft & Frey Ltd.

even where there is a practice referred to there, the preconditions of the general clause must also be met at all times.[2] Basically three preconditions arise as a result: (1) there must be a dominant market position of an undertaking that (2) abuses said position and thereby (3) hinders other undertakings from starting or continuing to compete or disadvantaging trading partners.[3] It is therefore not dominance as such that is sanctioned but the abuse thereof. 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.[4]

The term 'market dominance' is not defined in Article 7 CartA but in Article 4, Paragraph 2 CartA. According to that, dominant undertakings are one or more companies in a specific market that are able as suppliers or buyers to behave to an appreciable extent independently of other market participants (competitors, suppliers or buyers). Also, the term 'undertaking' is not defined in Article 7 CartA but in Article 2, Paragraph 1-bis CartA. According to this, undertakings are all buyers or suppliers of goods and services active in commerce, regardless of their legal or organisation form (personal scope of application of CartA). It follows therefrom that the focus must be solely on an economic understanding of the term 'undertaking' or on the entrepreneurial activity. Therefore this even covers undertakings that arise under public law, including private commercial companies that are part of a public body (e.g., the government, canton or commune).[5]

Article 7 CartA is often accused of lacking precision and specificity.[6] Effectively, the provision does need some interpretation. It is especially questionable whether the aspect of European compatibility (i.e., interpreting Swiss cartel law provisions in the light of EU competition law) can serve as aid to interpretation. With regard to the term 'imposition' in Article 7 Paragraph 2 lit. c CartA, the Swiss Federal Supreme Court addressed this question fairly recently and denied it: the Cartel Act Amendment of 1995 had no particular European political background. It was true that the Swiss legislator, like the European regulator, chose the term 'imposition'. It cannot, however, be inferred from the fact that the terminology was the same that an identical regulation had necessarily been sought. For imposition to exist, according to Swiss law it is at least necessary that the other side of the market has nothing to counter the economic pressure that stems from the market dominance, or cannot evade it.[7] Coercion arising merely from economic superiority or a causal nexus between the dominant position in the market and the unreasonable conditions, as is the view, for example, in European doctrine, is consequently not sufficient.[8] Whether this is set in stone is still not clear. The Swiss

2 Borer, Swiss Cartel Act, Competition Law I, 3rd edition, Zurich 2011, Article 7 N 4.

3 Recht und Politik des Wettbewerbs (RPW) [Competition Law and Policy], 2011/4, p. 525 Recital 28, although the assumption might be that Clause 3 was already included in Clause 2.

4 Amstutz/Carron, in: Amstutz/Reinert (Hrsg.), Basel Commentary on the Cartel Act, Basel 2010, Article 7 N 19 ff., with notes [cit. BSK KG-Author, Article N].

5 BGE [Federal Supreme Court Decisions] 137 II 199, E. 3.1.

6 Borer (Fn 1) Article 7 N 7, with notes; RPW 2010/2, p. 267 E. 4.5.1.

7 BGE 137 II 199, E. 4, in Re Swisscom – mobile telecommunications termination charges.

8 See also RPW 2010/2, p. 321 ff., in particular E. 12.2.1.

Competition Commission (ComCo; if not further specified, this definition includes the Swiss Competition Commission and its Secretariat) accuses the Federal Supreme Court, however, of simply overlooking the criterion of compatibility with European law in the documents relating to the Cartel Act Amendment.[9]

Article 3, Paragraph 1 CartA lastly governs the relationship of the CartA to other legal regulations: in applying the CartA, regulations are reserved that do not permit competition, in particular those that establish a state market and price system or give individual undertakings special rights to enable them to fulfil public duties. Not every regulatory intervention is, however, a fully comprehensive market and price system. Instead, the extent of the intervention must be established in each individual case. Only if the legislator actually intended to create an integrated market and price system and thereby a restraint of competitive freedom can the reservation in Article 3, Paragraph 1 CartA be assumed to apply to the entire market.[10] Article 3, Paragraph 2 CartA finally stipulates that effects on competition that arise exclusively from the legislation on intellectual property do not fall under the CartA. Import restrictions that are based on intellectual property rights are, on the other hand, assessed under the CartA.

II YEAR IN REVIEW

i Overview

In past years ComCo focused primarily on the opening of the Swiss market or on preventing markets from being foreclosed through agreements affecting competition. However, the assumption must be that in future the focus will increasingly also be on the circumstances described in Article 7 CartA. In late 2012, for instance, an investigation was opened against three companies in the Galenica Group, which were allegedly attempting to force their partners to continue to enter into business relationships. In addition, in the spring of 2013 a probe was begun in the area of the transmission of live sport on pay TV since there were alleged to be indications of abusive practices, namely based on long-term and comprehensive exclusive rights.

ii Publigroupe SA – unlawful practice as dominant undertaking due to the directives of the Association of Swiss Advertising Companies on the commissioning of professional intermediaries[11]

In this case, the Swiss Federal Administrative Court (FAC) found that in the relevant market for the procurement and the sale of space for advertisement in print media there was not enough actual competition due to the dominant position of Publigroupe. The latter had abused its dominant position to hinder independent intermediaries from starting or continuing to compete (Article 7 CartA). Publigroupe challenged the decision of FAC before the Swiss Federal Supreme Court (FSC). Firstly, FSC held – for the first time explicitly – that the nature of the competition law sanctions according to Article 49a

9 RPW 2011/4, p. 586 Fn 394.

10 Borer (Fn 1) Article 3 N 5; RPW 2012/3, p. 461 Recital 19.

11 Judgment of Swiss Federal Court 2C_484/2010 of 29 June 2012 (RPW 2013/1, p. 114 ff.).

CartA was criminal (FSC made reference to the decisions *Menarini* and *KME*). Hence, FSC stated that the guarantees provided by Articles 6 and 7 of the European Convention on Human Rights (ECHR) and of Articles 30 and 32 of the Swiss Constitution (SC) were basically applicable. FSC decided that Publigroupe and its wholly owned subsidiaries constitute a single economic entity. FSC clearly stated that the proceedings before ComCo do not meet the requirements according to Article 6 ECHR and Article 30 SC. However, FSC found that it is sufficient to meet the requirements according to those articles in the following court proceedings. In those court proceedings, the decision and review respectively of the relevant sanction must be reviewed with full discretion. Yet, according to FSC, this prerequisite does not exclude that the court reviewing the decision of ComCo can limit its discretion especially in technical matters. In the present case, FSC therefore found that FAC did not violate Articles 6 ECHR and Article 30 respectively by limiting its discretion. Furthermore, FSC found that it was not necessary with respect to Article 6 ECHR that FSC must have the same power to review the facts of the case. Rather it would be sufficient that the court of first instance, *in casu* FAC, could fully review the facts of the case whereas the review by FSC could be limited to questions of law. Further, FSC – also for the first time explicitly – rejected the complaint of Publigroupe whereupon it would not be possible to sanction an undertaking while at the same time that undertaking had concluded an amicable settlement according to Article 29 CartA since the latter would only concern the future behaviour of the relevant undertaking. In addition, FSC considered the complaint of Publigroupe whereupon Article 7 Paragraph 1 CartA – whether applied on its own or in connection with Article 7 Paragraph 2 lit. b CartA – would not be sufficiently precise to constitute an appropriate legal basis according to Article 7 ECHR and Article 15 UN Covenant II. FSC found that Article 7 Paragraph 1 CartA had to be read in connection with Article 7 Paragraph 2 lit. b CartA and that this interpretation in connection with other provisions such as Article 4 Paragraph 2 and 49a Paragraph 3 lit. a CartA showed that Art. 7 Paragraph 2 lit. b CartA was sufficiently precise. Hence, there was no violation of Article 7 ECHR and Article 15 UN Covenant II respectively. Finally, FSC examined whether the specific disputed provisions in the directives of the Association of Swiss Advertising Companies on the commissioning of professional intermediaries were abusive within the meaning of Article 7 Paragraph 2 lit. b CartA. Since those provisions hindered other undertakings from starting or continuing to compete and disadvantaged trading partners by discriminating between trading partners in relation to certain conditions of trade, FSC upheld the decision of FAC and dismissed Publigroupe's appeal.

iii Investigation regarding the Red Cross emergency call system for senior citizens

The background of this preliminary investigation was the fact that the managing committee of the national conference of the Swiss Red Cross (SRC) advised the Cantonal Red Cross organisations (CRC) to terminate the contracts with Medicall AG (Medicall) regarding the call centre services for the SRC's emergency call system for senior citizens and to conclude new contracts with Curena AG (Curena), a subsidiary

of CRC Zurich.[12] This advice had the effect that many CRCs changed to Curena. ComCo examined whether the behaviour of the SRC constituted an unlawful practice by a dominant undertaking according to Article 7 CartA. Firstly, ComCo found that the different CRCs were under the uniform control of the SRC so that they represented a group and had therefore together to be considered as one undertaking (hence also the SRC) according to Article 2 CartA. Although ComCo found that the SRC had a very strong market position as provider on the market for emergency call systems for senior citizens, it concluded that SRC did not impose unfair prices or other unfair conditions of trade on the senior citizens. Furthermore, ComCo stated that the market position of the SRC as demander on the market for call centre services was very weak. Hence, ComCo considered whether there was at least an unlawful practice by the SRC in the sense of Article 7 CartA if there was an individual dependence of Medicall on the SRC. ComCo denied such an individual dependence and therefore a violation of Article 7 Paragraph 2 lit. a CartA since Medicall would have enough possibilities and alternatives respectively to compensate the losses caused by the termination of the contracts with the CRCs. Finally, ComCo rejected the allegation put forward by Medicall that Curena was cross-subsidised by the CRC Zurich since Curena's revenue would cover its own marginal costs on a continuing basis. In summary, there was not enough evidence to find an unlawful restraint of competition so the preliminary investigation was terminated without consequences.

iv Tele 2 v. Swisscom (Switzerland) AG – request for reconsideration of a ComCo order

Since Swisscom attached a certain kind of advertisement to its monthly invoices, ComCo found in an earlier investigation that Swisscom probably abused its dominant position in the infrastructure market regarding the access network, to restrain competition in the downstream service market (Article 7 CartA).[13] In that earlier investigation, Swisscom concluded an amicable settlement with the Secretariat of ComCo according to Article 29 CartA, which required Swisscom not to attach advertisements to its invoices that were specifically aimed at clients without Carrier Preselection (CPS), as well as not to attach CPS cancellation forms. In the case at hand, Swisscom requested ComCo to revoke the aforementioned earlier amicable settlement because there had allegedly occurred a significant change in the legal and factual circumstances (cf. Article 29 Paragraph 3 CartA). ComCo rejected the request for reconsideration of Swisscom for the following reasons: Firstly, ComCo stated that, subsequent to the amicable settlement, the legal changes, adopted in the form of, *inter alia*, a newly created service for the re-billing for fixed network subscriber connections (VTA) did in fact create the theoretical possibility for the other providers of telecommunication services (FDAs) to suppress the relationship between Swisscom and CPS clients. However, ComCo found that the newly created service VTA was very unattractive with regard to price so that it would hardly be profitable for the other FDAs to use this service. Hence, the market situation was not

12 RPW 2013/1, p. 65 ff.

13 RPW 2013/2, p. 210 ff.

changed significantly by the introduction of the service VTA. Furthermore, although the amount of CPS clients had decreased by more than 60 per cent, ComCo was of the opinion that the 310,000 remaining CPS clients, who could be lured away by specific Swisscom CPS-advertisements, which could be sent as attachments to the monthly Swisscom invoices, constituted a considerable amount of clients. Consequently, ComCo found that the newly created service VTA did not constitute an adequate alternative. Hence, in the present case, there was no significant change in the legal or factual circumstances (cf. Article 29 Paragraph 3 CartA), which would justify an annulment of the amicable settlement concluded between Swisscom and the Secretariat of ComCo.

III MARKET DEFINITION AND MARKET POWER

i Basic principles

An undertaking is dominant according to Article 4, Paragraph 2 CartA if it can to an appreciable extent behave independently of other market participants (competitors, suppliers or buyers), although the note in parentheses is to make it clear that in determining where there is a market dominant position the focus must not simply be on data relating to market structure but there must also be an examination of the actual relations of dependence on the market. Therefore market dominance may also exist if an undertaking has a paramount market position in relation to competitors or if other undertakings as buyers or suppliers are dependent on the first undertaking (relative market dominance).[14]

To assess whether an undertaking is dominant, in practice an analysis must be made of the situation of the competitors (current competition), the market entry barriers (potential competition) and the position of the other side of the market. ComCo practice is essentially in accordance with that of the European Commission, whereby the following factors must be checked: (1) the competitive pressure or market position of the dominant undertaking and its competitors; (2) the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of potential competitors; and (3) the competitive pressure due to the negotiating strength of the buyers (countervailing market power).[15] Analysing these criteria requires the relevant market to be defined in terms of product, geography and time. In terms of product, the market comprises all goods or services that are regarded as capable of being substituted by the other side of the market with regard to their characteristics and their intended purpose. The geographically relevant market comprises the territory in which the other side of the market is the buyer or supplier of the goods or services comprising the product market. In defining the relevant market in terms of product and geography, ComCo applies Article 11, Paragraph 3 of the Merger Control Ordinance by analogy.[16] In terms of time, an examination must be conducted to see whether any goods or services

14 Borer (Fn 1) Article 4 N 16, with notes.

15 RPW 2012/1, p. 98 Recital 133.

16 RPW 2012/1, p. 103 Recital 158 and p. 105 Recital 170.

that allow for substitution in terms of product and geography are available all year round or just for a certain period.

The first guide that must be used is certainly market share: if the share is below 20 per cent a dominant position can generally only be said to exist if, based on the market structure, no effective countervailing power can be created (i.e., so that neither current nor potential competitors or the other side of the market can have a disciplinary effect). Even market shares of between 20 and 40 per cent do not automatically mean there is market dominance. Once again, additional indicators are needed of the actual existence of independence. Only when it comes to market shares of 50 per cent and more should it therefore become critical, although here too the market position must be examined in detail. Based on the wording in Article 4, Paragraph 2 CartA, it is also clear that market dominance may exist not only on the supply side, but also on the demand side.

It has not yet been completely clarified whether market dominance must be said to already exist when, in respect of a specified product, no alternative is possible in that a trader has to offer this product to end customers or else they would look for another trader ('must-in-stock' products or product-range dependence as a subset of relative market dominance). This is significant to the extent that the relevant product market might be limited to this product, which would automatically result in a monopoly. In actual fact, ComCo has in a few decisions affirmed the existence of must-in-stock products. However, this topic is still a hot potato and much debated in legal writings.[17]

ii Collective dominance

According to Article 4, Paragraph 2 CartA, market dominance can be exerted not only by a single undertaking but by a number of undertakings collectively. 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 CartA may apply cumulatively) or it is the consequence of the market structure.

As far as is evident, collective dominance has so far been affirmed only once in an investigation under Article 7 CartA. During that process ComCo 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. From the point of view of the other side of the market, there were accordingly no differences between the various suppliers. On the contrary, they

17 Cf. instead of many others Thomi/Wohlmann, 'Must-in-Stock-Produkte – Die Erweiterung des Begriffs der Marktbeherrschung' ['Must-in-Stock-Products – the expansion of the term market dominance'], in: *SZW/RSDA* 4/2012, p. 299 ff.

presented themselves as a single entity on the market.[18] That it must be the behaviour of all dominant undertakings appears, therefore, appropriate. Collective dominance is often the product of a parallel behaviour that is a result of the market structure. The initial position for collective dominance is consequently a joint behaviour, though not coordinated as defined in Article 4, Paragraph 1 or Article 5 CartA. This parallel behaviour must be examined to see if it is abusive. Exceptionally, the individual behaviour of a collectively dominant undertaking can be termed abusive within the meaning of Article 7 CartA if that behaviour serves at the same time to maintain collective dominance on the market. It is unclear whether this means there is a difference from European practice. It is true that European case law decided in one of the admittedly rare cases of vertical collective dominance that the behaviour of a single undertaking was sufficient.[19] However, this is somewhat problematic (at least) in cases of horizontal collective dominance since the buyer might shift to another collective dominant undertaking whose behaviour is not abusive. However, then the buyer is not dependent on the undertaking with the abusive behaviour: that undertaking cannot behave independently – its behaviour might be disciplined by the buyer switching to the competitor.

iii Intellectual property

Article 3, Paragraph 2 CartA says that CartA does not apply to effects on competition that arise exclusively from the legislation governing intellectual property. The question of the extent to which this provision excludes effects on competition from the CartA also concerns the contentious relationship between intellectual property law and cartel law. A few years ago, ComCo held that Article 3, Paragraph 2 CartA only covered effects on competition based on actions of the protected rights holder that would arise themselves from the relevant enactment of the intellectual property law. Any contractual extension of absolute protected rights would in contrast fall within the ambit of the CartA.[20] However, this is not firmly established practice. Instead, it is highly probable that Swiss practice will ultimately follow EU practice: consequently, a distinction must first be made between the existence and the exercise of intellectual property rights. However, because the existence of rights cannot be considered separate from their exercise the substantive extent (scope) of the right frequently only arises once it is exercised. Exclusive rights that are only exercised with regard to a restraint on competition are assessed under the CartA.[21]

In connection with Article 7 CartA, intellectual property law is primarily of significance when it comes to 'compulsory licences'. The question is whether a refusal to grant intellectual property law licences constitutes a refusal to enter into business relationships (Article 7, Paragraph 2 lit. a CartA). This is primarily relevant if the

18 RPW 2003/1, p. 134 f. and p. 150 f. Recital 241 f.; the probability of the emergence of collective market dominance is moreover regularly taken into consideration in relation to the future, hypothetical structure of the market during examination of corporate mergers.

19 See the notes in Whish, *Competition Law*, Seventh Edition, Oxford 2012, p. 581 f.

20 RPW 2006/3, p. 433 ff.

21 See also Borer (Fn 1) Article 3 N 11, with references to European practice.

licence or the intellectual property represents a 'facility' that is essential for providing specific services or for manufacturing specific products; another market participant is consequently reliant on the licence (essential facility). Refusing to grant a licence for intellectual property is, however, not in itself abusive. Rather, in addition to Article 7, Paragraph 1 CartA it is necessary that refusing the licence prevents a development that benefits consumers, such as a new product, the creation of which requires the licence for the intellectual property. Following European practice, this will only be answered in the affirmative if the undertaking asking for a licence does not intend to restrict itself to copying or duplicating the products or services of the dominant undertaking but wishes to produce or offer for sale a new product or a new service to satisfy a potential demand, in which case innovation potential that is sufficiently recognisable will be enough.[22]

IV ABUSE

i Overview

The list of examples in Article 7, Paragraph 2 CartA does not provide for exhaustive preconditions. Even where there is such a behaviour, the preconditions of Article 7, Paragraph 1 CartA must therefore be met.[23] Furthermore, Article 7 CartA, in contrast to Article 5 CartA (see Paragraph 2 there), does not contain any statutory justification of abuse. However, even with Article 7 CartA, justification is generally possible (legitimate business reasons).[24] As in European law, a distinction is generally made between the factual elements of impeding (excluding) and exploiting. Isolated practices in the list of examples in Article 7, Paragraph 2 CartA are similar to those defined in Article 102 of the Treaty on the Functioning of the European Union (TFEU). In addition, Article 7, Paragraph 2 CartA, however, does recognise other presumably abusive practices.

ii Exclusionary abuses

Refusal to enter into business relationships is again controversial. In fact, Article 7, Paragraph 2 lit. a CartA does not prohibit the dominant undertaking from organising its sales or purchase practice selectively. This provision consequently does not justify a general obligation to contract. This is only the case if the refusal cannot be based on objective justifications. These are frequently found in the area of transaction costs, or, for example, if the business partner behaves unreliably. It is also worth noting that the term 'refusal' includes breaking off, restricting or changing, and not entering into business relations. The breaking off or restricting of a business relationship is frequently evaluated more strictly than failing to enter into such relations.

Article 7, Paragraph 2 lit. b CartA covers discriminatory practices of any kind, although the term 'business conditions' must be interpreted broadly. These include supply terms (e.g., relating to time) or the quality of the goods delivered. Dominant undertakings are bound by the equal treatment rule. There can therefore be discrimination

22 BSK KG-Amstutz/Carron, Article 7 N 148.

23 Zäch, *Swiss Cartel Law*, Second Edition, Bern 2005, Recital 526 ff.

24 See also BSK KG-Amstutz/Carron, Article 7 N 57.

first where the same subject matter is treated differently, but also where there is the same treatment of disparate subject matter. No discrimination therefore exists if the practice of the dominant undertaking can be justified on objective grounds; for example, different transport or sales costs or different economies of scale (although the prices or business conditions can, even then, still be deemed to be unreasonable within the meaning of Article 7, Paragraph 2 lit. c CartA). Nor does the prohibition against discrimination stop at the door of the group or other economic ties. A dominant undertaking is instead required to treat both upstream and downstream competitors the same as it would treat economic entities 'belonging to' it. Discriminatory practices as a means of impeding other companies are often subtle, for example, the practice of granting traders varying degrees of financial support or providing them with special offers. In contrast, loyalty discounts to retain its own traders or to hinder the competitors are more obvious.[25]

Discount schemes are also of importance in the targeted undercutting of prices or other business conditions. Article 7, Paragraph 2 lit. d CartA consistently says there must be a price reduction or the offer of favourable business terms. However, what is required is targeted undercutting. Unlike general price reduction, price undercutting is therefore directed against individual competitors (predatory pricing), which, however, does not rule out a general price reduction. The purpose of such a practice is generally to force a weaker competitor out of the market, so that the gap that has arisen as a result can be filled and the price raised above the usual level. There is an indication of targeted price undercutting if the income can no longer support the undertaking's own marginal costs over the long term and they cannot be offset even on another market. On the other hand, there is no abusive behaviour if despite the gap there is still sufficient competition and therefore the price cannot be raised on the market in question or on another market above the level of the competition price. Consequently the initial position in Swiss law is somewhat less clear than in European law, which always assumes there are abusive prices if they are below the average variable costs.[26] In assessing contracts, the specific focus is on what are known as English clauses. Under this kind of clause, a contracting party (buyer) is promised, upon disclosing a competing offer, that its own prices will be set lower than those of the competitor. Such clauses may not only promote targeted undercutting (Article 7, Paragraph 2 lit. d CartA) but may also be unreasonable (Article 7, Paragraph 2 lit. c CartA). Price undercutting using discount schemes is less obvious. A discount scheme is, for instance, unlawful if it is tied to the sales of the products of the party granting the discount in relation to competing products: this is the case when discounts are not graduated based on total volume of purchases but are computed according to whether a trader covers a fairly large share of its aggregate requirements using one single supplier.[27] In these cases contract clauses can generally also be found that obligate the purchaser to disclose the sales figures for the competing products.

Limitation of production, sales or technical developments refers to the artificially induced shortage of goods with the goal of driving up prices or maintaining them at

25 Zäch (Fn 26) Recital 673 ff.

26 Borer (Fn 1) Article 7 N 24.

27 Zäch (Fn 26) Recital 687, with reference to case law.

a high level (to the detriment of the consumers). Article 7, Paragraph 2 lit. e CartA must be given a wide interpretation and covers the dominant undertaking's limitation in relation to itself and the limitation created in relation to third-party companies. The latter can, for instance, happen through exclusive contracts or through relationships regarding distribution and use. The limitation can, however, be justified if its purpose is to protect distribution targets. It is critical, however, when its aim is to impede competitors or split up markets.

iii Discrimination (including discriminatory pricing)

Discrimination against trading partners (i.e., the behaviour of a dominant undertaking, which discriminates against particular trading partners in comparison with others without objective grounds) is unlawful according to Article 2 lit. b CartA. The provision of Article 2 lit. b CartA is broad and covers any discrimination in relation to price or other conditions of trade.[28] Other conditions of trade include, *inter alia*, the quality of the contractual products or demand and supply conditions, whereby the term is again broad. Discrimination may always be assumed when a dominant undertaking applies either (1) different conditions of trade upon the same situation (direct discrimination), or (2) the same conditions of trade upon different situations (indirect discrimination).[29] Discrimination against competitors of the dominant undertaking falls outside the scope of Article 2 lit. b CartA (primary-line discrimination); only discrimination against trading partners (secondary-line discrimination) falls within the scope of Article 2 lit. b CartA.[30] The dominant undertaking is not obliged to treat its trading partners equally. There can be economically reasonable grounds that justify different treatment.[31]

The different treatment of trading partners can be used to impede or even drive from the market smaller competitors. Obvious means to impede smaller competitors are loyalty rebates or cumulative discounts if these have the effect that trading partners of the dominant undertaking only do business with the dominant undertaking and stop or do not start trading relationships with its competitors.[32] Another example of discrimination against trading partners is where manufacturers grant less financial support for advertisements or fewer products for promotions to some of their dealers, or if new products are not available for all dealers at the same time. Such measures impede the undertakings concerned in competition because they increase the sales of the preferred dealers.[33]

iv Exploitative abuses (including excessive pricing)

The imposition of unreasonable prices or other unreasonable business conditions under Article 7, Paragraph 2 lit. c CartA does not directly apply to the price-setting mechanism.

28 BSK KG-Amstutz/Carron, Article 7 N 155.

29 BSK KG-Amstutz/Carron, Article 7 N 206 ff.

30 BSK KG-Amstutz/Carron, Article 7 N 204.

31 Borer (Fn 1) Article 7 N 17.

32 Borer (Fn 1) Article 7 N 17.

33 Zäch (Fn 26) Recital 675, with reference to case law.

It only applies when the interplay of supply and demand is adversely affected. Low or high prices are not unreasonable in and of themselves but rather when they are clearly unfair or disproportionate and can be imposed by the dominant undertaking. According to case law, price abuse exists, for example, if a party with a monopoly abuses its position to impose exploitative (extortionate) prices on the buyer, in the knowledge that the buyer – because of the monopoly – has no feasible alternatives if he or she wants or has to have his or her need for the product met through the monopolist. The other side of the market consequently has nothing to counter the economic pressure caused by the dominance or cannot avoid it. This is assessed based on the current competition and the market entry barriers. Establishing whether the price or the business conditions are unfair or unreasonable is, however, a hard thing to do. Unreasonableness can, for example, be assessed using market comparisons or cost methods, while determining unfairness requires consideration of the interests of both the dominant undertaking and the trading partners.[34]

In the case of transactions subject to conditions within the meaning of Article 7, Paragraph 2 lit. f CartA, the dominant undertaking makes the contract being entered into conditional upon the contracting partner having to accept or provide additional services that have no relation to the subject of the contract either in terms of the subject matter or according to commercial practice. For example, the purchase of a machine is tied to the purchase of the paper to be processed by the machinery. Unlike Article 102, Paragraph 2 lit. d TFEU, this applies to dominant buyers as well as dominant suppliers. Transactions subject to conditions are generally used to extend the dependence of the other side of the market on one market to another one. They adversely affect the freedom of the contracting party, alter the competitive situation with regard to the additional service and are therefore considered to be anti-competitive. Whether an additional service can be sufficiently differentiated from the principal service is something that is decided on the basis of whether the tied services have their own markets. Assessing this under cartel law is not problematic when the tie-in is obvious. As well as actual pressure, enforcement can, however, also be by means of positive incentives (indirect tie-in), which makes it harder to assess under cartel law. Even transactions that are subject to such conditions can be justified provided they are proportionate and there are good arguments for them in terms of objectively persuasive technical or economic reasons or generally recognised commercial practice (substantive connection; legitimate business reason). Finally, general grounds of justification, such as consumer protection, avoidance of product liability or warranty of safety of use, come into question.[35]

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 49a, Paragraph 1 of the CartA, any undertaking that abuses a dominant position will be sanctioned with a penalty of up to 10 per cent of the

34 RPW 2004/3, p. 798.

35 Zäch (Fn 26) Recital 707 ff.

turnover achieved in Switzerland in the preceding three financial years (cumulatively); this is not limited to the relevant markets. Furthermore, Article 3 of the Cartel Act Sanctions Ordinance (CASO) provides that, depending on the seriousness and nature of the infringement, the basic amount of the sanction (the floor for calculating the sanction) will amount to up to 10 per cent of the turnover achieved by the undertaking in the relevant markets in Switzerland during the preceding three business years. Starting from the basic amount of the sanction, various factors are relevant in determining the sanction, some of which are aggravating and some of which are mitigating (Articles 4 to 6 of the CASO): according to Article 5 of the CASO, aggravating factors are, in particular, the duration of the infringement, the repetition of an infringement, the amount of the profits, the (leading) role of an undertaking (also with respect to retaliatory measures) or the fact that an undertaking does or does not cooperate with ComCo or attempts to obstruct the investigations in any other manner. According to Article 6 of the CASO, if there are mitigating circumstances, the amount of the sanction may be reduced. The list of mitigating circumstances according to Article 6 of the CASO is not exhaustive. In addition, cooperation outside a leniency application and the conclusion of a settlement with ComCo may also lead to a reduced sanction. Please see Section VI, *infra*, with regard to the full and partial waiver of a sanction in the case of leniency applications as well as with regard to discounts where settlements are concluded and in the case of cooperation with ComCo. Finally, it must be noted that only undertakings can be sanctioned for first-time infringements against the substantive law provisions. Natural persons, such as employees, who are subject to criminal sanctions, cannot be sanctioned for first-time infringements of these provisions, but only for infringement of amicable settlements and administrative orders and certain other infringements, which are subject to fines up to 100,000 Swiss francs (Articles 54 to 55 of the CartA).

The Federal Supreme Court recently gave its opinion at least to some extent on the important question of whether Article 7 CartA was sufficiently clear and whether the consequences of a party's own actions are foreseeable as a result. This is important for the very reason that principles of constitutional and international law require that only a law that is worded sufficiently clearly and specifically can create the constituent elements of a crime and can result in the imposition of a penalty (*nulla poena sine lege*). The same applies to the sanction under Article 49a CartA, which, given this background, is considered to be a penalty. The court of previous instance, prior to the Federal Supreme Court, the Federal Administrative Court, found that at least the general clause, because it was open-ended, was not a sufficient basis for a sanction to be imposed pursuant to Article 49a CartA. This was said to only be possible if the general clause was applied together with an offence from the list of examples.[36] The Federal Supreme Court, following intense deliberation and by a majority of three votes to two, agreed with the Federal Administrative Court's view that at least the list of examples is sufficiently specific. However, it deliberately left unanswered the question of whether the general clause itself is sufficiently specific.

36 RPW 2010/2, p. 314, E. 4.5.

However, it did hold that even 'criminal laws' required interpretation, and that it is indeed the duty of the courts to remove any remaining doubts regarding interpretation.[37]

ii Behavioural (including interim measures)

ComCo proceedings generally consist in a preliminary investigation and a (regular) investigation. Under Article 30 CartA, the proceedings end with a decision by ComCo in which 'measures' may be ordered. This provision, however, is not a statutory basis for all appropriate measures. The CartA does not provide for general jurisdiction to enact behavioural measures for practices specified in Articles 5 or 7 CartA. 'Measures', according to Article 30, Paragraph 1 CartA, essentially means that ComCo may make orders to eliminate any restraint on competition that may still exist. The result is that measures must consist in injunctions to take concrete steps or to cease and desist from doing something (i.e., a prohibition against continuing to practise the behaviour that has been found to be unlawful, or a positive injunction to initiate or implement specific measures aimed at eliminating the unlawful behaviour). ComCo may therefore order that a party cease and desist from an unlawful practice that has actually been found. It may consequently, for example, order a contract to be entered into if refusal to enter into a business relationship has been found to be unlawful. Measures relating to practices that are outside cartel law (i.e., that were not the subject of a proceeding or were not found to be unlawful) may not be ordered. In addition, orders must at all times be reasonable.

If, after the preliminary investigation, an investigation is opened there is the possibility, within the meaning of interim measures, to make certain orders for the duration of the proceedings. With regard to Article 7 CartA, it can, for example, be ordered that an allegedly dominant undertaking must continue to supply other market participants during the proceedings. For example, ETA, a subsidiary of the Swatch Group, which had announced that it was suspending deliveries of mechanical movements that were important to the whole watch industry, was obligated to continue making such deliveries to a certain extent.[38] It is true that the CartA has no express rule regarding interim measures, but based on the general reference in Article 39 CartA to the Federal Act on Administrative Procedure, which has a corresponding provision, they are permitted.[39] Interim measures may also be applied for by third parties provided that not only individual interests, which must be asserted in the civil courts, but also the public interest in protecting effective competition are affected. The precondition for ordering interim measures is that it can be ruled out with sufficient certainty that there are objective reasons for the allegedly unlawful behaviour that is to be investigated. Furthermore, the order must be reasonable. ComCo decisions concerning interim measures may be challenged independently in the Federal Administrative Court if they result or may result in a disadvantage that cannot easily be rectified (particularly of a financial kind).

37 BGer 2C_484/2010, E. 2 and 8.2 in Re Publigroupe (published as BGE 139 I 72 p. 72 ff.).

38 RPW 2012/2, p. 260 ff.

39 BGE 130 II 149, E. 2.1; RPW 2012/1, p. 164.

iii Structural remedies

Structural remedies aim at directly influencing the market structure. There are three categories of structural measures: (1) the disposal of participations, companies or rights (acceptance of disposal); (2) market openings (acceptance of market opening) and (3) unbundling of personnel, financial or contractual connections (other acceptance of unbundling).[40] Apart from corporate merger control (Article 31 Paragraph 3 CartA), ComCo generally does not have jurisdiction to order structural measures.

VI PROCEDURE

A government cartel investigation is often an unpleasant surprise. A swift, effective, and well-coordinated response is essential. The first step of a proceeding may be the opening of a preliminary investigation according to Article 26 CartA through the Secretariat of ComCo. Usually, the Secretariat of ComCo gathers information by sending questionnaires. In other cases the first step may be a leniency application, a complaint by a third party or the monitoring of certain markets by ComCo. If it comes to the conclusion that there are indications of an unlawful restraint of competition (or sometimes also if the Secretariat of ComCo believes it has a good case from a political perspective), an investigation will be opened according to Article 27 CartA. The opening is published in the Swiss Official Gazette of Commerce and, generally, in a press release. ComCo, or its Secretariat, may also comment on an investigation in interviews, on television or in a press conference (depending on the public interest and response), which makes an undertaking's preparations in responding to such media coverage and to questions of the media very important. Furthermore, the Secretariat of ComCo has the power to search any premises, including business premises, private addresses and adjacent areas. Therefore, an investigation can open with a dawn raid at the premises of the undertakings being searched. The Secretariat of ComCo is usually accompanied by an official, the police and IT experts, and it may seize any evidence. The undertakings and their employees must provide the Secretariat of ComCo with the documents that it requests and grant access to everything. Questions that are related to the dawn raid must be answered (e.g., regarding the location of documents, the archive system or passwords). ComCo recently took the view that evidentiary hearings and witness examinations can take place during a dawn raid, which is disputed by part of the doctrine and has, to our knowledge, not yet been tested before the courts. However, there is no obligation to actively assist the Secretariat of ComCo with the dawn raid. The undertaking should appoint a dawn raid team responsible on the company side for coordinating and monitoring any dawn raids and undertakings should always be prepared for dawn raids.

If an investigation is opened (regardless of whether there is a dawn raid), the Secretariat of ComCo will usually grant a deadline of approximately 30 days to answer (further) questions or to submit a statement regarding the allegations, or both (the deadlines in the preliminary investigation are usually shorter, approximately seven to 14 days). If the Secretariat of ComCo opens an investigation, there may be witness

40 Zäch (Fn 26) Recital 827, with reference to case law.

examinations or hearings before the Secretariat of ComCo. Even though ComCo has the statutory power to require the parties to an investigation to give evidence, the parties may, within certain limits, refuse to answer questions if this would result in self-incrimination (because of the procedural rights of the parties). In any event, undertakings must determine and prepare very carefully what information and documents are to be submitted and how this is to be done.

During the proceeding, there is the possibility of reaching an amicable settlement with ComCo or submitting a leniency application. Pursuant to Article 49a, Paragraph 2 of the CartA, a sanction may be waived in whole or in part if the undertaking assists in the discovery and elimination of the restraint of competition. Although the CASO stipulates a full or partial waiver of fines only in cases of horizontal and vertical agreements according to the CartA, it may be assumed, based on the wording of Article 49a CartA, that a (partial) waiver is also possible in case of unlawful practices by dominant undertakings under Article 7 provided, however, that the following conditions are fulfilled. According to Article 8 of the CASO, ComCo may grant an undertaking full immunity from a sanction if the undertaking reports its own participation in a restriction on competition and if it is the first applicant to provide (1) information that enables ComCo to open proceedings, or (2) evidence that enables ComCo to establish an infringement of competition (provided the information or evidence is not already available). A leniency application may lead to (1) a discount of 100 per cent of the sanction (immunity) if the undertaking is the first applicant and meets certain conditions, or (2) a discount of up to 50 per cent if the undertaking is not the first applicant but does meet the respective conditions, depending on how much that undertaking contributed to the success of the proceedings. However, full immunity from sanctions is granted only if several conditions are met, such as that the undertaking has not coerced any other undertaking into participating and has not played the instigating or leading role in the relevant infringement of competition. Since a dominant undertaking can always be considered to having a leading role, full immunity would probably be the exception. At the time of writing, ComCo suggests in an unofficial draft template for leniency applications that only a partial waiver of sanctions is possible. Finally, entering into an amicable settlement, along with cooperation with ComCo, may, depending on the particular circumstances, lead to a discount of between approximately 5 and 20 per cent.

Cooperation outside a leniency application that goes further than demanded by ComCo can also lead to a reduction of the sanction. Even though there are explanations by ComCo stating that cooperation is only taken into consideration within a leniency application, part of the doctrine takes a different view and ComCo has adopted this other view at least in certain cases. Mere cooperation would probably be rewarded with a smaller discount than concluding a settlement with ComCo. It must be noted that there is no established practice by ComCo with regard to discounts. Therefore, the above amounts must be seen only as a tentative indication. Finally, the amounts of the reduction in the case of settlement or cooperation depend mostly on the facts. As a general rule, the earlier and the more substantively an undertaking acts, the higher the benefit may be.

After usually roughly one year from the opening of the investigation (please note that it can also be less or significantly more than one year), the Secretariat of ComCo will decide internally whether it believes it has a case against the party or parties subject to the investigation. It may then send the parties the preliminary results of the gathering

of evidence (which also includes the allegations of competition law infringements) as a basis for possible settlement discussions or it may directly send a draft order stating the allegations, the position, the evidence and the reasoning of the Secretariat of ComCo. If the Secretariat of ComCo sends the draft order to the parties, it will usually grant the parties a deadline of 30 days to submit a statement in response to the draft order. This deadline can normally be extended. Based on the statement of the parties in response to the draft order, the Secretariat of ComCo may revise the draft order (and if there are substantial changes, again send it to the parties) or submit the draft order together with the statements of the parties to ComCo for a decision. Within roughly two to four months, there will usually be a hearing before ComCo during which the parties have a right to be heard and can present their view of the facts and of the legal assessment and during which ComCo asks the parties questions often with the aim of gathering further evidence against the parties. After this hearing, the parties may be asked follow-up questions. If no substantial further investigations or changes are made, ComCo will usually issue its decision (order) within one to three months. ComCo's decisions may be appealed to the Federal Administrative Court and thereafter to the Federal Supreme Court.

VII PRIVATE ENFORCEMENT

Private antitrust enforcement has not yet played a significant role in Switzerland. Of course, reporting an abuse of a dominant position to ComCo is often a less risky way to put pressure on a dominant undertaking than seeking a judgment or a settlement in a civil proceeding. Notwithstanding this hesitant development, there are specific provisions in the CartA regarding private enforcement. Pursuant to Article 12 CartA, a person hindered by an unlawful restriction on competition from entering or competing in a market is entitled to request the elimination of, or desistance from, the restriction or damages in accordance with the Code of Obligations (CO), and surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Pursuant to Article 41 CO, a person claiming damages must prove that loss or damage occurred, as well as the causal nexus between the allegedly unlawful action and the loss or damage, the illegality of the action, and fault. The level of proof that is required to claim damages is high; basically, any damages must be established based on the specific facts. Where the exact value of the loss or damage cannot be quantified, the court may estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party. Furthermore, there are no punitive damages. Finally, it must be noted that leniency granted to an undertaking does not preclude the undertaking from being subject to private enforcement. On the contrary, the findings of ComCo, including the published decisions of ComCo – which are to date usually very detailed and include evidence and confessions of competition law infringements, and of the respective effects on the market – can be detrimental in relation to private enforcement. However, according to recent informal information, ComCo intends to revise its practice regarding the conclusion of settlements by issuing summary decisions, with the aim that these cannot form the basis of claims in private enforcement proceedings. This will make settlements (which allow ComCo to conduct proceedings much more efficiently and

with less resources) more attractive to the undertakings under investigation. However, ComCo intends to make this dependent on certain conditions, in particular such that all parties to an investigation join the settlement and that the parties decide quickly to join the settlement.

VIII FUTURE DEVELOPMENTS

The most significant future development would be an amendment of the CartA that has been proposed and is currently being debated and that would include, *inter alia*, the following elements. First, the institutions may be revamped to include: (1) a (more) independent competition authority responsible for investigating potential infringements and for reviewing proposed concentrations (mergers); and (2) a new chamber of the Swiss Federal Administrative Court responsible for deciding on the matters brought before it by the competition authority. The aim of these new institutions would be to create more independence between the investigating and the decision-making body. It is unlikely that this will be realised. Second, a motion is pending and being debated according to which a new provision will be introduced into the CartA – a new Article 7a – so that undertakings distributing their products outside Switzerland in an OECD country at lower prices than in Switzerland will be deemed as infringing the CartA if they refuse to supply customers in Switzerland through their foreign distribution entities at the same prices and conditions, or if they take measures to prevent third parties from supplying into Switzerland. The ComCo itself opposes the introduction of this new provision mainly because it anticipates problems with regard to enforcement. Third, compliance programmes of undertakings may result in reduced sanctions (this is something that would already be possible under the current CartA, but has, to our knowledge, never been granted yet). Fourth, Article 5 will be revised to introduce basically a *per se* prohibition of the five types of agreements falling under Article 5, Paragraphs 3 and 4 of the CartA (hard-core horizontal and vertical agreements). This would basically be achieved by abolishing the condition of a significant effect on competition for a restriction on competition to be unlawful. Currently, it is very uncertain whether the proposed amendment of the CartA, or any parts thereof, will find a majority in the Swiss parliament. Even though, in particular, members of ComCo are manifestly optimistic, it may well be that the amendment of the CartA will fail. The outcome is wide open.

Finally, an agreement between the EU and Switzerland concerning cooperation on the application of their competition laws (in particular, regarding the exchange of information and evidence) was signed on 17 May 2013 (Cooperation Agreement). It has passed the legislative hurdles in the EU and must now be ratified by the Swiss parliament, which is generally expected to take place in summer 2014. The entry into force could then be expected at the beginning of 2015. At least from a Swiss perspective, also pursuant to statements of representatives of ComCo, no retroactive effect must be expected with regard to information and documents that were produced prior to the entry into force of the Cooperation Agreement. However, it is generally expected that information and documents that are produced after the entry into force will be subject to exchange between the competition authorities of the EU and Switzerland, whether or not the proceedings were opened prior to the entry into force.

Appendix 1

ABOUT THE AUTHORS

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Nicolas Birkhäuser is a partner at Niederer Kraft & Frey Ltd's competition law practice group. He graduated from the universities of Basel (lic iur, 1998) and Cambridge, UK (LLM, 2003). He is a member of the Zurich and Swiss Bar Association and other associations. He is also a member of the committee of the Swiss Competition Law Association (ASAS), which is the Swiss Group of the International League of Competition Law (LIDC). He regularly publishes articles in the field of competition law. Among others, Nicolas Birkhäuser acted as a national reporter for Switzerland at the 2012 Congress of the LIDC and as a speaker at various events, such as, for example, at an event of the Swiss section of the Studienvereinigung Kartellrecht e.V. in 2013.

Nicolas Birkhäuser advises and represents undertakings in competition law matters concerning in particular merger control, dominance, horizontal and vertical restraints, exchange of information, compliance, and competition enforcement investigations, including dawn raids and the risks and opportunities of leniency programmes. Nicolas Birkhäuser advises undertakings on Swiss and European competition law and coordinates multi-jurisdictional strategies and responses. His aim is to achieve the best results in both public competition enforcement before competition authorities and courts, and in private competition enforcement and other aspects of the undertakings' strategy and defence.

One of the central themes of Nicolas Birkhäuser's advice is to elaborate solutions that create maximum freedom of action for the undertakings in each specific case.

ANDREAS D BLATTMANN

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Andreas D Blattmann graduated from the University of Zurich (lic iur, 2005) and holds a PhD in Swiss and European competition law (Dr iur, 2012). Further, he is a member of the Zurich and Swiss Bar Association and regularly publishes articles in various legal

fields. Before joining Niederer Kraft & Frey's competition practice, Andreas D Blattmann worked with several Swiss courts, both as a senior clerk to the judges and as a judge. He primarly advises and represents clients in litigious and non-litigious competition law matters (such as merger control, compliance, dominance and monopolies, and cartel enforcement investigations). Furthermore, he advises on contract law and unfair competition and represents clients before state courts, encompassing in his practice domestic and international commercial disputes, enforcement and insolvency.

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