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Chapter 24

SWITZERLAND

Nicolas Birkhäuser and Andreas D Blattmann[1]

I INTRODUCTION

In addition to the prohibition of unlawful agreements affecting competition,[2] and the control of mergers,[3] the control of the behaviour of dominant undertakings pursuant to Article 7 of the CartA is one of the three basic pillars of Swiss cartel law. According to Article 7, Paragraph 1 of the CartA, dominant undertakings behave unlawfully if, by abusing their position on the market, they hinder other undertakings from starting or continuing to compete or if they disadvantage trading partners (i.e., the opposite side of the market). Article 7, Paragraph 2 of the CartA 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.

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2 Article 5 of the Cartel Act (CartA).

3 Article 9 et seq. of the CartA.

Consequently, Article 7 of the CartA is split into a general clause (Paragraph 1) and a non-exhaustive list of examples of potential abusive practices (Paragraph 2), although even where there is a practice referred to in the list of examples, the preconditions of the general clause must also be met at all times.[4] Basically, three preconditions follow from Article 7 of the CartA: (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 disadvantages trading partners.[5] 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 takes the view that such nexus is needed.[6]

The term 'market dominance' is not defined in Article 7 of the CartA but in Article 4, Paragraph 2 of the CartA. According to this statutory provision, 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 of the CartA but in Article 2, Paragraph 1-bis of the CartA. According to this provision, undertakings are all buyers or suppliers of goods and services active in the economic process, regardless of their legal or organisation form (personal scope of application of the CartA). It follows therefrom that the focus must be solely on an economic understanding of the term 'undertaking' or on the entrepreneurial activity. Therefore, Article 2, Paragraph 1-bis even covers undertakings governed by public law, including private commercial companies that are part of a public body (e.g., the federal government, cantons (federal provinces) or municipalities).[7]

Article 7 of the CartA is often accused of lacking precision and specificity.[8] Effectively, the provision does need some interpretation. It is particularly 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 of the CartA, the Federal Supreme Court addressed this question fairly recently and denied it: the Cartel Act Amendment of 1995 had no particular European political background. Although it was true that the Swiss legislator, like the European regulator, chose the term 'imposition', it could not 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

4 Borer (ed), *Schweizerisches Kartellgesetz, Wettbewerbsrecht I* [Swiss Cartel Act, Competition Law I], 3rd edition, Zurich 2011, Article 7 N 4.

5 *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.

6 Amstutz and Carron, in Amstutz and Reinert (eds), *Basler Kommentar, Kartellgesetz (BSK KG)* [Basel Commentary on the Cartel Act], Basel 2010, Article 7 N 19 et seq., with further references.

7 BGE [Federal Supreme Court Decisions] 137 II 199, consid. 3.1.

8 Borer (footnote 4) Article 7 N 7, with notes; *RPW* 2010/2, p. 267, consid. 4.5.1.

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.[9] Consequently, 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 not sufficient.[10] Whether this is set in stone is still not clear. The Swiss Competition Commission (ComCo)[11] 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.[12]

Finally, Article 3, Paragraph 1 of the CartA governs the relationship between the CartA and other statutory provisions: according to this rule, regulations take precedence over the provisions of the CartA where such regulations do not allow for competition, in particular provisions that establish a state market or 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 of the CartA be assumed to apply to the entire market.[13] Article 3, Paragraph 2 of the 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, however, assessed under the CartA.

II YEAR IN REVIEW

In previous years, the ComCo's primary focus was 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 of the CartA. In 2013, for instance, 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. Furthermore, the following cases should be mentioned.

9 BGE 137 II 199, consid. 4, in *Re Swisscom – mobile telecommunications termination charges*.

10 See also the considerations of the Federal Administrative Court in a judgment dated 21 February 2010, in RPW 2010/2, p. 321 et seq., in particular consid. 12.2.1 and 12.3.2.

11 If not further specified, this definition includes the Swiss Competition Commission and its Secretariat.

12 *RPW* (footnote 5) 2011/4, p. 586, footnote 394.

13 Borer (footnote 4) Article 3 N 5; *RPW* (footnote 5) 2012/3, p. 461 Recital 19.

i Publigroupe SA[14]

In this case, the 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.[15] Publigroupe challenged the decision of FAC before the Federal Supreme Court (FSC). First, FSC held – for the first time explicitly – that the nature of the competition law sanctions according to Article 49a of the CartA was criminal.[16] 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 of the ECHR and Article 30 of the 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 of the ECHR and Article 30 respectively by limiting its discretion. Furthermore, FSC found that it was not necessary with respect to Article 6 of the 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 this case 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 of the 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 of the CartA – whether applied on its own or in connection with Article 7, Paragraph 2 lit. b of the CartA – would not be sufficiently precise to constitute an appropriate legal basis according to Article 7 of the ECHR and Article 15 of UN Covenant II. FSC found that Article 7, Paragraph 1 of the CartA had to be read in connection with Article 7, Paragraph 2 lit. b of the CartA and that this interpretation in connection with other provisions such as Article 4, Paragraph 2 and 49a, Paragraph 3 lit. a of the CartA showed that Article 7, Paragraph 2 lit. b of the CartA was sufficiently precise. Hence, there was no violation of Article 7 of the ECHR and Article 15 of 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

14 Judgment of the Swiss Federal Supreme Court 2C_484/2010 of 29 June 2012 (*RPW* (footnote 5) 2013/1, p. 114 et seq.).

15 Article 7 of the CartA.

16 The FSC made reference to the decisions in *Menarini* and *KME.*

abusive within the meaning of Article 7, Paragraph 2 lit. b of the 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.

ii Swiss Press Agency

The ComCo opened an investigation against the Swiss Press Agency (SDA) after its main competitor AP Schweiz had closed down its activities. The 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 per cent, 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. The 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 base and the profitability of AP Schweiz. In addition, the ComCo held that SDA's exclusivity rebates had also caused an unequal treatment of media undertakings, which had had the effect of restricting competition on the downstream media and advertisement markets. The 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 CartA and imposed a sanction of 1.88 million Swiss francs on SDA. With regard to SDA's future conduct the ComCo approved an amicable settlement that included the following: a commitment by SDA 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).

iii The Swatch Group SA

The ComCo issued an order dated 21 October 2013 that concludes the proceeding during the course of which, *inter alia*, 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 gradually reduce its supplies of movements to competitors until 2019. After 31 December 2019 there will no longer be any 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. The ComCo held that it was too early for any ruling allowing Nivarox to reduce supplies of Assortiments to the manufacturers of movements; however, the ComCo left open whether a phasing-out may be possible in the future depending on how the market develops. Should the Swatch Group SA no longer have a dominant position on the market, it may request that the supply obligations be amended.

iv Jaguar Land Rover Schweiz AG

Jaguar Land Rover Schweiz AG terminated a service agreement with an authorised automotive service garage. The garage filed a claim with the Commercial Court of Zurich with the request to order that Jaguar Land Rover Schweiz AG continue the service agreement that 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 defined relevant product market Jaguar Land Rover Schweiz AG had a market share of less than 5 per cent (the 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.

III MARKET DEFINITION AND MARKET POWER

i Basic principles

According to Article 4, Paragraph 2 of the CartA one or more undertakings are dominant if they are able, as suppliers or buyers, to behave to an appreciable extent independently of other market participants (competitors, suppliers or buyers). The terms in brackets indicate that in determining whether there is a dominant position the focus must not only be on data relating to market structure. Instead, the actual relations of dependence on the market must also be taken into account. However, whether market dominance may already exist where an undertaking has a paramount market position *in relation to competitors* or where other undertakings as buyers or suppliers are dependent on the first undertaking (relative market dominance) is still not clear and subject to debates.[17]

At the outset, it is important to point out that Article 4, Paragraph 2 of the CartA governs four distinct categories – not only single but also collective dominance is governed by this provision; moreover, dominance on both sides of the market falls under Article 4, Paragraph 2 of the CartA – that is, dominance on the supply and on the demand side. This differentiation is of particular significance as the criteria according to which the assumed dominant situation is assessed differ from one situation to another. Of course, criteria such as market entry (or exit) barriers (i.e., potential competition), market share, pressure of competition from substitutes, the market phase and the position of the other side of the market must be analysed in every category; however, as the context differs from one category to the other, such criteria must be adapted to specific situations. For example, whereas in a situation in which a single firm is presumed dominant on the supply side, 'market entry barriers' – put simply – refer to the extent to which a price increase above minimal average costs is possible without inducing potential competitors to enter the market. In contrast, in a situation in which a single firm is presumed dominant on the buyer side, economic theories about market entry barriers apply rather by analogy when assessing whether there are (other) potential sales channels.

17 Borer (footnote 4) Article 4 N 16, with further references; *BSK KG* (footnote 6), Article 4 N 23 et seq.

Moreover, depending on the category, other criteria must be taken into account such as the essential facility doctrine in a case of single-firm dominance on the supply side.[18] Finally, in a case of collective dominance the criteria listed above are usually termed 'static structural characteristics' and describe the market in which (unlawful – that is, abusive) parallel behaviour might arise, therefore forming the basis for a theoretical assessment of the likelihood of such behaviour occurring. As this parallel behaviour is usually seen as the result of tacit collusion, the assessment must include the undertakings' options to retaliate to another undertaking's deviation from the collusive path ('cheat'). Such assessment is usually followed by an *empirical* examination of the 'static structural characteristics', which leads, in the end, to the conclusion as to whether collective dominance exists and whether competition is restricted.[19]

Based on the foregoing, the practice of the ComCo is essentially in accordance with that of the European Commission, whereby the following factors seem to be the core of any assessment: (1) the competitive pressure or market position of the dominant undertaking(s) and its competitors (actual competition); (2) the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of potential competitors (potential competition); and (3) the competitive pressure due to the negotiating strength of the buyers (countervailing market power).[20] Analysing these criteria regularly 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.[21] As to time, an examination must be conducted to see whether any goods or services that allow for substitution in terms of product and geography are available all year round or just for a certain period.

At least for situations in which a single firm dominance must be assessed, market shares regularly serve as a first indication: 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 of the CartA, it is also clear that market dominance may exist not only on the supply side, but also on the demand side.

18 *BSK KG* (footnote 6), Article 4 N 258 et seq., in particular N 396.

19 *BSK KG* (footnote 6), Article 4 N 412 et seq., in particular N 454 et seq.

20 *RPW* (footnote 5) 2012/1, p. 98 Recital 133.

21 Ibid., p. 103 Recital 158 and p. 105 Recital 170.

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, the ComCo has in a few decisions affirmed the existence of must-in-stock products. However, this topic is still a hot potato and debated in legal writings.[22]

ii Collective dominance

As outlined above, Article 4, Paragraph 2 of the CartA also governs collective market dominance. Two different scenarios can be distinguished: either the collective market dominance of two or more undertakings is the result of an agreement affecting competition[23] or it is, put simply, the consequence of the market structure, the situation then being regularly assessed under Article 7 of the CartA.[24] It should, however, be noted that Article 5 and Article 7 of the CartA may apply cumulatively, which is of relevance in the first scenario.

As far as evident, collective dominance has so far been affirmed only once in an investigation under Article 7 of the CartA. 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 presented themselves as a single entity on the market.[25]

iii Intellectual property

Article 3, Paragraph 2 of the CartA says that the CartA does not apply to effects on competition that arise exclusively from the legislation governing intellectual property.

22 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.; further *BSK KG*, Article 4 N 198 et seq.

23 Article 5 of the CartA.

24 For the sake of completeness, it is worth noting that a combination of the two might also be defined as a third scenario.

25 *RPW* (footnote 5) 2003/1, p. 134 et seq. and p. 150 et seq. Recital 241 et seq.; 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.

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, the ComCo held that Article 3, Paragraph 2 of the 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.[26] 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. To assess whether the scope of an exclusive right that is exercised is covered by the intellectual property right, it must be determined whether all or only part of its exercise is covered by the intellectual property right and which part of its exercise (if any) goes beyond it. Only the exercise of intellectual property rights with regard to a restraint on competition is subject to and assessed under the CartA.[27]

In connection with Article 7 of the 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.[28] This is primarily relevant if the 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 of the 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.[29]

IV ABUSE

i Overview

As outlined in Section I, *supra*, even where there is behaviour that would fall under the list of examples of Article 7, Paragraph 2 of the CartA, the preconditions of Article 7, Paragraph 1 of the CartA must also be met.[30] Furthermore, Article 7 of the CartA, in contrast to Article 5 of the CartA (see Paragraph 2), does not contain any statutory justification of abuse. However, even with Article 7 of the CartA, justification is in

26 *RPW* (footnote 5) 2006/3, p. 433 et seq.

27 See also Borer (footnote 4) Article 3 N 11, with references to European practice.

28 Article 7, Paragraph 2 lit. a of the CartA.

29 *BSK KG* (footnote 6), Article 7 N 148.

30 Zäch, *Swiss Cartel Law*, Second Edition, Bern 2005, Recital 526 et seq.

principle possible (legitimate business reasons).[31] As in European law, a distinction is generally made between the factual elements of impeding (excluding) and exploiting. Certain practices in the list of examples in Article 7, Paragraph 2 of the 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 of the CartA, however, does recognise other presumably abusive practices.

Another interesting question is whether in a case of collective dominance all collectively dominant undertakings would have to act jointly (or in the same way) or whether it is enough if only one of the undertakings acts abusively. In our view, it is important to differentiate between parallel behaviour and abuse. As not every behaviour of a (collectively) dominant undertaking is abusive within the meaning of Article 7 of the CartA, the specific situation must be assessed. For example, rising prices above a certain level might fall under Article 7, Paragraph 2 lit. c of the CartA. 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 (this would, as a result, lead to the collective dominance becoming unstable). Consequently, the conclusion must be that the buyer is not dependent on the undertaking behaving abusively. In other words, the latter cannot behave independently as its behaviour might result in the buyer switching to the competitor. In other cases, however, it might be possible that the anti-competitive behaviour of only one of the collectively dominant undertakings could qualify as abuse of the collective dominant position, particularly if it can be argued that it is done to protect all the collectively dominant undertakings. By way of an example, it might be possible that only one of the collectively dominant undertakings undercuts prices directed against a specific competitor in the sense of Article 7, Paragraph 2 lit. d of the CartA, while the others remain passive. Another question in this context is the extent to which abusive behaviour must be proven in proceedings before the ComCo. It cannot be excluded that the ComCo might take the view that proving the behaviour of only one of the collectively dominant undertakings would suffice.

Whether this understanding of collective dominance differs from European practice remains, in our view, unclear, although 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.[32]

ii Exclusionary abuses

Refusal to enter into business relationships is controversial. In fact, Article 7, Paragraph 2 lit. a of the 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.

31 See also *BSK KG* (footnote 6), Article 7 N 57.

32 See the references in Whish, *Competition Law*, Seventh Edition, Oxford 2012, p. 581 et seq.

The breaking off or restricting of a business relationship is frequently evaluated more strictly than failing to enter into a new business relationship.

Article 7, Paragraph 2 lit. b of the CartA covers discriminatory practices of any kind; 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 first where the same subject matter is treated differently, but also where there is the same treatment of disparate subject matter. No discrimination 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 of the 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.[33]

Discount schemes are also of importance in the targeted undercutting of prices or other business conditions. Article 7, Paragraph 2 lit. d of the 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 after the exit of the weaker competitor. 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.[34] 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[35] but may also be unreasonable.[36] 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

33 Zäch (footnote 30) Recital 673 et seq.

34 Borer (footnote 4) Article 7 N 24.

35 Article 7, Paragraph 2 lit. d of the CartA.

36 Article 7, Paragraph 2 lit. c of the CartA.

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.[37] 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 a high level (to the detriment of the consumers). Article 7, Paragraph 2 lit. e of the 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 7, Paragraph 2 lit. b of the CartA. The provision of Article 7, Paragraph 2 lit. b of the CartA is broad and covers any discrimination in relation to price or other conditions of trade.[38] 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 different conditions of trade upon the same situation (direct discrimination) or the same conditions of trade upon different situations (indirect discrimination).[39] Discrimination against competitors of the dominant undertaking falls outside the scope of Article 7, Paragraph 2 lit. b of the CartA (primary-line discrimination); only discrimination against trading partners (secondary-line discrimination) falls within the scope of Article 7, Paragraph 2 lit. b of the CartA.[40] The dominant undertaking is not obliged to treat its trading partners equally. There can be economically reasonable grounds that justify different treatment.[41]

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.[42] Another example of discrimination against trading partners is where manufacturers grant less financial

37 Zäch (footnote 30) Recital 687, with reference to case law.

38 BSK KG (footnote 6), Article 7 N 155.

39 BSK KG (footnote 6), Article 7 N 206 et seq.

40 BSK KG (footnote 6), Article 7 N 204.

41 Borer (footnote 4) Article 7 N 17.

42 Borer (footnote 4) Article 7 N 17.

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.[43]

iv Exploitative abuses (including excessive pricing)

The imposition of unreasonable prices or other unreasonable business conditions under Article 7, Paragraph 2 lit. c of the CartA does not directly apply to the price-setting mechanism. 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.[44]

In the case of transactions subject to conditions within the meaning of Article 7, Paragraph 2 lit. f of the 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 of the 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

43 Zäch (footnote 30) Recital 675, with reference to case law.

44 *RPW* (footnote 5) 2004/3, p. 798.

business reason). Finally, general grounds of justification, such as consumer protection, avoidance of product liability or warranty of safety of use, come into question.[45]

V REMEDIES AND SANCTIONS

i Sanctions

Pursuant to Article 49a, Paragraph 1 of the CartA, any undertaking (not individual) that abuses a dominant position will be sanctioned with a penalty of up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years before the imposition of the fine (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 financial years before the end of the infringement (the latter according to recent practice). 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:[46] 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 the 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 the ComCo. Finally, it must be noted that only undertakings can be sanctioned for first-time infringements against the substantive law provisions. Individuals, 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.[47]

The Federal Supreme Court gave its opinion at least to some extent on the important question of whether Article 7 of the 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

45 Zäch (footnote 30), Recital 707 et seq.

46 Articles 4 to 6 of the CASO.

47 Articles 54 to 55 of the CartA.

applies to the sanction under Article 49a of the CartA, which, given this background, is considered to be a criminal sanction. 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 of the CartA. This was said to only be possible if the general clause was applied together with an offence from the list of examples.[48] 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. 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.[49]

ii Behavioural remedies (including interim measures)

ComCo proceedings generally consist in a preliminary investigation and an in-depth investigation. Under Article 30 of the CartA, the proceedings end with a decision by the 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 of the CartA. 'Measures', according to Article 30, Paragraph 1 of the CartA, essentially means that the 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). The 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 of the 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 SA, 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 (as to the new developments in this case, see Section II.iv,

48 *RPW* (footnote 5) 2010/2, p. 314, consid. 4.5.

49 BGer 2C_484/2010, consid. 2 and 8.2 in *Re Publigroupe* (published as BGE 139 I 72 p. 72 et seq.).

supra).[50] It is true that the CartA has no express rule regarding interim measures, but based on the general reference in Article 39 of the CartA to the Federal Act on Administrative Procedure, which has a corresponding provision, they are permitted.[51] 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. The 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).

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 (acceptance of unbundling).[52] Apart from corporate merger control,[53] the 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 of the CartA through the Secretariat of the ComCo. Usually, the Secretariat of the 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 the ComCo. If it comes to the conclusion that there are indications of an unlawful restraint of competition (or sometimes also if the Secretariat of the ComCo believes it has a good case from a political perspective), an investigation will be opened according to Article 27 of the CartA. The opening is published in the Swiss Official Gazette of Commerce and, generally, in a press release. The 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.

The Secretariat of the 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

50 RPW (footnote 5) 2012/2, p. 260 et seq.

51 BGE 130 II 149, consid. 2.1; RPW (footnote 5) 2012/1, p. 164.

52 Zäch (footnote 30) Recital 827, with reference to case law.

53 Article 31, Paragraph 3 of the CartA.

of the 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 the 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). The ComCo recently took the view that evidentiary hearings and witness examinations can take place during a dawn raid, which is rightly 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 the 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 the 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). However, in particular in proceedings with a plurality of parties, it may take significantly longer until the parties hear from the Secretariat of the ComCo. Further, there are often witness examinations or hearings before the Secretariat of the ComCo. Even though the 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 must be submitted and how this is to be done.

During the proceeding, there is the possibility of reaching an amicable settlement with the 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 of the CartA and according to the recently issued and revised Explanatory Note and Form of the Secretariat of the ComCo on the Leniency Programme, that a reduction of a sanction is also possible in cases of abuse of dominance, but only in the form of a partial, as opposed to a full, reduction.

Full immunity from administrative fines is granted, if an undertaking is the first to either: (1) provide information enabling the ComCo to open an in-depth investigation pursuant to Article 27 of the CartA, provided that the 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 CartA; or (2) provide evidence enabling the ComCo to establish a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the 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:

a did not coerce any other undertaking to participate in the infringement and was neither instigator nor leader of the cartel;

b voluntarily submits all information or evidence in its possession concerning the unlawful practice in question to the ComCo;

c cooperates on a continuous basis and expeditiously, throughout the ComCo's administrative procedure; and

d discontinues its involvement in the infringement no later than the time of the leniency application (voluntary report) or upon being ordered to do by the ComCo.

Any undertaking that submits the leniency application (or marker) not as the first undertaking or does not meet the conditions for full immunity, but has unsolicited cooperated with the Secretariat and the ComCo, and terminated its involvement in the infringement no later than the time at which it submitted evidence, can benefit from a reduction of the sanction of up to 50 per cent. The amount of the reduction of a sanction depends on the importance of the contribution to the success of the proceedings (in particular, the timing, the quality and the quantity of the information and evidence submitted).

Cooperation outside a leniency application that goes further than demanded by the ComCo can also lead to a reduction of the sanction. Even though there are explanations by the ComCo stating that cooperation is only taken into consideration within a leniency application, part of the doctrine takes a different view and the ComCo has adopted this other view at least in certain cases.

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 the ComCo will decide internally whether it believes it has a case against the party or parties subject to the investigation. It may then communicate to 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 the ComCo. If the Secretariat of the 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 the 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 the ComCo for a decision. Within roughly two to four months, there will usually be a hearing before the 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 the 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, the ComCo will usually issue its decision (order) within one to three months. Against the ComCo's decisions appeals may be filed with the Federal Administrative Court and thereafter 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 the 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 (however, note that the ComCo should not be used for private interests and disputes and will tell the respective undertaking to file a claim before the civil courts). Notwithstanding this hesitant development, there are specific provisions in the CartA regarding private enforcement. Pursuant to Article 12 of the 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 restitution of unlawfully earned profits in accordance with the provisions on agency without authority. Pursuant to Article 41 of the 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 the ComCo, including the published decisions of the 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, the 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 the ComCo to conduct proceedings much more efficiently and with less resources) more attractive to the undertakings under investigation. However, according to some informal sources, the ComCo may intend 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 potential development was a proposed reform of the CartA that would have included a new Article 7a of the CartA, providing that undertakings distributing their products outside Switzerland in an OECD country at lower prices than in Switzerland would have been deemed as infringing the CartA if they had refused to supply customers in Switzerland at the same prices and conditions through their foreign distribution entities, or if they had taken measures to prevent third parties from supplying into Switzerland; however, the proposed amendment of the CartA was rejected by the Swiss parliament in September 2014. The ComCo itself opposed the introduction of this new provision mainly because it anticipated problems with regard to enforcement. There was, however, significant political support for the introduction of this provision. Further,

according to another new provision, compliance programmes of undertakings would potentially have resulted in reduced sanctions (this is something that is already possible under the current CartA but has, to our knowledge, not yet been granted).

It is yet unclear which elements of the reform that was rejected in Parliament as a package will be taken up again separately in a future reform. 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 CartA with the aim that suppliers outside Switzerland would be forced to supply customers (undertakings) in Switzerland at fair conditions. It is, of course, interesting to note that this motion and probably any other proposition to reform the CartA in the near future will be influenced by both the 'Swiss Island of high prices' and the pressure on the Swiss franc by the euro and the dollar on the international exchange rate markets.

Finally, a cooperation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. The cooperation agreement is a second-generation agreement. Information may be exchanged between the 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 Cartel Act provide, *inter alia*, 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. The ComCo and the Secretariat must notify the undertaking concerned and invite it to state its views before transmitting the data to the foreign competition authority.

Appendix 1

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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 (LLM, 2003). He is a member of the Zurich, Swiss, American and International Bar Associations as well as 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.

Mr 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 leniency programmes. He 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 and private competition enforcement including further aspects of the undertakings' strategy and defence, such as reputational issues.

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

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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) and an LLM from the National University of Singapore (2014). Further, he is a member of the Zurich, Swiss and International Bar Association and regularly publishes articles in various legal fields. Before joining Niederer Kraft & Frey, Dr Blattmann worked with several Swiss courts,

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