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Restraints of trade and dominance in Switzerland: overview

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RESTRAINTS OF TRADE
Scope of rules

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

Regulatory framework

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) applies to practices that have an effect on competition in Switzerland, even if they originate in another country. According to new case law, there is no need to demonstrate an appreciable effect on competition in Switzerland to apply the Cartel Act to practices that originate in another country.

According to the strict wording of the Cartel Act, there are no agreements or practices that can be treated as automatically (per se) illegal (*Article 5, Cartel Act*). However, the following agreements are presumed to eliminate effective competition:

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

(*Article 5(3) and (4), Cartel Act.*)

Nevertheless, the legal presumption under Article 5(3) and (4) of the Cartel Act can be rebutted by establishing that competition is not in fact eliminated by the agreement or practice in question. If the legal presumption is rebutted, according to Article 5(1) of the Cartel Act, the agreement or practice must then be assessed as to whether it significantly restricts competition. This issue of whether agreements that are presumed to eliminate competition must be demonstrated to significantly restrict competition in fact was disputed in recent years. However, the issue has been decided by the Federal Supreme Court in its decision in the matter of *Gaba/Gebro* on 28 June 2016 (*Federal Supreme Court Decision 143 II 297*). The Federal Supreme Court issued a decision that agreements regarding prices, quantities and territories under Articles 5(3) and (4) of the Cartel Act (that is, hard-core horizontal and vertical restrictions) qualify in principle as significant restrictions on competition due to their quality (that is, their object) even if the presumption of the elimination of competition is rebutted. The Federal Supreme Court held that this applies irrespective of quantitative criteria, such as the market share of the involved parties. According to this decision, the requirement for a significant effect on competition is only a *de minimis* clause when hard-core restrictions are in question, and quantitative criteria (such as effects) therefore need not be taken into account. In essence, the Federal Supreme Court ruled that the horizontal and vertical hard-core restrictions under Articles 5(3) and (4) of the Cartel Act are prohibited per se, subject only to a justification on grounds of economic efficiency (*see below*). This new practice has since been applied in several cases by the Federal Administrative Court and the Federal Supreme Court.

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

- They are necessary to:
  - reduce production or distribution costs;
  - improve products or production processes;
  - promote research into or dissemination of technical or professional know-how; or
  - exploit resources more rationally.
- They will not enable the parties involved to eliminate effective competition.

In one of its decisions following the decision in *Gaba/Gebro,* the Federal Supreme Court stated that Article 5(2) of the Cartel Act lists the possible grounds for justification on grounds of economic efficiency exhaustively, but at the same time points out that these grounds are openly formulated and that all grounds for efficiency can be taken into account. However, the Federal Supreme Court has stated that a competition agreement must be necessary to achieve the efficiency ground, with no other option available that is less restrictive of competition, to be justified on the grounds of efficiency. This means that the criterion of necessity is a major obstacle and is in fact almost insurmountable, since in practice it will always be possible to imagine less far-reaching measures with which the objective could (perhaps) have been achieved. There is therefore *de facto* a per se prohibition for horizontal and vertical hard-core restrictions under Articles 5(3) and (4) of the Cartel Act, as there is no realistic possibility of justification on grounds of economic efficiency.

The Competition Commission (COMCO) can issue ordinances or notices setting out the conditions under which agreements affecting competition are, as a general rule, deemed to be justified on grounds of economic efficiency. Guidance that reflects COMCO practice can be found in notices on:

- Vertical restraints.
- Agreements of minor importance (*de minimis*).
- Agreements in the automobile sector.

- Ratification and sponsoring of sporting goods.
- Schemes for calculating costs (cost-calculation aids).

These are all available on COMCO's website (*www.weko.admin.ch/weko/de/home/dokumentation/bekanntmachungen---erlaeuterungen.html*).

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

In its Notice Regarding Vertical Restraints, COMCO defines types of vertical agreements that are deemed to have a qualitatively significant effect on competition and sets market share thresholds of 15% and 30% (*see Question 3*). Hard-core restrictions are deemed to be principally qualified as significant restrictions on competition due to their quality (that is, their object) and are de facto prohibited (*see above*).

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

- The Cartel Act does not generally apply to effects on competition that result exclusively from the legislation governing IP. However, import restrictions and certain other restrictions based on IP rights are assessed under the Cartel Act.
- Statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of the Cartel Act. Such statutory provisions include, in particular, provisions that both:
  - establish an official market or price system;
  - grant special rights to specific undertakings to enable them to fulfil public duties.

Regulatory authority

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

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

The Cartel Act applies to both formal and informal practices. Agreements affecting competition include binding or non-binding agreements and concerted practices between undertakings operating at the same or at different levels of production that have a restraint of competition as their object or effect.

Exemptions

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

There are no block exemptions in Switzerland. However, there are notices and other publications by COMCO and the Secretariat that set out and explain their practice or views. In this regard, COMCO has issued the following:

- Notice Regarding Vertical Restraints dated 28 June 2010, and its Explanatory Note dated 12 June 2017, as both updated from time to time.
- Notice Regarding Vertical Restraints in the Automobile Trade dated 29 June 2015, as updated from time to time.
- Notice Regarding Agreements of Minor Importance (*de minimis* notice) dated 19 December 2005.
- These notices and other publications issued by COMCO and the Secretariat are not binding on the courts.

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

- A restriction on the territory into which or on the customers to whom a buyer party to the agreement can sell the contract goods or services, without prejudice to a restriction on its place of establishment, other than:
  - a restriction on active sales into the exclusive territory or to an exclusive customer group reserved to the supplier or allocated by the supplier to another buyer, provided that passive sales are permitted without restriction;
  - a restriction on sales to end users by a buyer operating at the wholesale level of trade;
  - a restriction on sales by the members of a selective distribution system to unauthorised distributors within the territory reserved by the supplier for the operation of that system;
  - a restriction on the buyer's ability to sell components supplied for the purposes of incorporation to customers who would use them to manufacture the same type of goods as those produced by the supplier.

  (*litera b.*)
- A restriction on active or passive sales to end users by members of a selective distribution system operating at the retail level of trade, without prejudice to the possibility of prohibiting a member of the system from operating out of an unauthorised place of establishment (*litera c*).
- A restriction on cross-supplies between distributors within a selective distribution system, including between distributors operating at different levels of trade (*litera d*).
- A restriction agreed between a supplier of components and a buyer that incorporates those components on the supplier's ability to sell the components as spare parts to end-users or to repairers or other service providers not entrusted by the buyer with the repair or servicing of its goods (*litera e*).
- Non-compete obligations, the duration of which is indefinite or exceeds five years. The time limitation of five years does not apply where the contract goods or services are sold by the buyer from premises and land owned by the supplier or leased by the supplier (*litera f*).
- Non-compete obligations after termination of the agreement. This does not apply if:
  - the obligation relates to goods or services that compete with the contract goods or services;
  - the obligation is limited to the premises and land from which the buyer has operated during the contract period;
  - the obligation is indispensable to protect know-how transferred by the supplier to the buyer; and
  - the duration of the obligation is limited to a maximum period of one year after termination of the agreement.

- A restriction on the use and disclosure of know-how that has not entered the public domain, is permitted for an unlimited duration.
- (*litera g.*)
- Restrictions on multi-brand distribution in selective distribution systems that specifically relate to trade marks of particular competing suppliers (*litera h*).

The legal provisions do not prohibit agreements on a maximum sale price or sale price recommendations. However, such agreements are qualified as hard-core restrictions under Article 5(4) of the Cartel Act if they amount to a fixed or minimum price as a result of pressure from, or incentives offered by, any of the parties (*section 10(1) litera a), Notice Regarding Vertical Restraints*).

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

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

COMCO has adopted the jurisprudence of the European Court of Justice (ECJ) on banning the use of third party platforms for the internet sale of luxury goods in its Explanatory Note of the Notice Regarding Vertical Restraints. In the case of *Coty* the ECJ decided in 2017 that a contractual clause that prohibited authorised distributors of a selective distribution network of luxury goods from using, in a discernible manner, third party platforms for internet sales of the goods in question, was an appropriate means to preserve the luxury image (*Decision C-230/16*). The ECJ did not provide for a general test to be applied on selective distribution networks, nor did it define the scope of luxury goods. However, there are good arguments that, according to the ECJ's *Coty* decision, marketplace bans do not constitute a hard-core restriction under Articles 4 *litera* b) or 4 *litera* c) of the EU Vertical Block Exemption Regulation irrespective of whether or not luxury products are at stake. Even though the European Commission and to some extent national jurisprudence in the EU denied the restriction of this exemption to luxury goods, COMCO only adopted a restrictive practice limited to luxury goods in its Explanatory Note.

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

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

Exclusions and statutes of limitation

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

Exclusions

Agreements that do not significantly affect competition are lawful (*see Question 1*). COMCO has issued a *de minimis* notice dated 19 December 2005. Agreements generally fall under this notice and are deemed to be lawful under Article 5 of the Cartel Act, if the following conditions are met (cumulatively):

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

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

Statutes of limitation

No sanctions are imposed if the restraint of competition has not been exercised for more than five years by the time an investigation is opened (*Article 49a(2), litera b, Cartel Act*). It is disputed whether agreements that were not formally nullified can be investigated and sanctioned even if they have not been implemented for more than five years (this has yet to be decided by COMCO and the courts).

According to a decision of the Federal Administrative Court in 2019, the deadline of the statute of limitation for enforcement only begins when the decision of COMCO takes legal effect or after its confirmation by the Federal Administrative Court or the Federal Supreme Court. The period of the statute of limitation for enforcement is then ten years. This decision of the Federal Administrative Court has been appealed to, and is currently subject to confirmation by, the Federal Supreme Court.

Notification

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

Notification

There is no obligation to notify agreements or practices to obtain an individual exemption or other clearance. However, it is possible to notify an agreement or practice. No fine is imposed if the undertaking itself formally notifies the agreement or practice before it is implemented. COMCO has issued a filing form for this purpose.

A sanction can nevertheless be imposed if the Secretariat communicates to the notifying undertaking the opening of a preliminary or in-depth investigation within five months from the notification of the agreement or practice, and the undertaking does not suspend the implementation of the agreement or practice in question. In practice, the formal notification of agreements or practices often does not lead to the required legal certainty and therefore should be carefully evaluated.

Informal guidance/opinion

Aside the formal notification of agreements or practices, it is possible to request informal advice from the Secretariat on matters relating to the Cartel Act. The advice by the Secretariat does not formally bind COMCO. However, it can be expected that COMCO will normally take into consideration advice given by the Secretariat.

Responsibility for notification

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

Relevant authority

The notification must be submitted to the Secretariat.

Form of notification

COMCO has issued a filing form, which can be downloaded from its website in the following languages:

- German (*www.weko.admin.ch/dam/weko/de/dokumente/2015/08/merkblatt_und_formularwiderspruchsverfahren.pdf.download.pdf/merkblatt_und_formularwiderspruchsverfahren.pdf*).
- French (*www.weko.admin.ch/dam/weko/fr/dokumente/2015/08/note_explicativeetformulaireduneretrictionalaconcurrence.1.pdf.download.pdf/note_explicativeetformulaireduneretrictionalaconcurrence.pdf*).
- Italian (*www.weko.admin.ch/dam/weko/it/dokumente/2015/08/circolare_e_moduloperlaproceduradiopposizione.pdf.download.pdf/circolare_e_moduloperlaproceduradiopposizione.pdf*).

Filing fee

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

Investigations

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

Regulators

The Secretariat can, at its discretion, initiate preliminary investigations on either:

- Its own initiative, for example, following market monitoring.
- Obtaining information from third parties.
- The request of the undertakings concerned.

If there are indications of an unlawful restraint of competition, the Secretariat, with the consent of one member of COMCO's presiding body, opens an in-depth investigation. The Secretariat must also open an investigation if it is requested to do so by COMCO or by the Federal Department of Economic Affairs, Education and Research of the Swiss government. The opening of an in-depth investigation must be announced through an official publication.

Third parties

Third parties have no right to demand that investigations be opened. However, third parties can provide information to the Secretariat and make informal complaints. There are no special requirements for making a complaint. The Secretariat has issued a form for the notification of incomplete exchange-rate pass-through, available on COMCO's website in German, French and Italian, with which any person can notify the Secretariat of any incomplete pass-through of benefits due to exchange rate fluctuations. In addition, the Secretariat has issued an Explanatory Note and Form of the Secretariat on Leniency Programme. The Secretariat can decide, at its discretion, whether to initiate a preliminary or in-depth investigation by applying prioritisation principles.

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

Interested parties

The parties concerned (that is, the parties subject to the investigation) as well as third parties (including complainants) have no procedural rights in preliminary investigations. The parties concerned have no right to consult files or to be heard, and third parties have no right to join the preliminary investigation.

In in-depth investigations, the parties concerned have the usual procedural rights to:

- Consult the files.
- Be heard.
- Participate in hearings.
- Comment on minutes to hearings of other parties.
- Suggest witness statements.

However, access to the file and other procedural rights are often granted at a late stage of investigations.

Affected third parties (including affected complainants) can join an in-depth investigation by making a request within 30 days of the publication that an in-depth investigation be opened. Third parties, as defined in Article 43(1), *litera* a) to c) of the Cartel Act (that is, parties who as a result of a restraint of competition are hindered from starting or continuing to compete, as well as certain professional or trade associations and consumer protection organisations) have limited procedural rights. Third parties that fulfil the stricter conditions of Article 6 of the Administrative Procedure Act in connection with Article 48 (*litera* b) and c)) of the Administrative Procedure Act, that is, parties that are particularly affected by the order and have a legitimate interest in the cancellation or amendment of the order, have, as a rule, full (unlimited) procedural rights. Access to the file can be restricted and its secrecy preserved if this is required by:

- Essential public interests of the Swiss Confederation or the Cantons, in particular the internal or external security of the Swiss Confederation.
- Essential private interests, in particular those of respondents.
- The interests of an official investigation that has not yet been concluded.

(*Article 27(1), Administrative Procedure Act.*)

However, these procedural rights are often disputed before COMCO and the courts.

Representations

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

Document access

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

Be heard

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

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

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

The Secretariat has wide investigative powers. It can collect information, for example, by:

- Requesting information.
- Sending questionnaires to the parties concerned as well as to, for example, competitors.
- Asking for statements.
- Holding hearings.
- Asking for testimony from witnesses.

However, parties that have allegedly infringed competition law can refuse to give witness testimony. According to COMCO practice, only members of a formal body (that is, executive board and board of directors) of an undertaking can refuse to give witness testimony. Other employees, including employees directly involved in the alleged infringement, are obliged to testify. COMCO often takes a very restricted view on which persons qualify as members of a formal body of an undertaking. For example, COMCO may also request former members of the executive board and board of directors (no longer employed by the undertaking) to testify against the undertaking on facts relating to the time they were members of the executive board or board of directors. The Federal Administrative Court has ruled that former board members had to testify on the facts but had a right to refuse testimony if it would constitute self-incrimination. This approach, which requires a case-by-case analysis for every question, is impracticable as it depends on facts that are not available to the person obliged to testify and is therefore impossible to carry out in practice. The Federal Administrative Court and the Federal Supreme Court will hopefully further develop this practice and give a full right to refuse testimony to former members of the executive board and board of directors.

The Secretariat can also conduct searches (dawn raids) or order the seizure of documents. These measures must be ordered by a member of COMCO's presiding body on application by the Secretariat.

Based on this information, the Secretariat then conducts its investigation. If the Secretariat concludes that the agreement or conduct in question constitutes an infringement of competition law, it will, as a rule, draft an order. The order is first submitted to the parties concerned for their comments. It is then brought forward to COMCO, together with the statements of the parties concerned, for COMCO to decide. If there are substantial comments or statements by the parties concerned, the Secretariat can revise its draft order and re-submit it to the parties concerned (however, this rarely happens).

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

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

Preliminary investigations can take from two to several months, and in-depth investigations from roughly one year to two or three years, or even significantly more. There is no strict timetable.

Publicity and confidentiality

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

Publicity

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

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

In addition, during the investigation proceeding, information of the parties concerned may be disclosed to the other parties concerned due to their right of access to the files, and, after the closure of the investigation proceeding, to third parties claiming access to the files (*see Question 7 and Cartel leniency in Switzerland: overview, Question 15 and Question 16*).

Automatic confidentiality

COMCO and the Secretariat are bound by professional secrecy, and their publications cannot reveal any confidential information such as business secrets and personal data. The Secretariat has published an explanatory note (*Explanatory Note "Business Secrets", 30 April 2008*) that provides guidance on the handling of business secrets. The Secretariat eliminates confidential information before publication, usually by consulting the parties beforehand.

Confidentiality on request

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

Administrative Court. The decision of the Federal Administrative Court can be appealed to the Federal Supreme Court.

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

The Secretariat has wide investigative powers and can collect information, for example, by:

- Requesting information.
- Sending questionnaires to the parties concerned as well as to, for example, competitors.
- Asking for statements.
- Holding hearings.
- Asking for testimony from witnesses.

However, parties that have allegedly infringed competition law can refuse to give witness testimony. According to the practice of COMCO, only members of a formal body (that is, executive board and board of directors) of an undertaking can refuse to give witness testimony. Other employees, including employees directly involved in the alleged infringement, are obliged to testify (*see Question 8*).

The Secretariat can also conduct searches (dawn raids) or order the seizure of documents. These measures must be ordered by a member of COMCO's presiding body on application by the Secretariat.

Settlements

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

The Secretariat can, on the initiative of the parties concerned or on its own initiative, propose settlement negotiations to the parties concerned with the aim of concluding an amicable settlement to bring an early resolution to an investigation. An amicable settlement is directed at future behaviour and does not exclude or limit sanctions for past behaviour that is the object of the investigation. However, an amicable settlement can be taken into account as a mitigating factor allowing for the reduction of a sanction. The sooner a party proposes an amicable settlement, the higher is the potential reduction of the fine. The Secretariat issued an Explanatory Note on Amicable Settlements, dated 28 February 2018, which can be downloaded from its website in German, French and Italian.

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

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

According to the practice of the Secretariat and COMCO, it is possible to conclude an amicable settlement without accepting the statements on the facts and the legal assessment by COMCO. By explicitly acknowledging the facts, a party can benefit from an (enhanced) reduction of the sanction for exceptionally good co-operation of a maximum of 20% (a reduction of a maximum of 40% can be granted together with the reduction for the amicable settlement, if no leniency application was made). However, according to Federal Administrative Court case law, a party concluding an amicable settlement can be deemed to have acknowledged an infringement of competition law.

Penalties and enforcement

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

Orders

COMCO issues its decisions in the form of formal orders. COMCO decisions state the:

- Facts of the case.
- Steps of the investigation proceeding.
- Arguments brought forward.
- Legal assessment by COMCO.
- Measures to remedy the restraints of competition.
- Fines, if any.

If the Secretariat has negotiated and concluded an amicable settlement with the parties concerned, that amicable settlement must also be approved by COMCO and forms part of COMCO's decision if it is approved.

Fines

Undertakings (not individuals) can be sanctioned with a fine of up to 10% of the turnover achieved in Switzerland in the preceding three financial years before imposition of the fine, for the following offences:

- Participating in an unlawful horizontal or vertical agreement (hard-core restriction) under Article 5(3) and (4) of the Cartel Act.
- Abuse of a dominant position under Article 7 of the Cartel Act.

The calculation of the maximum fine amount is not limited to the relevant markets. Only the mentioned types of restrictions on competition can be sanctioned in first-time infringements (that is, without violation of a prior order by, or settlement with, COMCO).

Depending on the seriousness and nature of the infringement, the basic amount of the sanction (the starting point for calculating the sanction) can amount to a maximum of 10% 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 (according to recent practice). In cases of horizontal agreements, the basic amount of the sanction usually amounts to between 7% and 10% (but can be lower), and in cases of vertical agreements, usually to 5%. However, the practice has developed and may yet develop further.

When calculating the amount of a sanction, COMCO carries out the following four steps:

- Step one: COMCO determines the basic amount.
- Step two: COMCO increases the basic amount based on the duration of the infringement. According to the Ordinance on Sanctions imposed for Unlawful Restrictions of Competition 2004, if the infringement has lasted for between one and five

years, the basic amount is increased by up to 50% (usually 0.8333% per month), if longer, by up to 10% for each additional year.

- Step three: COMCO increases and/or decreases the sanction, taking into consideration the mitigating and aggravating circumstances, including co-operation other than in the form of a leniency application. Discount for a possible settlement is part of the discount for co-operation.
- Step four: COMCO deducts from the subtotal (resulting from the steps one to three) the discount (that is, the percentage applicable) granted to an undertaking for a leniency application.

With regard to the calculation of the discount, the following applies under the Explanatory Note on Amicable Settlements:

- If no leniency application is made: for the conclusion of a settlement without a leniency application (maximum 20%) and for the co-operative conduct (maximum 20%), both discounts are added together, leading to a maximum discount of 40%. The Explanatory Note on Amicable Settlements overrules previous practice, where a discount of 25% for an amicable settlement was granted in one case.
- If a leniency application is made: for the conclusion of a settlement within a leniency application (maximum 20%) and for the leniency application (maximum 50%, if going in second or later). The discount for the settlement is a part of the discount for co-operation, while the discount for the leniency application is separate. There is no further discount for co-operative conduct because it is included in the discount for the leniency application. First the discount for the settlement (co-operation) is applied and a subtotal is calculated, then the discount for the leniency application is applied, leading to a maximum discount of 60% (that is, the maximum 20% and the maximum 50% are not added together).

The amount of the discount granted for an amicable settlement is determined based on the stage of the proceeding in which a party proposes negotiations for the settlement:

- The maximum of 20% is granted if the proposal is made at an early stage, that is, during the investigation of the facts.
- A discount of 15% is granted if the proposal is made at a medium stage, that is, after the investigation of the facts is finished and the Secretariat is drafting its motion (draft order) to COMCO.
- A discount of 10% is granted if an amicable settlement is proposed at a stage in which the Secretariat has already to a great extent drafted its motion to COMCO.
- A discount of 5% may be granted if an amicable settlement is proposed after the parties have received the motion of the Secretariat for their statements.

Personal liability

There are no criminal sanctions against individuals for first-time infringements against the substantive law provisions of the Cartel Act. However, individuals (acting for an undertaking) can be fined up to CHF100,000 for wilful violations of a:

- Settlement decision.
- Final and non-appealable order of COMCO or the Secretariat.
- Decision of an appellate body (courts).

Individuals who intentionally fail to comply or only partly comply with the obligation to provide information in an ongoing investigation can be fined up to CHF20,000.

Immunity/leniency

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

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

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

An undertaking that submitted the leniency application (or marker) after the first undertaking and/or that does not meet the conditions for full immunity can benefit from a reduction of the sanction of up to 50% if it has both:

- Co-operated on an unsolicited basis with the Secretariat and COMCO.
- Ended its involvement in the infringement no later than when it submitted evidence.

The amount of the reduction of a sanction depends on the importance of the contribution to the success of the proceedings, which depends on, in particular, the timing, the quality and the quantity of the information and evidence submitted.

An undertaking can benefit from a reduction of the sanction of up to 80% (amnesty plus) where both:

- The undertaking provides information to the Secretariat and COMCO about other hard-core restrictions within the meaning of Article 5(3) and (4) of the Cartel Act.
- The hard-core restrictions were unknown to the Secretariat and COMCO at the time of notification.

Impact on agreements

Agreements that contain provisions infringing competition law can be declared partially or entirely void. An agreement can be declared only partially void if it can be assumed that the parties would have in any case concluded the agreement in the absence of the provision found to be void.

Third party damages claims and appeals

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

Third party damages

Behaviour infringing competition law can give rise to third party claims for damages and/or for restitution of illicitly earned profits. Claims need not to be based on an infringement decision of COMCO. However, it can strengthen the position of a claimant to base a claim on a COMCO decision holding that the defendant has infringed competition law. If the legality of a restraint of competition is questioned in the course of civil proceedings, the case must be referred to COMCO for an expert opinion. However, this is not binding on the courts. Damages are limited to the

damage incurred and no punitive damages are available under Swiss law. The burden of proof in proceedings before civil courts lies on the claimant. It is generally difficult to prove damage and a sufficient causal nexus between the infringing agreement or conduct and the damage in such cases.

Third parties affected by unlawful restraints of competition can claim before the civil courts for removal or cessation of a restraint of competition. Agreements infringing competition law are typically partially or entirely void.

Special procedures/rules

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

Claims for damages are subject to a limitation period expiring three years after the claimant became aware of both the damage and the identity of the party that caused the damage (as from 1 January 2020, but previously one year). However, the limitation period expires at the latest ten years after the restraint of competition ended in any event. The same rules apply in relation to claims for restitution of illicitly earned profits. No limitation periods apply in relation to claims for removal or cessation of unlawful restraints of competition, and these claims can be brought forward as long as the restraints exist or are threatening.

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

Collective/class actions

Collective actions and class actions do not exist in Switzerland. However, simple dispute associations of several claimants, where claims for damages are assigned to a third party who brings all claims together as a claimant in its own name (along with the right of collective appeal) are possible to a certain extent.

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

Rights of appeal and procedure

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

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

Third party rights of appeal

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

MONOPOLIES AND ABUSES OF MARKET POWER

Scope of rules

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

Regulatory framework

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

Regulatory authority

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

17. How is dominance/market power determined?

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

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

Relevant criteria for the assessment of market dominance include, among other things:

- Market shares.
- Actual competition.
- Position of the opposite market side.
- Barriers to entry and potential competition.
- Characteristics of the undertaking in question.
- Structure of the market and market phase.

These criteria should not be applied without considering the specific facts of each case. The conditions in the market and competition between the undertaking in question and its competitors must be assessed on a case-by-case basis.

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

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

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

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

(*Article 7(2), Cartel Act.*)

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

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

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

The Federal Administrative Court stated as one of the key statements in its decision in the matter of SIX Group (DCC) on 18 December 2018 (*Federal Administrative Court decision B-831/2011*) that, in order to fulfil the criteria of Article 7 of the Cartel Act, no verifiable effects must have actually occurred, but that "a potentially detrimental effect on competition is sufficient for the implementation of an anti-competitive conduct according to the Cartel Act". Therefore, according to the practice of the Federal Administrative Court, Article 7 of the Cartel Act constitutes a strict liability offence. This judgment of the Federal Administrative Court has been appealed before the Federal Supreme Court, which is why this practice is not yet final.

Collective dominance has so far been affirmed only once in an investigation under Article 7 of the Cartel Act. During that process, COMCO gave an opinion, at least indirectly, on the issue of whether all collectively dominant undertakings would have to act jointly or in the same way, or whether it was enough if just a single undertaking acted abusively. The case concerned a contract clause that could be found in the contracts of all the dominant undertakings in the market. 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. Therefore, it appears that the behaviour of all the dominant undertakings has to be jointly abusive.

However, the specific situation must be assessed. For example, raising prices above a certain level may fall under Article 7(2), *litera* c of the Cartel Act. In such a case, all collectively dominant undertakings would normally have to act jointly, as otherwise the buyer would shift to another (collectively dominant) undertaking whose price is lower. Therefore, the undertaking behaving abusively cannot behave independently, as its behaviour may be disciplined by the buyer switching to a competitor. However, in other cases it may be possible that anti-competitive behaviour by only one of the collectively dominant undertakings could qualify as abuse of the collective dominant position, in particular, if it can be argued that it is done to protect all the collectively dominant undertakings. For example, one of the collectively dominant undertakings could undercut prices directed against a specific competitor in contravention of Article 7(2), *litera* d of the Cartel Act, while the others remain passive.

Exemptions and exclusions

19. Are there any exemptions or exclusions?

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

- The Cartel Act does not as a rule apply to effects on competition that result exclusively from legislation governing IP. However, import restrictions and certain other restrictions based on IP rights are assessed under the Cartel Act.
- Statutory provisions that, as a rule, do not allow for competition in a market for certain goods or services take precedence over the provisions of the Cartel Act. Such statutory provisions include, in particular, provisions that:
  - establish an official market or price system; and
  - grant special rights to specific undertakings to enable them to fulfil public duties.

Notification

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

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

Investigations

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

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

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

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

Penalties and enforcement

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

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

Third party damages claims

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

Third party damages

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

Special procedures/rules

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

Collective/class actions

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

EU LAW

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

Not applicable.

JOINT VENTURES

26. How are joint ventures analysed under competition law?

The Cartel Act and the respective regulations do not provide for any specific substantive rules for joint ventures. The same rules as outlined under *Question 1 to 25* apply. Joint ventures that are not covered by merger control are still subject to the rules applicable to agreements. For joint ventures covered by merger control, the co-ordinating effects between the parent companies as well as between each parent company and the joint venture are also subject to the rules applicable to agreements. However, an exception applies for co-ordinating effects, which are normally lawful if they result from the fact that a parent company has an interest in exercising its control so as to maximise the profit resulting from its participation in the joint venture as well as from its own activity.

INTER-AGENCY CO-OPERATION

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

A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. The co-operation agreement is a second-generation agreement. Information can be exchanged between COMCO and the European Commission even if there is no consent from the undertaking concerned, provided that:

- Both competition authorities are investigating the same or related conduct or transaction.
- The conduct or transaction is also unlawful under Swiss law.

However, new provisions in the Cartel Act provide that, among other things, 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 both the:

- Leniency applicant has given its consent.
- Data is not used or made available by the foreign competition authority in criminal or civil proceedings.

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.

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

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

In addition, COMCO has successfully based requests on the HCCH Convention on the Taking of Evidence Abroad in Civil and Commercial Matters 1970 (Hague Evidence Convention) to obtain information from parties domiciled in a foreign jurisdiction (France). The Hague Evidence Convention allows judicial authorities in a contracting state to obtain evidence or perform other judicial acts through a letter of request addressed to a central authority designated by the other contracting state (letter rogatory).

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

RECENT CASES AND TRENDS

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

In 2017, COMCO issued a decision against Swiss Post because it had abused its dominant position on the "market for addressed bulk mailings over 50 grams for business customers". According to COMCO, Swiss Post had not applied its price and discount systems uniformly to its customers, so that customers with comparable characteristics had been treated unequally. In addition, COMCO held that the price and rebate systems were not transparent to customers. Customers were therefore not easily able to estimate the price effect they would have had if they had handled part of their mail volume through a competitor of Swiss Post, which hindered them from switching to competitors, thereby hindering competition. This COMCO decision places high thresholds on market dominant undertakings when it comes to pricing. It requires any deviation from the applicable price system to be objectively justified in individual cases. This effectively prohibits market dominant undertakings from conducting price negotiations with their customers, as it is generally difficult to justify why one customer should have a better price than another. The only option left for a market dominant undertaking is to refrain from negotiations and to offer customers only a list price or, as should normally also be possible, pure linear quantity rebates that can be justified by efficiency gains and that are uniformly applied to all customers in the same way. Whether this really serves competition is obviously questionable.

Through an order dated 21 October 2013, COMCO issued and approved a second version of an amicable settlement with The Swatch Group SA (including ETA SA Manufacture Horlogère Suisse) authorising it to phase out its supplies of clockwork movements to its competitors. After 31 December 2019 there would have been no supply obligation. As opposed to the interim order and to a first draft of the amicable settlement, the order of COMCO applies to movements manufactured by ETA only, not to components for the escapement-regulator unit of watches (*Assortiments*) manufactured by Nivarox, another subsidiary of The Swatch Group SA. COMCO held that it was too early for any ruling allowing Nivarox to reduce supplies of *Assortiments* to the manufacturers of movements. However, COMCO left open whether a phasing-out may be possible in the future depending on how the market develops. In 2018 COMCO decided to open a proceeding to reconsider its order of 2013 regarding the phasing-out of supplies of movements to competitors ending in 2019, based on the developments on the market. As COMCO was not able to conclude the proceeding by the end of 2019, it issued an interim injunction for the duration of this proceeding, but at the latest until 31 December 2020. According to COMCO, this interim injunction will ensure that the obligation to supply "formally continues to exist". However, the interim injunction takes into account the fact that, due to the ordering process of ETA, the supply of movements "is in fact not possible" as from 1 January 2020. The interim injunction therefore provides that the supply of movements to customers is temporarily suspended. Small and medium-sized enterprises are excluded from this ruling. COMCO's concern appears to be that ETA could resume supplies of movements and force competitors out of the market (assuming that competitors are not sufficiently strong). This ruling is seen as unsatisfactory and it remains to be seen how this matter will develop.

There have been several civil court proceedings concerning the termination of service agreements with authorised automotive service garages by manufacturers. In one of these court proceedings, Jaguar Land Rover Schweiz AG terminated a service agreement with an authorised automotive service garage. The authorised service garage filed a claim with the Commercial Court of Zurich with the request that Jaguar Land Rover Schweiz AG be ordered to continue the service agreement, which had been terminated. The court rejected the request arguing that the sales of motor vehicles as well as the sales of spare parts and the provision of after sales and repair services formed part of the same relevant product market. In the so-defined relevant product market, Jaguar Land Rover Schweiz AG had a market share of less than 5% (premium sport utility vehicle segment). The court explicitly held that a single brand could not be held to be the relevant product market. Consequently, Jaguar Land Rover Schweiz AG did not have a dominant position and was under no obligation to conclude a contract with the service garage (*Decision of the Commercial Court of Zurich HE140256-O of 17 December 2014*). Several other court proceedings had a similar outcomes, with one exception, in which the civil court (arguably less specialised and facing a politically difficult case) held that the manufacturer had a dominant position in relation to an authorised automotive service garage. However, the Commercial Court of Zurich confirmed its practice outlined above in a decision published very recently.

In 2009, COMCO issued an order against Swisscom AG regarding the price policy for ADSL broad-band internet access. COMCO stated that Swisscom had a dominant position in the wholesale market for grid-bound broadband products in Switzerland. According to the COMCO order, the price of Swisscom for the wholesale products squeezed the margin in the secondary market for internet access for consumers. The margin squeeze hindered other undertakings from competing in the consumer market. Swisscom's margin squeeze behaviour was not listed specifically in the non-exhaustive list in Article 7(2) of the Cartel Act, and Swisscom argued it was therefore legal and no sanction could be imposed. However, the Federal Administrative Court confirmed the order of COMCO in 2016 and referred to the practice of the European Commission and the European Courts, which also prohibit margin squeezes. The decision of the Federal Administrative Court was appealed before the Federal Supreme Court and the Federal Supreme Court confirmed the decision of the Federal Administrative Court (*Decision of the Federal Supreme Court 2C_985/2015 of 9 December 2019*).

In 2014, COMCO opened an investigation against the Swiss Press Agency (SDA) after its main competitor AP Schweiz had closed down its activities. COMCO's investigation revealed that SDA had concluded subscription contracts with five media undertakings in the German-speaking part of Switzerland. These subscription contracts provided for rebates of up to 20%, which were subject to the condition that the (German-language) basic news services were purchased exclusively from SDA and not, at the same time, from AP Schweiz. COMCO concluded that the exclusivity rebates were specifically directed against SDA's competitor AP Schweiz and that they had actively contributed to weakening the customer basis and the profitability of AP Schweiz. In addition, COMCO held that SDA's exclusivity rebates had also caused an unequal treatment of media undertakings, which had had the effect of a restriction of competition on the downstream media and advertisement markets. COMCO concluded that, by doing so, SDA had abused its dominant position on the relevant product market of German-language basic news services for Swiss media undertakings in contravention of Article 7 of the Cartel Act, and imposed a sanction of CHF1.88 million on SDA. COMCO approved an amicable settlement regarding SDA's future conduct that included:

- 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 alleged foreclosure effects).

PROPOSALS FOR REFORM

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

A proposed revision of the Cartel Act was rejected in Parliament in September 2014.

It is still unclear which elements of the revision, which was rejected in Parliament as a package, will again be taken up separately in a future revision. The State Secretariat for Economic Affairs (SECO) issued a white paper in 2018 to discuss possible amendments that do not directly influence restraints of trade and dominance but envisage strengthening third party civil claims.

A popular initiative to amend the Federal Constitution (and indirectly the Cartel Act) was submitted with the aim of lowering prices, which would also implement the concept of relatively market dominant undertakings. The Federal Counsel drafted an indirect counterproposal, which would also implement the concept of relatively market dominant undertakings. According to the current debate, the concept of relatively market dominant undertakings would not only (as was previously envisaged) be implemented in the context of suppliers of goods and services outside of Switzerland for sales to Swiss purchasers, but as a general provision in the Cartel Act. The popular initiative and the indirect counterproposal do not envisage direct sanctions for relatively market dominant undertakings.

Practical Law Contributor profile

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