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Competition Law in Switzerland: Overview

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REGULATORY FRAMEWORK

1. What is the competition law 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. 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 in of themselves as automatically illegal, however, there is a legal presumption in case of certain types of agreements deemed to be hard-core restrictions (Article 5, Cartel Act). See *Question 3*.

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; and
  - grant special rights to specific undertakings to enable them to fulfil public duties.

The Cartel Act provides for the relevant rules regarding monopolies and abuses of market power (Article 7) and the definition of dominance (Article 4(2)). In addition, provisions of the *Ordinance on the Control of Concentrations of Undertakings 1996* (Merger Control Ordinance) are relevant, particularly with regard to the definition of the relevant market.

The *Competition Commission* (COMCO) has not issued any guidelines on the substantive analysis of monopolies and abuses of market power, except for a guideline on relative market power enacted in 2022. Case law is relevant for further guidance with regard to the practice of COMCO and the Secretariat (see*Question 4, Question 5 and Question 6*).

For details of the regulatory framework for mergers and acquisitions, see *Question 13*. COMCO has not issued any guidelines on the substantive analysis of concentrations.

REGULATORY AUTHORITY

2. Which authority or authorities regulate competition?

There are two institutionally separate authorities regulating competition, COMCO and the Secretariat.

In investigative proceedings, the Secretariat conducts investigations and, together with a member of the presiding body of COMCO, issues any necessary procedural rulings. The Secretariat can conduct preliminary investigations and market monitorings to assess whether there is evidence for unlawful restraints of competition. After completing an investigation, the Secretariat submits a motion to COMCO, which issues the decision. The Secretariat subsequently implements COMCO's decisions. In merger control proceedings, the Secretariat handles the case and can request additional information and documents from the undertakings concerned.

COMCO is a militia body with 11 to 15 members, consisting of mostly law and economics professors as well as representatives of major business federations and consumer organisations. COMCO meets every two to four weeks to take decisions and issue rulings.

RESTRICTIVE AGREEMENTS AND PRACTICES

3. What is the basic legal framework governing restrictive agreements and practices?

The Cartel Act applies to practices that have an effect on competition in Switzerland, even if they originate in another country. 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 in of themselves as automatically 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; or
  - 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 prices; or
  - 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 Article 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 Article 5(3) and (4) of the Cartel Act are generally prohibited, subject only to a justification on grounds of economic efficiency (see below). This new practice has since been applied in several cases by the courts.

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) be achieved. There is therefore *de facto* a general prohibition for horizontal and vertical hard-core restrictions under Article 5(3) and (4) of the Cartel Act, as there is no realistic possibility of justification on grounds of economic efficiency.

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's practice can be found in notices on:

- Vertical restraints.
- Agreements of minor importance (*de minimis*).
- Agreements in the automobile sector (the notice has been enacted as ordinance by the Swiss Parliament, and entered into force on 1 January 2024).
- Ratification and sponsoring of sporting goods.
- Schemes for calculating costs (cost-calculation aids).
- Relative market power.
- Procedural issues in various areas.
- The notices are available in German, French and Italian on the website of *COMCO* (this only refers to part of the notices; for a comprehensive list of notices please refer to the respective sites in German, French and Italian).

For the past few years, one of the main focuses of COMCO has been to investigate restrictions on parallel imports from the 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.

MONOPOLIES AND ABUSES OF DOMINANCE

4. Are there specific rules that apply to monopolistic or dominant companies?

The Cartel Act provides for the relevant rules regarding monopolies and abuses of market power (Article 7) and the definition of dominance (Article 4(2)). In addition, provisions of the Merger Control Ordinance are relevant, particularly with regard to the definition of the relevant market. COMCO has not issued any guidelines on the substantive analysis of monopolies and abuses of dominance, but it has issued a notice on the existence and abuse of relative market power (available in German, French and Italian). Case law is relevant for further guidance with regard to the practice of COMCO and the Secretariat.

5. How is dominance/monopoly 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).

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 (Article 5 and Article 7 of the Cartel Act may apply here cumulatively) or it is the consequence of the market structure.

Under the practice of the ECJ, the assessment of compliance with competition law must take into consideration the nature of the goods or services affected, as well as the actual conditions of the functioning and structure of the market(s) in question. The practice in Switzerland is more formalistic. This is also the case in the context of alleged abuses of a dominant position. Under recent case law, no economic "theory of harm" is required for alleged offences under Article 7(2) of the Cartel Act and there is no

insignificance threshold as competition is already weakened by the presence of the dominant undertaking. Similarly, abusive practices do not need actual verifiable effects, a potentially negative effect on competition can suffice. Article 7 of the Cartel Act is therefore a strict liability offence.

On 1 January 2022, the concept of relative market power was introduced into Swiss competition law. An undertaking with relative market power is an undertaking on which other undertakings are dependent for the supply of or demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other undertakings (Article 4(2bis), Cartel Act). Relative market power therefore always results from the specific relationship between two undertakings. Currently the most important field of application is the purchase of goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned (Article 7(2) litera g, Cartel Act). However, all other types of conduct prohibited for dominant undertakings also apply to undertakings with relative market power. As this revision came into force only recently, there is still no case law as to how the dependency between two undertakings is assessed. The Secretariat of COMCO mentions "must-stock" products, very few customers and the orientation of the business towards a long-term business relationship in its corresponding notice of 6 December 2021 (Status as of 22 August 2022; available in German, French and Italian). Undertakings that invoke the provisions on relative market power must generally have made unsuccessful efforts to find reasonable alternatives.

6. Are there any recognised categories of behavior that may constitute abusive conduct?

The Cartel Act stipulates that dominant undertakings and undertaktings with relative market power 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 (that is, predatory pricing).
- The limitation of production, sales or technical developments (for example, loyalty discounts).
- Any conclusion of contracts on the condition that the contracting partners accept or provide additional services (that is tying/bundling).
- Restrictions of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned

(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). Before the Federal Supreme Court's new practice, which is widely criticised, (see below) 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 or relative market power of an undertaking.
- There must be abuse by the undertaking of that dominant market position or the relative market power.
- The abuse of the dominant market position or relative market power must hinder other undertakings from starting or continuing to compete or disadvantage trading partners.

It is therefore not dominance or relative market power 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 supports 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 that, in order to fulfil the criteria of Article 7 of the Cartel Act, no verifiable effects must have actually occurred. The judgment determined that a potentially detrimental effect on competition is sufficient for the implementation of an anti-competitive conduct (*Federal Administrative Court decision B-831/2011*). This approach has been confirmed by the Federal Supreme Court on 2 November 2022, without further considerations regarding this point (*Federal Court decision 2C_596/2019*). Therefore, considering recent court practice, Article 7 of the Cartel Act constitutes a strict liability offence and paragraph 2 does not merely stipulate a list of examples of potential abusive practices; this is widely criticised.

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

7. Are there any exemptions from the competition laws? If so, what are the criteria for individual exemption or 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 and its Explanatory Note both dated 12 December 2022, as both updated from time to time.
- Notice Regarding Vertical Restraints in the Automobile Trade dated 29 June 2015: the notice has been enacted as ordinance by Swiss Parliament, in force as from 1 January 2024.
- 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 practice of the Swiss competition authorities regarding vertical agreements is generally aligned with the practice of the European Commission (see Article 15 of the Vertical Notice of 12 December 2022, available in German, French and Italian). However, in its leading case *Gaba/Gebro*, the Federal Supreme Court also stated that despite all the required parallelism (in the treatment of vertical agreements under competition law in Switzerland and the EU), it must not be forgotten that this can only be assumed if the basic concepts, case law and the system of European competition law with regard to vertical competition agreements have not fundamentally changed since 2003. As otherwise these shifts would no longer be covered by the Swiss legislative will. In addition, vertical agreements on absolute territorial protection in particular would have very different effects for smaller countries than is the case for large countries or single market areas such as the EU (*Federal Supreme Court Decision 143 II 297*). These considerations are not only of theoretical interest, but have lead to a more severe practice in Switzerland regarding different aspects. The below outline focusses on instances of so-called "Swiss finish", that is, stricter practice in Switzerland in comparison to the practice in the EU:

- **Formal binding effect.** While the new Vertical Block Exemption Regulation (*Regulation (EU) 2022/7200)* (VBER) is binding in its entirety and directly applicable in the EU, COMCO's Notice Regarding Vertical Restraints and its Explanatory Note only reflect the practice of the competition authorities, to which the courts are not (formally) bound. However, in practice they are relevant when interpreting the law.
- **Price recommendations.** Based on case law by the Federal Supreme Court, the absence of pressure or incentives does not create a "safe harbor". Price recommendations can also be qualified as sanctionable price agreements under Article 5(4) of the Cartel Act . This is if the price recommendations have the effect of a minimum or fixed price, in particular due to the degree of adherence. This may be the case if the price recommendations are communicated "particularly intensively", for example if price recommendations are repeatedly transmitted electronically to retailers' cashier systems (*c.f. decision by the Federal Supreme Court 147 II 72 dated 4 February 2021*).
- Therefore, there is considerable legal uncertainty in particular as to when unilateral price recommendations can be qualified as a restrictive agreement or concerted practice. In Switzerland, the practice regarding price recommendations is stricter than in the EU, particularly where there is a high degree of adherence, which is a potential risk for any undertaking issuing price recommendations.
- **Exclusive purchasing obligations.** Exclusive purchasing obligations, according to which the distribution partner in Switzerland is obliged to purchase the contract goods exclusively from a supplier in Switzerland, is held to lead to the indirect exclusion of passive sales into Switzerland and can be directly sanctioned on the basis of Article 5(4) in conjunction with Article 49a(1) of the Cartel Act. This is in contrast to the practice of the Europan Commission, where such exclusive purchasing obligations are generally exempt (depending on the facts, if they amount to a non-compete obligation, provided they do not apply for a period of more than 5 years). However, according to the practice of COMCO, an exclusive purchasing obligation does normally not qualify as a restriction of passive sales if a Swiss general importer is subject to an obligation to purchase directly from a foreign manufacturer, while the dealers at the lower retail levels and the end customers remain free to purchase the products cheaper abroad.
- In the context of parallel imports, the new provisions on relative market power must also be observed (see *Question 5*). Swiss law and practice therefore prohibit resrictions of parallel imports well beyond the practice in the EU, not only regarding agreements, but also regarding unilateral conduct of undertakings being dominant or having relative market power. Undertakings must be particularly cautious when structuring Europe-wide distribution.
- **Restrictions of passive sales.** A further difference to EU practice concerns the stricter assessment of restrictions of passive sales imposed on suppliers. While, according to the previous version of the Explanatory Note, restrictions of passive sales imposed on all types of suppliers (that is, the obligation of foreign suppliers vis-à-vis the Swiss general importer to refer unsolicited orders from distributors or end customers from Switzerland to the Swiss general importer) did not constitute an agreement on absolute territorial protection, such clauses can now only be imposed on manufacturing suppliers.
- **Parity clauses (best-price requirements).** Narrow parity clauses oblige the supplier not to offer its goods and services in its direct sales channels at a lower price than the agreed conditions. While narrow parity clauses are generally exempted in the EU Vertical Block Exemption Regulation, they are prohibited under unfair competition law in relation to accommodation providers in Switzerland.

Under certain conditions, agreements that are no hard-core restrictions are deemed not to have a significant effect on competition (and are therefore lawful), if the parties to the agreement have market shares below the thresholds stipulated in COMCO's Notice Regarding Vertical Restraints and COMCO's *de minimis* notice (see *Question 9*).

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 to the Secretariat of COMCO with the aim to obtain a ruling (clearance). In practice, this notification procedure according to Article 49a(3) litera a of the Cartel Act does often not lead to a final assessment by the the Secretariat of COMCO and is, therefore, rarely used.

8. Is it possible to obtain guidance from the authority as to whether an agreement or practice is likely to restrict competition?

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.

9. Is any conduct excluded from the scope of the competition laws?

Exclusions

COMCO issued a *de minimis* notice dated 19 December 2005, which provides that agreements that do not significantly affect competition are lawful (see *Question 3*). 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 3*).

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 3*). Very small undertakings are defined as having fewer than ten employees and an annual turnover in Switzerland of under CHF2 million.

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.

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(3) 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; undertakings should operate on the basis that there is a risk of fines).

According to a decision of the Federal Administrative Court in 2018, the deadline of the statute of limitation for enforcement only begins when the decision of COMCO takes legal effect. The period of the statute of limitation for enforcement is then ten years. This decision of the Federal Administrative Court has been confirmed by the Federal Supreme Court on 2 November 2022 (*Federal Court decision 2C_596/2019*).

Penalties

10. What penalties or sanctions are available for breaching the competition laws?

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, if any.
- 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 and Monetary Remedies

Undertakings (not individuals) can be sanctioned with a fine of up to 10% of the turnover achieved by the group 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%.
- 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 wilfully violating a final and non-appealable order of COMCO, the Secretariat or a court or a settlement decision.

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 cumulatively fulfils the following conditions:

- Did not coerce any other undertaking to participate in the infringement and was not an instigator or a leader of the cartel.
- Voluntarily submits all information or evidence in its possession concerning the unlawful practice in question to COMCO.
- Co-operates on a continuous basis and expeditiously throughout COMCO's administrative procedure.
- Discontinues its involvement in the infringement no later than the time of the leniency application (voluntary report) or when ordered to do by COMCO.

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 concluded the agreement also in the absence of the provision(s) found to be void.

Third Party Damages Claims

11. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or abuse of dominance? Are collective/class actions possible?

Follow-on/Standalone Actions

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 or the part of profits illicitly earned 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.

Because civil competition law proceedings are comparatively infrequent in Switzerland, the current reform project of the Cartel Act aims at establishing additional incentives. Regarding civil procedures, the Swiss Government has suggested that in addition to undertakings, consumers and the public sector would also be able to bring forward a case. Civil claims would no longer be subject to the statute of limitations during administrative proceedings. Damages paid would also be taken into account and lead to reduced sanctions after COMCO has already taken an administrative decision. It is difficult to assess whether the reform as such and the individual provisions will pass at the time of writing in December 2023.

Procedures or 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. 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.

Class/Collective 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.

Appeals

12. Is there a right of appeal against any decision of the authority? 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). The duration of proceedings, which is often excessive, is widely seen as a problem in Switzerland.

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.

MERGER CONTROL

13. What merger control rules apply to mergers and acquisitions in your jurisdiction?

The following laws, regulations and guidelines apply to mergers and acquisitions:

- Cartel Act.
- Merger Control Ordinance.
- Explanatory Note and Form of the Secretariat of the Competition Commission (Secretariat) on the Notification of a Proposed Concentration of 21 October 2014 (Status as of 5 February 2021).
- Note of the Secretariat on the Practice regarding the Notification and Assessment of Concentrations of 25 March 2009 (Status as of 1 October 2019).
- ICN Merger Notification and Procedures Template (February 2015).

COMCO has not issued any guidelines on the substantive analysis of concentrations.

14. What are the relevant jurisdictional triggering events?

The following transactions are deemed to be concentrations of undertakings subject to merger control:

- A statutory merger of two or more previously independent undertakings.
- An acquisition of control over one or more previously independent undertakings or parts of undertakings through any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement.
- An acquisition of joint control over an undertaking (joint venture).

The following joint ventures are caught by merger control if the joint venture performs all the functions of an autonomous economic entity on a lasting basis:

- Acquisition of joint control over an existing undertaking (also an existing joint venture).
- Founding of a new joint venture, if business activities from at least one of the controlling undertakings are transferred to the joint venture.

Control is assumed if an undertaking can exercise a decisive influence over the activities of the other undertaking through the acquisition of rights over shares or by any other means. The means of obtaining control can, in particular, involve the acquisition of the following:

- Ownership rights or rights to use all or parts of the assets of an undertaking (if those assets constitute the whole or a part of an undertaking that is a business with a market presence to which a market turnover can be attributed).
- Rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the management organs of an undertaking.

Partial interests and minority shareholdings are only covered if they allow an undertaking to exercise a decisive influence over another undertaking (this can also be in combination with contractual

agreements between the parties or other factual circumstances). There is a risk that the acquisition of a minority interest may qualify as an anti-competitive agreement if the undertakings concerned agree to co-operate.

For details of the latest jurisdictional thresholds see, *Merger Control Quick Compare Chart: Switzerland.*

To compare jurisdictions, see the*Merger Control Quick Compare Chart.*

Notification

15. What are the notification requirements for mergers? Are they mandatory or voluntary?

For statutory mergers, notification must be made jointly by the undertakings concerned. For acquisitions of control, the filing must be made by the undertaking or undertakings acquiring control. Where two or more undertakings must make the notification jointly, appeals by one party alone are possible (according to the Federal Supreme Court, which in 2019 overruled an opposite decision by the Federal Administrative Court).

Notifications as well as pre-notifications must be submitted to the Secretariat, which also assesses the concentration. Decisions are subsequently taken by COMCO.

COMCO provides an explanatory note on its website (Explanatory Note and Form of the Secretariat on the Notification of a Proposed Concentration, available in German, French and Italian). See *www.weko.admin.ch/weko/fr/home/rechtliches_dokumentation/notifications.html.*

Notification is mandatory. See *Question 14.*

Procedure and Timetable

16. What are the procedures and timetable?

Parties must notify a concentration to the Secretariat if both of the following are established:

- There is a concentration within the meaning of the Cartel Act including the applicable legislation.
- The undertakings concerned meet the relevant turnover thresholds or other triggering events.

When a concentration is notified, COMCO conducts an investigation as follows:

- **Phase I.** A preliminary investigation begins on receipt of the complete notification. COMCO must decide within one month whether the concentration could create or strengthen a dominant position. The concentration can be completed if no notice of the opening of an investigation is given within one month, or if COMCO notifies the undertakings of the clearance of the transaction, whichever is earlier.
- **Phase II.** If there are indications that the concentration could create or strengthen a dominant position, COMCO opens an in-depth investigation. COMCO notifies the undertakings concerned of this decision. The Secretariat publishes the principal terms of the notification of the concentration and states the timeframe within which third parties can comment on the notified concentration. COMCO must make a final decision within four months from the opening of the in-depth investigation. This time limit can only be extended if the proceeding has been delayed by the undertakings concerned. There is no "stop-the-clock" mechanism in Switzerland. However, there is a (unorthodox and rare) possibility of withdrawing and re-submitting the notification.
- COMCO's decision can be either:
  - clearance of the concentration;
  - clearance of the concentration subject to conditions or obligations (remedies);
  - prohibition of the concentration.

For an overview of the notification process, see *Switzerland Merger Notifications Flowchart.*

Publicity and Confidentiality

17. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The opening of an in-depth investigation (phase II) is legally required to be published. The Secretariat publishes the principal terms of the notification of the concentration. In addition, decisions or rulings are often published in COMCO's publication series (Law and Policy on Competition), as well as partly on COMCO's website.

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 published an explanatory note on 30 April 2008 (Explanatory Note: Business Secrets), which 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 undertakings concerned can request that certain information is kept confidential. If the Secretariat disagrees, the undertakings concerned can request a formal order, which can be appealed to the Federal Administrative Court.

SUBSTANTIVE TEST

18. What is the substantive test?

COMCO has not issued any guidelines on the substantive analysis of monopolies and abuses of market power, but only guidelines on the form for notification and on the formal requirements (available in German, French and Italian).

COMCO will prohibit a concentration, or authorise the concentration subject to conditions and obligations, if the investigation indicates that the concentration both:

- Creates or strengthens a dominant position liable to eliminate effective competition.
- Does not improve the conditions of competition in another market so that the harmful effects of the dominant position are outweighed.

In practice, the key issues in the substantive analysis are:

- The definition of the relevant markets.
- The effect of the concentration on the position of the undertakings concerned in the market.

The analysis of the effect of the concentration can include the following elements:

- Market shares.
- Degree of concentration.

- Actual competition.
- Potential competition, including barriers to entry and new market entries within two to three years.
- Possible countervailing power of the opposite market side.
- Financial strength.
- Access to supply and sales markets.
- Development of offer and demand.
- Substitutive competition.
- Collective dominance (if applicable).
- Improvement of the conditions for competition in another market.

COMCO usually clears transactions in phase I if there are no product and geographic markets that are affected by the concentration in which either:

- Two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland.
- One of the undertakings concerned holds a market share of 30% or more in Switzerland.

Merger Remedies

19. What are the types of remedies that can be required as conditions of merger clearance?

There are no specific provisions or procedures for offering and assessing remedies. If remedies become a potential issue or solution, close contact is established between COMCO, the Secretariat and the undertakings involved to define the scope of any potential remedies. The parties are normally asked at this stage which remedies are possible from their perspective. COMCO then assesses the remedies proposed by the parties, as it does not impose remedies that are not feasible from the parties' perspective. If no adequate remedies are found, COMCO generally prohibits the merger rather than imposes remedies that are not accepted by the parties. The assessment of remedies has no impact on the timing of the investigation.

COMCO has in the past imposed structural remedies (such as divestments) as well as behavioural remedies. Structural remedies must be completed within a defined time period.

Penalties

20. What are the penalties for failing to comply with the merger control rules?

Failure to Notify Correctly

Any undertaking that implements a notifiable concentration without filing a notification, or that fails to comply with a condition attached to an authorisation (remedial undertaking), is liable to an administrative fine of up to CHF1 million. For repeated failure to comply with a condition attached to an authorisation, an undertaking is liable to an administrative fine of up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who implements a notifiable concentration without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a criminal fine of up to CHF20,000. Individuals have not been fined to date.

Any undertaking that does not fully fulfil its obligation to provide information or produce documents is liable to an administrative fine of up to CHF100,000.

Unpaid sanctions against undertakings or natural persons domiciled in Switzerland would be enforced according to the rules of the Federal Act on Debt Collection and Bankruptcy. The authors' do not believe that the court of last instance has ever established that sanctions can be enforced abroad.

In the case of activities or even a subsidiary in Switzerland, sanctions are typically being paid due to the exposure to enforcement. According to the principle of flexible membership in corporate groups, a new holding company that became part of the group after the unlawful behaviour can also be fined, if the previous holding company and the defective group company are still part of the same group (*Federal Supreme Court Decision 2C_596/2019 dated 2 November 2022*). If, to the contrary, the defective company and the holding company are not part of the same group anymore, but were at the time of the unlawful behaviour, both groups need to be included in the proceedings: the group to which the defending company belonged before for the unlawful behaviour before the restructure and the group into which the defective company has subsequently been integrated (*Federal Administrative Court Decision B-831/2011 dated 18 December 2018*).

Implementation Before Approval or After Prohibition (Gun-Jumping)

Any undertaking that implements a concentration before approval or after prohibition is liable to an administrative fine of up to CHF1 million.

Any natural person who implements a concentration before approval or after prohibition is liable to a criminal fine of up to CHF20,000. Individuals have not been fined to date.

Failure to Observe

Any undertaking that fails to comply with a condition attached to the authorisation (remedial undertaking), implements a prohibited concentration or fails to implement a measure intended to restore effective competition is liable to an administrative fine of up to CHF1 million. For repeated failure to comply with a condition attached to the authorisation, an undertaking is liable to an administrative fine of up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who violates rulings relating to concentrations of undertakings is liable to a criminal fine of up to CHF20,000. Individuals have not been fined to date.

Appeals

21. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of Appeal

Decisions of COMCO and the Secretariat are subject to appeal by the parties.

Procedure

See *Question 12* for the procedural rules.

If two or more undertakings must make the notification jointly, appeals by one party alone are possible (according to the Federal Supreme Court, which overruled in 2019 an opposite decision by the Federal Administrative Court).

Third Party Rights of Appeal

See *Question 12*.

In merger control proceedings, third parties have no procedural rights (Article 43(4), Cartel Act) and no appeal rights.

22. Has the regulatory authority issued guidelines or policy on its approach in analysing mergers in a specific industry?

COMCO has not issued any guidelines on the substantive analysis of monopolies and abuses of market power. COMCO has only issued guidelines on the form for notification and on the formal requirements (available in German, French and Italian). The general rules apply (see *Question 18*).

JOINT VENTURES

23. How are joint ventures analysed under competition law?

The Cartel Act and the respective regulations do not provide for any specific substantive rules on joint ventures. The same rules as outlined under *Question 14*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 every 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.

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