

EU and Swiss Competition Law: Navigating the Boundaries

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Though Switzerland is not a member of the European Union (EU), its proximity to and relationship with the EU economy necessitate that businesses and counsel for entities with Swiss and EU operations consider both Swiss and EU law, especially in the realm of competition law. European competition law protects European competitive markets and, thus, any company whose activities affect Europe has to be aware of, and comply with, the EU rules even where it has no direct presence in the EU. Many Swiss corporations sell products in the EU, partner with EU companies, and may seek to merge with companies active in the EU. Though the European Commission (EC) does not have formal enforcement jurisdiction over Swiss entities, it can enforce a decision against a Swiss company, for example, by levying a fine against such company or its EU-based affiliates, ordering a modification of business practices that are implemented in the EU or prohibiting a merger between a Swiss company and another corporation from being

consummated. Over the past several years, the EC has investigated Swiss corporations for cartel behavior and evaluated potential mergers involving Swiss companies.

Swiss competition law resembles EU competition law in many respects. Since the passage of the Federal Act on Cartels and Other Restraints of Competition (ACart) in 1995, the Swiss government has amended ACart several times, each time bringing ACart closer in line with EU competition law. Currently, the Swiss government is debating further changes to Switzerland's competition regime. In 2010 and 2011, the Federal Government suggested several changes to Swiss competition law, including inter alia a restructuring of Switzerland's Competition Commission (Comco), changes to sanctions for violations, and increased cooperation with the EC on enforcement. In addition, over the summer of 2011, Comco provided new guidance to simplify the filing process for mergers that do not meet certain criteria.

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I. Relationship between EU and Swiss competition law

1. EU and Swiss competition regimes

Comco is the national competition authority of Switzerland. It has jurisdiction to enforce the provi-

sions of ACart and is supported by an investigatory body, the Secretariat. ACart governs (1) agreements between undertakings affecting competition; (2) abuse of a dominant position; and (3) mergers. Since ACart's passage, it has been revised multiple times to make it more closely aligned to the EU's rules on competition law. ACart gives Comco jurisdiction over those entities and activities that have an effect on the market in Switzerland, be they Swiss or non-Swiss entities.

EU competition law, similarly, covers cartels, abuse of a dominant position, and mergers.¹ Unique to the EU, EU competition law also applies to state aid.² Based on Article 105 TFEU, the EC has the duty to ensure the application of the principles laid down in Article 101 TFEU on restrictive agreements and

* The authors' law firms have represented or represent clients in some of the cases mentioned in this article.

¹ See Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) and Council Regulation 139/2004 EC (the Merger Regulation).

² See Article 107 of the TFEU. State aid refers to the support member states give to national companies. Article 107 TFEU prohibits member states from providing aid or subsidizing a business undertaking that affects trade between the member states unless it falls under a specified exemption or is otherwise compatible with the internal market.

Article 102 TFEU on abuse of a dominant position and to investigate cases of suspected infringement.

Though EU competition law does not specifically define the breadth of its application in terms of territorial scope or the nationality of companies, Article 101 TFEU states that the EC has jurisdiction over activities "... which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the internal market ...".³ Accordingly, the EC has taken a broad view of its scope and authority and frequently applied its competition law to non-EU entities whose activities may have an effect on or are implemented in the EU market. As former Commissioner Sir *Leon Brittan* commented with regard to one of the early cases involving non-EU companies, "the location of a party's incorporation or headquarters is immaterial for Competition Law," which must focus on impact on markets.⁴

The EU's substantially revised 'modernised' competition law went into effect in May 2004.⁵ While much of the substance remained the same, the new regulations decentralised authority for enforcing EU laws giving member states and national courts a greater role in enforcement. The EC and national competition authorities often act in parallel and share intelligence about potential infringements of competition law, particularly where transactions cross into several jurisdictions. Article 20 of Regulation 1/2003 grants the EC extensive investigative powers, including the power to carry out dawn raids on the premises of undertakings and in certain circumstances individuals' private homes.⁶ In addition, the Court of Jus-

tice of the European Union (CJEU) held that private citizens and businesses who suffer harm as a result of a breach of EU competition laws may bring a private action against and obtain reparation from the party who caused the harm.⁷ Thus, individual member states, the EC, and private entities may raise and bring actions against Swiss entities that conduct business in member states.

2. Cooperation between EU and Swiss competition authorities

Though Switzerland participates in the OECD Competition Commission and in the International Competition Network (ICN), it does not have any bilateral or multilateral agreements to cooperate on competition matters. Thus, Swiss competition authorities currently do not benefit from the network of national competition authorities within the EU referred to as the European Competition Network or "ECN". It has on occasion operated on an informal case-by-case basis with the EU. However, because there is no formal legal agreement to share information, the EC and Swiss competition authorities cannot exchange confidential information. There are, however, signs that increased cooperation is on the horizon. In August 2010, the Swiss government approved a mandate to negotiate an agreement with the EU to encourage and formalise cooperation between their respective competition authorities. Switzerland and the EU formally initiated negotiations for an agreement on cooperation between their competition authorities in March 2011 with the goal of facilitating the implementation of cartel laws and exchanging confidential information. According to sources close to the negotiations, a draft agreement has been reached. Subject to internal approval procedures and

³ Article 101 TFEU.

⁴ *Leon Brittan*, Competition Policy and the Merger Control in the Single European Market (1991), 6.

⁵ See Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1/1 of 4 January 2003 (hereinafter "Regulation 1/2003").

⁶ Article 20(2) of Council Regulation (EC) No 1-2003 of 16 December 2002:

"The officials and other accompanying persons authorised by the Commission to conduct an inspection are empowered:

- (a) to enter any premises, land and means of transport of undertakings and undertakings;
- (b) to examine the books and other records related to the business, irrespective of the medium on which they are stored;
- (c) to take or obtain in any form copies of or extracts from such books or records;

(d) to seal any business premises and books or records for the period and to the extent necessary for the inspection;

(e) to ask any representative or member of staff of the undertaking or association of undertakings for explanations on facts or documents relating to the subject-matter and purpose of the inspection and to record the answers."

⁷ See Case C-453/99, *Courage Ltd v. Bernard Crehan and Bernard Crehan v. Courage Ltd and Others*, para 26–27 (20 September 2001); Cases C-295/04 to C-298/04, *Manfredi v. Lloyd Adriatico Assicurazioni SpA*, para 61 (13 July 2008).

formal ratification obligations, it is expected that the agreement will enter into force some time during the year 2012.

3. Recent EU cases involving Swiss companies

EU jurisdiction over Swiss corporations is not hypothetical. In 1999, Swiss pharmaceutical corporation, Hoffmann-La Roche, was the worldwide market leader in vitamins, with a reported market share of approximately 50%. Between 1991 and 1999, the company was found to have participated in an unlawful price fixing cartel for vitamins. Hoffmann-La Roche pled guilty in the U.S. and paid a US \$500 million fine, then the largest fine ever secured in the U.S. for an antitrust violation.⁸ Two years later in 2001, the EC fined Hoffmann-La Roche EUR 462 million for the same infraction, also a record fine at the time.⁹

In addition to the *Hoffmann-La Roche* case, the EU has investigated and fined several Swiss companies for cartel behavior. For example, the EU General Court (General Court)¹⁰ upheld fines against several thread producers for operating a cartel between 1990 and 2001, including Switzerland's Zwicky, which was fined EUR 174 000.¹¹ Later that decade in 2008 and 2009, EC antitrust regulators raided the European offices of cement maker Holcim AG, a Swiss company, as well as other cement companies as part of a price fixing probe. Holcim is currently appealing the EC's investigatory procedures, an action discussed in further detail in Chapter IV.

Switzerland's ABB has been involved in several EC investigations relating to cartel behavior. In 2007, the EC fined Siemens EUR 396 million for its role in fixing prices with several companies in the market for gas-insulated switchgear. ABB escaped a fine for acting as a whistleblower and informing the EC about the cartel activities.¹² Two years later, the situation

was reversed. ABB was fined almost EUR 34 million in 2009 for participating in a market sharing cartel in the power transformer market, and Siemens paid no fine because it was the first company to inform the EC about the cartel.¹³ This time, the EC increased the fine for ABB by 50% on account of recidivism because it had already been fined by the EC for a previous cartel in 1998 related to pre-insulated pipes. The EC continued to monitor electrical equipment manufacturers and raided several electrical equipment manufacturers, including ABB in February 2010. However, the EC has since informed ABB that it closed its investigation into the matter.¹⁴

Mergers between Swiss companies and other foreign companies have also come under EC scrutiny. Most recently, the EC announced in November 2011 that it had opened a Phase II investigation into the merger between Johnson & Johnson and Swiss company, Synthes.¹⁵ The EC indicated that its initial investigation found that the proposed merger would combine the two leading suppliers of spine devices and substantially strengthen the leading position of the firms in other devices. It stated that it has "serious doubts" about the transaction and the proposed merger's effect on competition in the EU because of "concerns that the remaining competitors in many of the markets may not be able to exert a sufficiently strong restraint on the behaviour of the merged entity." A final decision is awaited at the time of writing.

II. Convergence between EU competition law and ACart

Notwithstanding significant amendments to Switzerland's competition law in 1995, ACart was soon found to be of limited effectiveness for actual enforcement. The *Hoffmann-La Roche* case visibly highlighted the weaknesses of ACart's enforcement mechanisms. Despite the fact that Hoffmann-La Roche was a Swiss firm and the evidence against it, un-

⁸ Department of Justice Press Release, F. Hoffmann-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel F. Hoffmann-La Roche Agrees to Pay \$500 Million, Highest Criminal Fine Ever (20 May 1999).

⁹ EC Press Release, Commission imposes fines on vitamin cartels (12 November 2001).

¹⁰ Formerly, the Court of First Instance.

¹¹ Joined Cases T-456/05 and T-457/05, Gütermann and Zwicky v. Commission (28 April 2010).

¹² EC Press Release, Competition: Commission fines members of gas insulated switchgear cartel over 750 million euros (24 January 2007).

¹³ EC Press Release, Antitrust: Commission fines producers of power transformers € 67.6 million for market sharing cartel (7 October 2009).

¹⁴ ABB Press Release, ABB confirms that European Commission closed investigation into ABB's FACTS business (14 September 2010).

¹⁵ EC Press Release, Mergers: Commission opens in-depth investigation into proposed acquisition of Synthes by Johnson and Johnson (4 November 2011).

like in the U.S. and EC, Comco was unable to impose any sanctions against the company because ACart did not have provisions to allow sanctions for first-time substantive infringements. ACart permitted Comco to issue fines only if a corporation had already been ordered by Comco to cease a certain activity but continued to act in contradiction to Comco's dictates.

1. 2003 revisions

In part due to the ineffectiveness of ACart exemplified in the *Hoffmann-La Roche* case, the Swiss government approved meaningful revisions to ACart in 2003 that brought ACart more in line with EU rules and significantly strengthened Comco's hand in investigating and enforcing competition law. First, the new law introduced direct sanctions for certain infringements of ACart, namely hardcore restrictions in horizontal agreements, some vertical agreements and abuse of a dominant position. Sanctions can be imposed at an amount up to 10% of a company's turnover achieved in Switzerland in the preceding three financial years. Though the EU calculates sanctions initially based on a company's global, not EU, turnover, this was a key move to give Comco teeth along the same lines as the EC. Second, the statute was amended to include a presumption that vertical agreements on resale price maintenance and distribution agreements that allocate territories (prohibition of passive sales or absolute territorial protection) eliminate effective competition unless the companies can demonstrate otherwise. Prior to the change, only certain hardcore horizontal agreements (price fixing, market sharing, quota arrangements) were presumed to eliminate effective competition. Third, Comco gained investigatory powers to conduct dawn raids of and seize documents from companies suspected of violating ACart. Fourth, Switzerland created a leniency provision akin to the EC's such that companies that contributed to the discovery of an anticompetitive practice could receive leniency and complete or partial immunity from sanctions. Fifth, ACart clarified the meaning of dominance by considering a company's strength in the market based on its relationship to competitors.

2. Recent changes on vertical agreements

In April 2010, the EC adopted a revised version of a regulation known as the Vertical Restraints Block Exemption Regulation (VBER) to replace the old VBER.¹⁶ Under the new VBER, certain vertical agreements¹⁷ are automatically exempted from the general prohibition of Article 101(1) TFEU provided that the supplier's and buyer's market share not exceed the 30% safe harbour and that the agreement does not contain "hardcore" provisions (such as price fixing).¹⁸ If the agreement is not exempted and, thus, is caught under Article 101(1), it is still not presumptively unlawful; instead it must be analysed to determine if it satisfies the exemption conditions under Article 101(3) TFEU. With regard to resale price maintenance, the VBER continues to treat agreements to fix prices as a hardcore restriction but allows companies to establish a very limited efficiency defence outside of the VBER.¹⁹ Further, the new VBER continues its rule that a supplier may restrict its distributor from making active sales into a territory or to a customer group reserved to another distributor, but cannot restrict passive sales.²⁰

A few months later, through new guidance, Comco announced a new notice on the treatment of vertical agreements signaling its intent to harmonise Swiss competition law with its recent case law and new developments in the EU. The new vertical restraints notice entered into force on 1 August 2010 and introduced an additional market share threshold. Whereas under the old regime, an individual assessment of an agreement was required only if the supplier's share of the relevant market exceeded 30% (and provided that there are no specific clauses comparable to hardcore restrictions under EU law), this will only be the case under the new notice if, cumulatively, the supplier's and the buyer's shares do not exceed 30%. The new vertical restraints notice further clarifies that price recommendations are problematic

¹⁶ Regulation (EU) No 330/2010 of 20 April 2010 on the application of Article 101(3) of the TFEU to categories of vertical agreements and concerted practices. The EC also revised its Guidelines on Vertical Restraints (OJ C 130/1 of 19 May 2010, Vertical Guidelines).

¹⁷ For example, an agreement between a manufacturer and a distributor.

¹⁸ Vertical Guidelines, para 23.

¹⁹ Vertical Guidelines, para 48.

²⁰ Vertical Guidelines, para 51.

only if they amount, in fact, to a fixed or minimum sale price as a result of pressure from or incentives offered by any of the parties. However, the most recent case law indicates that the (alleged) adherence to the price recommendations by a large number of resellers and distributors (e.g. representing 65% of the market) may be viewed by Comco as sufficient evidence of an agreement to fix prices. Even though, similar to the EU, the prohibition of passive sales by resellers is presumed to eliminate competition and can be sanctioned by fines, the vertical restraints notice lacks the detailed regulation of the Vertical Guidelines in the EU, and, thus does not provide the same level of legal certainty. Most importantly, the provisions of the new notice do not serve as “safe harbours” to market participants. This notice only serves “as a general rule” and leaves discretion to Comco to make a final decision on an infringement.

3. Current Swiss proposals for future amendments

Additionally in 2010 and 2011, the federal government embarked on a process to enact more significant amendments to ACart. On 30 June 2010, the federal government published a draft proposal detailing several potential changes. It recommended that institutions in charge of competition law (*i.e.* Comco) formally separate functions so that the competition authority and competition court become separate and independent bodies. Comco disagreed with the recommendation to create a new competition court separate from the competition authority. Instead, it suggested that it simply impose greater separation of personnel and functions within the existing authority. However, this may require closer examination if Comco sanctions an EU corporation in light of Article 6 of the European Convention on Human Rights which suggests the total separation between prosecutorial and judgment entities is required.²¹

The federal government also called for (1) increased cooperation with other competition authorities, such as the EU; (2) improvements in the notification procedure for undertakings to apply to Comco for ex-ante clearance of competition restraints; (3) more clearly defined criteria for assessing mergers to make ACart more in line with the way the EU assesses concentrations; (4) ending the requirement for merger filings for those mergers which affect the European Economic Area (EEA) and Switzerland in a similar way and would therefore be reviewed by the EC; (5) introducing a more sophisticated economic approach to assessing vertical restraints; and (6) allowing consumers to bring legal action against cartels.

Additionally, in September 2010, the Swiss Parliament passed a resolution obliging the federal government to submit a proposal for a revised sanctions regime for violations. The Federal Government responded in March 2011 by proposing measures to reduce sanctions for companies that operated an appropriate and effective compliance programme and to introduce sanctions for individuals who take part in horizontal cartel agreements. However, in its explanations of the proposed changes, it argued strongly against sanctioning individuals on the basis that diverging from EU law would complicate an agreement for cooperation between the two institutions. However, even though the EC itself cannot impose sanctions against individuals, certain member states have that ability. In some cases, member states have implemented legislation that allows national authorities to sanction individuals for competition law violations, for example, the United Kingdom authorised sanctions through the Enterprise Act 2002 with effect from 20 June 2003. In its comments on the proposed amendments, Comco also came out against individual sanctions but diverged from the federal government's support for a statutory reduction in sanctions for an effective compliance programme. Comco argued that since a discretionary reduction in sanctions

²¹ Article 6(1) European Convention on Human Rights (ECHR); see also *A. Menarini Diagnostics S.R.L. v. Italia* (Requete no. 43509/08), judgment of 27 September 2011 (holding that an administrative authority could lawfully impose a criminal sanction as long as the fine and decision was subject to review by a court with “full jurisdiction”). The Swiss Federal Administrative Court held, however, in its decision of 24 February 2010 regarding the Swisscom termination mobile telephony (RPW 2010|2, 242) that the current institutional setting does not violate Article 6(1)

ECHR because it is sufficient to have an independent tribunal at the appellate level. This view is questionable but has not been ultimately ruled upon yet by higher Swiss or EU authorities. The Swiss Federal Supreme Court confirmed the annulment of the sanction decision against Swisscom for other reasons in its decision of 11 April 2011 (RPW 2011|3, 440), without ruling on procedural rights.

is already permitted under the existing guidelines, the reduction should remain discretionary rather than obligatory.

Most recently, on 16 November 2011, the Federal Government published yet another set of proposals for amending ACart: Article 5 shall be construed as a partly *per se* violation (*i.e.* the hardcore horizontal and vertical restraints of competition that are presumed today to eliminate competition) including: (1) partially shifting the burden of proof regarding the justification of restraints; (2) replacing the dominance test in merger control (alignment with the EU) with the SIEC test (substantial impediment of effective competition); (3) imposing an obligatory reduction of sanctions in the case of an effective compliance programme; and (4) instituting institutional reform by separating a legally independent competition authority from the competition tribunal within the existing Federal Administrative Court. The competition tribunal would act as a first instance tribunal in cases of restraints of competition and abuse of a dominant position; whereas, the competition authority would act as investigator and continue acting at first instance in merger control proceedings. A detailed draft regarding the proposed amendments was submitted by the Federal Government to Swiss Parliament on 22 February 2012.

Comco also published new guidance on merger control in the summer of 2011. The new notice, “New practice in merger control proceedings”, provides procedural clarification for a simplified process for some mergers. If the undertakings do not meet certain criteria related to their involvement in upstream or downstream markets, then the undertakings need not provide further information on these markets ‘as a rule’, unless the Secretariat of the Comco explicitly requests otherwise.

4. Continued differences between EU and Swiss competition law

Despite the trend in convergence of Swiss and EU competition law, notable differences persist for the time being. First, Switzerland’s merger review is more permissive than the EU. The EU may prohibit or condition mergers that substantially impede effective competition in particular, as a result of the creation or strengthening of a dominant position. In Switzerland, only mergers that are likely to eliminate competition can be prohibited. Second, Switzerland

has a preliminary notification system for horizontal and vertical agreements. Companies may notify Comco of agreements or practices that would ordinarily be presumed to eliminate competition but that the companies believe should be considered lawful. If Comco does not respond within five months of notification that the agreement is unlawful, then the company may not be fined for the agreement even if Comco later determines the agreement violates ACart. However, in practice this provision has become obsolete in most cases because the Secretariat almost always starts a preliminary investigation, and thus, reactivates the threat of possible sanctions in case the notifying companies proceed with the envisaged agreement. In contrast, the EU abolished its formal pre-notification system for agreements with effect from 1 May 2004; thus, the onus is on the parties and their advisers to self-assess their agreements. Therefore, while in theory businesses may obtain some degree of legal certainty on their agreements by notifying Comco through an *ex ante* notification procedure, in practice, the situation is not much different in Switzerland due to the sword of *Damocles* pending above the parties if they continue with the project after a preliminary investigation has been opened.

III. Attorney-client privilege and in-house counsel

Attorney-client privilege is the chief means by which businesses may resist disclosure of confidential communications with counsel to a regulatory authority, third party in a regulatory or investigatory proceeding, or in litigation. Swiss and EU businesses and advisers should be aware of the scope of attorney-client privilege in each jurisdiction. In both the EU and Switzerland, the attorney-client privilege doctrine does not extend to in-house lawyers on the basis that their employment relationship is presumed to give rise to a lack of independence from the corporation.²² Even if admitted to the Bar or Law Society, in-house counsel communications within the company are not privileged. Thus, businesses are not en-

²² See C-550/7P, *Akzo Nobel Chemicals Ltd. & Akros Chemicals Ltd. v. Commission* (14 September 2010) and Swiss Federal Criminal Court decision regarding *Panalpina* (14 March 2008).

titled to refuse to give information or documents pertaining to such in the context of a competition investigation. A summary of a communication between in-house and external attorneys may be privileged in limited circumstances. However, if the in-house counsel incorporates his or her own comments, impressions or thoughts, then the summary will no longer be protected from disclosure on the basis of attorney-client privilege.

In comparison, in a decision dated 28 October 2008, the Swiss Federal Supreme Court held that an external lawyer's legal privilege can only be invoked if the documents are in the external lawyer's possession.²³ Thus, a company may not rely on attorney-client privilege for documents located on the company's premises unless it is so-called defence correspondence related to a pending investigation which is always protected (which is usually not the case if there is a dawn raid accompanying the opening of an investigation). Very recently, though, the Swiss Parliament welcomed a motion according to which the legal privilege of external lawyers shall be protected irrespective of the custody of the respective documents. Therefore, it appears quite likely that in the near future external lawyers' legal privilege may enjoy the same level of protection as in the EU.

Despite viewing in-house counsel similarly, it is important to take notice of the fact that the EU and Switzerland may treat foreign lawyers differently. According to the Advocate General opinion in *Akzo* and *Akcros v. Commission*, the *AM&S Europe v. Commission* (Case C-155/79) case stands for the proposition that the attorney-client privilege only applies to communications between a company and external counsel admitted to the bar of a member state of the EEA, and therefore, documents drafted by external non-EEA lawyers not admitted to an EEA bar would not be protected from disclosure to the EC. On appeal, the CJEU in *Akzo* affirmed the General Court's decision holding that because in-house counsel were not independent, the documents at issue were not privileged, and confirmed the continued relevance of *AM&S Europe*. Because it was not necessary to the final ruling, however, the CJEU did not specifically address whether non-EEA external counsel could benefit from the attorney-client privi-

lege. Because of the bilateral agreement between the EU and Switzerland on the free movement of persons of 21 June 1999 which provides for mutual recognition of professional certificates, Swiss attorneys are afforded the same level of attorney-client privilege as EU admitted counsel. However, attorneys barred only in the U.S., for example, may find that their communications are not covered by the attorney-client privilege in EC proceedings. Accordingly, as a matter of precaution, businesses should presume that documents prepared by non-EEA and non-Swiss counsel may be seized in the context of so-called "dawn raids", and used by the EC to build its cases. For this reason, companies may wish to rely more on advice given orally by in-house counsel and involve Swiss or EEA-qualified outside counsel in sensitive projects.

IV. Hot topics in EU and Swiss competition law

1. Challenging EC requests for information

Through its German subsidiary, Swiss company Holcim, is challenging the procedure by which the EC obtained the evidence it gathered in its investigation into alleged cartel behavior in the cement industry.²⁴ Holcim argued that the EC requested too much information, did not provide sufficient time to respond, and required disclosure of information that it was aware was not within Holcim's possession. Other cement companies involved in the investigation have filed similar complaints with the General Court. This coincides with several companies facing EC investigations bringing similar challenges. For example, Deutsche Bahn, the German railway company, has also filed a lawsuit with the General Court over what it called an unjustified "fishing expedition" by investigators who raided its offices seeking evidence of antitrust infractions.²⁵

These next two sections briefly highlight two sectors which are both prominent in Switzerland and have been the focus of EC and national competition

²³ See Swiss Federal Supreme Court decision regarding *Panalpina* (28 October 2008).

²⁴ Action brought on 9 June 2011 – *Holcim (Deutschland) and Holcim v. Commission*, (Case T 293/11).

²⁵ Action brought on 7 June 2011 – *Deutsche Bahn a.o. v. Commission* (Case T 289/11).

interest for some time: the financial services and pharmaceutical industries.

2. Financial services

In 2005, the EC launched a sector inquiry into the financial services industry targeting three areas: payment cards, core retail banking and business insurance. The EC released its final report in 2007 stating that it found a “number of competition concerns in the markets for payment cards, payment systems and retail banking products.”²⁶ It expressed concern with regard to the large variations in merchant and interchange fees for payment cards, barriers to entry in the markets for payment systems and credit registers, obstacles to customer mobility and product tying. Rather than fine any individual company, however, the EC worked with financial services companies who agreed to voluntarily reform some of their practices.

Over the past year, regulators in the U.S. and Europe have been investigating whether several banks colluded to set rates for both the London Interbank Offered Rate (LIBOR) and its Euro equivalent, the EURIBOR. In July 2011, a Swiss bank indicated that it had been granted leniency or immunity from potential violations by some authorities, in return for its continuing cooperation with the investigations. The inquiry is ongoing.

3. Pharmaceutical industry

Pharmaceutical companies in Switzerland and elsewhere will be familiar with the EC’s sustained interest in the pharmaceutical industry. In January 2008, the EC initiated a sector inquiry and conducted several surprise inspections (dawn raids) at pharmaceutical companies throughout the EU. Since several Swiss pharmaceutical companies have offices in the EU, the EC has jurisdiction to search them. Though the final report did not reveal any obvious violations, it expressed concern in particular with the practice of originator companies allegedly delaying or blocking generic companies entry into the market.²⁷ Generally,

patent settlements can be an efficient way of resolving patent disputes, but the EC fears that they have also been used as a means of excluding or delaying the entry of potentially cheaper drugs.

The EC’s final report was not the end of its interest in the pharmaceutical sector. In December 2010, the EC raided pharmaceutical companies over alleged abuse of dominance in delaying generic drugs from entering the market. Swiss company, Nycomed, was among the companies inspected at its site in Germany.²⁸ The EU Competition Commissioner stated on the same day of the raids: “Building on our recent sector inquiry, I will continue to enforce with determination competition rules in the pharmaceutical sector.”²⁹ More recently, the EC has been investigating Johnson & Johnson and Swiss-based Novartis for entering into agreements that it considers may have the effect of hindering entry of Fentanyl into the Dutch market and a number of investigations are pending involving, for example, Les Laboratoires Servier, Lundbeck, Teva, and Cephalon.³⁰

V. Conclusion

Given the interconnectedness of the European market and the aggressiveness of the EU competition authorities, businesses with operations in Switzerland and the EU and their advisers should be aware of and familiar with how both competition regimes affect them. Over the past decade, these regimes have become more and more similar. Nonetheless, there are some important differences. Recently, the EC has conducted inquiries into the pharmaceutical and financial services industries that have touched upon

²⁶ EC Press Release, Competition: Commission sector inquiry finds major competition barriers in retail banking (31 January 2007).

²⁷ EC Press Release, Antitrust: shortcomings in pharmaceutical sector require further action (8 July 2009).

²⁸ Andrew Jack/Nikki Tait, EU regulators raid AstraZeneca and Nycomed, *Financial Times* (3 December 2010).

²⁹ Speech by Joaquín Almunia, *Converging paths in unilateral conduct*, ICN Unilateral Conduct Workshop, Brussels (3 December 2010).

³⁰ EC Press Release, Antitrust: Commission opens proceedings against Johnson & Johnson and Novartis (21 October 2011); EC Press Release, Antitrust: Commission opens investigation against pharmaceutical companies Cephalon and Teva (28 April 2011); EC Press Release, Antitrust: Commission opens formal proceedings against pharmaceutical company Lundbeck (7 January 2010); EC Press Release, Antitrust: Commission opens formal proceedings against Les Laboratoires Servier and a number of generic pharmaceutical companies (8 July 2009).

Swiss firms and a number of investigations within individual companies are ongoing. This is a developing area of law and practice. Accordingly, businesses and their advisers should be vigilant for increasing convergence between competition law in the EU and Switzerland, greater cooperation between the compe-

tion authorities, pending appeals in EC investigations and the use of authorities' investigatory powers. To best protect their interests, businesses will need to be increasingly sophisticated in navigating the differences and interdependence between the EU and Swiss competition regimes.
