Switzerland's ACart – the grace period is over

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On April 1, 2004, a substantially revamped and amended Federal Act on Cartels (ACart) entered into force. Enterprises that participate in certain forms of horizontal or vertical agreements or that abuse a dominant position will be subject to substantial first-time infringement fines. A transition period until March 31, 2005 allowed for the termination or notification of existing unlawful agreements or conduct without fine. After the expiration of this grace period, the Swiss competition authorities can now fully exert their enhanced powers.

First experiences with the amended Federal Act on Cartels

Possibility of direct sanctions post transition period

While, under the old ACart, the Swiss Competition Commission (Commission) could only impose fines on companies in case of repeated infringements the amended law now allows direct sanctions for certain infringements deemed to be particularly harmful to competition, i.e. 'hard-core cartels' (price fixing, artificial quantitative restrictions, market allocations; Art. 5 para. 3 ACart), certain vertical agreements (retail price maintenance, prohibition of passive sales; Art. 5 para. 4 ACart) and the abuse of dominance (Art. 7 ACart). The proposed fines may be as high as 10% of the cumulated group sales turnover in Switzerland over the previous three financial years. The fines may be imposed up to five years after the unlawful anti-competitive practices have been terminated.

Companies were given the opportunity to adjust their behaviour to the new rules. According to the transitional rules of the amended ACart, no direct sanctions were imposed on companies if they notified or ceased unlawful anti-competitive practices which had already been practiced prior to April 1, 2004. Such a notification or termination was possible within one year following the amendment's entry into force, i.e. until March 31, 2005.

The Appeals Commission on Competition matters (ACC) ruled, on March 18, 2005, on a disputed issue in this context. The Competition Commission had taken the view that, under the transitional regime, it was only possible to notify agreements and practices which, so far, had not been known to the Commission. For this reason, the authority refused to accept several notifications under the transitory regime submitted by Swisscom and concerning, *inter alia*, termination costs in mobile telephony and for SMS deliveries between different networks. The ACC decided in favour of the applicant and held that it was irrelevant whether or not the Commission had previous knowledge of the notified practice. On appeal of the Competition Commission, the ACC's decision has been reversed by the Swiss Federal Court on August 19, 2005. The reasons for this judgment confirming the Competition Commission's view have not been published yet.

Conduct of dawn raids and seizures

The amendment of the ACart also provides for enhanced investigation powers for the competition authorities (dawn raids and seizures). The competition authorities may order and conduct searches in business premises, private homes and vehicles and seize pieces of evidence (Art. 42 para. 2 ACart, Art. 45-50 Federal Administrative Penal Code). During house searches, the principle of proportionality and the legal privilege (Swiss standards; see below) must be respected. Companies or individuals whose premises are searched may request sealing of seized documents or electronic data if this material is privileged, of private nature or outside the scope of the investigation. In that case, a court will decide whether or not the seized documents/data may be reviewed by the competition authorities.

Early in April 2005, the Commission's Secretariat (which acts as the Commission's investigatory body; thereafter: Secretariat) issued a short notice on dawn raids (not available in English) setting out how the Secretariat intends to conduct dawn raids in practice:

- Any company subject to a cartel investigation is entitled to appoint an external lawyer who may advise the company during the investigation. However, the CEO (or in his/her absence the most senior company representative) is the only contact person for the Secretariat, not the external lawyer.

- The Secretariat will immediately start to search business premises and to seize exhibits and will not wait for the external lawyer to arrive. Seized pieces of evidence will be set aside. Upon arrival, the external lawyer may review the seized items and request sealing for certain documents or data, if appropriate.
- In the view of the Secretariat, the scope of the legal privilege is very limited and covers only lawyer-client-correspondence pertaining to the client's defense in the current investigation. Any other document produced by the external lawyer and found at the client's premises (or in private homes/vehicles of company management or employees) may be seized. No legal privilege at all will be granted to in-house counsel. In the Secretariat's view, they lack the necessary independence from their company.

Leniency Programme

If a company takes part in the disclosure and removal of a restraint of competition, the impending fine may be fully or partially waived (Art. 49a para. 2 ACart). Conditions and procedure for full or partial exemption from sanctions are contained in the Ordinance on Sanctions (OS ACart) which also entered into force on April 1, 2004. According to Art. 8 OS ACart, full exemption ('Amnesty') can be granted if the competition authorities had no previous knowledge of the reported restraint of competition and the amnesty-seeking company delivers voluntarily sufficient information allowing the Commission's Secretariat to open an investigation. In case the competition authorities are already aware of the restraint of competition, the company only qualifies for full leniency if it submits evidence which enables the authorities to ascertain a violation of Art. 5 para. 3 ACart ('hard-core cartel' agreements between competitors) or 5 para. 4 ACart (vertical agreements on resale price maintenance or the prohibition of passive sales).

Amnesty can only be granted to the 'first mover', i.e. the first company reporting to the Commission's Secretariat and delivering evidence. Furthermore, the applicant must (1) not have had a leading and/or instigating role in the relevant competition violation, (2) fully and completely terminate its own involvement in the competition law violation and (3) voluntarily disclose all relevant information and cooperate with the Commission's Secretariat throughout the investigation.

Other parties than the 'first mover' may be eligible for partial exemption (Art. 12 and 13 OS ACart). In that case, reductions are possible in the amount of up to 50% of the impending fine, depending on the importance of the contribution to the success of the procedure. Applicants for partial exemption must also fulfill the three preconditions set out above. If the disclosure by another party leads to the disclosure of yet another restraint of competition the fine may be reduced by up to 80%.

Recent case law - merger control and anti-competitive agreements

Swisscom/Cinetrade

On March 7, 2005, the Commission cleared unconditionally, after an in-depth investigation, a share acquisition by Swisscom, Switzerland's leading provider of telecommunication services, of Cinetrade, a company trading movie rights and offering Pay TV services. The co-operation with Cinetrade will help Swisscom to complement its core business (telephone and internet) with TV services and to secure broadcasting rights for TV Premium Content, e.g. major sport events.

Swissgrid

Following an in-depth investigation, the Commission approved conditionally, on March 7, 2005, the establishment of Swissgrid AG, an electricity network company founded by six electricity companies in order to join their high voltage grids. The Commission identified a risk of a dominant position on the market for transporting high voltage electricity in three Swiss regions. The authority, however, conceded that Swissgrid helped to ease the transport of high voltage energy, to improve the energy supply of end consumers and also to foster competition on the Swiss electricity market not yet fully liberalised. To secure these benefits, Swissgrid has been ordered to grant third parties discrimination-free access to its networks, to publish tariffs and terms of use, to establish a cost accounting for its high voltage grid, to refrain from any commercial activities, such as energy production or trading, and to avoid, in its management, overlaps with other energy companies.

Migros/Valora

On June 14, 2005, the Commission approved unconditionally the acquisition of joint control by Migros, Switzerland's leading retailer, and Valora AG, leader in the kiosk and newsstands sector in the German-speaking part of Switzerland, over cevanova AG, a franchise concept for convenience shops at railway stations. The parties wish to extend the concept also towards shops at filling stations. cevanova AG had been founded in 2000 and was initially controlled jointly and at equal shares by Migros, Valora and Swiss Railways (SBB). The Commission held there was sufficient competition

on the market for convenience shops, in particular with regard to newspaper distribution channels.

Federal Court: no third-party appeal in merger proceedings

The Swiss Federal Court (SFC) recently confirmed on two occasions that third parties, under the ACart, have no right to challenge decisions in merger proceedings. On June 14, 2005, the SFC dismissed an appeal by Etablissements Cherix, a publisher, against Edipresse group's acquisition of two daily newspapers in the French-speaking Canton Vaud. On June 16, 2005, the SFC's President, by means of an interlocutory injunction, dismissed a request by Cablecom, Switzerland's second-biggest communication company, to block Swisscom's share acquisition in Cinetrade (see above). Cablecom withdrew its request on July 8, 2005. On both occasions, the SFC held that the legislator had had the clear intention to exclude third parties from the merger control review process (deviating from the general principle of administrative law where a right to challenge a decision results from legitimate interests being at stake) stating in the ACart that only the undertakings involved in the concentration are parties to the merger proceedings.

CoopForte

On November 8, 2004, the Commission reached an amicable settlement with Coop, Switzerland's second biggest retailer. Since 2003, Coop had developed a concept called 'CoopForte' to strengthen Coop's market position by means of shop designing, increased attractiveness of the product range, improved communication, and more. Assuming that the 'CoopForte' concept was also in the suppliers' interest, Coop unilaterally announced to deduct automatically 0.5% of each supplier's invoice. The Commission, in its investigation, found there was sufficient competition on the retail market with enough opportunities for Coop's suppliers to switch to other clients in case they were unwilling to accept the 'CoopForte' deduction. The question of Coop's likely dominance was thus left open. However, the Authority held that, under particular circumstances, suppliers might possibly depend on delivering Coop. For this reason, the Commission obliged Coop to assess its new marketing concept over several months and to reimburse any supplier who was able to demonstrate that it did not benefit from 'CoopForte'. Coop's regular main suppliers are excluded from this assessment.

Feldschlösschen/Coca-Cola

On December 6, 2004, the Commission closed its four-year investigation of Feldschlösschen's distribution system for alcoholic and non-alcoholic beverages. Feldschlösschen Holding, a leading Swiss manufacturer and bottler of beer, mineral water and soft drinks, had concluded a bottling agreement with Coca-Cola to supply pubs and restaurants with beverages. The Commission did approve this agreement since Feldschlösschen's and Coca-Cola's competitors could use alternative distribution channels to serve their clients in the catering trade. The authority, however, had concerns with regard to long-running exclusive delivery contracts between Feldschlösschen and various pubs and restaurants. The Commission held that exclusive deliveries exceeding a period of five years could only be justified on economic grounds, e.g. because of substantial investments or a loan on the brewery's side. This decision is relevant for the whole brewery sector in Switzerland.

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Retail price maintenance for books

On March 21, 2005, the Commission prohibited the so-called 'Sammelrevers' which obliges bookshops not to depart from end sales prices fixed by publishers. In the German-speaking part of Switzerland, 90% of all books are sold at fixed prices. Already in 1999, the Commission had found that the 'Sammelrevers' did violate the Cartel Act. However, its decision went on appeal up to the SFC which remanded the case back to the Commission to evaluate whether the price fixing could be justified by economic efficiencies. Following an in-depth market research, the Commission resumed that the retail price maintenance had neither led to a greater variety of books nor prevented the

ongoing concentration in the retail book trade.

ADSL-Services of Swisscom

On October 20, 2005, the Commission announced another investigation in the area of ADSL-services. The question is whether or not Swisscom abuses its dominant position in charging high prices for providing the necessary net infrastructure to service providers as precondition for being able to offer ADSL-services. Compared to the prices Swisscom charges its end customers for ADSL, the prices for getting access to the network are allegedly in a range that no sufficient margin is possible. This price policy might be qualified as an abuse of a dominant position under the ACart in form of a so-called price- or margin-squeeze.

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