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# Switzerland

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## Legal and organisational developments

This year has been marked by two key legislative projects: the government's draft bill for an amendment of the Swiss Act on Cartels and the publication of a revised Notice on Vertical Agreements.

### Public consultation regarding draft of revised Act on Cartels

On 30 June 2010, the Swiss federal government published a draft bill for an amendment of the Act on Cartels (Draft) along with an Explanatory Report. The government has submitted this Draft for public consultation until 19 November 2010.

The Draft proposes several fundamental changes and innovations compared to the current Act on Cartels:

*Creation of an independent Federal Competition Court*

Today's Swiss Competition Commission (ComCo) and its Secretariat constitute a uniform authority which performs investigating, prosecuting and decision-making functions at the same time. The Commission and its Secretariat usually interact intensely at every stage of the procedure. This organisational structure has been subject to vigourous criticism from private practitioners and is currently being challenged before the federal courts. Critics regard the current system as being contrary to the right to an independent tribunal according to the Federal Constitution and the European Convention on Human Rights, at least as far as sanctions proceedings are concerned. The Draft now provides for a clear separation between investigating and prosecuting functions, on the one hand, and decision-making functions, on the other hand. While it confers the latter to a newly established independent Federal Competition Court, it leaves the former to a Competition Authority which is basically made up of the current Secretariat. The Competition Court shall be composed of full-time and part-time judges. A majority of the part-time judges shall have entrepreneurial experience or economic knowledge. All the judges must be independent. In particular, they must not be employees of any trade association, in contrast to the representatives of interest groups within the current ComCo. As a rule, the Competition Court shall make its decisions as a first instance court in two-party proceedings. The Competition Authority may submit its motions (prohibition of a certain conduct, imposition of fines, interim measures, approval of an amicable settlement, etc), and the undertakings concerned may submit their defence. By contrast, the Competition Authority shall only have limited decision-making powers, which shall be conferred to it for purely practical reasons. Thus, the Competition Authority shall continue to make decisions on concentrations of undertakings and issue the necessary procedural orders in the course of its investigations (requests for information, extensions of deadlines, etc). In these cases, the Competition Court shall act as a first appeals instance. In any case, it shall be possible to appeal the decisions of the Competition Court before the Federal Supreme Court on points of law.

*Differentiated treatment of vertical agreements*

The Act on Cartels currently provides that vertical agreements regarding fixed or minimum prices and vertical agreements regarding the prohibition of passive sales in distribution contracts are presumed to eliminate effective competition and, hence, to be unlawful. The federal government believes that this provision is too rigid and no longer in line with present-day economic theory and empiricism. It therefore suggests that the presumption described above shall be abolished or that a fine for a vertical agreement (but not a prohibition) shall be ruled out in case the undertaking concerned proves that an identical agreement is practised in the EU without any objection and credibly shows that the agreement would commonly be admissible in the European Economic Area. This latter solution would allow undertakings to extend their European distribution systems to Switzerland without incurring the risk of being fined for an infringement of the Swiss Act on Cartels (provided, of course, that these distribution systems are in compliance with EU competition law).

*Improvement of the objection procedure*

According to the current version of the Act on Cartels, an undertaking may notify the ComCo of a specific restraint of competition before it takes effect. In this case, the undertaking may be fined for the notified conduct only if the ComCo informs the undertaking of the opening of a formal or preliminary investigation within five months from the notification and the undertaking then holds on to the notified conduct. The Federal Government believes that this procedure, in its present form, does not provide a sufficient degree of legal certainty for the undertakings concerned. It therefore suggests that the deadline for the Competition Authority to take action should be reduced from five to two months and that only the opening of a formal (but not a preliminary) investigation (within or after the two-month period) should be sufficient to set the protection from fines aside.

*Modernisation of the control of concentrations*

The current Swiss merger control regime features a peculiar standard of assessment which is sometimes called the 'dominance-plus test'. According to this test, the ComCo may prohibit a concentration of undertakings (or impose conditions) only if:

- the concentration creates or reinforces a market dominant position;
- effective competition can be eliminated by means of this position; and
- the concentration does not lead to any improvement of the competitive situation in another market which would outweigh the harmful effects of the dominant position.

The federal government regards this test as ineffective and, therefore, proposes to replace it either with a simple dominance test (whereby the criterion of a possible elimination of competition would be dropped) or with an SIEC test (Significant Impediment to Effective Competition) analogous to EU law. The government favours the dominance test, as this might be the less resource-consuming alternative. As regards the criteria for the notification duty, the government wants to maintain the existing turnover thresholds, which are comparatively high. Remarkably, it even suggests a new exception

to the notification duty in order to avoid duplicate proceedings in international cases. This exception would apply in cases where every relevant market geographically extends over Switzerland plus at least the European Economic Area and the concentration of undertakings is being appraised by the European Commission. Finally, the government's Draft creates a possibility to extend the (relatively short) time limits for first and second phase proceedings with the consent of the notifying undertakings. This would facilitate a coordination of Swiss merger control proceedings with parallel proceedings in the EU.

*Improvements regarding the possibility of international cooperation*

The Draft includes two new provisions which authorise the Competition Authority to cooperate and exchange information with foreign competition authorities subject to certain prerequisites. These prerequisites are similar to the principles of judicial assistance law (in particular, the principles of double criminality, reciprocity and speciality).

*Strengthening of private enforcement*

The Draft does not introduce any kind of class actions, as the government wanted to avoid an 'excessive suing culture', but limits itself to minor amendments. In particular, the right to sue shall be extended to persons 'threatened or hurt in their economic interests by an unlawful restraint of competition', including consumers (who could assign their claims to consumer organisations then) and public entities. At present, this right is restricted to persons which have been 'prevented from entering or competing in a market by an unlawful restraint of competition'. Furthermore, the Draft provides that periods of limitation shall neither run between the opening of a formal investigation and the final decision nor start during this period.

There are ongoing political discussions on whether undertakings which have implemented compliance programmes should benefit from lower fines and whether fines (and prison sentences) should be introduced for individual persons in case of cartel infringements. The federal government has deliberately adjourned these controversial questions to a later stage. The government has also refused to amend the provision of the Act on Cartels which states an information duty for undertakings involved in an investigation, although this provision might often conflict with the constitutional right to remain silent. The government obviously leaves it to the courts to strike the right balance in this regard.

Overall, at this point, it is open to what extent and by when the government's proposals for a revised Act on Cartels will be implemented. Should the legislative process run smoothly, the earliest possible implementation would likely be in January 2013.

### Publication of revised Verticals Notice

On 30 June 2010, the Swiss Competition Commission (ComCo) published a revised version of its Notice on Vertical Agreements after it had submitted a draft of such Notice to public comments in April 2010.

The ComCo's aims were to adapt the former Verticals Notice to the revised EU Verticals Block Exemption Regulation, to prevent foreclosure of the Swiss markets, and to codify its practice in three recent leading cases (ie, the pruning shears case, the *hors-liste* pharmaceuticals case and the toothpaste case). Remarkably, two of these cases are still on appeal before the Federal Administrative Court.

The ComCo's revised Verticals Notice (RVN) features several important changes and clarifications:

- The RVN clarifies in its preamble that, as far as possible, the same rules shall apply to vertical agreements in Switzerland as in the EU, so as to prevent an isolation of the Swiss markets and to provide legal certainty. To this extent, the rules of the EU shall apply by analogy in Switzerland.
- The RVN clarifies that 'general measures of advertising or sales promotion' shall be deemed to constitute passive sales even if they reach customers in a territory, respectively, a group of customers which the supplier has reserved to itself or which it has exclusively assigned to another dealer, provided, however, that such measures are a reasonable alternative to addressing customers outside these territories or customer groups (eg, in the dealer's own territory). Accordingly, internet sales shall constitute passive sales unless sales efforts are actually targeted at customers outside the assigned territory.
- The RVN clarifies that it is also applicable to vertical agreements in the case of dual distribution (ie, to non-reciprocal vertical agreements between competitors, where the supplier is a manufacturer and a distributor of goods, while the buyer is a distributor and not a competing undertaking at the manufacturing level or the supplier is a provider of services at several levels of trade, while the buyer provides its goods or services at the retail level and is not a competing undertaking at the level of trade where it purchases the contract services). The fact that the RVN is applicable shall, however, not rule out that a parallel assessment under the rules for horizontal agreements is required. It remains to be seen what this statement will mean in practice.
- According to the Swiss Act on Cartels (ACart), vertical agreements regarding absolute territorial protection or regarding fixed or minimum prices presently are presumed to eliminate effective competition and, thus, to be unlawful. The former Verticals Notice provided that this presumption could only be rebutted by proof of intrabrand competition. This provision was subject to fierce criticism from private practitioners, economists, and academic writers. The RVN now provides for an overall assessment of the relevant market, whereby the existence of either sufficient intrabrand competition or sufficient interbrand competition (or sufficient competition due to a combination of both) must be demonstrated.
- The ACart provides that every agreement which significantly affects competition must be justified on grounds of economic efficiency. Whereas the former Verticals Notices listed certain categories of agreements which were deemed to significantly affect competition per se, the approach of the RVN is more open in this respect. It provides for an overall assessment which is to include both qualitative and quantitative criteria. The RVN, however, retains the former list of per se significant types of agreements in the form of a list of 'qualitatively severe' agreements. It remains to be seen whether this new approach of the RVN will have an impact on the assessment of vertical agreements in practice.
- The RVN provides that the restriction of sales by members of a selective distribution systems to unauthorised distributors within the territory reserved by the supplier to operate that system shall not be regarded as 'qualitatively severe' per se. As in the revised EU Block Exemption Regulation, the passage in italics is new compared to the former Verticals Notice.
- The RVN now explicitly recognises the admissibility of the so-called 'location clause' in selective distribution systems (ie, the clause prohibiting a member of the system from operating out of an unauthorised place of establishment). Remarkably, the Motor Vehicles Notice (which takes precedence over the RVN) still considers location clauses as unlawful if they are contained in a motor vehicle dealer agreement.

- The former Verticals Notice provided that price recommendations had to be assessed in the individual case, and listed several circumstances which were to 'carry weight' in this assessment. The RVN holds on to this individual assessment, but now clarifies that a price recommendation is deemed to be 'qualitatively severe' if it amounts to a fixed or minimum sale price as a result of pressure from, or incentives offered by, any of the parties (which corresponds to the relevant criterion in the EU Block Exemption Regulation). The specific circumstances listed in the former Verticals Notice are still mentioned in the RVN, but only as circumstances which could cause the ComCo to have a closer look at price recommendations.
- According to the former Verticals Notice, an agreement that significantly affected competition was deemed to be justified without individual assessment if the supplier's market share in the relevant market did not exceed 30 per cent. The RVN now provides a double-sided 30 per cent threshold relating to both the supplier's and the buyer's market shares, analogous to the rules of the revised EU Block Exemption Regulation.

### Public consultation re revision of Motor Vehicles Notice

In February 2010, the ComCo notified interested parties of its stance on a possible revision of the Notice on Vertical Agreements in the Motor Vehicles Sector and called for comments. According to this notification, the ComCo intends to leave the current Motor Vehicles Notice unchanged for the time being. A decision shall be made in the first quarter of 2013 about whether the Notice shall be adapted to the revised rules of the EU as of 1 June 2013 or not. Notwithstanding some critical comments on the emerging gap between Swiss and EU law, the ComCo announced in June 2010 that it would hold on to its approach. The ComCo obviously considers the emerging gap between Swiss and EU law as being of minor importance. At least, it intends to amend its Explanatory Remarks on the Motor Vehicles Notice in the middle of this year.

### New chairman of ComCo

In January 2010, Professor Walter Stoffel announced his resignation from the office of President of the ComCo as of 30 June 2010, in the midst of his second term of office. Professor Stoffel had held this post since 2003, after having served as the ComCo's vice president since 1998.

In May 2010, the federal government appointed Professor Vincent Martenet as Prof Stoffel's successor. Professor Martenet has been a member of the ComCo since 2005 and has been its vice president since 2008. At the same time, he is a full professor of constitutional law and competition law at the University of Lausanne.

## Recent cases – horizontal agreements

### Credit cards (DMIF)

In July 2009, the ComCo opened a formal investigation regarding the Domestic Multilateral Interchange Fees (DMIF) of Visa and MasterCard. Interchange fees are fees paid by acquirers (which negotiate credit card acceptance agreements with retailers) to issuers (which issue credit cards). They influence the commissions which retailers have to pay to their acquirers. The investigation deals with the question whether it is permissible to fix interchange fees collectively and, as the case may be, what kind of control mechanisms should apply. The ComCo currently has not (yet) decided to replace its traditional cost-based approach with a different one, such as the merchant indifference test.

A first investigation of this matter had been closed in December 2005 with an amicable settlement which was concluded for a period of four years. The parties then undertook to reduce their fees. The purpose of the present investigation is to reassess this solution in the light of recent developments at the European level.

In January 2010, the ComCo issued provisional measures with the objective of renewing the solution of 2005 in a modified form, particularly, with a stronger focus on the most cost-efficient market participants. These measures will lead to a reduction of the DMIF and to an alignment with the European average. They were based on an amicable settlement with the most important market players and are to stay in force until the ComCo will issue its final decision. However, the ComCo's provisional measures are still in dispute, as they have been appealed before the Federal Administrative Court.

### Plumbing, cooling and heating systems

In May 2010, the ComCo issued a decision regarding two European manufacturers of components for plumbing, cooling and heating systems: Flamco AG and Pneumatex AG. The ComCo found that these two undertakings had coordinated the amounts and dates of price increases for various products in Switzerland. While Flamco AG was fined 169,000 Swiss francs, Pneumatex AG's fine (which would have amounted to 5.2 million Swiss francs) was waived in its entirety, as Pneumatex AG had filed a leniency application and substantially contributed to the finding of the facts. The ComCo's decision was based on an amicable settlement with the parties. An investigation by the EU competition authorities relating to the same matter is still pending.

### Perfumes and cosmetics

In May 2010, the Secretariat of the ComCo closed its formal investigation of the market for luxury perfumes and cosmetics and submitted a proposal for a decision to the ComCo and to the parties involved. According to the Secretariat's proposal, the ComCo is asked to declare that the Act on Cartels has been violated and to impose fines upon the individual members of the relevant industry association. The fines proposed by the Secretariat range from approximately 17,000 Swiss francs to 25.5 million Swiss francs, and their total is estimated to be substantially in excess of 100 million Swiss francs. In its investigation, the Secretariat had found signs that an exchange of market information organised by the industry association ASCOPA enabled the undertakings involved to coordinate their prices and freeze their market shares. The Secretariat qualified this as unlawful price-fixing and quantity-fixing agreements. In addition, the Secretariat alleged that the members of ASCOPA agreed on uniform General Terms and Conditions of trade. The parties involved were invited to submit their comments on the Secretariat's proposal.

### Other cases

In July 2009, the ComCo issued its decision regarding bid rigging by members of a Bern-based electrical installation cartel (cf report for *The European Antitrust Review 2010*). Based on an amicable settlement, the ComCo imposed fines on seven of the eight participating undertakings and waived the fine of the eighth undertaking which had been the first to file a leniency application. In the meantime, the ComCo has published its decision including the considerations. It appears from the text of the decision that, besides the undertaking which obtained a full waiver of its fine for its leniency application, every undertaking was granted a 20 per cent reduction of its fine for participating in the amicable settlement and a further 40 per cent reduction for having cooperated in the investigation. The fact that such large reductions are available even for undertakings which were

not the first to file a leniency application might potentially reduce the incentive for undertakings to file leniency applications at the earliest stage possible, and thus ultimately jeopardise the effectiveness of the ComCo's leniency programme.

Finally, the two investigations on freight forwarding and on air cargo are still pending. It is as yet unclear when they will be brought to an end.

## Recent cases – vertical agreements

### Resale price maintenance and price recommendations

In December 2009, the ComCo imposed fines of a total of 5.7 million Swiss Francs upon three pharmaceutical companies (namely, Pfizer AG, Eli Lilly (Suisse) SA and Bayer (Schweiz) AG). The ComCo accused them of having entered into agreements on fixed resale prices with the retailers of three *hors-liste* pharmaceuticals against erectile dysfunction (ie, Viagra, Cialis and Levitra). Although these pharmaceuticals are available on prescription only, they are not covered by health insurance. Their price is, therefore, not regulated by the state. The ComCo's reproach was that the accused companies had fixed the resale prices of these pharmaceuticals by means of price recommendations. These recommended prices were integrated in the industry-specific IT systems or transmitted from wholesalers to pharmacies and self-dispensing doctors. According to the ComCo, the vast majority (allegedly around 80 per cent) of pharmacies and self-dispensing doctors did in fact charge these prices to their patients. In the ComCo's view, this pricing system had its origin in the so-called *Sanphar* cartel, which had been prohibited in 2000. Overall, the ComCo concluded that these circumstances were sufficient to constitute an unlawful agreement on fixed resale prices even in the absence of threats or incentives. Appeals by all fined parties against the ComCo's decision are pending before the Federal Administrative Court.

In May 2010, The ComCo opened a formal investigation against Roger Guenat SA and conducted a dawn raid on the premises of this company. Based on a complaint, the ComCo suspects Roger Guenat SA of imposing resale prices upon it dealers, particularly in the form of maximum discounts, and of hindering or preventing parallel imports of mountaineering products into Switzerland.

In June 2010, the ComCo opened a formal investigation against a cantonal section of the Swiss Real Estate Professionals' Union. This section had published an information sheet on its website containing fee recommendations for its members. The investigation is now supposed to show whether the application of the information sheet amounted to an unlawful price-fixing agreement or not.

### Absolute territorial protection

In December 2010, the ComCo imposed fines of 4.8 million Swiss francs and 10,000 Swiss francs respectively upon the producer of Elmex toothpaste (Gaba International AG) and its licensee in Austria (Gebro Pharma GmbH). The ComCo's reproach was that a former licence agreement between these parties (formally in force from 1982 until 2006) included a clause prohibiting the export of Elmex products by the Austrian licensee, and that this amounted to an unlawful prohibition of passive sales (respectively, parallel imports). Remarkably, the ComCo could not provide evidence of any specific case where parallel imports would in fact have been prevented. On the contrary, the parties to the licence agreement showed that there were exports of Elmex products from Austria to Switzerland despite the above-mentioned clause. The ComCo, however, treated these exports as a 'special case' and refused to take them into account. The ComCo further took notice of the fact that the new agreement between the parties (which has been in force since 2006) no longer provides a clause prohibiting exports but only an information duty regarding exports. The ComCo did not qualify this information duty as unlawful in the individual case, although such a clause may under certain circumstances have the effects of an unlawful prohibition of exports. Incidentally, the ComCo qualified the fine against the Austrian licensee as 'symbolic', as the licensee had drawn no profit from the contractual clause in dispute. The ComCo's decision has been appealed before the Federal Administrative Court by both parties.

In March 2010, the ComCo opened a formal investigation against Nikon AG and conducted a dawn raid on Nikon AG's premises. Based on a complaint, the ComCo suspects Nikon AG of hindering or preventing parallel imports of Nikon photo products into Switzerland. The investigation is to show whether this allegation is true or not.

### Other cases

In February 2010, the ComCo opened a formal investigation against Aktiengesellschaft Hallenstadion Zürich (AGH), the operator of a major event hall, and Ticketcorner AG (Ticketcorner), a ticketing system operator. AGH and Ticketcorner had entered into a five-year cooperation agreement providing that every organiser of an event in AGH's event hall must distribute at least 50 per cent of its tickets through Ticketcorner. Two of Ticketcorner's competitors subsequently filed a complaint with the ComCo. In a preliminary investigation, the Secretariat of the ComCo found signs that the agreement between AGH and Ticketcorner could constitute an unlawful anti-competitive agreement and that AGH could possibly have abused a dominant position. The formal investigation is now supposed to show whether these allegations are true or not.

## Recent cases – dominance

### *Swisscom ADSL*

In November 2009, the ComCo ruled in a decision that the leading Swiss telecom operator Swisscom had abused a market dominant position through its pricing policy for ADSL services and fined Swisscom 220 million Swiss francs.

Swisscom is active as an ADSL provider, competing with several other providers. However, Swisscom also provides the pre-product which is indispensable for the provision of broadband internet services via ADSL. The ComCo reproached Swisscom with a so-called 'margin squeeze'. According to the ComCo, Swisscom had rendered the margin between the costs of the pre-product and the retail prices too narrow by charging high prices for the pre-product until 2007. The ComCo found that Swisscom's competitors had not been in a position to run their ADSL businesses profitably, therefore. It is true that even Swisscom incurred losses from its ADSL business; these were, however, compensated by profits resulting from the sale of the pre-product.

Swisscom has appealed the ComCo's decision before the Federal Administrative Court. This appeals procedure is currently pending.

### *Swisscom MT*

In March 2010, the Federal Administrative Court (FAC) largely overturned the ComCo's decision of February 2007, whereby the ComCo had fined Swisscom with an amount of 333 million Swiss francs for an alleged abuse of a dominant position. The ComCo had accused Swisscom of imposing unfair mobile termination rates upon competitors.

Based on an appeal by Swisscom, the FAC annulled the ComCo's finding of an abusive conduct and, consequently, the fine of 333 million Swiss francs. The FAC found that Swisscom had not been in a

position to impose any specific mobile termination rates. It argued that, according to the Telecommunications Act, any competing provider of telecommunications services could have applied for a reduction of such rates in an interconnection procedure before the Federal Communications Commission. There had been no such requests, though. As a result, the FAC considered Swisscom's termination rates to be unobjectionable from a competition law point of view.

The FAC only confirmed the ComCo's finding that Swisscom had a dominant position in the market for the termination of calls into its own mobile network. The FAC chose a 'greenfield approach' here, refusing to take into consideration the disciplining effects of the telecommunications legislation, as it did in its assessment of a possible abuse. Furthermore, the FAC rejected some procedural arguments which had been brought forward by Swisscom. In particular, it held that the procedure had neither violated the principle *nulla poena sine lege certa* (ie, the rule of certainty of law) nor Swisscom's right to an independent tribunal.

Both Swisscom and the Federal Department of Economic Affairs (on behalf of the ComCo) have filed appeals against the FAC's decision. These appeals are currently pending before the Federal Supreme Court.

#### Publigroupe

In April 2010, the Federal Administrative Court rejected an appeal by the media advertising company Publigroupe against a ComCo decision of March 2007. The ComCo had found that Publigroupe abused a dominant position in the market for the placement and sale of advertising space in print media in Switzerland. The allegation was that Publigroupe prevented independent advertising placement agents from entering and competing in the market and that it discriminated against such agents in comparison to other placement agents by the fact that it refused to pay commissions to them based on certain unjustified criteria contained in commissioning guidelines.

Publigroupe has announced to appeal the matter before the Federal Supreme Court.

#### *ETA*

In September 2009, the ComCo opened a formal investigation against ETA Manufacture Horlogère Suisse SA (ETA), a subsidiary of the Swatch group. In a preliminary investigation, the Secretariat of the ComCo had found signs that ETA could possibly have abused a dominant position in the market for mechanical movements. This preliminary investigation had been triggered by complaints after ETA had notified its customers of price increases and changes in its conditions of payment. The formal investigation is now supposed to show whether ETA has in fact abused a dominant position or not. The ComCo intends to place a particular focus on the question whether intra-group companies have possibly been favoured over external customers.

#### *AGH/Ticketcorner*

In February 2010, the ComCo opened the above-mentioned investigation against AGH and Ticketcorner.

### Recent cases – merger control

#### *Pfizer/Wyeth*

In July 2009, Pfizer obtained conditional clearance from the ComCo for its proposed acquisition of Wyeth in a first-phase procedure. The condition imposed related to a voluntary commitment made by Pfizer and Wyeth during the procedure. As regards the markets where both Pfizer and Wyeth were active, the combined market shares of the two undertakings proved to be small in most cases. The only exceptions concerned tranquillisers and endectocides respectively. In the case of tranquillisers, the combined market share of Pfizer and Wyeth was high (ie, between 40 per cent and 50 per cent). This high market share was not perceived as critical, though, due to the existence of substitutable products in the category of hypnotics and sedatives. Furthermore, the ComCo observed that any price increase for the tranquillisers in question is subject to prior approval by the Federal Office of Public Health. As to the segment of endectocides for production animals, the ComCo noted that the parties had allayed its concerns by making the same commitments as the ones which the European Commission had imposed on them with regard to Belgium, Germany, and the United Kingdom. Finally, as regards the markets where only Pfizer or Wyeth were active, the ComCo found that there was either sufficient actual competition or sufficient potential competition.

#### *Edipresse/Tamedia*

In September 2009, the ComCo approved the acquisition of the Swiss activities of Edipresse group by Tamedia, two publishing houses, in a second-phase procedure. The ComCo observed that in most of the markets concerned, Tamedia gained no market shares through the acquisition. This was due to the fact that, in these markets, Tamedia was active only in the German-speaking part of Switzerland, whereas Edipresse was active only in the French-speaking part. The market for commuter newspapers in the French-speaking part of Switzerland was an exception, though. The acquisition led to the combination of the only two existing commuter newspapers there. The ComCo found, however, that there was no room for two commuter newspapers in that region, anyway, and that one of these newspapers (ie, the one published by Edipresse) would have dropped out of the market shortly even without the acquisition. This finding was confirmed by an independent expert. A survey conducted by the ComCo also showed that obviously no other media company was willing to enter the market by acquiring Edipresse's commuter newspaper. The ComCo, therefore, considered the prerequisites of the so-called 'failing division defence' to be fulfilled and approved the acquisition.

#### Early postal delivery

In September 2009, the ComCo approved the combination of the early postal delivery organisations of Swiss Post and two media groups in the Zurich area (ie, the NZZ group and Tamedia) subject to a condition in a second-phase procedure. The condition was that the two media groups must neither participate in the capital of the combined delivery organisation nor exercise any kind of (joint) control over it. The ComCo found that the combined organisation would have a dominant position unless market entries remain possible to a sufficient extent. In this regard, it observed that an alternative delivery organisation would hardly be in a position to enter the market without having the two media groups as customers. The ComCo, therefore, prohibited the involvement of these two media groups in the combined delivery organisation.

#### *Sunrise/Orange*

In April 2010, the ComCo prohibited the planned acquisition of Sunrise Communications AG (Sunrise) by France Télécom SA and the subsequent merger of Sunrise with France Télécom AG's Swiss subsidiary Orange Communications SA (Orange). Sunrise and Orange are two of the three network operators in the Swiss mobile telecommunications market. In case of a merger, they would have

had a combined market share of approximately 40 per cent. The third operator is Swisscom with a single market share of approximately 60 per cent.

According to the ComCo, the merger would have produced a situation where only two mobile phone companies with a network of their own would have been left in Switzerland. In the ComCo's view, this would have led to a collectively dominant position suitable to eliminate effective competition. Moreover, the ComCo considered it as unlikely that the two remaining market players would have been disciplined by market entries. The ComCo believed that in such a situation, neither Swisscom nor the merged new company would have had sufficient incentives to compete effectively for market shares, but that it would have been more advantageous for them to keep prices up. According to the ComCo, possible synergies for end customers would not have been significant enough so as to outweigh the expected harm to competition. Also, the ComCo could not identify any effective remedies or conditions which could have allayed its concerns. By contrast, the ComCo believes that in the current situation with three competitors, there is still a certain degree of competitive dynamics and a market which is open towards innovation.

## Private enforcement

*Switch*

In November 2009, the Commercial Court of the Canton of Zurich dismissed a request for interim relief directed against Switch, the internet domain name registry for the top level domains .ch (Switzerland) and .li (Liechtenstein).

Switch owns a subsidiary that provides domain name registration services for end customers in competition with several other providers. On the welcome page of its website, however, it mentioned only its own subsidiary specifically as an option for domain name registrations, whereas the competitors were mentioned only generically there (ie, without individualisation). Similarly, Switch displayed only the logo of its own subsidiary on that page. Several competitors, therefore, requested that this conduct be prohibited as an abuse of a dominant position.

The Commercial Court found that Switch had a dominant position as it was the only registry available for .ch and .li domains, and as these national domains were not substitutable by international domains (such as .com). Moreover, it considered the preferential treatment of Switch's subsidiary as an abuse of this dominant position. Nevertheless, the Court ultimately dismissed the request for interim relief, as the applicants failed to demonstrate the imminence of a 'hardly reparable prejudice', which is a prerequisite for obtaining interim relief. On the contrary, Switch was able to show that there had been no drop in domain name registrations performed by the applicants during the time when its subsidiary enjoyed preferential treatment on its website.

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Homburger is a major Swiss business law firm. Since its establishment in 1957, Homburger has advised and represented Swiss and international corporate clients and individual entrepreneurs on key aspects of business law. We offer our clients expert legal advice, support them in business negotiations, represent them before arbitral tribunals and in court, and protect their interests in civil and administrative proceedings.

Homburger is organised into six practice teams and five working groups, integrating the skills and experience of more than 100 lawyers and tax experts focusing on specific areas. Our practice teams are litigation/arbitration, corporate/M&A, financial services, tax, IP/IT and competition. The working groups cover employment law, insolvency/restructuring, insurance, private clients and white-collar investigations.

The members of the working groups are drawn from Homburger lawyers in the various practice teams. And as such, we epitomise the culture of Homburger's idea of teamwork and cooperation within the firm.

Homburger's competition practice, established as one of the first in Switzerland after the first Swiss Federal Act on Cartels entered into force in the early 1960s, has recently been involved in the first ever Swiss cases of leniency applications, dawn raids and sanction procedures. It advises domestic and foreign multinational as well as small and mid-sized companies in Swiss and European competition law and represents them before the Swiss Competition Commission and the European Commission as well as before national and international courts and administrative bodies. Services include domestic and EU merger control notifications and the handling of multinational merger control filings, administrative and civil antitrust litigation and investigations concerning horizontal and vertical restraints of competition and abuses of market power, counselling, antitrust audits and tailored compliance programmes. Other areas of practice include specific advice on public procurement and regulated industries, in particular telecommunications, energy and media.

**Franz Hoffet**

Homburger

Franz Hoffet heads Homburger's competition law practice group. He has extensive experience in all areas of Swiss and European competition law, ranging from merger control to administrative and civil antitrust litigation. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities, the European Commission and in civil courts and arbitration proceedings.

Franz Hoffet also advises clients on compliance matters of Swiss and European competition law. Other areas of practice include regulated markets and public procurement.

**Marcel Dietrich**

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Marcel Dietrich is a partner in Homburger's competition law practice group. His practice focuses on Swiss and European competition and antitrust law, in particular administrative and civil antitrust litigation and national and multinational merger control. He also advises on compliance matters and regulated markets, in particular telecommunication, energy, media and transport as well as public procurement.

Marcel Dietrich's practice also includes corporate and contract law, mergers and acquisitions, and domestic and international litigation and arbitration.

**Gerald Brei**

Homburger

Gerald Brei is a partner in Homburger's competition law practice group. His practice focuses on antitrust law with a special emphasis on European, Swiss and German law.

Gerald Brei is experienced in all aspects of antitrust law, eg, merger control, restraints of competition (particularly in distribution agreements and technology transfer agreements), infringement procedures and preliminary investigations of antitrust authorities. Gerald Brei also advises companies on antitrust compliance programmes.

Due to his extensive experience as in-house counsel in the industry (former head of the antitrust group of the legal department of Siemens), Gerald Brei is well suited to advise corporate clients on antitrust matters.


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