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Switzerland

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Legal developments

In the ongoing discussions on the proposed revision of the Act on Cartels in Switzerland, the Swiss government has taken a new and important step by submitting to the parliament its bill for a number of substantial amendments on 22 February 2012. Several of the proposed changes are highly controversial and it is therefore expected that the draft bill will trigger fierce discussions. Hence, it is yet unclear if and when the proposed amendments will enter into force. The bill has entered the parliamentary deliberations in summer 2012.

The draft bill provides for amendments of the Cartel Act in the following areas:

- institutional reform;
- per se prohibition of hardcore restrictions (irrespective of actual anti-competitive effects, ie, a mere form-based approach);
- reform of merger control;
- strengthening of private enforcement;
- mandatory reduction of sanctions in the case of compliance programmes; and
- procedural improvements in order to increase legal certainty.

In addition to the amendments proposed by the government, the parliament will also have to deal with the following two proposals from its own ranks:

- prohibition of illegal price differentiations (ie, companies selling branded products abroad for lower prices than in Switzerland may not refuse selling these products to Swiss customers through their foreign distributors at their (lower) price or may not take measures aimed at inhibiting passive sales into Switzerland by third parties); and
- criminal sanctions against individuals.

The most important suggested amendments are the following:

Institutional reform

Under the present law, Swiss competition law is primarily enforced by the Swiss Competition Commission (ComCo) and its Secretariat. This one-tier authority both conducts the investigation and takes the decision. This amalgamation of investigation and decision making has been criticised. In addition, the critique relates to the fact that there is a lack of clear distinction of responsibilities between the ComCo and the Secretariat. It has further been criticised that the ComCo is partly composed of representatives of industry and trade associations as well as of unions. Furthermore, under the present regime, the Federal Administrative Court (FAC) acts as a lower appellate court which must review the ComCo's decisions as to the law and the facts ('full jurisdiction'). In fact however, the FAC in its practice grants the ComCo a margin of 'technical discretion'; thereby, the FAC substantially reduces its review of the decision as to the facts. The Federal Supreme Court (FSC) finally acts as the upper appellate court which reviews the ComCo's and the FAC's decisions as to the law only.

The government proposal suggests the introduction of a Competition Authority (CA) which only conducts investigations but does not take the decisions in antitrust cases. The CA would no longer include any representatives of industry and trade associations and unions. In merger cases it would not only conduct investigations but also take decisions. The FAC's new role would be to take decisions upon motion of the CA in antitrust cases. It would further act as a lower appellate court in merger cases. As opposed to the present situation, the FAC would include judges with entrepreneurial experience or specific knowledge of competition economics. The FSC would act as the only appellate court in antitrust cases and as the upper appellate court in merger cases. It is expected that the proposed new institutional setup would more clearly distinguish between the investigative and decision-making tasks and hence improve both the quality and the acceptance of decisions in competition matters. Furthermore, it is expected that procedures would become more efficient and faster due to the limitation of appeals. The government's proposal has nevertheless met with fierce criticism, in particular from former ComCo officials who have defended the existing institutional set-up.

Per se prohibition of hard core restrictions

Under the current law, agreements which significantly restrict competition and are not justified on grounds of economic efficiency or agreements which eliminate effective competition are prohibited. The present law provides for a rebuttable presumption that certain hard core restrictions eliminate effective competition. This applies in particular to hardcore horizontal agreements and certain types of vertical agreements (fixed or minimum prices or absolute territorial protection). However, under the practice of the FSC, the rebuttal of these legal presumptions has become relatively easy. The FSC has held that it is sufficient for the undertakings to indicate residual or partial competition in order for a successful rebuttal.

The government proposal does not change the prohibition of agreements which significantly restrict competition and are not justified on grounds of economic efficiency. However, it suggests that this prohibition be of a per se character for specified hardcore restrictions (horizontal agreements on the fixing of prices, the limitation of quantities or the allocation of territories or customers; vertical agreements on fixed or minimum prices or absolute territorial protection), unless they can be justified on grounds of economic efficiency. Under the new regime it would no longer be required for the CA to prove a significant adverse effect on competition for the per se cases. The proposal further seems to move the burden of proof for the efficiency defense to the undertakings.

Reform of merger control

The current Swiss merger regime provides for a 'dominance-plus' test under which concentrations may only be prohibited if, firstly, they lead to the creation or strengthening of a dominant position, and secondly, if such dominant position is liable to eliminate effective competition. Under this regime it has been very difficult for the authorities to meet the burden of proof required to prohibit concentrations. In most cases, the undertakings were successful to indicate

that there were serious doubts that a concentration would lead to the elimination of effective competition. The government's proposal for an amendment would therefore introduce the substantial impediment of effective competition test (SIEC-test) as it is presently used under the European merger regime.

Additional changes in the merger regime include more flexible review periods. The present review periods in Switzerland are one month for phase I and an additional four months for phase II. The reform would introduce the possibility to extend the review period in phase I by 21 days and in phase II by two months. Such extension would have to be agreed between the authorities and the undertakings concerned.

Finally, the reform would include a waiver of the notification obligation in the case of a concentration where all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration is assessed by the European Commission. In such cases, the filing of a copy of the Form CO with the Swiss authorities for information purposes but without review would be sufficient.

Organisational developments

Effective 1 January 2012, the federal government has appointed Professor Winand Emons, Professor Armin Schmutzler and Mr Henrique Schneider as new members of the ComCo. They replace Professor Pasquier, Professor Petitpierre and Mr Horber who have resigned from the ComCo.

At the same time, the federal government has appointed Professor Andreas Heinemann, who has already been a member of the ComCo, as second vice president of the ComCo. The appointments increase the number of economists in the ComCo.

Recent cases – horizontal agreements

The Swiss Association of Producers, Importers and Distributors of Cosmetics and Fragrances (ASCOPA)

The *ASCOPA* decision has been handed down by the ComCo in October 2011 concluding thereby an investigation that has been widely discussed in the Swiss competition community. This was not only due to the large number of parties and lawyers involved, but relates also to the manner in which the investigation has been conducted. In its first application to the ComCo, the Secretariat suggested that the members of ASCOPA agreed on fixing prices and on stabilizing market shares and, hence, applied for imposing fines against the members of ASCOPA ranging from 17,000 Swiss francs up to 25.5 million Swiss francs and totalling approximately 120 million Swiss francs. The ComCo's Secretariat communicated its first application to the press and stated that the investigation had already come to an end. At this time, none of the parties had obtained access to the file or had an opportunity to comment on the application.

After receiving the parties' comments to the first application, the ComCo's Secretariat decided to take further investigative measures.

In its second application to the ComCo, the Secretariat substantially revised its position. It no longer suggested that the parties agreed on fixing prices or stabilising market shares but only that the information exchange taking place within ASCOPA led to a higher price level and thus to an agreement on keeping prices generally high for which sanctions could not be imposed. The ComCo followed this application in its decision of October 2011 at large. This decision is seen by the ComCo as landmark decision on information exchange. It is, however, noteworthy that the decision did not apply the pertinent criteria for the assessment of information exchange (ie, those related to the market structure and the information exchanged), which are generally acknowledged both under Swiss and EU competition law. The ComCo also held that not all agreements on prices constitute hard core agreements subject to a fine under Swiss competition law.

The decision is under appeal.

Road and underground construction companies in Argovia

In December 2011, the ComCo took its decision in the investigation against several road and underground construction companies in the Canton of Argovia. It found that the parties agreed unlawfully on prices and allocations of customers in more than 100 cases of public and private tenders. The imposed individual fines range from approximately 5,000 Swiss francs to approximately 1.4 million Swiss francs and amount to a total of approximately 4 million Swiss francs. Six companies benefited from a reduction of their sanction, whereas one undertaking obtained a full waiver of its sanction under the ComCo's leniency programme. Some of the parties have lodged an appeal with the FAC against the ComCo's decision.

It is worth mentioning that the ComCo, contrary to its standing practice, did not explicitly declare with the operative part of the decision (ie, the order itself) that the parties' behaviour constituted an infringement of Swiss competition law. Rather, the operative part only includes the decision as to the imposition of fines and costs (as well as the closing of the proceedings against one party). The decision gives no explanation as to the reason for this deviation from the standing practice. It might be that it is related to the FSC's decision in the *Swisscom* case (mobile termination fees; see *The European Antitrust Review 2012*) in which the FSC held that there was no public interest justifying an isolated finding of a dominant position. It remains to be seen whether the ComCo will adhere to the new-style operative part or whether it returns to its standing practice.

Fibre optic cable networks

One of the ComCo's main fields of activity in 2011 was again related to projects for fibre optic cable networks. Swisscom, Switzerland's incumbent telecom provider, and certain regional energy supply companies are planning to jointly build such networks in various Swiss cities. After specific clauses of cooperation agreements have been notified to the ComCo in so-called objection procedures aimed at ascertaining ex ante the legality of agreements, the ComCo's Secretariat opened preliminary investigations. The result of these preliminary investigations has been published in the second half of 2011. The Secretariat came to the conclusion that some of the clauses, including the exclusivity for Layer 1 of the fibre, contain hard core restrictions that could not be exempted from sanctions ex ante. The Secretariat argued that the impact on competition can only be assessed ex post once the cable networks become operative.

In theory, this does not rule out that the parties implement these clauses despite the Secretariat's verdict. However, the parties would bear the whole risk of being fined if it turned out that the clauses cannot be justified on grounds of economic efficiency. According to the ComCo, the parties decided therefore to amend their contracts accordingly.

New investigations

In November 2011, the ComCo opened an investigation against ten wholesalers of plumbing products and conducted dawn raids. The ComCo investigates whether the parties have illegally agreed on prices or the allocation of markets.

In February 2012, the ComCo announced the opening of an investigation against several large banks after having received a

leniency application. The investigation relates to allegations that derivatives' traders of different banks might have influenced reference interest rates for certain currencies and agreed on spreads of derivatives in favour of their employers.

Recent cases – vertical agreements

One of the main activities of the ComCo in the second half of 2011 and the first half of 2012 was related to vertical agreements. Some of the ComCo's decisions in this field need to be seen against the background of the Swiss authorities' constant concern that companies could try to provide for an absolute territorial protection of the Swiss market in order to raise prices above the level of the neighbouring countries. This concern became even more virulent with the economic crises and the increase of the Swiss franc's value against the euro. The ComCo emphasises its readiness to fight with all its power against agreements on resale price maintenance and restrictions of passive sales into Switzerland.

Online sales of household appliances (white goods)

In September 2010, the ComCo had opened a formal investigation against Electrolux AG and V-Zug AG. While Electrolux AG had entirely prohibited its dealers from selling products through online shops, V-Zug AG had imposed certain conditions upon its dealers in this respect. The parties cooperated with the ComCo throughout the investigation and expressed their willingness to develop general criteria for online sales in cooperation with the ComCo and its Secretariat. This led to an amicable settlement between the parties and the ComCo's Secretariat.

In its decision of July 2011, the ComCo approved the amicable settlement. Further, it came to the conclusion that it is unlawful as a matter of principle to prohibit sales via online shops. According to the ComCo's decision, online sales can only be lawfully restricted under very restrictive circumstances. Thus, it is lawful to impose certain quality standards for online shops. Further, it is generally lawful to require that wholesalers have at least one brick and mortar shop. It seems, however, that this condition only applies if the products are mostly sold via brick and mortar shops. Finally, the ComCo stressed in its decision that, in any event, each and every restriction that is aimed at resale price maintenance, or at inhibiting parallel imports into Switzerland, would be unlawful.

Price recommendations: Preliminary investigations regarding market for hearing instruments and products of Festool

In its first decision on price recommendations (hors-liste pharmaceuticals; see *The European Antitrust Review 2011*) which is still pending on appeal before the FAC, the ComCo decided in December 2009 that the producers' price recommendations amounted to resale price maintenance although the producers of the pharmaceuticals did not exercise any pressure or grant any incentives for adherence to the price recommendations. The reasoning of the decision is not entirely clear but it seems that the decision relied mainly on the fact that allegedly more than 80 per cent of the retailers adhered to the price recommendations. It has been unclear since whether, in contrast to the practice under EU competition law, a high level of adherence to price recommendations suffices for an agreement on resale price maintenance.

In 2011, the ComCo's Secretariat, in two preliminary investigations, had the chance to shed more light on this question. In the preliminary investigation regarding the market for hearing instruments, the Secretariat's services markets division, which had also been in charge in the hors-liste investigation, had to decide whether price recommendations by producers of hearing instruments constituted an unlawful agreement on resale price maintenance. It was undisputed that the producers did not exercise pressure on, or incentivise, retailers for adherence to the price recommendations. Nevertheless, the Secretariat came to the conclusion that there were indications for an agreement on price maintenance because a considerable part of the retailers adhered to the recommendations.

The second preliminary investigation concerning Festool was conducted by the Secretariat's product markets division. Again, the question whether price recommendations can constitute resale price maintenance arose. Contrary to the hearing instruments case, the product markets division held that, as a general rule, the level of adherence in itself does not necessarily suffice to establish an agreement on resale price maintenance. In general, other elements would be necessary for such a qualification.

Hence, it still remains unclear whether price recommendations that are adhered to unilaterally by retailers can constitute an agreement on resale prices in Switzerland.

Nikon

In November 2011, the ComCo held that Nikon unlawfully impeded parallel imports into Switzerland and fined the company with 12.5 million Swiss francs. According to the decision, Nikon's dealer contracts contained clauses that implicitly or explicitly prohibited parallel imports into Switzerland. For instance, the wholesaler contract for Switzerland and Liechtenstein required the wholesaler to buy Nikon's products only from Nikon or another authorised distributor in the contract territory, ie, Switzerland and Liechtenstein. Nikon's distribution contracts with its resellers in the EEA provided for an obligation of the resellers not to sell Nikon's products outside the EEA (to which Switzerland does not belong).

Nikon claimed that these contractual provisions were never applied in practice, did not have any effect on the market, and, hence, were lawful. It seems that the ComCo agrees with Nikon that the contractual provisions need to be applied in order to constitute unlawful behaviour. However, according to the decision, the ComCo, during its dawn raid at Nikon's premises, seized e-mails suggesting that Nikon in fact tried to impede parallel imports. Although accepting that parallel imports for Nikon's products took place, the ComCo found therefore that Nikon's behaviour led to a restriction of passive sales and, hence, to an unlawful restriction of competition.

With its reasoning, the ComCo confirmed its standing (although debatable) practice according to which the effects on the market need to be assessed by means of qualitative and quantitative criteria, but that the requirements for the latter are low in the case of hard core restrictions. If this reasoning is correct, the effects-based approach of Swiss competition law according to which an agreement needs to have a real and significant effect on the market in order to be unlawful would be practically replaced for hard core restrictions by a mere form-based approach looking only at the content of the agreement without assessing its effects.

The decision is under appeal.

BMW

In May 2012, the ComCo fined the BMW Group 156 million Swiss francs for impeding direct and parallel imports into Switzerland. This is the third largest fine ever imposed by the ComCo. The reasons for the decision have not yet been published. However, in its press release, the ComCo refers to a clause in BMW Group's contracts with authorised dealers in the EEA prohibiting them from

selling BMW and MINI vehicles to customers outside the EEA (to which Switzerland does not belong).

According to the ComCo's press release, the investigation had been opened in autumn 2010 after the ComCo received various complaints by Swiss customers who had tried unsuccessfully to purchase a BMW or MINI vehicle from a dealer outside Switzerland. Further, the issue had also been raised in the Kassensturz, a consumer programme of the national Swiss broadcasting company. At this time, the Swiss franc's value increased substantially compared with the Euro which made it attractive for Swiss customers to purchase cars outside Switzerland. This investigation is therefore a telling example for the fact that the ComCo is willing to also act upon complaints of individuals.

The decision is under appeal.

Recent cases – dominance

Sale of tickets for events in the Hallenstadion Zurich

The Hallenstadion Zurich is one of the largest venues in Switzerland and hosts events of all kinds (concerts and sporting and corporate events). The Hallenstadion Zurich concluded a contract with Ticketcorner, a ticketing company, giving Ticketcorner the right to sell at least 50 per cent of the tickets of each event taking place in the Hallenstadion Zurich through its own channels. In order to comply with its obligations under this contract, the Hallenstadion Zurich included in its general terms and conditions an obligation for each event organiser to sell at least 50 per cent of the tickets for the events to the Hallenstadion Zurich.

Based on complaints from competitors of Ticketcorner, the ComCo opened an investigation. One of the questions raised was whether the Hallenstadion Zurich committed an abuse of dominance by requiring event organisers to sell 50 per cent of their tickets via the Hallenstadion Zurich. The ComCo came, however, to the conclusion that Hallenstadion Zurich is not market dominant. The ComCo defined the relevant market to include all event places in the German part of Switzerland that can be rented, including open places, stadiums and indoor event halls. On this market many different other competitors are active.

However, it needs to be noted that the ComCo also shortly assessed whether the Hallenstadion Zurich could have a 'relative' market dominant position despite not being market dominant in a classical sense. According to the ComCo, 'relative' market dominance would be given if certain individual market participants are economically dependent on the Hallenstadion Zurich. This was not the case. However, it is noteworthy that the ComCo applied the concept of 'relative' market dominance that is far from being generally accepted in Switzerland.

Swatch group

In June 2011, the ComCo opened a formal investigation against the Swatch group after it had announced it would discontinue the supply of certain components for mechanical movements (see *The European Antitrust Review 2012*). The investigation will have to show whether such a behaviour would amount to an abuse of dominance. Early in the investigation, the Swatch group expressed its willingness to conclude an amicable settlement involving a gradual phase-out of the supplies in question and, based thereon, the ComCo has issued an order for interim relief (ie, provision measures) for the duration of its investigation. According to this order, the Swatch group is obliged to continue its supply to its full extent for the time being; in 2012, it may reduce the supply by a specified percentage.

Some of the customers of Swatch group appealed against the ComCo's decision on interim relief and asked for an obligation of the Swatch Group to continue its supply to its full extent. The FAC rejected these appeals. According to the FAC, the appellants failed to show that the interim relief is detrimental to effective competition. The FAC stresses that substantial questions of competition law yet to be investigated by the ComCo in the main procedure (eg, the possible effects of a reduction of the Swatch group's supply on customers and Swatch group's market position) cannot consitute the subject matter of the appeal procedure against interim relief.

The interim relief has been extended by the ComCo in May 2012 for a further year, until the end of 2013.

SDA

After conducting a preliminary investigation, the ComCo opened in February 2012 a formal investigation against Schweizerische Depeschenagentur (SDA), Switzerland's major news agency. The investigation will have to clarify whether SDA abused its alleged market dominance. According to the ComCo's press release, the investigation concerns mainly SDA's rebates policy, including exclusivity rebates, and allegations of bundling. The investigation is ongoing.

Recent cases – merger control and private enforcement

In the second half of 2011 and first half of 2012, no important cases have been published in the area of merger control and private enforcement.

Franz Hoffet
Homburger

Franz Hoffet heads Homburger's competition practice team. 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
Homburger

Marcel Dietrich is a partner in Homburger's competition practice team. 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, internal investigations and regulated markets, in particular communication, 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 practice team. His practice focuses on antitrust law with a special emphasis on European, Swiss, and German law.

Gerald Brei has considerable experience in all relevant areas of antitrust law, eg, merger control, restraint of competition, particularly in distribution and technology transfer agreements, as well as the administrative and infringement proceedings of antitrust authorities. He also advises companies on antitrust compliance programs, regulated markets and procurement law.

Due to his extensive and long-standing experience, inter alia as in-house counsel in the industry (former head of the antitrust group of the Siemens legal department), Gerald Brei is well suited to advising corporate clients on a vast range of antitrust matters.

Andreas Burger
Homburger

Andreas Burger is an associate in Homburger's competition practice team. His practice focuses on Swiss and European competition and antitrust law, in particular antitrust investigations, merger control and internal compliance audits. In addition, he advises and represents clients in matters relating to contract and administrative law.

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