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GLOBAL COMPETITION REVIEW

Switzerland

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Legal developments

On 22 February 2012, the Swiss government submitted to parliament its bill for a number of substantial amendments of the Act on Cartels. Several of the proposed changes are highly controversial. Parliamentary deliberations started in summer 2012, and it is unclear if and when and with what scope the proposed amendments will enter into force.

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

- institutional reform;
- per se prohibition of hard-core 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 is also discussing the following two proposals from its own ranks:

- the 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 Council of State deliberated the proposed revision in March 2013. As a general tendency, the Council of State followed a hard line in substantive questions and accepted most of the proposed amendments. In contrast, the Council of State only decided on slight and small changes with regard to the proposed institutional reform and rejected the main governmental proposals.

The National Council's committee for economic affairs and taxation announced in April 2013 to obtain further clarification on certain questions which relate to the decisions taken by the Council of State. Further, the committee conducts hearings with the affected bodies. Parliamentary deliberations in the National Council start in autumn 2013.

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. The government's proposal has met with fierce criticism, in particular from former ComCo officials who have defended the existing institutional set-up.

The parliamentary deliberation in the Council of State resulted in the rejection of the governmental proposal to introduce a CA. Rather, ComCo should stay in place and deal with all cases as before. However, the Council of State decided to reduce the number of members of ComCo to five independent members (from currently 12 members).

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 hard-core 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 hard-core 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 defence to the undertakings.

In its deliberations, the Council of State approved the per se character of the prohibition of certain types of agreements which restrict competition and are not justified on grounds of economic efficiency according to the governmental proposal. However, the Council of State added specifications with regard to the burden of proof.

Further, the Council of State unexpectedly and against the governmental (and its own commission's) recommendation approved the proposal from its own ranks to implement a new article in the Cartel Act regarding unjustified restrictions of purchasing abroad (illegal price differentiations), limited to OECD states. It will be interesting to follow the deliberations in the National Council later this year on this point of the revision.

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.

The Council of State followed in its decision the proposals of the government.

Organisational developments

As of 1 September 2012 a new construction division was created within the Secretariat. The new construction division – previously part of the product markets division – is responsible for cases relating to the construction markets sector (the main construction and secondary construction industries) as well as the priority topic of bid rigging. It deals with restraints of competition in the construction and procurement industries as well as in environment-related matters. Mr Frank Stüssi, previously head of management affairs in the Secretariat, was appointed head of the new division.

Recent cases – horizontal agreements

Freight forwarding

In December 2012, the investigation into the freight forwarding sector was concluded. Fines in the total amount of 6.2 million Swiss

francs were imposed. According to ComCo's decision, major international air freight forwarders coordinated their activities between 2003 and 2007 in relation to certain fees and surcharges. The decision substantiates this on the basis of several sample fees, including fees specific to Switzerland such as the Surchage Collection Fee, Security Fee Agent, E-dec Fee and import duty clearance fee, together with international surcharges (eg, the Air Automated Manifest System, Peak Season Surchage, Currency Adjustment Factor and the New Export System Fee). The proceedings were initiated by Deutsche Post AG/DHL's leniency application. As a result, this company benefited from a complete exemption from sanctions. Further leniency applications were filed by Deutsche Bahn and Agility, which led to substantial reductions in the sanctions imposed on these companies. The following fines were imposed: 907,349 Swiss francs on Agility Logistics International BV, 1,021,751 Swiss francs on Deutsche Bahn AG/Schenker, 1,173,767 Swiss francs on Kühne + Nagel International AG and 3,117,286 Swiss francs on Panalpina Welttransport (Holding) AG. The ComCo also approved amicable settlements with all of the above mentioned companies and with the Spedlogswiss association.

For the first time, the ComCo applied the concept of a 'single complex and continuous infringement'. Although it would be in principal possible to clarify for each fee or surcharge if they constitute an infringement, the ComCo held that it would be 'artificial' to take apart a continuous conduct which was characterised through one single objective. However, the decision does not contain a detailed reasoning with respect to the 'single complex and continuous infringement'. Hence, it remains to be seen how this concept will be applied in the future.

The conduct of the international freight forwarders was also investigated and sanctioned by the European Commission and the Department of Justice of the United States of America.

IFPI

In July 2012, the ComCo imposed a fine of 3.5 million Swiss francs on IFPI Switzerland for impeding parallel imports into Switzerland. IFPI is the umbrella association for manufacturers of sound and audiovisual recording media (eg, CDs) in Switzerland. Phononet AG, an intermediary in the media industry, was fined 20,000 Swiss francs for the same reason. The investigation revealed that members of IFPI agreed to exclude parallel imports into Switzerland. Phononet AG supported the effect of this agreement through its conduct with Swiss producers. In an amicable settlement, IFPI and Phononet AG committed not to demand the signing of waivers of the right to make parallel imports and not to impede or prevent parallel imports of physical sound and audio-visual recording media (eg, CDs). The decision is legally binding.

According to the ComCo, this case is an example of horizontal agreements impeding parallel imports into Switzerland.

Road construction and civil engineering companies investigations

The ComCo is currently conducting several investigations into road construction and civil engineering companies in different Cantons of Switzerland. In its latest press release, the ComCo emphasised its readiness to fight against bid rigging and stated that this forms part of its main activities.

In June 2013, the ComCo announced its decision against road construction companies in the canton of Zurich. The investigation was opened in June 2009 and dawn raids were conducted (see *The European Antitrust Review 2010*). According to the press release, the

ComCo found that the parties were involved in bid rigging in 30 cases. The ComCo imposed fines amounting to a total of 500,000 Swiss francs against 12 companies. One company benefited from a complete exemption from sanctions due to a leniency application and full cooperation.

In April 2013, an investigation was opened against several road construction and civil engineering companies in the canton of St Gallen. According to the press release, the Secretariat has indications that several companies made arrangements to coordinate the award of contracts and to allocate construction projects and customers.

In October 2012, the ComCo opened an investigation against several road construction and civil engineering companies in the Lower Engadin and conducted dawn raids at the premises of the companies concerned. The Secretariat has indications that several companies in the Lower Engadin made arrangements to coordinate the award of contracts and to allocate construction projects and customers. In April 2013, the ComCo announced that this investigation has been expanded. There are indications that further companies are involved in the alleged practices. Additional dawn raids were conducted.

In December 2011, the ComCo took its decision in the first of the road construction and civil engineering investigations which was conducted against several 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 (see *The European Antitrust Review 2013*). The appeal proceedings are still pending.

Other investigations

In May 2013, the ComCo announced the opening of an investigation in the automobile market. According to the press release, ComCo has indications about possible price-fixing agreements between Swiss concession holders of brands of the Volkswagen group (ie, VW, Audi, Skoda and Seat).

In February 2012, the ComCo opened 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 (eg, LIBOR and TIBOR) and agreed on spreads of derivatives in favour of their employers. The available data is extensive and to a large extent located abroad which raises complex legal questions. The investigation is still ongoing.

Recent cases – vertical agreements

One of the main activities of the ComCo in the second half of 2012 and the first half of 2013 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. Where market foreclosure relates

to agreements between undertakings, the ComCo consistently intervenes.

Altimum SA

On 20 August 2012, the ComCo fined Altimum SA 470,000 Swiss francs for retail price fixing in relation to alpine sports equipment. The general importer Altimum SA set minimum sale prices to retailers for alpine sports equipment (eg, headlamps, helmets and ice axes) of the Petzl brand. Hence, price competition among retailers in Switzerland was prevented. The investigation was opened in May 2010 and dawn raids were conducted. The investigation revealed that competition in Switzerland was affected at least from 2006 until the end of 2010.

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 investigation was opened in autumn 2010 after the ComCo received numerous complaints from end customers in Switzerland who had tried unsuccessfully to buy a new BMW or MINI car from dealers outside Switzerland. Further, the issue had also been raised in the *Kassensturz*, a consumer programme of the national Swiss television 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. BMW AG had inserted a clause in contracts with dealers in the European Economic Area (EEA) under which authorised dealers in the EEA were prohibited from selling new BMW and MINI cars to customers outside the EEA and thus in Switzerland as well. As a result of the contractual clause, customers in Switzerland were unable to benefit from substantial exchange rate benefits. The foreclosure of the Swiss market also led to reduced competitive pressure on retail prices for new BMW and MINI cars in Switzerland.

This investigation is an example for the fact that the ComCo is willing to also act upon complaints of individuals. The decision is under appeal.

Price recommendations

In 2012, the ComCo conducted an investigation against the Neuchatel Section of the Association of Real Estate Agents. The investigation concerned a checklist issued by the association to its member companies. This checklist contained recommendations on prices and fixed the rate bands of real estate management services fees. It also provided for fixed rates for real estate brokerage. The ComCo concluded that the recommendations relating to real estate management significantly affected competition in the market. On average, more than one third of the members of the Union adhered to the price recommendations. The ComCo approved the amicable settlement concluded with the parties and imposed a sanction of 50,000 Swiss francs on the members who followed the recommendations.

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.

New investigation: Online hotel booking platforms

In December 2012, the ComCo opened an investigation against the companies booking.com, HRS and Expedia. Subject of this investigation are, inter alia, the so-called 'best price guarantee' clauses contained in the agreements between the mentioned companies and their partner hotels. Further, the investigation aims to clarify whether these companies are market dominant and if so, if the companies commit an abuse by implementing and enforcing such clauses.

Recent cases – dominance

Swiss Federal Supreme Court: Publigroupe SA

On 29 June 2012, the Swiss Federal Supreme Court confirmed a fine of 2.5 million Swiss francs imposed by the ComCo on Publigroupe SA for abuse of a dominant position. The court held that the conditions of unlawful practice by a dominant undertaking were fulfilled. In March 2007, the ComCo had fined Publigroupe for abusing its dominant position with regard to advertisements in the print media. Publigroupe is a media sales service provider through which advertisements are placed for publication in the print media. Publigroupe established a set of conditions which intermediaries seeking to engage its services on behalf of advertisers had to meet in order to receive a commission from Publigroupe.

The Swiss Federal Supreme Court's long-awaited decision confirmed the constitutionality and compliance of the procedure before the ComCo with the European Convention on Human Rights (ECHR). The Swiss Federal Supreme Court is of the view that the penalties provision of the Act on Cartels (article 49a) is of criminal nature. Consequently, the procedural guarantees under articles 6 and 7 of the ECHR and articles 30 and 32 of the Swiss Constitution are applicable. Since the ComCo is not a judicial authority, proceedings before it fail to meet the requirements of ECHR and the Swiss Constitution. However, according to the Swiss Federal Supreme Court, the requirements of the ECHR and the Constitution are

sufficiently fulfilled if proceedings before the Federal Administrative Court (ie, the first appeal body against decisions of the ComCo) meet the required procedural conditions. In this respect, it is essential that the Federal Administrative Court has full jurisdiction and reviews the ComCo's decision under all aspects of fact and law. However, the Swiss Federal Supreme Court nevertheless stated that the Federal Administrative Court is permitted to exercise restraint with regard to the review of technical factual questions.

Galenica AG group

In December 2012, the ComCo opened a formal investigation into the commercialisation of electronic medical information required for the distribution, supply and billing of medicines in Switzerland. E-mediat AG, Documed AG and HCI Solutions AG are important players in the field of electronic medical information. The investigation aims to establish whether these companies of the Galenica AG group hold a dominant position and if so whether they are abusing that position. In particular, the investigation will have to clarify whether e-mediat AG, Documed AG and HCI Solutions AG force their partners to continue their business relations. This case has to be seen as part of a sectoral analysis of the market for the distribution of pharmaceuticals in Switzerland that the Secretariat has been carrying out since 2011.

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 constitute 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 Depeschagentur (SDA), Switzerland's major news agency. The investigation will have to clarify whether SDA abused its alleged market dominance by obstructing competitors or discriminating against customers. The investigation concerns mainly SDA's rebates policy, including exclusivity rebates, and allegations of bundling. The preliminary investigation indicated that the SDA's pricing system might aim at squeezing out existing competition and preventing market entries. The investigation is ongoing.



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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
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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.



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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.



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Homburger is organised into six practice teams and five working groups, integrating the skills and experience of around 120 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, restructuring/insolvency, insurance, private clients and white-collar/investigations.

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 medium-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 communication, energy, transport, pharma/health care and media.



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