THE DOMINANCE AND MONOPOLIES REVIEW

Tenth Edition

Editors
Maurits Dolmans, Henry Mostyn and Patrick Todd

THE LAWREVIEWS

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TENTH EDITION

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Editors
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PREFACE

It seems apt that in the preface to *The Dominance and Monopolies Review*'s 10th edition we confront the existential question facing the law governing unilateral conduct. That is: is *ex post* antitrust enforcement dying out?

Antitrust enthusiasts have three main reasons to be nervous. First, a decade of debate about under-enforcement has resulted in a wave of multi-jurisdictional regulatory initiatives to constrain the behaviour of large digital platforms and open up digital markets to more competition. These proposals vary, but tend to govern conduct that would traditionally have been subject to *ex post* antitrust enforcement. Second, authorities are turning to alternative tools to tackle unilateral conduct, such as market studies. Third, some perceive that authorities face a high evidentiary burden of successfully bringing abuse cases. Put together, these trends could leave a diehard abuse of dominance practitioner in low spirits about antitrust's future, at least in digital markets.

But other developments give cause for hope. Authorities remain adamant that digital regulations will complement rather than replace their existing abuse toolboxes, and that they will continue to investigate conduct that falls outside the scope of new regulation. Agencies, in particular the UK Competition and Markets Authority (CMA), have used their existing enforcement powers nimbly to open investigations and secure commitments from defendant companies quickly. And recent cases affirm that the abuse toolbox is not inflexible, putting into practice the classic mantra that the categories of abuse are not closed. There is space for abuse of dominance rules to be applied flexibly to conduct not previously explored, for example in relation to sustainability, although this raises separate issues regarding certainty for businesses.

As these trends and developments show, the law governing abuses of dominance, and the role it plays in competition policy, are constantly evolving and becoming more complex, bringing new challenges for businesses and practitioners to navigate. To provide some respite, this 10th edition of *The Dominance and Monopolies Review* seeks to provide an accessible and easily understandable summary of global abuse of dominance rules. As with previous years, each chapter – authored by specialist local experts – summarises the abuse of dominance rules in a jurisdiction, provides a review of the regime's enforcement activity in the past year and sets out a prediction for future developments. From those thoughtful contributions, we identify three main trends, as previewed above.

i Antitrust v. regulation

Over the past year, regulators and legislators have moved from consultation to action, as they have set out competing proposals for regulation to address perceived competition problems caused by concentration in digital markets. Mostly, these proposed regulations cover similar themes, such as prohibiting leveraging and self-preferencing, mandating interoperability and maximising user control over choices online.

Perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), has formulated *ex ante* 'dos and don'ts' for large gatekeeper platforms. The UK has set up a digital markets unit (DMU) to create enforceable conduct requirements for companies with 'strategic market status'. While the legislation giving the DMU necessary enforcement powers has not yet been introduced, the DMU is operating in 'shadow' form to operationalise enforcement of the new regime. The CMA has also conducted two market studies into digital advertising and online platforms and mobile ecosystems to identify activities that should be subject to the regime. In Germany, the German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'paramount cross-market significance' (PCMS). In essence, the law enables the Bundeskartellamt to designate firms as holding PCMS, and then to impose *ex ante* prohibitions on certain defined practices. The Bundeskartellamt adopted its first PCMS decision against Google in 2021, and a second PCMS decision against Meta in 2022. In the US, the American Innovation and Choice Online Act, which would regulate similar conduct as its foreign counterparts, is currently before the US Senate.

It is perhaps understandable that regulators and legislators seek to regulate rather than pursue individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex and require proof that harm has or is likely to occur. As Commissioner Vestager has explained as the motivation for the DMA: 'We need regulation to come in before we have illegal behaviour and to be able to say these are the rules of the game and this is what you must do.'

The DMA will prohibit conduct directly covered by past and current abuse of dominance cases. For example, the DMA's prohibition on self-preferencing targets conduct that was the subject of the Commission's 2017 *Google Shopping* decision, currently on appeal to the CJEU. The DMA's prohibition on gatekeepers using non-publicly available data generated or provided by their business users to compete with those business users would address the conduct challenged in the Commission's ongoing investigations into Amazon and Meta. And the prohibition on gatekeepers requiring business users to use the gatekeeper's own payment service would address conduct alleged in the Commission's ongoing investigation into Apple.

Rules that are set to be enacted in the UK and US are similarly expected to displace antitrust enforcement against digital platforms like Amazon, Meta, Apple and Google. Unlike in the EU, though, these regimes appear to allow companies the opportunity to justify their behaviour, on the grounds of consumer benefits or that alternatives would lead to harm. For example, the CMA recognises that 'conduct which may in some circumstances be harmful, in others may be permissible or desirable as it produces sufficient countervailing benefits', and it has advised that conduct should be exempted under its new regime if it 'is necessary, or objectively justified, based on the efficiency, innovation, or other competition benefits it brings'. Likewise, the new German rules allow a company to justify its practices. That seems a better approach – for competition and consumers – and it is troubling that the DMA does not contain any analogous provision.

How will these new rules affect antitrust enforcement in digital markets? Will abuse of dominance give way completely to *ex ante* regulation?

We think not. As Commissioner Vestager said recently, antitrust and regulation 'are complementary – both will remain necessary. No one should expect the new [DMA] to replace Article 101 and 102 enforcement actions.' There are at least three reasons why there is space for antitrust enforcement to carry on – and expand – when regulation provides additional recourse.

First, though the DMA is broad, it applies to a discrete set of firms (those designated as gatekeepers), products/services (designated as 'core platform services') and practices (set out in the text of the DMA). Forms of conduct that fall between the cracks will therefore have to be addressed by traditional antitrust enforcement. For example, the DMA focuses on consumer-facing digital products and services, and practices involving business-to-business services could potentially slip through the net. The Commission is currently investigating various practices by Microsoft in relation to its collaboration software, Teams, and infrastructure-as-a-service software, Azure, following allegations of unlawful tying, bundling, and denial or degradation of interoperability. The Commission and the CMA also recently announced concurrent investigations into an agreement between Meta and Google (Jedi Blue), alleging that it could distort competition in the online display advertising market. And that's just digital markets. Antitrust enforcement has played, and will continue to play, a role in traditional markets. Recent cases in the EU and UK cover non-digital industries such as pharmaceuticals, electricity trading services and electric vehicle charge points.

Second, at least in the near term, antitrust enforcement remains the only recourse even for conduct that may be covered by forthcoming regulation. The DMA does not come into force until 2024, and UK and US equivalent laws are likely to be further away still. In February 2022, the chair of the House of Lords Communications and Digital Committee wrote to the CMA, urging it to take a 'more robust approach to using [its] existing enforcement powers' given that the 'new legislation could take a significant amount of time to come into force'. By way of reply, in March 2022, the CMA stated that it had 'identified options for taking further action in digital markets under [its] market investigation and competition enforcement tools, ahead of the DMU receiving its powers'.

Third, recent cases showcase the potential for abuse of dominance cases to be opened, investigated and closed quickly, parrying the oft-cited concern that abuse of dominance cases close the stable door after the horse has bolted. In the UK, the CMA opened an investigation into Google's proposal to remove third-party cookies from its Chrome browser, tested two rounds of commitments and closed its case in just over one year. It quickly opened an investigation into exclusivity contracts for electric vehicle charge points on motorways and secured commitments from the parties following a market study.

We therefore expect antitrust cases to continue to play an important role in maintaining competitive markets, even in the digital sector.

ii The evidentiary burden for authorities in abuse of dominance cases

Antitrust law has long suffered from the criticism that the existing abuse toolbox is too unwieldy – and the standard of proof for authorities too high – for necessary antitrust cases to be sustainable, in particular in the US. In its 2020 report on digital markets, for example, the US House of Representative antitrust subcommittee said, 'In the decades since Congress

enacted [the Sherman, Clayton, and FTC Acts], the courts have significantly weakened these laws and made it increasingly difficult for federal antitrust enforcers and private plaintiffs to successfully challenge anticompetitive conduct and mergers'.

In recent years, the perception that antitrust cases are prohibitively hard to bring appears to have subsided as authorities have opened more cases. In 2021 and early 2022, the CMA opened seven new abuse of dominance cases, having not opened any in 2020. The European Commission, for its part, opened six new abuse of dominance investigations, and US authorities have also been relatively active recently, following years of inaction compared with their European counterparts.

The European Commission has been the pioneer of big ticket antitrust cases in the past decade, issuing record-breaking fines to Intel, Google and Qualcomm. In 2022, though, the General Court partially annulled the Commission's 2009 decision imposing a €1.06 billion fine on Intel for abusing its dominant position through the granting of exclusivity-conditioned rebates. The judgment followed an initial General Court judgment in 2014 concluding that exclusivity rebates by dominant undertakings are per se abusive, regardless of the circumstances of the case, and that the Commission did not therefore have to establish that Intel's conduct was capable of restricting competition and there was no need for the General Court to review the Commission's as-efficient competitor (AEC) test. In 2017, the CJEU overturned the General Court's judgment, explaining that, although exclusivity rebates are presumptively unlawful, the presumption is rebuttable if the defendant shows that the conduct is not capable of restricting competition and foreclosing AECs.

In 2022, the General Court rendered a *renvoi* judgment annulling in part the Commission's decision and the fine in full. Applying the CJEU's judgment, the General Court found that the Commission had not established to the requisite legal standard that the rebates were capable of having, or were likely to have, anticompetitive effects. In particular, the Court identified errors in the AEC tests carried out by the Commission and found that the decision failed to properly consider two of the five criteria identified by the Court of Justice to assess rebates' ability to restrict competition, namely their market coverage and duration. Because it was not possible to identify the amount of the fine that related solely to the 'naked restrictions', which in the General Court's view the Commission correctly qualified as per se unlawful, the General Court annulled the entire fine.

The case establishes – at least in respect of exclusionary discounts – that if authorities choose to assess the anticompetitive effects of presumptively unlawful conduct, they must get that assessment right. Officials have claimed that the judgment raises the bar of enforcement to an unacceptably high level. Andreas Mundt, head of the German competition authority, said that the judgment 'might lead to a situation where the law becomes unenforceable because it takes even more time, it gets even more complex'. We disagree. The case establishes a roadmap for authorities to follow and guardrails to operate within when assessing exclusionary discounts. For example, the General Court criticised the Commission for running its AEC analysis in respect of a short time period, then extrapolating its analysis to cover a longer period. That approach is insufficient, which authorities will recognise going forward. Cases like *Microsoft (Windows Media Player)* show that, where the Commission appreciates that an effects-based analysis is required, it can undertake such an analysis and survive judicial review.

iii Expanding the abuse toolbox

Finally, recent EU and UK cases have shown that the abuse toolbox can be applied flexibly to new forms of conduct not previously examined by the courts.

In November 2021, the General Court upheld the Commission's decision finding that Google had committed an abuse by favouring its own comparison shopping service (CSS). The Commission previously found that Google positioned and displayed, in its general search results pages, its own CSS more prominently than competing CSSs. The Commission imposed on Google a fine of €2.42 billion. In the judgment, the General Court largely dismissed Google's appeal against the Commission's decision and confirmed the amount of the fine.

The General Court rejected Google's argument that the Commission should have established the legal conditions for a duty to supply (indispensability and risk of eliminating competition), because the case related to the issue of access to prominent placement on Google's results pages. The General Court accepted that the case is not 'unrelated to the issue of access', but it found the conduct 'can be distinguished in their constituent elements from the refusal to supply'. On that basis, the General Court held that the conduct constituted an 'independent' abuse, separate from a refusal to supply. Accordingly, the Commission was not required to show that the duty to supply conditions were met.It remains to be seen whether this legal test will survive on appeal, but it shows the Commission can apply the existing tools flexibly.

Another case showcasing the elasticity of the abuse toolbox comes from the UK. In October 2021, the Competition Appeal Tribunal (CAT) certified opt-out collective proceedings and rejected a claim for summary dismissal in *Justin Gutmann v. First MTR South Western Trains and Stagecoach South Western Trains*. The proceedings arose out of allegations that certain rail companies failed to use their best endeavours to ensure awareness among their customers of boundary fares (i.e., fares for travel to and from outer boundaries of Transport for London's rail zones) so that customers who took journeys beyond the outer zone covered by their Travelcard would not purchase a fare covering the totality of their journey (thereby paying for parts of their journeys twice). This, the proposed class representative claimed, constituted an exploitative abuse of dominance.

In response to the defendants' claim for strike out, the CAT held that the case on abuse was reasonably arguable. If the charging of unfair and excessive prices, or the use of unfair trading terms, by a dominant company can constitute an abuse, the CAT did not regard it as 'an extraordinary or fanciful proposition to say that for a dominant company to operate an unfair selling system, where the availability of cheaper alternative prices for the same service is not transparent or effectively communicated to customers, may also constitute an abuse'. In doing so, it held that the 'law on what constitutes unfair trading conditions, in particular, is in a state of development'.'

It also referred to the 2019 decision of the German Federal Cartel Office that Facebook had abused its alleged dominance by not giving its users a genuine choice over whether it could engage in unlimited collection of their personal data from non-Facebook accounts as one that was 'challenged as an extension of the boundaries of the law on abuse of dominance'. That case is making its way through the German appellate courts, and is pending the outcome of a preliminary ruling by the CJEU.

These cases remind us that, at least in the EU and UK, the existing abuse of dominance toolbox can be adapted to confront novel abuses (albeit with a high risk of judicial scrutiny). There is, for example, no inherent reason why sustainability could not be incorporated into an abuse of dominance assessment. Analyses of pricing practices could take environmental costs into account: the concept of 'competition on the merits' could include competition on sustainability (and reject competition based on overexploitation of public goods), and there

could be *sui generis* abuses that involve unsustainable business practices that also restrict competition. In addition, conduct that might otherwise be abusive could be excused because of sustainability-based objective justification.

With extensions of the case law, however, come increased uncertainty for businesses planning their practices. *Google Shopping*, for example, extends the law governing the circumstances in which dominant firms will be forced to provide access to a facility to their rivals, without that asset necessarily being indispensable for those rivals to compete.

As in previous years, we would like to thank the contributors for taking time away from their busy practices to prepare insightful and informative contributions to this 10th edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

Maurits Dolmans, Henry Mostyn and Patrick Todd
Cleary Gottlieb Steen & Hamilton LLP
London
June 2022

Chapter 21

SWITZERLAND

Marcel Meinhardt, Astrid Waser, Benoît Merkt and Ueli Weber[1]

I INTRODUCTION

Swiss law regulates the abuse of a dominant position by a dominant undertaking in the Cartel Act (CartA). It is thereby to a large extent modelled after Article 102 of the Treaty on the Functioning of the European Union. Hence, according to Article 4, Paragraph 2 of the Cartel Act, companies are considered dominant if they are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.

Conceptually different, however, and as of 1 January 2022, Swiss law also captures relative market power in its new Article 4, Paragraph 2 bis. This provision defines relative market power as dependency for supply or demand without adequate and reasonable opportunities for switching.

Article 7 of the Cartel Act clarifies what conduct is prohibited for undertakings that are considered dominant or have relative market power. According to the general clause in Article 7, Paragraph 1 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete or disadvantage trading partners. This general clause is supplemented by a non-exhaustive list of types of conduct that are particularly considered unlawful:

a refusal to deal (e.g., refusal to supply or to purchase goods);
b discrimination between trading partners in relation to prices or other conditions of trade;
c imposition of unfair prices or other unfair conditions of trade;
d undercutting of prices or other conditions directed against a specific competitor;
e limitation of production, supply or technical development;
f conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services; and
g restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.

Furthermore, the Federal Price Surveillance Act and the Federal Act against Unfair Competition have parallel jurisdiction in the context of excessive prices.

1 Marcel Meinhardt, Astrid Waser and Benoît Merkt are partners and Ueli Weber is an associate at Lenz & Staehelin

II YEAR IN REVIEW

In 2021, the Federal Administrative Court (FAC) rendered an important decision concerning an alleged margin squeeze as well as unfair pricing practices of the Swiss telecom incumbent Swisscom. The case concerned Swisscom's infrastructure that was also used by its competitor Sunrise in a tender for a project to network company locations of Swiss Post. The FAC confirmed ComCo's findings albeit reducing the fine. Swisscom has appealed this decision to the Federal Supreme Court (FSC). Meanwhile, the follow-on investigation of the Competition Commission (ComCo) going beyond that one tender of Swiss Post is ongoing. In this second investigation, ComCo has also raised an allegation of discriminating practices of Swisscom. The decisions in both of these cases are expected to clarify important issues relating to pricing and price differentiation practices.

The main developments in 2021, however, are two interim measures issued by ComCo.

The first case concerns the expansion of the fibre optic infrastructure of Swisscom. Swisscom changed its network construction strategy to a single-fibre model with point-to-multipoint topology from its previous four-fibre model with point-to-point topology. According to ComCo, layer 1 access was guaranteed under the four-fibre model whereas the new strategy would be abusive as it hindered Swisscom's competitors and layer 1 access. The FAC confirmed this assessment in its decision and concluded that the network construction strategy of Swisscom constituted prima facie a restriction of technological development. Hence, it upheld the interim measures imposed by ComCo. Swisscom appealed the ruling to the FSC, which, in December 2021, decided to not grant suspensive effect to the appeal.

This trend towards interim measures, namely in dominance cases, was confirmed in a decision affecting the financial markets. Following a complaint, ComCo started investigating ATM schemes in Switzerland. The complaint accused Mastercard of obstructing the market entry of a competitor by refusing to 'co-badge' new debit cards of the competitor with Mastercard's existing products. ComCo held in its interim measure that Mastercard had prima facie abused its dominant position by not allowing the requested co-badging. Mastercard has appealed this decision and the FAC has not yet rendered its judgment. In parallel, ComCo continues to investigate the case on the merits.

Significant decisions and cases 2021

Sector	Investigating authority	Conduct	Fine levied
Telecommunications	Swiss Federal Administrative Court (judgment dated 24 June 2021)	The Swiss Federal Administrative Court ruled that Swisscom charged excessively high prices in a tender for projects to network company locations. Further, Swisscom charged its competitors excessively high prices for accessing its network infrastructure so that they were unable to submit a competitive bid for this project. According to the court, Swisscom also a conducted a margin squeeze.	7,475,261.05 Swiss francs
Pharma	ComCo	Final report on preliminary investigation into allegedly abusive practices on the market for the development and production of biologics. ComCo came to the conclusion that the undertaking in question did not hold a dominant position.	None

Current cases

Sector	Investigating authority	Conduct	Case opened
Payment solutions	ComCo	Following a complaint from SIX that Mastercard was obstructing the market entry of its new ATM scheme (NCS), ComCo opened an investigation. The obstruction was said to be Mastercard's refusal to co-badge the NCS on the new debit Mastercard. ComCo is now investigating whether Mastercard has engaged in abusive conduct by a dominant company. Precautionary measures have been taken for the duration of the investigation.	February 2021
Telecoms	ComCo	Investigation against Swisscom AG concerning the expansion of the fibre optic network. According to ComCo, there are indications that Swisscom is abusing a dominant position by changing the construction method during the expansion in such a way that competitors no longer have direct access to the network infrastructure. ComCo took precautionary measures to prohibit Swisscom from denying competitors access during the expansion of the fibre optic network. The FAC confirmed these measures. The case is pending at the FSC.	December 2020
Telecoms	ComCo	Investigation against Swisscom AG. According to ComCo, Swisscom allegedly charged excessively high prices in various tenders for projects to network company locations. Furthermore, according to ComCo, Swisscom charged its competitors excessively high prices for accessing its network infrastructure so that they were unable to submit a competitive bid for these projects.	August 2020
Recycling and waste disposal	ComCo	ComCo announced an investigation into alleged abuse of market dominance by a waste disposal site in Basel because it has indications that the undertaking is offering lower prices to its shareholders compared to other costumers and has refused to serve certain customers.	June 2021
Hotel booking platforms	Price surveillance authority	Indications that Booking.com's online prices for hotel bookings are excessive.	February 2017

III MARKET DEFINITION AND MARKET POWER

i Undertakings

Only undertakings may achieve a dominant position. According to Article 2, Paragraph 1 bis of the Cartel Act, undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form. This concept of an undertaking is very broad and follows – similar to other antitrust laws in Europe – a functional approach, based on the economic activity of an entity. Both undertakings governed by public law and private undertakings that are part of a public body (e.g., the federal government, cantons or communes) are considered as undertakings within the meaning of the Cartel Act.[2] Furthermore, an undertaking in this sense may act on the supply side or on the demand side of a market. For the purpose of the Cartel Act and therefore for assessing dominance, a group of companies is considered as one single economic entity or undertaking, respectively.

2 Federal Supreme Court, BGE 137 II 1999, c. 3.1.

ii The relevant market

To determine whether an undertaking enjoys a dominant position or monopoly power, the relevant market has to be defined. In cases concerning abuse of a dominant position, the rules applicable in merger control cases are being used analogously.[3] Pursuant to Article 11, Paragraph 3 of the Merger Control Ordinance, the relevant product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. The relevant geographic market comprises the area in which consumers purchase and in which suppliers sell the goods or services that constitute the product market.

As for the definition of the relevant product market, Swiss authorities generally rely on the demand-side-oriented market concept.[4] According to this concept, the relevant product market consists of all goods and services that have the same characteristics or the same intended use as the product under investigation. Accordingly, goods or services that are regarded as functionally interchangeable by the opposite market side fall within the same product market. The good has to be substitutable for another good. Other methods used by the Swiss authorities to determine the relevant market are the test of cross-price elasticity and the small but significant and non-transitory increase in price test.[5] These methods serve to assess whether the allegedly disadvantaged opposite side of the market could switch to alternative offers with regard to product, geographical and temporal terms.

iii Dominant position

Single dominance

According to the legal definition in Article 4, Paragraph 2 of the Cartel Act, 'dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market'. Based on this definition, dominance may exist on the demand side as well as on the supply side of a market.

Under Swiss law, there are no hard criteria to assess whether an undertaking has a dominant position. In recent case law, the FAC ruled that, to assess single dominance, an in-depth analysis of the market characteristics, such as the current competition (market shares), potential competition (market entry barriers), the position of the other side of the market (countervailing market power) and the influence of interrelated markets, has to be performed. Moreover, it held that the structure of the undertaking as well as the specific market conduct has to be taken into account.[6] ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It takes the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers into consideration. With regard to market shares, there is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. Whereas according to the former practice of the authorities, market shares of 50 per cent and more were considered as an 'indicator' for dominance, the FAC now holds

3 See Federal Administrative Court, RPW 2015/3, p. 676, *Sanktionsverfügung – Preispolitik Swisscom ADSL*; RPW 2016/1, p. 91, Online-Buchungsplattformen für Hotels.

4 See, e.g., Federal Administrative Court, RPW 2015/3, p. 619, *Sanktionsverfügung – Preispolitik Swisscom*.

5 See Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*.

6 Federal Administrative Court, decision of 18 December 2018, B-831/2011, c. 404, DCC.

that market shares of 50 per cent or more 'at least' give rise to a presumption of the existence of a dominant position. The presumption is further strengthened for market shares above 60 or 70 per cent. The requirements for rebutting the presumption increase accordingly.[7] Finally, ComCo analyses the vertical relationships by assessing the competitive pressure due to the negotiating strength of the other side of the market.

To establish market dominance, the Swiss competition authorities satisfy themselves on the balance of probability.[8]

Collective dominance

According to the wording of Article 4, Paragraph 2 of the Cartel Act, one or more undertakings may hold a dominant position. In cases of collective dominance, several undertakings together hold a dominant market position. In the context of merger control, ComCo introduced the concept of collective dominance to Swiss antitrust law in 1998[9] and later also applied this concept to cases of abuse of market dominance.[10] Collective dominance is assumed if at least two undertakings deliberately adopt a parallel (i.e., collusive) market conduct (collusion). Since parallel behaviour is a normal reaction of competitors to exogenous market developments, collective dominance is only assumed in cases of deliberate collusion.

There are no hard criteria for the existence of collective dominance. ComCo bases its assessment primarily on the following indicators:

a market concentration (number of companies active in the market and their market shares. The fewer companies that are active in a certain market, the more likely it is for collusion to occur);

b symmetries in cost structure, products offered and interests (price remains the sole competitive factor);

c market growth, potential competition and market-entry barriers; and

d market transparency.[11]

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive situation on the relevant market as well as on the upstream and downstream markets to determine whether the relevant market offers sufficient incentives for durable collective dominance.

In 2020 ComCo applied the aforementioned criteria to the planned merger between Sunrise Communications AG and Liberty Global Europe Financing BV.[12] The target company of this merger was UPC GmbH, Switzerland's largest cable company. However, in the case at issue, ComCo found it unlikely for the newly created entity to hold a collectively dominant position together with Swisscom. When assessing the planned merger between Ticketcorner

7 id., c. 442.

8 id., c. 405.

9 RPW 1998/3, p. 408, *Bell AG/SEG-Poulets AG*.

10 e.g., RPW 2003/1, pp. 134 et seq., *Kreditkarten-Akzeptanzgeschäft* (collective dominance affirmed); RPW 2016/1, p. 122, *Online-Buchungsplattformen für Hotels* (collective dominance ruled out).

11 See, e.g., RPW 2020/2, p. 808 et seq., *Sunrise/Liberty Global*.

12 ibid.

and Starticket, Switzerland's two largest ticketing providers, ComCo considered potential collective dominance. However, ComCo did not find sufficient evidence for the existence of a collectively dominant position.[13]

In another case, ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it found strong indications of a single dominant position for Booking.com, it considered the existence of collective dominance to be unlikely.[14]

Relative market power

The Swiss Parliament revised the Cartel Act and adopted the concept of relative market power in March 2021. The revised Cartel Act entered into force on 1 January 2022. In December 2021, shortly before the revised Cartel Act came into force, ComCo published a guidance paper on how it intends to interpret and enforce the new rules.

Under the revised Cartel Act, the prohibitions previously applicable only to dominant undertakings (Article 7 Cartel Act) are extended to companies with relative market power. A company is considered to have relative market power if other companies depend on it with respect to the supply of or demand for a product or service to which there is no sufficient and reasonable alternative. According to ComCo's guidance paper, alternatives are sufficient if other offers are available that can also adequately satisfy the undertaking's needs. In this regard, a number of factors are taken into account, such as product characteristics, purchasing conditions, brand reputation, brand loyalty of consumers and the market share of the undertaking with relative market power. Further, an alternative can be considered unreasonable due to individual characteristics of the dependent undertaking, such as specific investments in connection with an existing business relationship, the contractual relationship itself, switching costs, affected turnover in relation to total turnover and the occurrence of the alleged dependency (e.g., cause of the dependency). As a general rule, and according to ComCo, an undertaking can only invoke the allegation of relative market power after it has unsuccessfully tried to find reasonable alternative sources of supply. Contrary to a conventional assessment of market dominance, it is irrelevant whether the allegedly relative dominant company can behave independently of other market participants to a significant extent. The relative market power of a company must always be determined with respect to a specific bilateral commercial relationship.

Unlike dominant undertakings, relatively dominant undertakings cannot be sanctioned directly for abusing a position of relative market power (i.e., for a first offence). However, such undertakings may face an investigation of ComCo or civil lawsuits from private plaintiffs, or both. If ComCo finds a violation, it can impose behavioural remedies (e.g. an obligation to supply or non-discriminatory pricing). ComCo has already announced that it is determined to decide leading cases to provide guidance on the scope of application of the new rules. It is yet to be seen how many cases ComCo will actually decide, as settlements appear to be an attractive solution for both sides (for undertakings as well as ComCo).

13 RPW 2018/3, p. 672 et seq., *Ticketcorner/Starticket*.

14 RPW 2016/1, p. 123, *Online-Buchungsplattform für Hotels*.

IV ABUSE

i Overview

Given a dominant position of an undertaking, the application of Article 7 of the Cartel Act requires that the undertaking hinders other undertakings from starting or continuing to compete, or disadvantages trading partners by abusing its dominance. Article 7 of the Cartel Act is only applicable if there are no legitimate business reasons for the abusive behaviour of the dominant undertaking. These preconditions have to be met cumulatively.

Paragraph 2 of Article 7 of the Cartel Act contains a non-exhaustive list of examples of types of conduct that may be considered abusive. However, if a certain behaviour is listed in Article 7, Paragraph 2 of the Cartel Act, it is not unlawful per se, because to constitute abusive behaviour, the preconditions pursuant to Article 7, Paragraph 1 of the Cartel Act have to be met additionally. In other words, Paragraph 2 has to be applied in conjunction with Paragraph 1.[15] Conversely, conduct not covered by one of the examples listed in Paragraph 2 but meeting the preconditions mentioned in Paragraph 1 falls within the scope of this umbrella clause and is, therefore, unlawful. This is, for example, the case for margin squeeze behaviour.[16]

Regarding abuse of a dominant position, the Cartel Act does not contain any per se prohibitions. It is therefore necessary to consider the specific circumstances and market conditions of the case at issue when assessing potentially abusive behaviour. In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship diverge significantly from those that could be expected in the context of effective competition. In practice, the authorities analyse both the competitive and anticompetitive effects of a certain conduct on the market, in particular when the conduct does not fall under at least one of the listed abuses in Article 7, Paragraph 2 of the Cartel Act.

However, the FAC recently held that where a certain conduct fell under Article 7, Paragraph 2 of the Cartel Act, no economic theory of harm had to be examined as such conduct was generally perceived to be unlawful.[17]

Nevertheless, even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits to maintain its leading market position. Consequently, if the purpose of a certain practice is simply to improve the quality of a product (e.g., by requiring suppliers to respect a certain standard), such practice has to be considered legitimate even if it may eliminate certain suppliers or competitors from the market.

Article 7 of the Cartel Act covers exclusionary as well as exploitative practices. While the first mainly concern competitors, the latter aim at harming commercial patterns or consumers.

With the introduction of the concept of relative market power, a further type of abusive practice was added to Article 7 of the Cartel Act. Under the revised Cartel Act, undertakings with relative market power as well as dominant undertakings are prohibited from restricting the opportunity of buyers to purchase goods or services offered both in Switzerland and abroad at local prices and conditions.

15 Federal Supreme Court, RPW 2013/1, p. 114, *Publigroupe*.

16 e.g., Federal Supreme Court, decision of 9 December 2018, 2C_985/2015, c. 5.1.

17 Federal Administrative Court, decision 18 December 2018, B-831/2011, c. 1124 et seq., *DCC*.

ii Exclusionary abuses

Refusal to deal

Refusal to deal is one of various forms of exclusionary abuse. According to Article 7, Paragraph 2, Letter a of the Cartel Act, any refusal to deal (e.g., refusal to supply or to purchase goods) may constitute an abuse of a dominant position. The concept of refusal to deal takes various forms, such as refusal to supply, termination of supply, refusal to access, refusal to license or exclusion of sales. However, this provision does not constitute a general obligation to contract for dominant undertakings.[18] The refusal to deal is only unlawful if it has (or is likely to have) an anticompetitive foreclosure effect and if it cannot be justified by legitimate business reasons. In particular, a refusal to deal is likely to be held unlawful if a dominant undertaking intends to boycott its business partners or aims at forcing them to behave in a certain way. Under certain circumstances a refusal to deal may also be considered unlawful if a dominant undertaking refuses to grant access to an essential facility.

One of the major cases in which ComCo applied the essential facilities doctrine concerned the SIX Group. ComCo imposed a fine of approximately 7 million Swiss francs on the SIX Group for refusing to supply interface information to competitors and thus rendering their products incompatible with SIX card payment terminals.[19] The FAC later upheld this decision.[20] The case is now pending at the Federal Supreme Court.

In 2013, ComCo approved an amicable settlement between the Secretariat and Swatch Group, under which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.[21] Swatch Group had undertaken to supply certain minimum amounts per year to third-party customers and to treat all customers equally. The supply obligation ended on 31 December 2019.

ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having only granted access to a reduced range of sport content to others.[22] An appeal against ComCo's decision is still pending. In a similar case, in 2020, ComCo fined UPC 30 million Swiss francs after finding that UPC abused its market dominance by refusing to supply Swisscom with broadcasts of certain live ice hockey games.

In addition, in the ongoing investigation against Mastercard for refusing to co-badge, a refusal to deal allegation is at stake. In its interim measure, ComCo held that Mastercard had prima facie abused its dominant position by not allowing the requested co-badging. Mastercard has appealed this interim decision, and the investigation is ongoing.

As far as refusal to license is concerned, such refusal is only considered abusive if standard essential patents are concerned. It is, in fact, inherent to IP rights that their holders enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Accordingly, Article 3, Paragraph 2 of the Cartel Act explicitly exempts the effects on competition that result exclusively from the legislation governing IP from the scope of the Cartel Act. Only the modalities to exercise an IP right may be considered

18 id., c. 797.

19 RPW 2011/1, p. 96 et seq, *Six/Terminals mit Dynamic Currency Conversion*.

20 Federal Administrative Court, decision 18 December 2018, B-831/2011, DCC.

21 RPW 2014/1, p. 215 et seq., Swatch Group *Lieferstopp*.

22 RPW 2016/4, p. 920 et seq., *Sport im Pay-TV*.

abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the distinction is difficult to make.

Exclusive dealing

Another form of exclusionary abuse is exclusive dealing, a conduct that is not listed in Article 7, Paragraph 2 of the Cartel Act. However, cases of exclusive dealing may fall within the umbrella clause of Article 7, Paragraph 1 of the Act.

Rebates

Fidelity rebates are considered to be financial benefits, granted to customers for purchasing all or a certain percentage of their demand exclusively from the dominant undertaking. The rebates are granted irrespective of the actual quantity purchased.[23] Such rebate systems are considered to impede the market entry of potential competitors, as customers are reluctant to switch from the dominant undertaking granting fidelity rebates to other undertakings.[24] Consequently, fidelity rebates are considered unlawful under Article 7, Paragraph 2, Letter e of the Cartel Act.

Target discounts have a comparable effect. Target discounts are unlawful under the Cartel Act if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking.[25]

However, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflect these cost efficiencies correctly.

In a 2017 decision, ComCo found that the Swiss Post rebate system unlawfully hindered its competitor Quickmail. Swiss Post granted additional monthly discounts to those customers who had reached a certain sales target. According to ComCo, due to the complication of Swiss Post's rebate system, customers were almost unable to assess the impact of outsourcing parts of their mail delivery to Quickmail.[26] This decision became binding and enforceable in 2021.

Predation

Even if set by a dominant undertaking, low prices are generally desirable and not illegal per se under cartel law. However, if a dominant undertaking deliberately sets particularly low prices to drive current competitors out of the market or to deter a potential new competitor from entering the market, Article 7, Paragraph 2, Letter d of the Cartel Act is fulfilled (predatory pricing).

In cases of predatory pricing, a dominant undertaking would first undercut prices of competitors until they leave the market; eventually, it would re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the competition authority is likely to assume that prices below average variable costs are aimed at driving competitors out of the market or preventing new competitors from entering the market.[27]

23 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027; RPW 1997/4, p. 514, *Telecom PTT-Fachhändlerverträge*.

24 RPW 1998/4, pp. 675 and 676, *Beschwerdeentscheid der REKO/WEF*.

25 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027.

26 ibid.

27 RPW 2020/3a, p. 1212, *Kommerzialisierung von elektronischen Medikamenteninformationen*.

According to the practice of the authorities, predatory pricing occurs when the following conditions are cumulatively met:

a predatory strategy: the dominant undertaking deliberately and intentionally attempts to drive a weaker current competitor out of the market or to keep a potential new competitor out of the market; and

b recoupment: the dominant undertaking is able to raise prices as soon as the competitor has left the market, the threat of market entry has been prevented or the competitor has been disciplined.[28]

Price or margin squeeze

Price or margin squeeze is a particular form of discrimination between trading partners and may be inferred as abusive market behaviour of a dominant undertaking.

According to the Federal Supreme Court, price or margin squeeze can only occur if the following characteristics are present: a dominant undertaking, vertical integration of the dominant undertaking and competitors depending on the good or service provided by the dominant undertaking on the wholesale market. It further defines price or margin squeeze as a situation where the wholesale price for competitors is set above the price the dominant undertaking sets as retail price on the downstream market. Price squeeze shall also occur if the margin between the wholesale price for competitors and the market price of the dominant undertaking is not sufficient to cover an as-efficient competitor's product-specific costs. In both scenarios, price squeeze occurs if an equally efficient competitor on the retail market could not meet the retail price of the dominant undertaking. To assess whether an efficient competitor could meet the price of the dominant undertaking, a cost-price comparison has to be carried out (as-efficient competitor test).[29]

In 2009, ComCo imposed a fine of approximately 200 million Swiss francs on the Swiss telecommunications provider Swisscom for abusing its dominant position in the market for broadband internet through margin-squeeze behaviour.[30] ComCo held that due to the high prices set by Swisscom on the wholesale market competitors, with which Swisscom competed on the retail market by offering its asymmetric digital subscriber line broadband internet services to end customers, were unable to profitably offer their services on the retail market. The abusive behaviour would have been corroborated by the fact that while Swisscom generated large profits on the wholesale market, its subsidiary active on the retail market incurred losses. The FAC confirmed ComCo's decision in substance, but reduced the fine imposed to approximately 186 million Swiss francs.[31] Ultimately, the Swiss Federal Supreme Court upheld this decision.[32]

More recently, ComCo has been focusing on the behaviour of Swisscom in the wide area network (WAN) sector. In 2015, ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for, inter alia, a margin squeeze (and other abusive practices).[33] A

28 RPW 2002/3, p. 432 et seq., *Radio- und TV-Markt St. Gallen*; RPW 2003/1, p. 62 et seq., *Espace Media Groupe/Berner Zeitung AG/Solothurner Zeitung*.

29 Federal Supreme Court, decision of 9 December 2019, 2C_985/2015, c. 5.e et seq.

30 RPW 2010/1, p. 116 et seq., *Preispolitik Swisscom ADSL*.

31 Federal Administrative Court, decision of 14 September 2015, B-7633/2003.

32 Federal Supreme Court, decision of 9 December 2019, 2C_985/2015.

33 RPW 2016/1, p. 128, Swisscom WAN-Anbindung.

WAN is a telecommunications or computer network that extends over a large geographical distance. In 2008, Swiss Post organised a public tender for WAN services. Swisscom offered a price for its WAN services to Swiss Post that was – according to ComCo – approximately 30 per cent below the price offered by its next competitor, the latter having to acquire prior facilities from Swisscom at a wholesale price before being able to offer its WAN services. Swisscom's wholesale price for these facilities was allegedly above the price at which Swisscom won the public tender. Hence, the price offered by Swisscom on the wholesale level would not have allowed any competitor to compete on the retail market. In 2021 the FAC confirmed ComCo's decision,[34] thereby reducing the fine. Notably, the FAC accepted a reasonably efficient competitor test by ComCo (as opposed to an as-efficient competitor test). Said test focuses on the cost of an actual competitor because, according to the court, the product-specific costs of Swisscom (i.e., also of an as-efficient competitor) were not available.[35] However, Swisscom appealed the decision before the FSC. This appeal is pending.

In 2020, ComCo opened a follow-on investigation in the WAN sector. The accusations of price squeeze against Swisscom are similar to those of the 2015 decision, but this time Swisscom allegedly pursued a strategy of price squeezing not only in the Swiss Post public tender but also in the WAN sector in general. In addition, ComCo focuses more on the alleged price discrimination. ComCo has not yet rendered a decision in this regard.

Tying and bundling

The purpose of the provision on tying transactions[36] is to prevent a dominant undertaking from disadvantaging or hindering other undertakings by making a transaction dependent on another transaction with no reasonable connection to the underlying transaction. Tying practice is generally understood to occur when the dominant undertaking induces a trading partner (supplier or customer) to provide or accept an additional service in the form of goods or services that has no factual connection to the main good or service.[37] Such tying can occur on both the supply side and the demand side.

According to the Federal Supreme Court, tying practices within the meaning of Article 7, Paragraph 2, Letter f of the Cartel Act occur if the following criteria are met:

a separate goods;
b tying;
c restriction of competition; and
d lack of objective justification.

Goods are considered to be separate if the additional good or service has no factual connection to the main one. Whether a factual link exists can be assessed based on the market of the additional good or service. The fact that both the main product or service and the tied one belong to the same product market indicates a factual link. Conversely, if separate product markets exist, a factual link between both products or services is unlikely. Tying occurs when the supplier of the tying good makes its supply conditional on the purchase of an additional service. Hence, the customer has no choice but to purchase the tied good as well.

34 Federal Administrative Court, decision of 24 June 2021, B-8386/2015.

35 Federal Administrative Court, decision of 24 June 2021, B-8386/2015, c. 8.4.2.2.

36 Article 7, Paragraph 2, Letter f of the Cartel Act.

37 Federal Supreme Court, decision of 12 February 2020, 2C_113/2017, c. 6.2.1.

A tying practice is only relevant under antitrust law if it results in a restriction of competition. This is particularly the case if the dominant undertaking uses its position to induce its suppliers or customers to supply or purchase a good that they either do not want to sell or purchase at all, or at least not under the terms and conditions stipulated by the dominant undertaking, or if the dominant undertaking uses its dominance on one market to transfer its market power to the market of the tied good on which it is not yet dominant.[38]

In a particular case, ComCo assessed whether an obligation imposed by the operator of an event location in Zurich upon event organisers to sell at least 50 per cent (de facto resulting in 100 per cent) of all tickets for events in its event location via a specific ticketing provider (Ticketcorner) was unlawful under Article 7, Paragraph 2, Letter f of the Cartel Act. While ComCo held that the parties are not dominant in the relevant markets,[39] the FAC,[40] and eventually the Federal Supreme Court,[41] took a different stand. They found that the operator of the event location abused its dominant position to tie its service to the services of Ticketcorner. It is interesting that an unlawful tying practice within the meaning of Article 7, Paragraph 2, Letter f of the Cartel Act may also occur when the dominant undertaking ties its product or service to goods or services of a third party.

iii Discrimination

According to the Cartel Act, a dominant undertaking is not allowed to treat its trading partners differently with regard to prices and other conditions of trade.[42] However, the prohibition to discriminate trading partners does not imply a general obligation to treat trading partners equally. Unequal treatment is considered unproblematic from an antitrust point of view as long as it can be objectively justified (e.g., quantity rebates, justified by corresponding economies of scale). According to the authorities, a dominant undertaking is unlawfully discriminating its trading partners if the following criteria are met:

a unequal treatment;
b the unequal treatment concerns trading partners;
c the unequal treatment results in restriction of competition; and
d there are no legitimate business reasons for treating trading partners differently.

With regard to discriminatory pricing, rebates are of special importance. Rebates may be considered as practices discriminating trading partners and therefore be unlawful under Article 7, Paragraph 2, Letter b of the Cartel Act. This is the case when only larger customers above a certain turnover threshold may benefit from more favourable conditions.[43]

In contrast, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflects these cost efficiencies correctly.

In a 2017 decision, ComCo fined Swiss Post approximately 23 million Swiss francs for, inter alia, allegedly having discriminated its business customers by granting discounts and special conditions for mail delivery to some but not all customers. Thus, different customers

38 id., c. 6.2.2.
39 RPW 2012/1, p. 74 et seq., *Vertrieb von Tickets im Hallenstadion Zürich*.
40 Federal Administrative Court, decision of 24 November 2016, B-3618/2013.
41 Federal Supreme Court, decision of 12 February 2020, 2C_113/2017.
42 Article 7, Paragraph 2, Letter b of the Cartel Act.
43 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027.

with comparable mailing characteristics would have received different conditions, resulting in some of them being better off than others.[44] Discriminatory pricing may also appear in the form of margin or price squeezes (see Section IV.ii).

According to the law, discriminatory practices of dominant undertakings may not only concern prices but also other conditions of trade. The term other conditions of trade is interpreted broadly and covers any actual or contractual obligations entailing an economic advantage or disadvantage for trading partners (e.g., terms of delivery, terms of sale and purchase or terms of payment).[45]

iv Exploitative abuses

It is unlawful for dominant undertakings to impose unfair prices or other unfair conditions of trade.[46] According to this provision, a dominant undertaking behaves unlawfully if it benefits from unfair prices or unfair trading conditions towards the opposite market side through coercion. It is still unclear whether it is necessary under Article 7, Paragraph 2, Letter c of the Cartel Act to prove the 'imposition' as being coercive, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.[47]

However, based on the case law of the Federal Supreme Court, ComCo assesses the existence of coercion according to the following criteria:

a during the period under investigation, alternative options existed for the trading partner in question; and

b given the negotiating power, the trading partner in question was able to object to the imposition of the prices or other terms and conditions in question.[48]

A price is unreasonable if it is disproportionate to the economic value of the service provided. Conditions of trade, on the other hand, are unreasonable if they are unfair, disproportionate or excessively binding in terms of time or content. Conditions of trade are disproportionate if they do not serve a legitimate interest or are not necessary for this purpose because more moderate means are available. According to ComCo, a price set by a dominant undertaking is unreasonable if it is disproportionate to the consideration and is not an expression of performance competition but of a monopoly-like dominance on the relevant market.[49]

In the above-mentioned WAN sector ComCo decision (see Section IV.ii), ComCo not only held the price or margin squeeze practice of Swisscom as an abuse of its dominance but also the imposition of excessive prices on Swiss Post. ComCo found that Swiss Post had no alternatives to those telecommunications service providers that had submitted an offer but, rather, would have had to either accept an even more expensive offer or forego a WAN connection for its sites. Since Swiss Post would have had no alternative options available

44 id., c. 1018.

45 See Federal Supreme Court, BGE 139 I 72, c. 10.2.3.

46 Article 7, Paragraph 2, letter c of the Cartel Act.

47 In decision BGE 137 II 199, c. 4.3.4, the Federal Supreme Court held that 'imposition' as a coercive element was a separate requirement under Swiss law that needed to be established. However, in later case law there have been some implications that the Federal Supreme Court may amend this statement and focus more on EU competition law in terms of this question (BGE 139 I 72, c. 8.2.3).

48 RPW 2014/2, p. 403, *ETA Preiserhöhungen*.

49 RPW 2016/1, p. 186, *Swisscom WAN-Anbindung*; RPW 2008/4, p. 579, *Tarifverträge Zusatzversicherung Kanton Luzern*.

to avoid Swisscom's offer, the element of coercion would have been fulfilled.[50] In 2021 the FAC confirmed ComCo's decision;[51]however, it did lower the fine. An appeal against this judgment is currently pending before the FSC.

In addition to ComCo, the price supervisor, a federal government office, has parallel jurisdiction in the context of excessive pricing. Under the Federal Price Surveillance Act, the price supervisor has the power to prohibit abusive price increases and to order price reductions. Unlike ComCo, the price supervisor does not have the power to impose fines for past conduct.

Restrictions on purchases of goods and services abroad

With the introduction of the concept of relative market power, a further type of exploitative abuse was added to Article 7 of the Cartel Act. According to the new Article 7, Paragraph 2, Letter g of the Cartel Act, besides dominant undertakings, undertakings with relative market power may also not restrict buyers from purchasing goods or services offered both in Switzerland and abroad at local prices and conditions customary in such foreign country. The legislative purpose of this amendment is to lower the prices charged to companies in Switzerland (the 'Swiss surcharge') by allowing Swiss buyers to purchase products at cheaper prices abroad. However, it is not required that a foreign supplier specifically tailors purchase conditions to a Swiss buyer's needs (e.g., there is no obligation to arrange for shipment to Switzerland).

It remains to be seen how this new type of abusive conduct is interpreted and enforced in practice. Even though both companies with relative market power as well as dominant undertakings are captured by the new rule, different sanctions apply. Dominant undertakings can be fined directly for violating Article 7, Paragraph 2, Letter g of the Cartel Act, as for any other type of abusive conduct. By contrast, companies with relative market power are not subject to direct penalties for their first violation: only subsequent violations directly trigger fines. However, behavioural remedies (e.g., delivery obligations) may be ordered directly.

V REMEDIES AND SANCTIONS

i Sanctions

Any undertaking that abuses its dominant position may be charged with a sanction of up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behaviour. Additionally, the profit resulting from the unlawful behaviour is taken into account.[52]

The sanctioning of undertakings is more thoroughly regulated by the Cartel Act Sanctions Ordinance,[53] which also sets out the aggravating and mitigating factors in more detail.

50 RPW 2016/1, p. 187 et seq., *Swisscom WAN-Anbindung*.

51 Federal Administrative Court, decision of 24 June 2021, B-8386/2015.

52 Article 49a, Paragraph 1 of the CartA.

53 Ordinance of 12 March 2004 on sanctions imposed for unlawful restraints of competition.

Aggravating factors may be the repetition of an infringement, the amount of the profits, as well as a lack of cooperation with the competition authorities or even attempts to obstruct the investigation. In contrast, a premature termination of the infringement or cooperation with the competition authorities are examples of mitigating factors. Furthermore, the conclusion of an amicable settlement or a leniency application can lead to a partial or full waiver of the sanction (see Section VI).

In contrast to other jurisdictions, Swiss cartel legislation does not provide for the sanctioning of natural persons for first-time infringements of the provisions (i.e., individuals acting on behalf of an undertaking abusing its dominant position). However, individuals may be fined up to 100,000 Swiss francs in other cases, such as infringement of amicable settlements or a binding decision of ComCo.[54]

ii Behavioural remedies

In addition to the possibility of imposing sanctions on undertakings, ComCo has extensive decision-making and remedial powers. According to Article 30, Paragraph 1 of the Cartel Act, ComCo decides the appropriate measures (i.e., issuing orders to eliminate restraint on competition). Measures therefore may prohibit an undertaking from continuing the practice that has been found unlawful or may oblige an undertaking to conduct specific measures aimed at eliminating an unlawful behaviour. As such, ComCo can also oblige an undertaking to enter into a business relationship with another undertaking if it has judged the refusal to deal to be unlawful.

Under certain conditions, interim measures may be ordered for the duration of the proceedings. As such, ComCo may issue injunctions to change specific business practices (i.e., compelling an undertaking to grant access to a certain facility). However, interim measures require, among other conditions, that in their absence, competition would suffer a disadvantage that could not easily be rectified. Interim measures allow ComCo to impose behavioural remedies even before completion of its investigation. In 2021, ComCo demonstrated an increased tendency to impose interim measures, as illustrated by the following two cases.

The first case concerns the expansion of the fibre optic infrastructure of Swisscom. In late 2020, ComCo issued an interim measure prohibiting Swisscom to continue with the fibre roll-out without guaranteeing layer 1 access. On appeal, the FAC upheld the interim measure and confirmed ComCo's assessment finding that the network construction strategy of Swisscom constituted a prima facie restriction of technological development. Swisscom has appealed the ruling to the FSC, which, in December 2021, decided to not grant suspensive effect to the appeal.

The second case concerns an investigation into ATM schemes in Switzerland. ComCo accused Mastercard of hindering market entry of a competitor by refusing to co-badge new debit cards of its competitor with Mastercard's existing products. Even though the investigation on the merits is still ongoing, in February 2021, ComCo issued various interim measures ordering Mastercard to technically prepare its debit cards for co-badging. Mastercard appealed this decision and the FAC has not yet rendered its judgment. In parallel, ComCo is continuing to investigate the case on the merits.

54 Articles 54 to 55 of the CartA.

iii Structural remedies

Apart from corporate merger control, the Cartel Act does not provide for structural remedies (i.e., in abuse of dominance cases, ComCo does not have jurisdiction to order structural measures).

VI PROCEDURE

In general, the investigation of restraints of competition, under which abuse of dominance cases fall, starts with the preliminary investigation. According to Article 26 of the Cartel Act, the Secretariat of ComCo (Secretariat) may conduct preliminary investigations *ex officio*, at the request of undertakings involved or in response to a complaint from a third party. At this stage, the information is usually gathered through questionnaires sent to the undertakings. Undertakings have no right to inspect the files. Measures to eliminate or prevent restraints of competition may be proposed by the Secretariat.

Where there are indications of an unlawful restraint of competition, the Secretariat opens an investigation, in consultation with a member of the presiding body of ComCo.[55] Regarding the publication of the opening of an investigation, the Secretariat has and uses various means to give notice of the purpose of and the parties to the investigation. Along with the publication in the Swiss Official Gazette of Commerce, in many cases a press statement is released. Depending on the public interest, the Secretariat may also comment on news coverage. Third parties are invited by the Secretariat to come forward within 30 days if they wish to participate in the investigation.[56]

The investigative powers of the competition authorities within an investigation are broad, and the far-reaching investigative measures include the conduct of searches (dawn raids) and the seizure of evidence (documents and electronic data).[57] Additionally, the competition authorities may hear third parties as witnesses and require the parties to an investigation to give evidence.[58] Regarding the duty to provide information, undertakings subject to an investigation are obliged to provide all the information required and produce the necessary documents to the competition authorities.[59] Failure to act accordingly may entail an administrative fine. Concerning dawn raids in particular, undertakings must answer questions that are related to them and must provide the competition authorities with documents and grant access to any premises for which this is requested. The duty to provide information is limited by the *nemo tenetur* legal principle (right against self-incrimination). However, in recent case law, the Federal Supreme Court has restricted this principle in a way that only current formal and de facto organs may invoke the company's right to silence. Former organs of undertakings under investigation can be questioned as witnesses without restriction.

The competition authorities can order interim measures for the duration of the proceedings. They may also be applied for by third parties provided that public interests such as the protection of competition are affected. Decisions concerning interim measures can be challenged independently of the main proceedings before the FAC.

55 id., at Article 27.

56 id., at Article 28, Paragraph 2.

57 id., at Article 42, Paragraph 1.

58 id., at Article 42, Paragraph 2.

59 id., at Article 40.

An investigation can be terminated with an amicable settlement reached between an undertaking and the Secretariat.[60] Although there is no obligation to conclude an amicable settlement, it may be a reasonable measure to avoid lengthy and costly procedures. The conclusion of an amicable settlement is considered as cooperation, which leads to a reduction of a possible sanction of up to 20 per cent. A partial or even a full waiver of sanction may be reached if a leniency application is filed and if the undertaking assists in the discovery and elimination of the abuse of dominance.[61]

The Secretariat has published various notes on the procedure, including on the conduct of investigations, amicable settlements and deadlines.

VII PRIVATE ENFORCEMENT

The Cartel Act explicitly provides for civil proceedings in addition to administrative proceedings. Regarding rights arising from a hindrance of competition, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request the following before a civil court: the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Code of Obligations (CO) or surrender of unlawfully earned profits in accordance with the provisions on agency without authority.[62] Hindrances of competition particularly include the refusal to deal and discriminatory measures.[63]

Additionally, the Cartel Act explicitly provides for further instruments for the civil courts to enforce the right to elimination and desistance. In this regard, the courts may, at the plaintiff's request, rule that any contracts are null and void in whole or in part or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard.[64] Furthermore, civil courts also have the possibility to order interim measures.

With respect to case law, in the *Etivaz* decision,[65] the Swiss Federal Supreme Court found a dominant position of a cooperative and awarded the plaintiff an antitrust claim for admission to the cooperative. There is no specific case law with regard to contracts concluded by dominant undertakings. However, the Swiss Federal Supreme Court held that a contract constituting an unlawful agreement affecting competition according to Article 5 of the Cartel Act is void under Article 20 of the CO, as the purpose of the Cartel Act requires this sanction.[66]

Having said this, private antitrust enforcement against unlawful practices of dominant undertakings has not yet played a significant role in Switzerland. The main reasons are considered to be consumers' lack of standing to sue, the short limitation period and the high burden of proof to claim damages. However, the importance of private enforcement might increase with the new legislation and the introduction of the concept of relative market power. Even today, civil court proceedings may be preferable in refusal to deal cases.

60 id., at Article 29.
61 id., at Article 49a, Paragraph 2.
62 id., at Article 12, Paragraph 1.
63 id., at Article 12, Paragraph 2.
64 id., at Article 13.
65 BGE 139 II 316.
66 BGE 134 III 438.

In 2019, ComCo tried to promote private antitrust enforcement by lowering fines for companies that pay damages to cartel victims. The cartel involved 12 construction companies that regularly allocated road construction projects among themselves and jointly determined their offer prices. ComCo's Secretariat offered the parties the opportunity to settle with the cartel victims following its request for a decision. The Secretariat promised to request that ComCo reduce the fines if damages to the cartel victims were paid. Subsequently, nine out of the 12 companies agreed to pay the cartel victims approximately 6 million Swiss francs in compensation. As a result, ComCo followed the Secretariat's request and reduced the fines of the respective nine companies by approximately 3 million Swiss francs, taking into account 50 per cent of the settlement payments made. Although this case concerned a cartel, it is likely that ComCo will extend this new practice to abuse of dominance cases in the future.

VIII FUTURE DEVELOPMENTS

In November 2021, the Federal Council published proposed amendments to the Cartel Act for consultation. The proposal mainly concerns merger control but also seeks changes concerning procedure and civil competition law, which could also impact cases with unilateral behaviour. The Federal Council and Parliament are still likely to amend at least parts of this new proposal after the consultation process. However, the following points are already noteworthy:

i Standing to sue

With regards to the enforcement of competition law claims, the proposal provides for a strengthening of the civil law remedies for anyone whose economic interests are threatened or violated by an unlawful restriction of competition. Thus, under the proposed new regime, consumer interest groups and public authorities may also seek civil law remedies against market-dominant undertakings.

ii Statute of limitations

It is also proposed that the statute of limitations shall be suspended from the start of an investigation until a legally binding decision is rendered. The purpose of such suspension is to ensure that the potentially long duration of administrative competition law proceedings does not preclude the civil enforcement of claims, including against dominant undertakings.

iii Time frames

With the aim of speeding up competition law proceedings, the Federal Council proposes specific times frames for competition authorities as well as courts deciding competition law cases. These time frames are proposed to be merely indicative and not enforceable. Competition authorities only bear the burden of giving reasons as to why the time frames have not been met.

iv Consultation procedure

The proposal seeks certain improvements (i.e., shortened time frames, reduced risk of sanctions) with regards to the consultation procedure. The consultation procedure allows an undertaking to notify contemplated conduct to ComCo prior to implementation, thereby avoiding sanctions.

The legislative process of the revision of the Cartel Act is only in its early stages, and it is not expected that any of the above-mentioned legislative changes will come into force before 2023 or 2024.

Appendix 1

ABOUT THE AUTHORS

MARCEL MEINHARDT

Lenz & Staehelin

Marcel Meinhardt is a partner at Lenz & Staehelin and heads the firm's competition and regulated market practice group. He is a leading expert in competition law and is renowned for his broad, first-rate practice. Marcel specialises in all areas of Swiss and European merger control work and competition law, particularly in the postal services, insurance, banking, motor car, green energy, media, retail, construction, pharma, ticketing and IT sectors. He also advises on regulatory issues in connection with the electricity, environmental and gas industries. Marcel has been responsible for numerous Phase I and Phase II merger notifications to the Swiss Competition Commission, most recently in the context of infrastructure joint ventures in the electric car industry, and coordinated multi-jurisdictional merger filings. He has acted in many high-profile and leading cases.

BENOÎT MERKT

Lenz & Staehelin

Benoît Merkt is a leading expert in competition law and is renowned for his first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, notably in the banking and finance, energy, high-tech, infrastructures (electricity), consumer goods, chemical, luxury goods, motor car distribution, public broadcasting and retail sectors. He has been responsible for a large number of merger notifications to the Swiss Competition Commission and coordinated multi-jurisdictional merger filings. Benoît advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant position, vertical restraints, cartels and public procurement.

ASTRID WASER

Lenz & Staehelin

Astrid Waser is a partner in the competition, regulated market and investigation groups in Zurich. She specialises in all aspects of competition law, public procurement law, media and telecoms law and compliance. Astrid also advises on regulatory, administrative and internal investigations, and has long-standing experience in the field of compliance matters. She advises in non-contentious matters and represents clients before Swiss authorities and

courts, in particular in investigations and infringement procedures of the Swiss Competition Commission, as well as in merger filings and in public procurement procedures. Astrid is a regular speaker at conferences and seminars.

UELI WEBER

Lenz & Staehelin

Ueli Weber's practice focuses on competition law. He works as an associate in the Zurich office and is a member of the firm's competition, investigations, litigation and arbitration groups, as well as the corporate and M&A practice group.

LENZ & STAEHELIN

Brandschenkestrasse 24
8027 Zurich
Switzerland
Tel: +41 58 450 80 00
marcel.meinhardt@lenzstaehelin.com
astrid.waser@lenzstaehelin.com
benoit.merkt@lenzstaehelin.com
ueli.weber@lenzstaehelin.com
www.lenzstaehelin.com

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