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Cartels

Switzerland: Trends & Developments

Marcel Meinhardt, Benoît Merkt, Astrid Waser and Désirée Stebler
Lenz & Staehelin

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Trends and Developments

Contributed by:
Marcel Meinhardt, Benoît Merkt, Astrid Waser and Désirée Stebler
Lenz & Staehelin see p.5

Trends and Developments in Cartel Regulation in Switzerland

The year 2019 is characterised by a lively decision-making activity of the Swiss Competition Commission ("ComCo"). Of these, 11 decisions were taken (compared to four in 2018). Nine of these were settled by amicable settlement and ten resulted in a sanction.

In 2019, the ComCo charged a total of CHF150 million in fines – of which the Forex amicable settlement alone amounted to CHF90 million. The decisions by the ComCo concerned sectors as diverse as road construction, financial services and automobile leasing. In 2019, the ComCo conducted a total of 19 investigations, of which only three were newly opened (compared to six in 2018).

The main novelty for 2019 is the facilitation of damages for those affected by a cartel. The ComCo discussed the introduction of such new mechanisms in two cases, of which only one is yet publicly available. In a bid-rigging case, the ComCo found a mechanism to encourage the parties to pay damages. The ComCo also mentioned that improving the situation of those suffering damages is on its agenda for the years to come.

Change in focus

While for many years the focus of the ComCo was primarily on vertical price fixing agreements and vertical territorial foreclosure (in particular restrictions on direct or parallel imports from the European Economic Area into Switzerland), there is an increased focus on cartels (horizontal agreements between competitors; in particular suspected bid-rigging in public and private procurement matters). Of the 11 ComCo decisions, only two concerned vertical agreements. Of these, one qualified as a price fixing agreement and one as a territorial agreement. Both concerned product markets, namely skis in the case of Stöckli and tractors in the case of Bucher Landtechnik. Both proceedings were concluded by amicable settlement.

It is of note that the ComCo, the Federal Administrative Court (FAC) and the Federal Supreme Court (FCS) have continued to tighten their position on hard-core restraints where the qualification of an agreement as horizontal or vertical (an agreement between companies at different level of the production or distribution chain) loses importance. For example, in the French-language book market case, the investigation was opened in 2008 for a presumed cartel, but extended to a behaviour that now qualifies as a vertical agreement. Even more interesting, the FSC left open the definition of the type of agreement in its 2020 decision in relation to the agreement between Ticketcorner and Hallenstadion, and a trend towards a more formalistic approach has been observed in cases of market dominance.

After an overview of the novelty – taking into account damages, the continued trend of tightened practice, the continued trend of reaching amicable settlements, and the co-operation between the European Commission and the ComCo will be reviewed.

Novelty – Taking Into Account Damages

According to its 2019 annual report, the ComCo has received a growing number of claims from companies, private individuals and public bodies requesting compensation following decisions on unlawful agreements in the last two years. In two cases in particular, a new compensation mechanism was discussed and applied: the first concerned an agreement between competitors in the sector of automobile leasing which is not yet publicly available, and the second a bid-rigging agreement in the construction sector.

Twelve companies active in the road construction industry in the canton of Grisons (*Graubünden*) met and allocated cantonal and municipal road construction projects among themselves regularly. The ComCo fined a sum of CHF11 million, an amount that would have been much higher had the ComCo not deducted the damages paid by the cartelists to those suffering damages (ie, the canton of Grisons and the municipalities) in its calculation. In this case, the ComCo's investigative body, the Secretariat, proposed to the cartelists to settle with the affected municipalities and canton of Grisons offering in exchange a significant reduction of the antitrust sanction.

As a result, nine (out of 12) of the companies entered into settlement agreements with the municipalities and canton of Grisons, and approximately CHF6 million in damages were paid. In its decision, the ComCo reduced the fines of the respective nine companies by approximately CHF3 million, taking into account the settlement payments as mitigating factors.

With its new practice, the ComCo introduced civil damages into the administrative cartel procedure, thus circumventing the difficulties of obtaining damages in civil cartel procedures.

Although the Swiss Cartel Act provides for civil damages, the barriers to reclaim damages in civil procedures are high (Switzerland is neither part of the EU antitrust damages directive nor does it have anything comparable). In particular, a plaintiff has to prove the damages occurred which is difficult as it has to be shown that the difference between the hypothetical financial situation without a violation of the law would have been significantly better.

Further, a plaintiff has to provide the evidence of the unlawful restraint of competition. Such evidence is difficult to obtain as competition authorities have to protect business secrets, official secrecy and the documents provided by leniency or immunity applicants.

The new practice might put commercial pressure on companies to compensate damages before the decision by the ComCo is binding, as the decision whether to pay damages has to be made prior to the latter decision.

Continued Trend of Tightened Practice

With the landmark Gaba judgment in the matter of the Elmex toothpaste, the FSC ruled in 2016 that hard-core agreements on prices, quantities and territories constitute per se, in principle, significant restraints of competition and are unlawful if they cannot be justified on economic efficiency grounds. A review of quantitative effects such as market shares is no longer necessary. This strict approach has been confirmed by the FSC in its BMW decision in 2017 and its Altimum SA decision in 2018. In both cases, the FSC clarified that the barriers to justify otherwise unlawful anticompetitive agreements based on grounds of economic efficiency are high, in particular for hard-core restraints.

The trend toward a tightened practice continued in 2019 and 2020, not only for agreements but also for abuse of dominance cases. In particular, we observe (i) that for agreements the qualification as type of agreement (either vertical or horizontal) is becoming less important, (ii) the practice as regards exclusivity clauses is being further tightened and (iii) for market dominance cases, there is a shift towards a more formalistic practice, which focuses less on an actual effect on competition.

Importance of qualification of type of agreement

Early 2010, the ComCo opened an investigation against Hallenstadion, an event venue, and Ticketcorner, a ticketing distributor. Hallenstadion and Ticketcorner had concluded an agreement according to which Ticketcorner had the right to distribute 50% of the tickets for events at the Hallenstadion. Whereas the ComCo concluded that the agreement did not contain an unlawful competition agreement, the FAC came to the opposite conclusion.

In its decision in February 2020, the FSC confirmed that the 50% clause in the agreement was unlawful (notably because of Hallenstadion's dominant position), albeit an agreement that did not trigger fines as it does not contain a hard-core restriction. Usually, for the definition of the market affected by the agreement, the court has to define the type of agreement at hand. However, in this case, according to the FSC, the agreement between Hallenstadion and Ticketcorner was neither a horizontal, nor a vertical agreement, but rather another type of agreement.

Further, also in the French-language book market case, which will be discussed next, the investigation was opened for a presumed cartel but extended to a behaviour that now qualifies as a vertical agreement.

Tightening of practices

In the French-language book market case, the FAC issued nine judgments in October 2019 in relation to the French-language book market. Contractual agreements between the Swiss distributors and the foreign editors often provide for territorial exclusivity. These exclusivity regimes should not be problematic as long as passive sales remain available for the downstream market, ie, supply requested by the Swiss retailers and booksellers directly from foreign editors.

A peculiarity of the nine cases is the wording of these exclusivity clauses. They did not provide for an exclusion or restriction of passive sales. Under the concept of "proof by indication", however, the ComCo and the FAC concluded that the exclusivity clauses were to be qualified as hard-core restraints because there were, according to the ComCo, sufficient indications of a restriction of parallel imports, or restriction of passive sales, on the downstream market. Surprisingly the ComCo and the FAC excluded sales of books by Amazon from the relevant market. This approach is not in line with the ComCo's own practice, which in general considers that internet sales are essential in order to prevent absolute territorial protection. Further, neither the ComCo, nor the FAC examined in detail (through queries or interrogation) how these unclear contractual clauses were applied in practice by the editors located abroad, ie, if passive sales were in fact not possible in practice.

If the FAC decisions were to be confirmed by the FSC (eight appeals are pending), the practice on hard-core restraints would be further tightened. Unclear clauses that do not expressly mention the authorisation of passive sales, combined with some indication of restriction of parallel import on the downstream market could already lead to a sanction notwithstanding the fact that the relevant market in question is completely open to internet sales.

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Shift towards more formal practice

In its decision of May 2019, the FAC confirmed a sanction of CHF7 million against SIX for abuse of a dominant position. An appeal against this decision has been lodged to the FSC – the decision is not final.

The decision concerned "dynamic currency conversion" (DCC), a service that enables cardholders abroad to choose their home currency instead of the local currency when making payments on a terminal. Between early 2005 and early 2007, SIX refused to disclose interface information necessary to connect terminals and, therefore, merchants using SIX payment card terminals had to use the DCC function. According to the FAC, SIX's refusal to disclose interface information qualified as abusive conduct by a dominant undertaking (ie, a refusal to deal and the tying of services).

One of the key messages of the DCC decision concerns the need to prove the existence of competitive harm in dominant position cases. In particular, FAC concluded that for dominant undertakings a tangible negative effect on competition is not necessary, a simple potential negative effect on competition is sufficient to be considered anticompetitive conduct.

Continued Trend of Reaching Amicable Settlements

With nine out of 11 decisions concluded with amicable settlements, the year 2019 confirms the trend of recent years towards more amicable settlements.

Of particular interest are three investigations: the Forex investigation; the Yen Libor and Euroyen Tibor investigation; and the automobile leasing investigation. In all three investigations, not all parties to the proceedings were part of the settlement agreement and, thus, the investigations have been ongoing since 2010 and 2014 will continue – in the Forex and automobile leasing investigation for only one party – in an ordinary procedure and will result in an ordinary decision only for the non-settling parties.

The Forex investigation

In the Forex investigation, the banks concluded an amicable settlement where it was agreed not to collude in manipulating exchange rates for their own financial gains in the future. The ComCo imposed a fine totalling around CHF90 million on two of the chat rooms. Although the majority of the banks were involved in this settlement agreement, the investigation is continuing in an ordinary procedure against one party.

The Yen Libor and Euroyen Tibor investigation

In the Yen Libor and Euroyen Tibor investigation, the ComCo approved a settlement agreement with Rabobank and Llyods for an amount of approximately CHF700,000. The ComCo took into account the limited participation of these two banks and the fact that they only had bilateral exchanges during the manipulation scheme. This investigation continues in the ordinary procedure against two banks and three cash brokers.

The car leasing investigation

In the car leasing investigation, eight parties concluded an amicable settlement because of alleged exchanged information on the level of leasing interest. The sanctions amounted to approximately CHF30 million. The case was initiated by a leniency application.

No agreement could be reached with only one company. In addition, one company which was party to the amicable settlement appealed the decision to the FAC.

Co-operation Between the European Commission and the ComCo

Although Switzerland is not part of the European Union, the European regulatory framework and case law have often played a role in the ComCo's investigations and decisions. In addition, the co-operation agreement with the European Union (in force since December 2014) aims to achieve a close co-operation between the ComCo and the European Commission. However, information that was provided by the parties under leniency or settlement procedures must not be exchanged, unless the parties give the competition authorities a waiver.

In 2019, the co-operation between the ComCo and the European Union was very visible. The ComCo and various other European competition authorities had co-ordinated simultaneous dawn raids at companies suspected of being involved in international price and territorial agreements. Co-ordinated dawn raids are a mechanism provided within the framework of the co-operation agreement between the European Union and Switzerland.

Lenz & Staehelin is one of the largest law firms in Switzerland, with over 200 lawyers forming its legal staff. Internationally oriented, the firm offers a comprehensive range of services and handles all aspects of internal and Swiss law. The Lenz & Staehelin competition team is one of the largest among Swiss law firms, with almost 20 attorneys in the competition team located in Geneva and Zürich. Competition practice areas include notably cartel and merger regulation, abuse of dominant position, compliance programmes and distribution law, as well as public procurement.

Authors

Marcel Meinhardt is a partner in the competition group of Lenz & Staehelin in Zürich and is renowned for his broad, first-rate practice. He specialises in all areas of Swiss and European merger control work and competition law, particularly in postal services, insurance, banking, motor car, energy, media, retail, construction, pharma, ticketing and information technology. Marcel has been responsible for a large number of merger notifications to the Swiss Competition Commission and has co-ordinated multi-jurisdictional merger filings. He heads the competition and regulated market practice group of Lenz & Staehelin.

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

Astrid Waser is a partner in the competition group of Lenz & Staehelin in Zürich and a leading expert in competition law, with an excellent reputation in the Swiss market. She specialises in all aspects of competition law, public procurement law, media and telecoms law, and on regulatory issues in connection with gas and electricity industries. She advises and represents clients in merger filings, cartel investigations and infringement procedures of the Swiss Competition Commissions. Astrid publishes on Swiss and European competition law and public procurement law, and is a regular speaker at conferences and seminars.

Désirée Stebler has been working as an associate for the competition group of Lenz & Staehelin in Zürich since 2016. She holds an LLM degree from Harvard Law School and was a member of the competition team during a secondment for a magic circle law firm in London. She specialises in all areas of competition law and represents clients regularly in cartel and abuse of dominant cases. Together with Dr Marcel Meinhardt, Désirée is responsible for an article in one of the leading Swiss commentaries on competition law.

Lenz & Staehelin

Brandschenkestrasse 24
8027 Zürich

Tel: +41 58 450 80 00
Fax: +41 58 450 80 01
Email: marcel.meinhardt@lenzstaehelin.com
Web: www.lenzstaehelin.com