THE DOMINANCE AND MONOPOLIES REVIEW

NINTH EDITION

Editors
Maurits Dolmans and Henry Mostyn

THE LAWREVIEWS

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PREFACE

Even before covid-19 disrupted the world as we knew it, competition law was at a crossroads, facing far-reaching and sometimes contradictory calls for reform – including with respect to monopolisation and abuse of dominance. This is driven in large part by developments in the digital sector, as well as an increasing awareness of the urgency of the climate crisis, environmental degradation and loss of biodiversity.

Some, such as President Macron and Chancellor Merkel, have argued that there is too much competition from abroad, and advocate for more permissive enforcement to facilitate 'European champions' to emerge: 'We need to adapt the EU competition law: [It is] too focused on consumer rights and not enough on EU champions' rights.'

Others maintain that there is too little competition, enforcement has been too permissive, and the rules should be tightened. Senator Elizabeth Warren, for example, has argued that 'competition is dying. Consolidation and concentration are on the rise in sector after sector. Concentration threatens our markets, threatens our economy, and threatens our democracy. Evidence of the problem is everywhere.' Similarly, Professor Joseph Stiglitz contends that 'current antitrust laws, as they are enforced and have been interpreted, are not up to the task of ensuring a competitive marketplace'.

A third set of commentators believes that competition policy is misdirected, that the historic focus of competition law has been too narrow, and that the consumer welfare standard should be expanded to take account of social, industrial, environmental and other considerations (sometimes referred to as 'hipster antitrust').

And a fourth critique, voiced by Maurice Stucke and Ariel Ezrachi, maintains that many of today's problems result from too much 'toxic' competition overall, driven by ideologues, lobbyists and privatisation, and that we need to promote a kind of 'noble competition', where rivals mutually strive for excellence.

To address these challenges, a dizzying array of reports has emerged, commissioned by governments in the US, EU, UK, Germany, France, Australia and elsewhere. And from those reports, a constellation of ideas has emerged to overhaul competition law, including: reorienting the goals of antitrust policy away from the consumer welfare standard towards a broader societal welfare test; reversing the burden of proof in merger control; per se bans on certain categories of conduct in the digital sector (including prophylactic controls on vertical integration); lowering the standard of judicial review to give competition authorities more leeway; injecting political oversight into competition law enforcement; loosening the standard to impose duties to share data with rivals; introducing market study regimes; allowing authorities to impose remedies without formally establishing an infringement; and establishing mandatory codes of conduct for digital platforms.

Where does this all leave busy practitioners and businesses that are trying to navigate the complex and constantly evolving rules concerning abuse of dominance? Helpfully, this ninth edition of *The Dominance and Monopolies Review* seeks to provide some respite, providing 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 to watch out for over the next year.

Sustainability and abuse of dominance

The past year has seen sustainability become a new and important focus for competition regulators. The Dutch competition authority started the trend by setting 'sustainability' as a key priority and proposing a more permissible review for certain environmental agreements. The Hellenic Competition Commission followed, advocating for far-reaching policy changes to promote sustainability goals across all areas of competition policy. The European Parliament has called on the European Commission to 'urgently take the concrete action needed in order to fight and contain the threat of climate and environmental catastrophe before it is too late'. As Commissioner Vestager has noted, 'everyone is called upon to make our contribution to the necessary change – including enforcers'. The European Commission initiated a consultation, and the Organisation for Economic Co-operation and Development held several events to discuss the integration of climate and environmental goals in competition policy. Chinese competition law already provides an explicit exemption for 'agreements between undertakings which they can prove to be concluded for . . . serving public interests in energy conservation, environmental protection and disaster relief'.

At core, the cause of the climate crisis is a market failure: the cost of pollution of air, water and land, and the damage wrought by greenhouse gas emissions to the climate today and in the future are generally not included in the price of goods and services. Because the market price of a polluting product excludes the social cost, production is higher than the social optimum, taking into account that consumption of natural resources now exceeds what the regenerative capacity of the Earth can sustain.

To address this market failure, the discussion around including environmental goals in competition law has, so far, mostly focused on state aid, horizontal cooperation and merger control. For example, it has been argued that the consumer welfare analysis in merger control could include whether the merger could be expected to raise or lower the environmental price that consumers pay, which is not reflected in the market price in monetary terms or in quality (which could take account of non-market externalities such as emissions). Likewise, horizontal guidelines could be revised to allow cooperation in pursuit of environmental goals, where individual producers are willing to invest in greening production, but may be held back by the fear that they will be undercut by those who do not invest, or by cheaper imports.

There is no inherent reason, however, why sustainability could not be incorporated into an abuse of dominance assessment, too. This could be done in a number of ways.

First, pricing analysis (for example, for loyalty rebates, predatory pricing, margin squeeze) could take into account the actual costs incurred by the dominant company and by society, including not only the total costs of production, but also the environmental cost. A company may be able to price lower than its rivals because it is employing polluting or greenhouse gas emitting technology, at great societal cost, which is not reflected in its traditional variable and fixed costs.

Second, a dominant provider with an incumbent polluting technology might commit an abuse by excluding rival, greener technologies by means other than competition on the merits. Such conduct should already violate dominance rules. In this case, however, 'competition on the merits' should be defined so as to exclude competition that relies on avoidable pollution or greenhouse gas emissions. Also, the assessment should take into account that consumer harm would be even higher from the abuse because of the exclusion of a greener technology. The theory would be not dissimilar to that pursued by the European Commission in its *Car Emissions* cartel investigation, albeit that case concerns horizontal collusion to restrict competition on innovation for emission cleaning systems.

Third, there may be *sui generis* abuses that involve unsustainable business practices that also restrict competition. For example, a dominant producer might employ cheap and polluting means of production, and thereby price cheaper than its rivals. A dominant raw materials producer might make misleading representations to an environmental agency to secure a licence to extract minerals. And a dominant chemical producer could illegally dump products in rivers, thereby gaining an advantage over rivals that dispose of waster safely. All these might conceivably be an abuse of dominance because they distort competition, via means other than competition on the merits. The fact that they may also infringe other laws is no bar to bringing an abuse of dominance claim, just as a dominant factory owner burning down a rival's factory can be both arson and an abuse of dominance. Rivals should have a cause of action, especially where environmental rules are inadequate or insufficiently enforced.

Fourth, there may be situations where conduct that might otherwise be abusive could be excused because of sustainability-based objective justification, just as Article 101(3) of the Treaty on the Functioning of the European Union is being considered to exempt otherwise anticompetitive agreements that promote sustainability. For example, a dominant e-commerce platform might prioritise in its ranking green products (including green technologies sold by its downstream subsidiary) over polluting products (sold by its rivals). Provided that greenwashing is avoided, a regulator might consider that even if such conduct has the potential to restrict competition, it should be objectively justified because of the overall benefits it creates for society.

Regulation versus antitrust enforcement

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. In broad terms, the concerns with digital markets are that certain market characteristics (such as network effects and tipping, lack of switching, and lock-in effects) lead to high concentration, insurmountable entry barriers and exploitation of market power, especially (but not only) when combined with abusive conduct.

The German 10th Amendment to the Act against Restraints of Competition introduced new rules to tackle companies with 'cross-market significance'. The UK is setting up a digital markets unit to create an enforceable code of conduct for companies with 'strategic market status'. And perhaps most significantly, the EU, with its draft Digital Markets Act (DMA), is formulating *ex ante* dos and don'ts for large 'gatekeeper' platforms.

It is perhaps understandable that regulators and legislators seek to go down the route of regulation, rather than pursuing individual cases. Regulatory rules can potentially reach quicker outcomes than antitrust cases, which can be long and complex. As Commissioner

Vestager has explained as the motivation of 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.'

At the same time, regulation can also come with risks to competition and society. This is because ill-crafted or insufficiently flexible regulation can impede innovation, snuffing out pro-competitive conduct before it takes place or raising barriers to entry. As the UK Competition and Markets Authority (CMA) has explained, 'Greater regulation is – on average – associated with less competition. For instance, countries with lower levels of product market regulation tend to have more competitive markets and enjoy higher rates of productivity and economic growth.'

Accordingly, it is particularly important that new rules of the road 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 code of conduct 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.

It is therefore troubling that the draft DMA does not contain any analogous provision. As currently framed, the prohibited behaviours and obligations are extremely broad. They touch on almost all aspects of competition and have far-reaching consequences for consumers in Europe. But the draft DMA includes no safeguards to protect against unintended adverse consequences, even to protect users from privacy violations or exposure to fraudulent activity, or preventing other harmful behaviour. It is difficult to see the benefit of this approach. It is positively harmful.

A proportionality safeguard would be a simple way to improve the draft regulation, without impeding any of its objectives. Including a proportionality safeguard would also be consistent with general principles of EU law. Under Article 16 of the Charter of Fundamental Rights (which is a binding source of EU law under Article 6(1) of the Treaty on European Union), companies (even alleged gatekeeper platforms) have a right to conduct their own business. Interference with that right is only permitted if it is proportionate. By implication, it should therefore be open to companies to justify their practices, on the grounds of proportionality. A blanket refusal to engage with justifications at all is disproportionate to the aims of the DMA, and harmful.

Advocate General Pitruzzella rightly commented in March 2021 on the draft DMA that 'too much rigidity could hinder efficiency and introduce a disproportionate limitation on the freedom to conduct a business'. Rather, rebuttable presumptions together with justification defences strike the balance between 'the need for certainty' and 'the need to avoid false positives in antitrust enforcement and undue limitations of fundamental rights'.

Mandatory arbitration as a mechanism to solve FRAND disputes

A third theme of the past few years' dominance enforcement is the continued global focus on the licensing of standard-essential patents (SEPs) on fair, reasonable and non-discriminatory (FRAND) terms. Refusing a licence or seeking an injunction is considered an abuse of dominance, unless the SEP owner is a 'willing licensor' or the implementer is an 'unwilling licensee'. In August 2020 in the UK, the Supreme Court handed down an important judgment in *Unwired Planet*, finding that an English court can set the royalty rates and terms of a FRAND licence on a worldwide basis, to determine whether a licensor or licensee is 'willing'. In Europe, the EU Commission's expert group wrote a 230-page report on the licensing and valuation of SEPs on FRAND terms.

A problem has emerged, however, that the current legal framework does not incentivise parties to reach a negotiated outcome as to the FRAND rate. This is because for both implementers and SEP holders, the best alternative to a negotiated agreement (the BATNA) is to litigate: for SEP holders, the BATNA is usually to seek an injunction and offer a high royalty, thus threatening a high penalty while limiting risk by appearing to follow the sequence requirements of the European Court of Justice's *Huawei/ZTE* judgment. Implementers, on the other hand, may have an incentive to challenge the validity or infringement of the patents at issue. So the BATNA of an implementer may therefore be to seek judgment for invalidity or non-infringement, thus threatening long delays, while limiting risk by also appearing to follow the sequence of the *Huawei/ZTE* case.

As a result, parties are not incentivised to reach settlements as to the FRAND rate. In our view, the best way to address this problem is to ensure that the BATNA is no longer a positive outcome, but a possible negative one for each party. This could be achieved by ensuring that, absent agreement within a reasonable time period, a third party sets the rate for the parties (for example, by standard-setting organisations requiring arbitration or rate setting as a fallback for the FRAND undertaking). Parties tend to be much more willing to negotiate and ready to reach agreement on a balanced solution if the fallback is someone else deciding the rate.

For this reason, a refusal to agree to rate setting should be seen as rebuttable presumption of being an 'unwilling' licensor (and an abuse of dominance) for the purpose of the question of whether an injunction is available on an SEP. Conversely, an offer to have an independent third party set the rate and key terms should be seen as a rebuttable presumption of being a 'willing' licensor or licensee. The advantage of such mandatory arbitration as a fallback is that it encourages a reasonable outcome. Both parties have an incentive to agree on a rate to avoid an arbitrator setting a rate for them. And even if they cannot agree on a rate, the rate will be set. Abuse of dominance can thus be avoided. Arbitration in this respect is better than litigation because it is faster, more flexible, reduces forum shopping and results in awards that are enforceable worldwide. Arbitration also allows the parties to address IP rights implicating multiple national jurisdictions in a single proceeding. We believe that this solution could solve the endless FRAND disputes and end abusive hold-up and hold-out.

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 ninth edition of *The Dominance and Monopolies Review*. We look forward to seeing what the next year holds.

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London
June 2021

Chapter 23

SWITZERLAND

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

I INTRODUCTION

i Legal basis

Swiss law regulates the abuse of a dominant position by a dominant undertaking in the Cartel Act (CartA). Swiss law is thereby strongly oriented towards Article 102 of the Treaty on the Functioning of the European Union.

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.

Article 7 of the Cartel Act clarifies what conduct is prohibited for such companies. 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; and
f conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.

Furthermore, the Federal Price Surveillance Act and the Federal Act against Unfair Competition must be observed in some cases for dominant undertakings. The former can become relevant primarily in the context of excessive prices. The latter is relevant in connection with prices that are too low.

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

ii Specific rules regarding certain sectors or markets

According to Article 3, Paragraph 1 of the Cartel Act, statutory provisions that do not allow for competition in a market for certain goods or services take precedence over the provisions of this Act. Such statutory provisions include, in particular:

a provisions that establish an official market or price system; and

b provisions that grant special rights to specific undertakings to enable them to fulfil public duties.

The practical significance of these provisions is limited. Possible areas of application are, for example, markets that are highly regulated in terms of price, such as in part of the health sector, or legal monopolies.

Article 3, Paragraph 2 of the Cartel Act also clarifies that the Act does not apply to effects on competition that result exclusively from the legislation governing intellectual property (IP). However, import restrictions based on IP rights shall be assessed under the Act.

In addition, various special laws for certain sectors, complementing the Cartel Act, must be observed when applying the rules of competition law.

This is the case, for example, in the telecoms and media sector. The main sources of law in this sector are the Telecommunications Act (TCA) and the Federal Act on Radio and Television, as well as the Ordinance on Telecommunications Services. These acts contain special rules that apply to dominant undertakings.

The main goal of the TCA is to ensure that a range of cost-effective, high-quality competitive telecommunications services are available in Switzerland, as well as to guarantee effective and fair competition among carriers, operators and service providers. Therefore, telecommunications providers with a dominant position are obliged to grant access to infrastructure and services to other providers in a transparent and non-discriminatory manner at cost-oriented prices.

Furthermore, the sector-specific rules allow the Federal Department of the Environment, Transport, Energy and Communications, after consulting the Competition Commission (ComCo) regarding the question of whether a dominant undertaking jeopardises diversity of opinion and offerings, to demand certain measures from such undertaking, namely that it ensures diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the markets.

Finally, there are sector-specific postal laws, which, inter alia, ensure a certain basic service and state that providers of postal services regulate a non-discriminatory, transparent and timely access to their partial services through agreements.

II YEAR IN REVIEW

In 2020, there were several high-profile cases related to the abuse of a dominant position. Most of the cases concern the telecoms and media sector.

Two new proceedings were directed against state-owned telecommunications industry leader Swisscom. ComCo opened an investigation against Swisscom for an alleged margin squeeze as well as unfair pricing practices pertaining to the use of Swisscom's infrastructure in tenders for projects to network company locations. This new investigation is a sequel to an investigation that concluded with a sanction against Swisscom (*WAN-Anbindung*) and that is currently subject to an appeal pending before the Federal Administrative Court (FAC). The decisions in both of these cases are expected to clarify important issues relating to margin squeeze as well as imposition of unfair prices and discrimination between trading partners. In addition, ComCo opened proceedings against Swisscom and imposed provisional measures on the grounds of a possible abuse of dominance through the stand-alone expansion of the fibre-optic infrastructure.

ComCo also fined Swisscom's competitor UPC for unlawful refusal to deal with regard to the exclusive live broadcast of Swiss ice hockey games on pay-TV. This decision is based on an extremely narrow market definition in the area of pay-TV, which ComCo had already applied in an analogue case (*Sports in Pay-TV*), which, for this reason, is also subject to a complaint pending before the FAC.

Furthermore, ComCo released Swatch subsidiary ETA from its supply obligation and restrictions on mechanical Swiss-made watch movements. With this, ComCo put a provisional end to the multi-year process initiated by ETA in 2013. This process was a novelty to Swiss competition law and aimed at allowing ETA as a dominant undertaking to gradually withdraw from its supply obligations, thus giving it more freedom in the choice of its commercial partners. The gradual reduction of ETA's supply obligations enabled competitors to expand their capacities and customers to adjust their sources of supply, leading to profound changes in the Swiss watch industry. Although ETA is now no longer subject to supply obligations, it remains dominant and thus under ComCo's general supervision with regard to the abuse of market power.

ComCo also announced that it was fully opening up the natural gas market in central Switzerland. This was reached within the framework of an amicable settlement with two pipeline network operators that ComCo qualified as dominant under the essential facility doctrine and that ComCo also sanctioned for unlawful refusal to deal (although with a reduced fine amount). As a result, end consumers in the network may now freely choose their gas supplier. ComCo expects this decision to have a signal effect, thus opening up the gas market throughout Switzerland in pre-emption of an ongoing and less far-reaching revision of the Gas Supply Act.

Finally, the Federal Supreme Court partially upheld the appeal against the FAC's decision in *AG Hallenstadion/Ticketcorner*. The Federal Supreme Court held that it was not established that the agreement between the ticketing provider Ticketcorner and the concert venue AG Hallenstadion, according to which at least 50 per cent of the tickets for rock and pop concerts at the Hallenstadion shall be distributed via Ticketcorner, constituted an abuse of dominance by Ticketcorner and remanded the case to ComCo for further examination. By contrast, AG Hallenstadion was held to have abused its dominant position by linking the rental of its venue for concerts to the 50 per cent requirement and thus imposing the ticketing clause on its clients.

i Significant decisions and cases 2020

Sector	Investigating authority	Conduct	Fine levied
Pay TV	ComCo	ComCo fined UPC for unlawful refusal to deal with regard to the exclusive live broadcast of Swiss ice hockey games on pay-TV. UPC abused its market dominance by refusing its competitor Swisscom any offer to broadcast live ice hockey until summer 2020. With this conduct, UPC has, according to ComCo, inadmissibly impeded Swisscom's competitive position.	Approximately 30 million Swiss francs

Sector	Investigating authority	Conduct	Fine levied
Manufacturing of watches	ComCo	At the end of 2013, ComCo approved a settlement with Swatch Group. This stipulated that the subsidiary must supply its customers with certain quantities of assortments and mechanical watch movements until the end of 2019. In its 2020 decision, ComCo concluded that no further obligations are to be imposed on ETA. However, the Swatch subsidiary remains dominant in the market for mechanical Swiss-made movements and is therefore under supervision with regard to the abuse of market power.	None
Natural gas	ComCo	EGZ and EWL supply natural gas to end customers in central Switzerland. According to ComCo they have abused their dominant position in the transport and distribution of natural gas via their pipeline networks, in particular by refusing to allow a third-party supplier to pass through their networks to supply certain customer groups.	Approximately 2.6 million Swiss francs (reduced because of cooperation)
Telecommunications	Price Surveillance Authority	In 2018, the Price Surveillance Authority launched an investigation into the prices for renting fibre from Swisscom AG for the purpose of providing broadband access to end customers. In 2020, the Price Supervisor and Swisscom reached an amicable settlement with which Swisscom agreed to reduce the price for this product.	None
Major events / concerts	Federal Supreme Court	AG Hallenstadion was held to have abused its dominant position by linking the rental of its venue for pop and rock concerts to the requirement according to which at least 50 per cent of the tickets for concerts at the Hallenstadion shall be distributed via Ticketcorner.	To be determined by ComCo

ii 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.	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
Construction	ComCo	In 2019, ComCo opened an investigation because, among other things, it had indications that a pavement company in the canton of Berne had abused a dominant position. Specifically, there is suspicion that it treated its shareholders preferentially and built up a long-lasting customer-loyalty mechanism to the detriment of other pavement companies.	March 2019
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 the other antitrust laws in Europe – a functional approach, based on the economical 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.

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.

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

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*.

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 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 per cent 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]

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

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*.

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.

Recently, 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 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 worth mentioning in this regard, 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

Swiss cartel law does not yet know the concept of 'relative market power'. However, the Swiss Parliament revised the Cartel Act and adopted the concept of relative market power in March 2021. The revised Cartel Act is expected to enter into force in early 2022 (see Section VIII).

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]

12 ibid.
13 RPW 2018/3, p. 672 et seq., *Ticketcorner/Starticket*.
14 RPW 2016/1, p. 123, *Online-Buchungsplattform für Hotels*.
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.

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 the 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.

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 licence 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.

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

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*.

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.

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 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 which 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.

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

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

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.

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] An appeal against the ComCo decision is currently pending.

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 to enter the market.[27]

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: (1) a dominant undertaking, (2) vertical integration of the dominant undertaking and (3) 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

26 ibid.

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

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*.

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 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 significantly 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. An appeal against ComCo's decision is currently pending before the FAC.

Most recently, in 2020, ComCo opened another 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. ComCo has not yet rendered a decision in this regard.

Tying and bundling

The purpose of the provision on tying transactions[34] 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

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*.
34 Article 7, Paragraph 2, letter f of the Cartel Act.

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.[35] 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.

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 at 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.[36]

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,[37] the FAC[38] and eventually the Federal Supreme Court[39] 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.[40] 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

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

36 id., c. 6.2.2.

37 RPW 2012/1, p. 74 et seq., *Vertrieb von Tickets im Hallenstadion Zürich*.

38 Federal Administrative Court, decision of 24 November 2016, B-3618/2013.

39 Federal Supreme Court, decision of 12 February 2020, 2C_113/2017.

40 Article 7, Paragraph 2, letter b of the Cartel Act.

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 namely the case when only larger customers above a certain turnover threshold may benefit from more favourable conditions.[41]

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 with comparable mailing characteristics would have received different conditions, resulting in some of them being better off than others.[42]

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).[43]

iv Exploitative abuses

It is unlawful for dominant undertakings to impose unfair prices or other unfair conditions of trade.[44] According to this provision, a dominant undertaking behaves unlawful 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 coercive, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.[45]

However, based on the case law of the Federal Supreme Court, the Competition Commission 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

41 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027.
42 id., c. 1018.
43 See Federal Supreme Court, BGE 139 I 72, c. 10.2.3.
44 Article 7, Paragraph 2, letter c of the Cartel Act.
45 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).

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.[46]

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.[47]

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 to avoid Swisscom's offer, the element of coercion would have been fulfilled.[48] An appeal against ComCo's decision is currently pending before the FAC.

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.[49]

The sanctioning of undertakings is more thoroughly regulated by the Cartel Act Sanctions Ordinance,[50] which also sets out the aggravating and mitigating factors in more detail.

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

46 RPW 2014/2, p. 403, *ETA Preiserhöhungen*.
47 RPW 2016/1, p. 186, *Swisscom WAN-Anbindung*; RPW 2008/4, p. 579, *Tarifverträge Zusatzversicherung Kanton Luzern*.
48 RPW 2016/1, p. 187 et seq., *Swisscom WAN-Anbindung*.
49 Article 49a, Paragraph 1 of the CartA.
50 Ordinance of 12 March 2004 on sanctions imposed for unlawful restraints of competition.

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 the Swiss Competition Commission.[51]

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, these measures require, among other conditions, that in their absence, competition would suffer a disadvantage that could not easily be rectified. In a very recent investigation concerning ATM schemes (opened 8 February 2021), ComCo has issued interim measures and there are indications that ComCo will increasingly make use of this instrument.

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 (the 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.[52] 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

51 Articles 54 to 55 of the CartA.

52 id., at Article 27.

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.[53]

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).[54] Additionally, the competition authorities may hear third parties as witnesses and require the parties to an investigation to give evidence.[55] 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.[56] 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 the 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 interest such as the protection of competition are affected. Decisions concerning interim measures can be challenged independently of the main proceedings before the FAC.

An investigation can be terminated with an amicable settlement reached between an undertaking and the Secretariat.[57] 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 by 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.[58]

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)

53 id., at Article 28, Paragraph 2.
54 id., at Article 42, Paragraph 1.
55 id., at Article 42, Paragraph 2.
56 id., at Article 40.
57 id., at Article 29.
58 id., at Article 49a, Paragraph 2.

or surrender of unlawfully earned profits in accordance with the provisions on agency without authority.[59] Hindrances of competition particularly include the refusal to deal and discriminatory measures.[60]

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.[61] Furthermore, civil courts also have the possibility to order interim measures.

With respect to case law, in the *Etivaz* decision,[62] 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.[63]

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 the 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' (see Section VIII). Even today, civil court proceedings may be preferable in refusal to deal cases.

As case law has shown, compensation payments in civil proceedings may also lead to a reduction of the sanction, although this is not explicitly stated in legislation.

VIII FUTURE DEVELOPMENTS

The consultation on the partial revision of the Cartel Act is set to take place at the end of 2021, with the Federal Council's dispatch expected to follow at the end of 2022. The partial revision will most likely include, among other things, the modernisation of merger control, the improvement of the opposition procedure and the strengthening of civil antitrust law.

Initiated by the popular Fair Price Initiative, Parliament revised the Cartel Act and adopted the concept of relative market power. Under the new law, prohibitions previously applicable only to dominant undertakings will be extended to undertakings with only relative market power.

An undertaking is considered to have relative market power if other undertakings depend on it with respect to the supply of, or demand for, a product or service in such a way that there is no sufficient and reasonable possibility to switch to other undertakings.

59 id., at Article 12, Paragraph 1.
60 id., at Article 12, Paragraph 2.
61 id., at Article 13.
62 BGE 139 II 316.
63 BGE 134 III 438.

In contrast to the traditional determination of market dominance,[64] it is irrelevant whether the allegedly relatively dominant undertaking can behave independently of other market participants to a significant extent. Whether an undertaking has relative market power must always be determined in relation to a specific bilateral business relationship.

In addition to the concept of relative market power, a further type of abusive practice is added to Article 7, Paragraph 2 of the Cartel Act, prohibiting undertakings with relative market power and dominant undertakings to restrict customers from purchasing goods or services offered in Switzerland and abroad at local prices and conditions.

Whether a contractual partner is dependent is likely to be assessed by ComCo on the basis of the German practice. In this context, the Competition Commission has already announced that it will strive for leading decisions analogous to German case practice and for various sectors.

Direct penalties for an abuse of relative market power (i.e., for a first offence) are not envisaged. However, in the event of a violation against a final decision prohibiting a certain abusive behaviour of an undertaking with relative market power, the undertaking may be fined up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years.

According to the competent authority, the amendment will not enter into force before the beginning of 2022.

64 Article 4, Paragraph 2 of the CartA.

Appendix 1

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