THE CARTELS AND LENIENCY REVIEW

SEVENTH EDITION

Editors
John Buretta and John Terzaken

THE LAWREVIEWS

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2019

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Chapter 25

SWITZERLAND

Marcel Meinhardt, Benoît Merkt and Astrid Waser[1]

I ENFORCEMENT POLICIES AND GUIDANCE

The Federal Law on Cartels and Other Restraints of Competition of 6 October 1995 (the Cartel Act), as amended, is the legislation regulating cartels in Switzerland. The regulatory framework is complemented by several federal ordinances, and general notices and communications of the Competition Commission (the Commission).

The federal authorities responsible for the investigation of cartel matters are the Commission and the Secretariat of the Commission (the Secretariat), which are independent of the federal government. The Commission consists of 13 members, who are elected by the Federal Council, and is headed by a president and two vice presidents. The majority of the members must be independent experts (having no interest in or special relationship with any economic group whatsoever) – they are usually professors of law or economics. The Commission is the deciding body in cartel matters, while investigations are conducted by the Secretariat. The Secretariat also prepares the Commission's decisions. It is organised into four services, responsible for the product, services, infrastructure and construction markets respectively. Each service is headed by a vice director. The Secretariat has more than 70 employees, including a significant number of economists.

The Cartel Act prohibits unlawful restraints of competition such as anticompetitive agreements or concerted practices. Anticompetitive agreements are characterised by the following three elements:

a Regarding the content and effect of an agreement limiting effective competition in the market for certain goods or services, either the purpose or the effect of the agreement must be to significantly impede competition or to eliminate effective competition.

b Irrespective of the form it takes, any agreement qualifies under the Cartel Act, be it bilateral (a cooperative or non-enforceable agreement, a binding, non-binding or 'gentlemen's agreement') or the concerted practices of several undertakings.

c Regarding the parties to the agreement, the Cartel Act applies both to agreements between undertakings operating at the same level of the market and to those between undertakings operating at different levels of the market (horizontal and vertical agreements).

1 Marcel Meinhardt, Benoît Merkt and Astrid Waser are partners at Lenz & Staehelin.

The Cartel Act is based on the principle of abuse. The mere existence of an anticompetitive agreement does not, in principle, mean that the agreement is unlawful. To be unlawful, such an agreement must either eliminate effective competition or significantly restrict effective competition without being justified on economic efficiency grounds.

However, by law (Article 5(3) and (4) of the Cartel Act), certain horizontal and vertical restraints (hard-core restraints) are presumed to eliminate effective competition, namely:

a horizontal agreements that:
- directly or indirectly fix prices;
- restrict quantities of goods or services to be produced, purchased or supplied; or
- allocate markets geographically or according to trading partners; and

b vertical agreements that:
- contain minimum or fixed resale prices; or
- foreclose geographical markets.

Such a presumption may be rebutted if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. If competition is not eliminated, it has to be assessed whether the agreement significantly restricts competition. According to the Federal Supreme Court's *Gaba* and *BMW* decisions, 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.

In addition, in exceptional cases and at the request of the undertakings concerned, the Federal Council may authorise specific conduct of undertakings for compelling public interest reasons.

II COOPERATION WITH OTHER JURISDICTIONS

As Switzerland is not part of the European Union, investigations, prosecutions and sanctions decided by the European Commission have no legal implications for the Commission. The same applies for decisions by antitrust authorities in other jurisdictions. Even if the EU regulatory framework and case law has often made significant inroads into the Commission's practice, the Federal Supreme Court has held explicitly that Swiss competition law must be interpreted independently from EU law.

However, the bilateral agreement between the European Community and the Swiss Confederation on Air Transport provides for directly applicable substantive and procedural provisions regarding competition law. According to the agreement, the European Commission rules on the admissibility of agreements, decisions and concerted practices as well as abuses of a dominant position concerning routes between Switzerland and the European Union, whereas the Commission remains responsible for routes between Switzerland and third countries. In the case of investigations on possible infringements that are carried out under these competences, the Swiss and European authorities are obliged to cooperate fully (i.e., to give the other party all necessary information and assistance in the case).

Also, Switzerland was the first state to sign a second-generation cooperation agreement in competition matters with the European Union, which entered into force on 1 December 2014. This agreement is the legal basis for cooperation between the European Commission (but not the Member States) and the Swiss authorities. Its aim is closer cooperation. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the European Commission and the Commission seek

to combat cross-border anticompetitive practices more effectively. Therefore, the competition authorities may inform each other of enforcement activities and coordinate investigation procedures (e.g., parallel dawn raids) as well as transmit certain information even without the consent of the undertakings concerned and may use this information for the enforcement of their respective competition laws. The exchange of information without consent is subject to narrow restrictions. The competition authorities must investigate the same or related conduct. Information obtained under leniency or settlement procedures must not be exchanged without consent. The same applies to information that has been received in breach of procedural rights, such as legal professional privilege and the right against self-incrimination. Further, the competition authorities are entitled but not obliged to exchange information.

In the absence of an agreement, the Swiss authorities are able to share confidential information with other competition authorities if all the undertakings concerned have issued a waiver.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

According to Article 2(2), the Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (the effects doctrine). Therefore, agreements concluded abroad or conduct that takes place outside Switzerland but that has such effects in Switzerland may fall under Swiss jurisdiction. The Commission imposed severe sanctions on Nikon and BMW in 2015 because their European dealer agreements contained provisions prohibiting exports to countries outside the European Economic Area (EEA). As Switzerland is not part of the EEA (and was, as a result, affected by those provisions), the Commission was of the opinion that these restrictions led to a foreclosure of the Swiss market. In general, the Commission tends to interpret effects in Switzerland rather broadly – the mere possibility of effects suffices.

The Federal Supreme Court confirmed in the *Gaba* and *BMW* cases that, pursuant to the effects doctrine, restrictions of competition committed outside Switzerland also fall into the geographical scope of the Cartel Act. It is sufficient that the restriction of competition may potentially have an effect on the Swiss market. Whether the restrictions of competition actually had an effect on the Swiss market is not decisive.

IV LENIENCY PROGRAMMES

The Cartel Act provides for a leniency programme. According to the Cartel Act, an undertaking that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from total or partial immunity.

There are no statutory deadlines for applying for immunity or leniency. However, only the first applicant may enjoy total immunity. Markers are available and may be applied for, preferably by email or fax and precedent announcement by phone. In addition, it is also possible to deliver the marker in person or to have it delivered by a representative, to send it by mail or, with the agreement of the Secretariat, to make an oral statement on record at its premises. However, one must bear in mind that these options are slower than a notification by email or fax, particularly during a dawn raid. Further, if the submission is delivered by post, it may not be possible under certain circumstances to precisely timestamp the report upon receipt and to establish the order of precedence or ranking. It is not possible to apply

for a marker by phone. Marker requirements are set out in the notice on leniency published by the Secretariat, including a brief description of the company and the conduct. There are no statutory deadlines for applying or perfecting a marker.

The Secretariat will acknowledge receipt of the leniency application and specify the date and time of its receipt. With the consent of the president or either of the two vice presidents of the Commission, the Secretariat will communicate to the applicant whether it deems that the conditions for total immunity from fines are met, any additional information that the disclosing undertaking should submit and, in cases of anonymous disclosure, the time frame within which the undertaking should reveal its identity.

The threshold for total immunity is rather high. Pursuant to the Ordinance on Sanctions, the Commission may grant immunity from fines if an undertaking is the first to either:

a provide information enabling the Commission to open an in-depth investigation and the Commission did not have, at the time the leniency application was filed, sufficient information to open a preliminary or an in-depth investigation (disclosure cooperation); or

b submit evidence enabling the Commission to find a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the Commission did not have, at the time the leniency application was filed, sufficient evidence to find an infringement of the Cartel Act (identification cooperation).

Moreover, the undertaking has to fulfil the following conditions:

a It has not coerced any other undertaking into participating in the infringement of competition and has not played the instigating or leading role in the relevant infringement of competition.

b It voluntarily submits to the competition authority all available information and evidence relating to the infringement of competition that lies within its sphere of influence.

c It continuously cooperates with the competition authority throughout the procedure without restrictions and without delay.

d It ceases its participation in the infringement of competition upon submitting its voluntary report or upon being ordered to do so by the competition authority.

In its recent practice, the Secretariat has repeatedly insisted that a leniency applicant must at least admit its involvement in an unlawful agreement subject to potential sanctions. It made it clear that it is not sufficient to simply produce factual elements. In the Secretariat's view, a leniency applicant would, in principle, have to admit that the unlawful agreement had effects on the markets. However, one decision of the Federal Administrative Court in the *Metal Fittings for Windows* cases clearly states the right of the leniency applicants to argue against the Commission's legal interpretation of the facts.

Where an undertaking does not meet these conditions but has cooperated with the Commission and terminated its involvement in the infringement no later than the time at which it submitted evidence, the Commission still has the option of reducing the sanction.

In addition, no fine will be imposed if the undertaking itself notifies the restraint of competition before it produces any effects (notification procedure). For that purpose, the Commission has published specific filing forms. In contrast, a sanction may be imposed if

the Commission communicates to the notifying undertaking the opening of a preliminary investigation (Article 26 of the Cartel Act) or the opening of an in-depth investigation (as per Article 27 of the Cartel Act) within five months of notification of the restraint and the undertaking continues to implement the restraint of competition.

In addition, Article 29 of the Cartel Act provides that the Secretariat may propose settlements to the undertakings involved concerning ways to eliminate the restraint of competition. A settlement must be made in writing and requires formal approval of the Commission. The settlement will also include a proposal of the range of the fine that has to be finally decided by the Commission. Settlements are binding on the parties and the Commission, and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties (see Section V).

The right of access to witness statements, minutes of hearings and other documents relevant to the investigation may be limited to protect cooperating parties. The level of confidentiality protection is the same for all leniency applicants. Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an *ad hoc* basis.

The Commission and the Secretariat are aware of a leniency applicant's need for confidentiality and, in the recent past, have established several measures to protect leniency applicants. However, these measures have not yet been tested in court. The catalogue of protective instruments includes the option of submitting oral statements, paperless proceedings and restricted access to the files. Access rights of other parties to an investigation were, in the Secretariat's practice, limited to accessing the files at the premises of the Secretariat. The right to take photocopies was limited to annexes, while copies of the main body of corporate statements or minutes of hearings were not allowed. In addition, access to the files was only granted shortly before the investigation had finished. The Secretariat has also implemented a number of specific internal measures to protect leniency applicants. Internal access to the file is restricted, and only the Secretariat case team knows about the existence or identity of leniency applicants. Moreover, the leniency documents are stored in a separate file.

When opening an investigation, the Secretariat gives notice by way of official publication. The notice states the parties to the investigation and its purpose. There is no express obligation to keep the identity of the leniency applicant confidential. In practice, the Secretariat keeps the leniency applicant's identity confidential for as long as possible. However, even if the final decision does not reveal the name of the leniency applicant, it is not impossible that a party familiar with the facts of the case may deduce the applicant's identity from the context.

Furthermore, according to its practice, the Commission excludes leniency information completely from the disclosure to third parties of data of a cartel investigation, which is closed and the respective Commission's decision is final and binding.

Under Swiss law, a counsel may represent the employees under investigation as well as the undertaking, provided that it discloses the fact to both parties and that there is no conflict of interest. Given that different kinds of sanctions apply to individuals and undertakings, as a general rule it is advisable to seek independent legal advice (see Section V).

V PENALTIES

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question. Although generally accepted in the actual doctrine, it has not yet been confirmed that the nullity of the agreements applies *ex tunc*.

From an administrative law point of view, under Article 49a of the Cartel Act, direct sanctions (fines) are imposed on undertakings that participate in a hard-core horizontal cartel according to Article 5(3) of the Cartel Act or participate in hard-core vertical restraints pursuant to Article 5(4) of the Cartel Act (see Section I).

The Federal Supreme Court confirmed in the *Gaba* and *BMW* cases that direct sanctions may also be imposed for hard-core agreements pursuant to Article 5(3) and (4) of the Cartel Act that significantly restrict but do not eliminate effective competition. This question had been disputed for a long time in the Swiss doctrine.

The Ordinance on Sanctions lays down the method of calculation of fines. In addition, the Commission has issued an explanatory communication on the Ordinance of Sanctions.

The maximum administrative sanction is a fine of up to 10 per cent of the turnover realised in Switzerland during the preceding three financial years (cumulative). The amount of the fine is calculated by taking into account the duration and gravity of the unlawful agreements or practices, as well as the presumed profit arising from the unlawful agreements or practices. In a first step, the Commission determines the base amount of the penalty that, depending on the seriousness and nature of the infringement, may amount up to a maximum of 10 per cent of the turnover achieved by the undertaking concerned in the relevant markets in Switzerland during the preceding three financial years. In a second step, the base amount is increased according to the duration of the infringement. In a third step, the penalty may be increased or reduced because of aggravating and mitigating factors, such as achieving a profit that is particularly high by objective standards, playing an instigating or leading role in the restraint of competition, or playing a strictly passive role in the restraint of competition. A discount can also be obtained based on leniency cooperation or on settlement. Finally, in a last step, the Commission will ensure that the penalty imposed is proportional. By determining the penalty level, the Commission is bound by the maximum amount of the sanction.

Furthermore, an undertaking that violates an amicable settlement to its own advantage, a legally enforceable decision of the Commission or a judgment by either the Federal Administrative Court or the Federal Supreme Court can be fined up to 10 per cent of the turnover it achieved in Switzerland in the preceding three financial years. In assessing the amount, the likely profit that resulted from the unlawful behaviour is taken into account.

Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an investigation, can be fined up to 100,000 Swiss francs.

The Commission has not yet imposed sanctions against individuals acting as private undertakings in cartel cases.

The Cartel Act contains no specific regulation on the exclusion from public procurement procedures in cases of cartel conduct. However, the Swiss Public Procurement Act provides that the contracting authority may exclude undertakings from an ongoing procurement procedure or delete them from a list of qualified undertakings in cases of cartel conduct. In addition, several cantonal procurement acts provide that undertakings may be banned from participating in procurement procedures for a period of several years in cases of cartel conduct.

There are no direct criminal sanctions for individuals for cartel activities in the Cartel Act. Swiss law does not provide for imprisonment for cartel conduct. However, individuals

acting for an undertaking, but not the undertaking itself, who violate a settlement decision, any other enforceable decision or court judgment in cartel matters, may be fined up to 100,000 Swiss francs. In addition, individuals who intentionally fail to comply or only partly comply with the obligation to provide information during an investigation can be fined up to 20,000 Swiss francs. Individuals who can be fined include executives and board members, as well as all *de facto* managers and directors. These sanctions are time-barred after five years following the incriminating act. The Commission has yet to impose fines against individuals in cartel cases. Further, individuals involved in cartel conduct in public procurement proceedings may be subject to direct criminal sanctions under the Swiss Criminal Code, particularly for fraud and forgery of documents.

VI 'DAY ONE' RESPONSE

The Secretariat has broad investigative powers. It may hear the parties who have allegedly committed a competition law infringement, as well as third parties concerned (such as competitors or suppliers), ask for statements and hold hearings. It can compel testimony from witnesses, although not from the parties alleged to have entered into an unlawful anticompetitive agreement. Any hearings or witness statements must be evidenced in the minutes. The parties involved have the right to comment on these minutes. The parties in the investigation are, in principle, required to disclose information and documents. The competition authorities may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimony and expert opinions. Moreover, according to Article 42(2) of the Cartel Act, the president and each of the vice presidents of the Commission have the power to order inspections, dawn raids and seizures at the request of the Secretariat. In the case of a dawn raid the Secretariat has the right to search all types of premises, both business premises and private apartments, and all types of devices. In the field of electronic data, the search authorisation extends to all data that can be accessed from within the searched premises.

The persons concerned have an obligation to endure the dawn raid passively and not interfere with any investigation activity. Access to the rooms and computer systems to be searched has to be granted by opening doors and safes and disclosing passwords. Further, no documents or data may be destroyed or hidden, since it cannot be ruled out that such behaviour may be classified as preventing an officer from performing a duty, which is punishable according to the Swiss Criminal Code. In addition – as has already happened – violations of the obligation to submit may be taken into account as an aggravating factor when calculating the sanction.

However, the persons concerned have no duty to cooperate as long as the undertaking has not decided to file for leniency. They are not required to participate actively in the search.

Undertakings subject to an inspection have the right to be assisted by external lawyers. Nevertheless, the representatives of the Secretariat in charge of the investigation will not wait for the external lawyer to arrive before searching the premises or seizing documents and electronic data. However, any evidence discovered while external lawyers are not present will be separated. Once an external lawyer is on site, he or she may screen the evidence collected in his or her absence, comment on its content and, if necessary, ask for it to be sealed.

In view of the above, it is advisable for an undertaking to have dawn raid guidelines redacted and implemented stating the following: (1) the search warrant and the identification documents of the inspectors have to be inspected carefully and copied; (2) the inspectors

have to be granted access and be accompanied by an employee; (3) the legal department and the chief executive officer have to be informed immediately; and (4) the employees must not prevent or impede the search (i.e., neither destroy nor hide any documents or data).

VII PRIVATE ENFORCEMENT

Third parties impeded by an unlawful restraint of competition from entering or competing in a market may request before the civil courts:

a the elimination of the unlawful agreement or cartel;
b an injunction against the unlawful agreement or cartel;
c damages; or
d restitution of unlawful profits.

However, contrary to the proceedings before the Commission the burden of proof in civil proceedings is with the claimant. Under Swiss law, the main difficulties are providing concrete proof of the damage incurred and establishing a sufficient connection between the anticompetitive agreement and the damage. This is even more difficult in the case of indirect purchaser claims. Also, court costs and legal costs must usually be borne by the losing party in the proceedings. As a consequence, civil proceedings are very rare in Switzerland.

The claim is limited to the damage actually incurred; no punitive damages are available in Switzerland. Passing-on defences are not excluded. However, a claimant may request the remittance of illicitly earned profits.

VIII CURRENT DEVELOPMENTS

i Federal Administrative Court clarifies treatment of non-binding retail price recommendations

In January 2018, the Federal Administrative Court reversed the sanctions against Pfizer, Eli Lily and Bayer imposed by the Commission. Pfizer, Eli Lilly and Bayer sell their medications for erectile dysfunction in Switzerland through pharmacies and self-dispensing physicians who are authorised to sell medications. All three pharmaceutical companies had published retail price recommendations (RPR) for these medications, which were explicitly designated as 'non-binding'. In November 2009, the Commission ruled that publishing and following the RPR under the specific circumstances of the case would result in an unlawful and sanctionable vertical price-fixing. Pfizer, Bayer and Eli Lilly were prohibited from further publishing the RPR. In addition, the three pharmaceutical companies were fined a total of 5.7 million Swiss francs.

With its three decisions of 19 December 2017, the Federal Administrative Court set aside the sanctions against Pfizer, Eli Lily and Bayer imposed by the Commission. The Federal Administrative Court held that unilaterally announced, recommended prices are only problematic from a competition law point of view if they lose their character as a recommendation and are monitored and enforced by exerting pressure or granting incentives. The Federal Administrative Court's decisions have not entered into legal force yet.

ii Federal Supreme Court confirms admissibility of international forum running

In its decision of 14 March 2018, the Federal Supreme Court ruled that securing an advantageous place of jurisdiction in Switzerland (known as forum running) during

international disputes is a sufficient interest for an action seeking a negative declaratory judgement. With this ruling, the Federal Supreme Court deviates from its previous case law, according to which Swiss parties who were confronted with an impending legal action by the counterparty abroad were not in a position to pre-empt it by filing an action for a negative declaratory judgment (i.e., an action seeking a declaration that the claim asserted by the counterparty does not exist) in Switzerland. The background of the Federal Supreme Court's new ruling was the decision of Swatch Group and two of its subsidiaries (the plaintiffs) to stop supplying the defendant (an English wholesaler of watch parts; the defendant) in the context of introducing a selective distribution system. The defendant asked the plaintiffs to confirm that they would resume the delivery as otherwise the defendant would file an action before the High Court in London for violation of European antitrust law without further notice. The defendant subsequently filed an action in London. However, shortly before that, the plaintiffs filed an action for a negative declaratory judgment in the Commercial Court of the Canton of Berne. In this action, the plaintiffs asked for a declaration that they are not obliged to supply the defendant and that they do not owe the defendant anything in connection with the termination of supply, in particular no damages. The Court limited the proceedings, *inter alia*, to the question of whether the plaintiffs had a legitimate interest in such an action. On the basis of Swiss law, the Court denied this interest and dismissed the action on procedural grounds. As the last instance, the Federal Supreme Court upheld the complaint by Swatch Group and its two subsidiaries, and concluded that on the basis of Swiss law, the aim of a plaintiff (i.e., the defendants in forthcoming foreign proceedings) to secure a favourable place of jurisdiction in Switzerland is a sufficient interest in an action for a negative declaratory judgment. According to the Federal Supreme Court, the previous restrictive approach disadvantaged parties in Switzerland in disputes since they were denied the possibility of filing such an action in Switzerland whereas this opportunity was available to their counterparties abroad. According to the Federal Supreme Court, this change of jurisprudence applies 'at least in the international context'. It thus remains unclear whether the Federal Supreme Court would also abandon its restrictive approach with regard to forum running in domestic disputes and would permit actions for a negative declaratory judgment to this end.

iii Federal Supreme Court must decide whether appeal of merger decisions require joint action of involved parties

In May 2017, the Commission prohibited a proposed merger between the two Swiss ticket distributors Ticketcorner and Starticket after an in-depth review. Ticketcorner and Starticket both distribute tickets for concerts and shows through physical and online channels. They also provide software solutions for the direct sale of tickets. As a result of the merger, Starticket would have become a wholly owned subsidiary of Ticketcorner. Ticketcorner filed an appeal before the Federal Administrative Court against the Commission's decision, whereas the joint venture partner did not appeal the decision. In its judgement of 3 May 2018, the Federal Administrative Court rejected Ticketcorner's appeal and argued that Ticketcorner was not in a legal position to appeal the decision of the Commission without its joint venture partner. However, the Federal Administrative Court also held that there was neither a legal practice nor a relevant provision in the applicable statutes addressing this question. Ticketcorner subsequently appealed the Federal Administrative Court's decision before the Federal Supreme Court. The Court will have to decide whether an appeal of a merger decision by the Commission requires a joint action of all the involved joint venture parties.

Appendix 1

ABOUT THE AUTHORS

MARCEL MEINHARDT

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Dr Marcel Meinhardt is a leading expert in competition law 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. He also advises on regulatory issues in connection with the electricity and gas industry. Marcel Meinhardt has been responsible for a large number of merger notifications to the Swiss Competition Commission and has coordinated multi-jurisdictional merger filings. He advises in contentious and non-contentious matters and has acted in high-profile cases on alleged abuses of dominant positions, vertical restraints and cartels. He heads the competition and regulated market practice group of Lenz & Staehelin.

In April 2017, the Swiss business magazine *Bilanz* named Marcel Meinhardt as competition lawyer with the most recommendations of general counsels and colleagues in Switzerland. *Chambers and Partners* has recognised his many years as a leading lawyer in the field of competition and antitrust. He is described as a 'brilliant lawyer' and clients attest that 'he impresses with his first-rate theoretical and practical knowledge of competition law, and is a very quick and smart thinker, who is pragmatic as well as thorough. He tailors his advice to our individual needs and to the specific requirements of each situation, and I appreciate his incredibly fast response times' (2018). He is commended as a 'dedicated litigator who is very supportive and has good business sense' (2017). Marcel Meinhardt is 'outstanding in what he does, what he writes and how he handles searches' (2016). *The Legal 500* lists him in the latest 'Legal 500 Hall of Fame' as one of only four Swiss competition lawyers who has received constant praise from his clients for continued excellence and for being 'at the pinnacle of the profession'. He is 'one of the top leading experts in competition and antitrust law', who 'focuses on results and the specific requirements of each situation' and possesses 'first-rate theoretical and practical knowledge' (2018). *Who's Who Legal* 2018 lists Marcel Meinhardt as a 'most highly regarded' lawyer and he is considered a 'top partner at the firm and in Swiss competition law'. According to *Who's Who Legal* 2017, he has the 'ability to analyse complex circumstances and provide advice on both the legal and business aspects'. He also qualifies as 'absolutely brilliant' and as 'a counsel you desperately want to have, especially on hard-core abuse of dominance, cartel and other horizontal agreements' (*Who's Who Legal* 2016).

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

Benoît Merkt is also one of the leading Swiss law practitioners in the field of tax-exempt and non-profit organisations. He heads the firm's practice in this field. He has incorporated major foundations and associations of international scope and regularly advises clients with respect to the structuring and implementation of charitable projects in Switzerland and abroad.

Considered as 'one of the best' and 'recognised for his first-rate competition law practice' (*Who's Who Legal* 2017), 'the superb Benoît Merkt is noted by sources for his expertise in competition law and his particular skill in complex cross-border cases' (*Who's Who Legal* 2018). Clients laud his 'excellent knowledge and relationship with clients, clarity and precision', also adding that he is 'well connected with relevant authorities' (*Chambers and Partners* 2018).

ASTRID WASER

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Dr Astrid Waser is a leading expert in competition law with an excellent reputation in the Swiss market. She specialises in all aspects of competition (antitrust) law, public procurement law and media and telecoms law. Astrid Waser also advises on regulatory issues in connection with the gas and electricity industries. She advises in non-contentious matters and represents clients before Swiss authorities and courts, in particular in merger filings, cartel investigations and infringement procedures of the Swiss Competition Commission as well as in public procurement procedures. She also has long-standing experience in the field of internal and regulatory investigations and compliance matters. Astrid Waser publishes on Swiss and European competition law and public procurement law, and is a regular speaker at conferences and seminars.

Chambers and Partners 2018 recognises Astrid Waser as a leading antitrust lawyer with an excellent reputation in the Swiss market. Clients report that 'she is an experienced competition lawyer with excellent analytic skills and very good business sense'. She has also been described as 'a very bright person' and her 'experience and quality' was praised by clients (2017 edition). Astrid Waser is featured in *Who's Who Legal* 2018 as a 'very intelligent and bright' lawyer with a wealth of expertise in the field. She is described as 'a true antitrust lawyer' and is commended as 'a bright practitioner' (*Who's Who Legal* 2017). She also qualifies as 'a prominent purebred competition lawyer' (*Who's Who Legal* 2016).

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