F. Competition law

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Mani Reinert's practice covers all aspects of antitrust law in a wide range of industries.

He routinely represents clients in merger control filings before the Swiss Competition Commission and co-ordinates multijurisdictional merger control filings. Furthermore, he advises and represents clients in administrative proceedings before the Swiss Competition Commission and assists clients in dawn raids and in the implementation of compliance programs.

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In Chambers Europe, Mani Reinert is ranked in band 1 of the leading lawyers for Competition / Antitrust and Legal 500 lists Mani Reinert among the leading individuals in Switzerland in the area of competition law.

1. Introduction

The Swiss Act on Cartels ("CA") *(Kartellgesetz, Loi sur les cartels)* distinguishes three types of conduct that are subject to regulation:

- Agreements that (i) significantly restrict competition and are not justified for reasons of economic efficiency (see below 2.) or that (ii) eliminate effective competition.
- The abuse of a dominant position (see below 3.)
- The concentration of undertakings (see below 4.).

2. Agreements restricting competition

2.1. Introduction

Under the Swiss Act on Cartels ("CA") *(Kartellgesetz, Loi sur les cartels)* two types of agreements restricting competition are unlawful:

- Agreements that significantly restrict competition. According to a leading case decided by the Federal Supreme Court, agreements which presumptively eliminate competition according to the CA, i.e. horizontal price fixing, quantity fixing and market sharing (horizontal hardcore restrictions), as well as vertical price fixing and territorial protection (see below 2.3) are in general deemed to be significant without the need to show that there is a quantitatively significant restriction of competition. Significant restrictions of competition are unlawful if they are not justified for reasons of economic efficiency (see below 2.2).
- Agreements that eliminate effective competition. Such agreements are unlawful and cannot be justified for reasons of economic efficiency. As already mentioned, the CA presumes that certain restrictions, i.e. horizontal hardcore restrictions as well as vertical price fixing and territorial protection eliminate effective competition (see below 2.3).

Unlawful agreements restricting competition have no effects between the parties and are void. In addition, direct fines may be imposed on parties that entered into agreements that presumptively eliminate effective competition (i.e. horizontal hardcore restrictions as well as vertical price fixing and vertical territorial protection) (see below 2.4).

2.2 Agreements significantly restricting competition

Agreements that significantly restrict competition are unlawful if all of the following conditions are fulfilled:

- There is an agreement or concerted practice;
- which has as its object or effect the restriction of competition;
- which is significant and;
- which cannot be justified on grounds of economic efficiency.

2.2.1 Agreement or concerted practice

The CA does not only cover binding and non-binding **agreements** but also **concerted practices.** Concerted practices are a form of coordination which, without qualifying as an agreement, knowingly substitutes cooperation between the respective enterprises for competition. **Recommendations** (for examples price recommendations issued by trade associations) have also been considered as concerted practice even if only a minority of the addressees have followed them.

However, mere **parallel behavior,** where enterprises react in the same way but based on autonomous decisions to changes in the market, is not caught by the concept of concerted practice. This applies even if such parallel behavior occurs consciously, i.e. if the enterprises know that their competitors will react to market changes in a parallel way. This is because competition also implies that competitors monitor each other and the market conditions and must have the possibility to react to such changes in a profit-maximizing manner. The same is true for price leadership where competitors, based on autonomous decisions, follow the pricing behavior of the market leader.

In the following, the term "agreement" is used as a collective term for both agreements and concerted practices.

2.2.2 Object or effect of restricting competition

Only agreements and concerted practices having as their object or effect a restriction of competition may be unlawful. As regards horizontal or vertical agreements on prices, territorial protection and production quota, such agreements are considered by the Competition Commission ("ComCo", *Wettbewerbskommission, Commission de la Concurrence*) to have in principle as their object a restriction of competition.

2.2.3 Significant restriction of competition

According to the recent Gaba-judgment of the Federal Supreme Court *(Bundesgericht, Tribunal fédéral),* **agreements which the CA presumes to eliminate effective competition,** i.e. agreements among competitors to fix prices or quantities or to allocate territories or customers (horizontal hardcore restrictions), as well as vertical price fixing and territorial protection (see below 2.3) are in general deemed to significantly restrict competition without the need for ComCo to show that there is a quantitatively significant restriction of

competition. In other words, an agreement to fix prices is generally deemed to restrict competition without ComCo having to show that the parties had a big market share, consistently adhered to it etc. In the mentioned *Gaba* case, the Federal Supreme Court decided that an agreement between the licensor Gaba and the licensee Gebro to prevent parallel exports out of Austria (and therefore into Switzerland) constituted a significant restriction of competition regardless of any quantitative aspects. Similarly, in *BMW*, the Federal Administrative Court held that a prohibition of BMW on its German dealers to export new vehicles to Swiss customers constituted a significant restriction of competition regardless of the fact that in the relevant period of more than a year, over a thousand new BMWs and Minis were parallel imported into Switzerland. This per se approach is not appropriate. It risks to qualify agreements such as joint buying, co-insurance schemes, joint production etc. as per se significant restrictions of competition that are, however, not anti-competitive but on the contrary pro-competitive. Also, it creates inappropriate incentives for ComCo to seek to wrongly qualify agreements as horizontal hardcore restrictions or vertical price fixing and territorial protection, respectively, in order to be dispensed with a quantitative analysis.

As regards other agreements, ComCo has to show that restriction of competition is **qualitatively and quantitatively** significant.

A restriction is **qualitatively significant** if it restricts an important competition parameter.

Whether a restriction is **quantitatively significant** is assessed based on the degree of competitive pressure that the parties to the agreement face from "outsiders" (rivals not being parties to the agreement), from other parties to the agreement and from customers with buying power. Agreements that do not constitute a hardcore restriction that is by law presumed to eliminate effective competition (such as horizontal price fixing, resale maintenance, or the prevention of passive sales), will generally not be quantitatively significant if the parties involved have a combined market share of 10 % in case of a horizontal agreement or 15 % in case of a vertical agreement.

2.2.4 Justification on grounds of economic efficiency

Significant restrictions of competition are only lawful if they can be justified on grounds of economic efficiency. This is the case if the restriction:

- is necessary to reduce production or distribution costs; to improve products or manufacturing processes; to promote research or the dissemination of technological or professional know-how; or to rationalize the use of resources; **and**

- under no circumstances allows the participating enterprises to eliminate effective competition.

So far, this efficiency justification has played a minor role. Many practices which where found to form a significant restriction of competition were also found not to be justifiable and consequently to be unlawful. Also in some cases, ComCo argued that the justification offered by the parties did not constitute an efficiency justification within the sense of the CA, rather it would constitute a general public interest not to be assessed by ComCo. In other cases ComCo argued that the restriction would not be necessary to achieve the efficiency goal. However, it has to be born in mind that many of these cases involved hardcore restrictions.

Cases where ComCo held that a significant restriction of competition was justified by reasons of economic efficiency, involved multilateral interchange fees in the credit card industry, joint-purchase agreements of smaller insurers to achieve countervailing market power vis-à-vis hospitals with market power, as well as a specialization agreement between small and medium-sized enterprises in the print industry.

2.2.5 Notices of ComCo

The Competition Commission has issued various notices[31] in which it has stated under which conditions specific restrictions can be justified for reasons of economic efficiency and ComCo's accompanying explanations **("Vertical Explanations").**[32]

One of the most important notices is the notice on the assessment of vertical agreements under the CA **("Vertical Restraints Notice")**[33] In many points, the Vertical Restraints Notice and the Vertical Explanations correspond to the EU Regulation No. 330/2010[34] of the European Commission. According to the Vertical Restraints Notice, vertical agreements not containing certain hardcore restrictions are justified if neither the market share of the supplier on the market on which it sells the contract goods nor the market share of the buyer on the market where it purchases the contract goods, does exceed 30 %. There remain, however, some differences. For example, in the Vertical Explanations, ComCo states that an obligation of the buyer to purchase the contractual goods

31 See http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de for German.

32 https://www.weko.admin.ch/dam/weko/de/dokumente/2017/Erl%C3%A4uterungen%20zur%20Vertikalbekanntmachung%20vom%2012.%20Juni%202017.pdf.download.pdf/Erl%C3%A4uterungen%20zur%20Vertikalbekanntmachung%20vom%2012.%20Juni%202017.pdf

33 See https://www.weko.admin.ch/dam/weko/de/dokumente/2017/Vertikalbekanntmachung%20vom%2028.%20Juni%202010%20(Stand%2022.%20Mai%202017).pdf.download.pdf/Vertikalbekanntmachung%20vom%2028.%20Juni%202010%20(Stand%2022.%20Mai%202017)_D.pdf

34 See http://ec.europa.eu/competition/antitrust/legislation/vertical.html.

only in the contractual territory would be an indirect restriction of passive sales (and presumptively eliminate effective competition). In addition, occasionally ComCo appeared to assume that parallel networks with similar agreements would cumulatively restrict competition without investigating or elaborating whether or why this would in fact be the case.

Following the enactment of EU Regulation No. 461/2010[35] of the European Commission, ComCo has revised its notice on the assessment of vertical restraints in the **motor vehicle sector (Motor Vehicle Notice).** The Motor Vehicle Notice mirrors to some extent the EU Regulation No. 461/2010 of the European Commission. However, there are notable (and unexplained) differences: For example, the Motor Vehicle Notice does not provide for an exemption below a market share of 30 %, it prevents suppliers from requiring of their dealers to offer maintenance and repair services, it does prohibit the restriction of the sale of competing products, it requires a two-year termination period and appears to require that service dealers have the right to restrict their activities to selling spare parts. It is questionable whether these regulations which prohibit practices that are legal under EU competition law are compliant with the CA. It is worth mentioning that some courts have disregarded the former version of the Motor Vehicle Notice. For example, the Commercial Court of Zurich has refused to oblige suppliers to offer service dealers a new service dealer contract after its termination irrespective of whether the service dealers fulfilled the standards even though the former version of the Motor Vehicle Notice stipulated such a right.

In its **SME notice,** ComCo describes under which conditions agreements between small and medium-sized enterprises are lawful. Basically, this is the case if the agreement enhances the competitiveness of the participating enterprises and has a limited impact on the market unless it is a horizontal or vertical agreement on prices, territorial protection, or production quota.

In its notice on agreements on the use of **guidelines on cost calculation,** ComCo has set out the conditions under which guidelines on cost calculation are justified on grounds of economic efficiency. Put briefly, agreements regarding the use of guidelines on cost calculation are justified where such guidelines do only describe methods of cost calculation and do not restrict the freedom of the parties to determine their own prices and conditions of sale and do not imply an information exchange which could lead to a concerted practice. Consequently, guidelines on cost calculation cannot be justified if they stipulate fixed amounts of costs or if they suggest specific prices, margins, or rebates.

35 See http://ec.europa.eu/competition/sectors/motor_vehicles/legislation/legislation.html.

Another notice concerns the **homologation and sponsoring of sport goods.** In short, agreements on the **homologation** of sport goods are lawful if they are based on non-discriminatory and objective criteria which are contingent on the technical and qualitative requirements linked to the intended use of the respective sport goods. In addition, an international homologation must be acknowledged if the sport good fulfills the respective criteria. Agreements which make the use of sport goods conditional upon **sponsoring** are unlawful if they provide for an exclusive use of the sport goods of a sponsor and if such exclusivity applies to an entire tournament or sport event with a duration of a year, a season or a large part of it.

2.3 Agreements presumptively eliminating competition

2.3.1 Horizontal agreements

As already mentioned, the CA states that the following **horizontal agreements** (i.e. agreements between actual or potential competitors) are presumed to eliminate effective competition:

- Agreements to directly or indirectly fix prices. The main examples for such agreements are price cartels and bid rigging. However, ComCo also views multilaterally agreed interchange fees or joint purchasing as agreements that directly or indirectly fix prices (a practice that is to be rejected).
- Agreements to restrict the quantities of goods or services to be produced, bought, or supplied. Examples are quota cartels which serve to stabilize price cartels or non-compete obligations. However, according to ComCo also mutual specialization agreements are caught by this category (a practice that is to be rejected).
- Agreements to allocate markets by territories or by customers. Again, the main examples is bid rigging.

The **presumption** that effective competition is eliminated can be **rebutted** by showing that there is either effective external or effective internal competition.

However, the question of whether the presumption can be rebutted has become of limited practical relevance. According to the Gaba-judgment of the Federal Supreme Court, it is generally assumed that the agreement significantly restricts competition and, therefore, is unlawful unless it can be justified for reasons of economic efficiency.

2.3.2 Vertical agreements

As regards vertical agreements, i.e. agreements between firms being active on different levels of trade, elimination of effective competition is presumed in the following two cases:

- Agreements fixing minimum prices. The presumption does not cover vertical agreements on maximum prices. The same is true for resale price recommendations of the supplier as long as there is no pressure exercised or incentive offered to follow the recommended prices. In a case concerning Cialis, Levitra and Viagra, ComCo, however, found that price recommendations by manufacturers that were largely followed by the drug stores would constitute agreements on fixed retail prices even though there was no pressure exercised from or incentive offered by the manufacturers. The decision is currently on appeal and recent statements of ComCo (among others in the Vertical Explanations), indicate that ComCo has moved away from a position that a mere adherence to price recommendation would be sufficient to establish a resale price maintenance.
- Distribution agreements prohibiting passive sales (i.e. unsolicited sales) by other distributors. The presumption does not cover the prohibition of active sales.

The **presumption** of elimination of effective competition can be **rebutted** by showing that there is either effective intrabrand or interbrand competition.

However, again, if the presumption is rebutted, according to the practice of the Federal Supreme Court, it is generally assumed that the agreement significantly restricts competition and, therefore, the agreement is unlawful unless it can be justified for reasons of economic efficiency.

2.4 Consequences of unlawful agreements

There are civil and public law consequences of unlawful agreements restricting competition.

As regards civil law, unlawful agreements restricting competition are void and not enforceable.

With respect to public law, ComCo can impose so-called **direct fines** in case of unlawful agreements that are presumed to eliminate effective competition. As set out above in 2.1, these are (1) horizontal agreements on price fixing, quota and market sharing as well as (2) vertical agreements on price fixing and territorial protection. As regards unlawful practices not falling within the scope of these two categories, fines can only be imposed after the parties have either contravened a decision declaring the practice as unlawful or a settlement concluded with ComCo. Both sorts of fines may amount to up to 10 % of the total group turnover generated in Switzerland during the last three business years. The fines are calculated based on the turnover generated in the market in Switzerland affected by the infringement and then increased/decreased for aggravating and mitigating factors. This turnover calculation methodology means

that companies having small margins and high sales are disproportionally hit by fines. For example, BMW received a fine of CHF 156 million due to the high sales figures generated in the car market.

The CA provides for **whistle-blower/leniency rules** with respect to direct fines. Under these rules, the first enterprise informing ComCo about an unlawful practice can get full immunity of fines. Full immunity, however, is not available to enterprises which have coerced other enterprises to participate in the unlawful practice or have been the originator or ring leader of the unlawful practice. Enterprises for which full immunity is not available (for example enterprises that came to inform ComCo after another enterprise has done so) may receive a reduction in fines of up to 50 % for cooperation with ComCo. The reduction depends on the significance of the added value of the cooperation (usefulness of submitted evidence etc.). Enterprises reporting another unrelated unlawful practice may receive a reduction of up to 80 %.

3. Abuse of a dominant position

3.1 Introduction

Enterprises having a dominant position must not impede other competitors (exclusive practices) or exploit their trading partners (customers and suppliers, respectively) (exploitative practices) by abusing their dominant position. This analysis involves three steps:

- Definition of the relevant market (see 2.2.1).
- Assessment whether there is a dominant position. There are two kinds of dominance: Single dominance where one enterprise is dominant (see 2.2.2) and collective dominance where two or more enterprises jointly hold a dominant position (see 2.2.3).
- Assessment whether the dominant enterprise abuses its dominant position (see 2.3.).

An enterprise which abuses its dominant position may be fined in an amount of up to 10 % of the turnover it generated in the last 3 business years in Switzerland (see 2.4).

3.2 Dominant position

3.2.1 Relevant market

The relevant market has a product and a geographic dimension:

The most common criterion to define the **product market** is demand-side substitutability. This concept asks which products are sufficiently similar in func-

tion, price, and attributes as to be regarded as reasonable substitutes for each other by users. Whether a product A is substitutable with product B may be determined by the SSNIP test (Small but Significant Non-transitory Increase in Price): If a hypothetical small (5–10 %) and permanent (1 year) increase in the price of product A would result in customers switching to product B and thereby making the price increase of product A unprofitable, product B is substitutable with product A.

The **geographic market** is defined according to the analogous criteria by asking within which geographic area customers switch suppliers or would do so in response to an increase in prices. In addition, it is sometimes asked in which area the competitive conditions are sufficiently homogeneous to prevent geographic price discrimination. This approach may lead to a broader definition of the geographic market.

3.2.2 Single firm dominance

In assessing whether a particular enterprise enjoys single dominance in the relevant market, the following criteria are taken into account:

- **Market share:** A high market share is often seen as an indication of a dominant position (especially if the other competitors are multiple times smaller). In the past, enterprises found to be dominant had generally market shares in the region of 60–100 %. However, in some decisions, some enterprises having a market share of 35–48 % were found to be dominant. Nevertheless, it should be stressed that market shares are only the starting point of the analysis. As the Federal Supreme Court rightly pointed out, a high market share can also imply effective competition if, for example, there are various substitutable products, but the customers choose the respective product because it is the most advantageous one. Similarly, ComCo found in a case that an enterprise with a market share of 50–70 % was not dominant because its prices showed that it could not act independently from its competitors.
- **Stability of market share:** Market shares dynamically changing over time show the existence of effective competition, i.e. that the respective enterprise is not dominant. For example ComCo concluded in light of a decrease of a market share from 65 % to 40 % within 2–3 years that there was no dominant position.
- **Market entry barriers / potential competition:** High market entry barriers and the lack of potential competition in connection with a high marketshore are an indication for dominance. Potential competition exists

where it is likely that new competitors may enter the market within a period of 2–3 years in a sufficient scale.

- **Countervailing power:** An enterprise may not be considered dominant where its trading partners have considerable buying power.
- **Other factors:** There may be factors that indicate dominance, as for example if the respective enterprise is the only one which has a national distribution network, enjoys a much higher degree of brand awareness etc.

3.2.3. Collective dominance

Collective dominance arises where two or more enterprises jointly have power over the relevant market, i.e. where the market structure is such that the enterprises necessarily collude instead of competing with each other. In assessing whether two or more enterprises are collectively dominant, the following criteria are taken into account:

- **Degree of concentration / market shares:** The more competitors there are the less likely a collective dominance is since the difficulties to collude increase exponentially with the number of players. Not surprisingly, the majority of cases where collective dominance has been discussed concerned duopolies. As regards the combined market share, in general, collective dominance can be excluded where the oligopolists have a joint market share of less than 50–60 %.
- **Stability of market shares:** Where market shares among the oligopolists change over time, this is a clear indication of effective competition.
- **Market transparency:** Collusion is only possible where the market is sufficiently transparent for all members of the dominant oligopoly to be aware, sufficiently precisely and quickly, of the direction in which the other members' market conduct is evolving.
- **Market entry barriers / potential competition:** Collusion is only possible where market entry barriers are sufficiently high to prevent entry of new competitors.
- **Symmetries in cost:** Collusion will be only sustainable where the oligopolists have similar cost structures because otherwise there will be a strong incentive for deviating from a common strategy.
- **Countervailing power:** Collusion is unlikely where the trading partners of the oligopoly have a strong position.
- **Linkages:** ComCo views corporate linkages (such as participation in joint ventures) as an important tool for facilitating collusive behavior.

- **Retaliation:** For a situation of collective dominance to be viable, there must be adequate deterrents to ensure that there is a long-term incentive in not departing from the common policy. This implies that highly competitive action of one member must provoke identical action by the other members of the dominant oligopoly so that it would derive no benefit from its initiative.

3.2.4 Economic dependence

Due to a change of the wording of the CA revised in 2003, there is a debate on whether the notion of dominance is broader than described above.

In the *Coop Forte* decision, a case concerning buyer power of Coop, one of the two big grocery chains in Switzerland, ComCo held in a *obiter dictum* that the term "dominant position" includes the notion of (i) "classic dominance" (in the form of single and collective dominance as described above) and (ii) "economic dependence." The concept of economic dependence implies that a company can also be held dominant if one of its suppliers/customers is economically dependent from the respective company.

The issue has not been decided so far in a contested procedure. In light of the legislative history, the Coop Forte *obiter dictum* is not defensible.

3.3 Abuse

The general criterion applied by ComCo to assess whether a specific practice constitutes an abuse of a dominant position, is to ask whether the practice does impede a competitor in entering into competition and whether the practice can be justified by legitimate business reasons. If such justification is possible, the practice is lawful. Examples of potentially abusive practices include:

- **Predatory price-cutting:** Predatory price-cutting is unlawful where (1) prices are below average avoidable cost (AAC, AAC is the average of the costs that could have been avoided if the dominant enterprise had not produced a discrete amount of extra output) and (2) there is a prospect of recouping losses by raising prices after having eliminated the competitors.
- **Excessive pricing:** There is no conclusive Swiss case law on excessively high prices. Given the difficulties which are inherent to price regulation, ComCo is reluctant to regulate prices. It is more likely to focus on practices by which a dominant enterprise seeks to strengthen or maintain its dominance. In addition, in Switzerland, regulating prices of dominant enterprises has been traditionally the task of the so-called Price Regulator (*Preisüberwacher, Surveillant des prix*) and not the task of ComCo.

- **Prize squeezing:** Price squeezing occurs where a vertically integrated firm is dominant in the upstream market and supplies goods to other enterprises that compete with the dominant firm in the downstream market. As a general rule, price squeezing is unlawful if the dominant enterprise sells at wholesale prices so high that a reasonably efficient competitor cannot operate profitably because they have no sufficient profit margin.
- **Exclusive purchasing obligations:** Exclusive purchasing obligations are abusive if they prevent the entry or expansion of competing suppliers. The same applies to **fidelity** or **conditional rebates,** i.e. rebates (such as incremental or retroactive rebates) that reward customers for a particular purchasing behavior. Conditional rebates may have an effect similar to exclusive purchasing obligations. As a general rule, rebates that result in prices that are below AAC will be considered to be abusive. In contrast, prices that remain consistently above the long-run average incremental cost (LRAIC) are not abusive; LRAIC is the average of all the (variable and fixed) costs that a company incurs to produce a particular product. Also, as a rule of thumb, linear quantity rebates as well as rebates that reflect only the reduced costs of the supplier in handling larger quantities do not constitute an abuse.
- **Exclusive distribution:** Similarly, ComCo has held that exclusive agreements by which a dominant enterprise systematically requires its suppliers only to supply the dominant enterprise is abusive and absent a justification.
- **Discrimination:** ComCo tends to require that dominant enterprises have to treat like customers alike. Therefore, if similar customers are treated differently, ComCo tends to require a justification for the different treatment. As regards **price discrimination,** previous decisions of ComCo show some willingness to require dominant enterprises not to discriminate customers with regard to prices (unless there is a cost justification). However, given that price discrimination is a widespread economic phenomenon and in most cases efficient, price discrimination should only be regarded as abusive where it involves predatory price-cutting, price squeezing or fidelity rebates.
- **Refusal to supply:** Dominant enterprises are in general free to choose their business partners. Refusals are likely to be abusive if (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (2) the refusal is likely to lead to the elimination of effective competition on the downstream market, and (3) the refusal is likely to lead to consumer harm. So far ComCo has imposed a duty to supply other business partners on monopolists or near-

monopolists only. An example is the duty of an electrical utility to run third-parties' energy through the own network. In addition, duties to supply may be limited in time. For instance, the Swatch group, a near monopolistic producer of mechanical raw clockworks, was only required to supply such clockworks to refiners for a transitional period of six years.

- **Tying:** The typical example of tying is the case where the supplier which has a dominant position in the product market for X, causes its buyers of product X (tying product) also to purchase product Y (tied product) from him. Such tying is likely to be found to be abusive where (1) customers would (the tying being absent) buy product X and Y from separate suppliers and (2) there is no justification for the tying; technical difficulties are such a reason.

3.4 Consequences of an abuse of a dominant position

As already mentioned, ComCo can impose direct fines on a dominant enterprise in an amount of to up to 10 % of the total group turnover generated in Switzerland during the last three business years.

In contrast to enterprises participating in cartel activity, full immunity from fines is not available for dominant enterprises abusing their position. Theoretically it is possible for a dominant company to get a reduction in fines of up to 50 % by filing a leniency application.

4. Merger control

Under the CA, a concentration has to be notified to the secretariat of ComCo if the enterprises involved meet certain turnover thresholds.

4.1 The notion of concentration

The following transactions between previously independent enterprises qualify as concentrations:

- mergers;
- acquisition of sole control over an enterprise;
- acquisition of joint control over a full-function joint venture.

From the requirement that the transaction must occur between previously independent enterprises, it follows that pure intragroup transactions do not form a concentration within the meaning of the CA. For example, when two 100 % subsidiaries of the same parent company merge with each other, such merger does not form a concentration.

4.1.1 Mergers

A merger within the meaning of the CA occurs where a company is absorbed by another, the latter retaining its legal identity while the former ceases to exist as a legal entity. A merger also occurs where two or more independent companies amalgamate into a new company and cease to exist as separate legal entities.

In the absence of a merger under company law, a merger within the meaning of the CA also occurs where the combining of the activities of previously independent enterprises results in the creation of a single economic unit. Such to be the case there must be (1) a common economic management (frequently established contractually) and (2) other factors such as internal profit and loss compensation, cross-shareholdings, and/or external joint liability.

4.1.2 Acquisition of sole control

As a general remark, the term "control" means the ability to **exercise a decisive influence** on the activities of the other enterprise. The means by which control can be acquired include, in particular, either separately or in combination:

- ownership or the right to use all or part of the assets of the enterprise;
- rights or contracts which confer decisive influence on the composition, voting, or decisions of the organs of an enterprise.

Having said that, examples of acquisition of control include:

- the acquisition of the **majority of the voting rights** of a company;
- the acquisition of **assets;**
- the acquisition of a **"qualified minority"** in connection with other factors conferring control either on a legal and/or a *de facto* basis. On a **legal basis,** sole control can occur where for example the minority shareholder has the right to appoint the majority of the board of directors. On a **de facto** basis, sole control occurs where the minority shareholder is likely to achieve a majority at the shareholders' meeting.

4.1.3 Acquisition of joint control over a full-function joint venture

The acquisition of joint control does only constitute a concentration where (1) joint control is acquired over (2) a full-function joint venture. In addition, in case of a creation of a new joint venture to be jointly controlled by the founding parent companies, a concentration only occurs where activities of at least one of the parent companies are contributed to the joint venture. As regards these conditions, the following has to be added:

Joint control exists where two or more enterprises have the possibility of exercising decisive influence over another enterprise (the joint venture). Unlike

sole control which confers power of exercising decisive influence upon a specific shareholder, joint control is characterized by the possibility of a **deadlock situation** resulting from the power of two or more parent companies to reject proposed strategic decisions. This in turn implies that where changing coalitions among the parents are possible, no joint control exists.

The clearest form of joint control exists in 50/50 joint ventures. In the other cases, the power to block strategic actions is frequently conferred to by veto rights (granted by shareholder agreements and/or by the articles of association). While it is not required that such **veto rights** confer decisive influence on the day-to-day running of the joint venture, they must go beyond the veto rights normally accorded to minority shareholders in order to protect their financial interests as investors (such as changes in the articles of association, an increase or decrease in the capital, or the sale or winding-up of the joint venture). Veto rights conferring joint control typically include decisions and issues such as the business plan, the appointment of the senior management, major investments, and the budget. Note that for a finding of joint control, it is not necessary that all of the veto rights mentioned above are granted. It might be sufficient if only some or even only one such right exists.

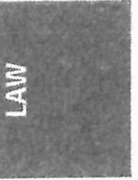
A **full-function joint venture** exists where the joint venture performs (1) all the functions of an autonomous economic entity (2) on a lasting basis:

- A joint venture does perform **the functions of an autonomous economic entity** if it has sufficient resources (finance, management, staff, and assets) in order to conduct its business activities. In addition, a joint venture must be more than being auxiliary to its parents' activities without having access to the market (as is the case, for example, when its activities are limited to R&D or production). Likewise a joint venture has no full-function character if it acts principally as a sales agent for its parents. Similarly where the joint venture relies almost entirely on sales to its parents for more than a start-up period of more than three years, it does not constitute a full-function joint venture.
- A joint venture must be intended to **operate on a lasting basis.** This is usually the case where the parent companies commit the resources described above to the joint venture. However, where the joint venture is only established for a short finite duration, a long-lasting basis is not present. As regards the necessary duration, normally, a five- to ten-year time horizon should be sufficient.

As already mentioned above, in case of a **creation of a new joint venture** to be jointly controlled by the founding parent companies, a concentration only occurs where **activities** of at least one **of the parent companies are contrib-**

uted to the joint venture. In practice this condition plays little or no role. ComCo has decided that the mere contribution of capital into the new joint venture is sufficient to satisfy that condition.

4.2 Thresholds



The CA provides for two alternative thresholds under which a concentration has to be notified: a turnover threshold and a dominance threshold.

4.2.1 Turnover threshold

Under the turnover threshold, a concentration has to be notified if

- all enterprises involved reach a combined aggregate worldwide turnover of at least CHF 2 billion or a combined aggregate turnover of at least CHF 500 million in Switzerland, **and**
- at least two of the enterprises involved reach a turnover of at least CHF 100 million each in Switzerland.

Hence, it is important to know which are the enterprises involved. This depends on the kind of the concentration:

- **Merger:** the enterprises involved are the merging enterprises.
- Acquisition of **sole control:** The enterprises involved are the enterprise acquiring control as well as the target. The seller, however, does not constitute an enterprise involved.
- Acquisition of **joint control:** The enterprises involved are the enterprises jointly acquiring control as well as the controlled joint venture.
- Note that if two enterprises acquire joint control over a joint venture which has neither actual nor future activities or turnover in Switzerland, this concentration has not to be notified in Switzerland even if the turnover thresholds are formally met by the parent companies.

In calculating the turnover of an enterprise involved, the turnover of the whole group it belongs to must be taken into account. In case an enterprise sells one of its subsidiaries, only the turnover generated by the target is relevant and not the one of the seller.

In general, the turnover consists of the proceeds earned through the ordinary business activity of selling goods or services during the last business year prior to the signing. From these proceeds, all reductions on earnings such as discounts, rebates, value-added tax, as well as other taxes directly allocated to the turnover have to be deducted.

As regards the **geographical allocation,** the turnover is generally attributed to the place where the customer is located.

4.2.2 Dominance threshold

Under the alternative threshold, a concentration has to be notified regardless of the turnover generated if

- a legally enforceable decision establishes that an enterprise concerned has a dominant position in a market in Switzerland, **and**
- the concentration concerns either the same or an upstream, downstream, or neighboring market.

4.3 Competitive assessment

The Competition Commission may prohibit the concentration or authorize it subject to conditions or obligations if the investigation reveals that the concentration:

- creates or strengthens a dominant position which may eliminate effective competition **and**
- does not lead to an improvement of the competitive conditions in another market which prevails over the disadvantages of the dominant position.

As regards the first criterion, ComCo considers whether the proposed concentration would create or strengthen a single firm or a collective dominance. The Federal Supreme Court has held that the term "dominant position which may eliminate effective competition" establishes a threshold higher than the dominance threshold used with regard to the abuse of a dominant position (see above 3.2.2). ComCo does not always adhere to this case law. In a case concerning the concentration of two telecom operators (Orange and Sunrise), ComCo prohibited the concentration based on concerns that the concentration would create unilateral effects but argued that the concentration would create a collective dominant position of Orange/Sunrise and Swisscom.

As regards the second criterion, so far, it has been of limited importance.

4.3.1 Single firm dominance

In assessing the issue of single firm dominance, ComCo takes into account the following effects:

- **Horizontal** effects: In examining horizontal effects, ComCo looks as a first step at market share overlaps. Overlaps below 20 % are presumed to be unproblematic. The same tends to be true where the overlap is only marginal, i.e. where one party has a very small market share (i.e. 1–2 %). As regards the upper limit of market share threshold, there is no clear-cut threshold since market share figures say little about the competitive forces in a market. However, the criteria employed are more or less the same as used in the context of the abuse of a dominant position (see 3.2.2). Where

no market share overlaps occur, ComCo normally has no concerns with regard to horizontal effects. A (very rare) exception is the case where the concentration removes a very strong potential competitor.

- **Vertical** effects: Anti-competitive vertical effects may arise in concentrations between enterprises each active on a different (upstream or downstream) level of trade. The main concern resulting from vertical concentrations are foreclosure effects. For example by merging with a dominant raw material supplier, a producer on the downstream level may foreclose the raw material supply to its competitors.
- **Conglomerate** effects: The main example of anti-competitive conglomerate effects is portfolio power, i.e. the possibility to offer customers a portfolio of products belonging to separate product markets and thereby having the ability to exclude competitors which only offer a part of this portfolio.

4.3.2 Collective dominance

In assessing whether a concentration creates a collective dominance, ComCo uses the same criteria as described above in 3.2.3.

So far ComCo found only in a few cases that a collective dominance would have been created as a result of a concentration. One recent example is the proposed concentration of Orange and Sunrise.

4.4 Procedure

Similar to the EU merger control, the Swiss merger control procedure has two phases: In phase I which starts the day after the secretariat of ComCo *(Sekretariat der Wettbewerbskommission, Secrétariat de la Commission de la Concurrence)* has received the complete notification, ComCo has one month to decide whether it wants to initiate a phase II investigation. If ComCo initiates a phase II investigation, it has to decide within four months whether it clears the concentration, prohibits it or rather asks for remedies. Unlike in the EU there is no special (i.e. extended) deadline for phase I and II in case the parties offer conditions and obligations to remedy potential competitive concerns.

As regards remedies, ComCo prefers structural remedies (such as the divestiture of a business unit) to behavioral ones. The reason is that behavioral remedies are more difficult to monitor and to enforce. Often ComCo has adopted the conditions and obligations which had been offered by the merging entities to the European Commission in the parallel European merger control proceeding.

In case a reportable concentration is not notified, ComCo may impose fines of up to CHF 1 million on the enterprise and/or fines in an amount of up to

CHF 20,000 on members of the management involved (so far ComCo has only imposed fines on enterprises but not on members of the management). In addition, without clearance, the validity of the concentration under civil law remains suspended.

5. Bibliography

AMSTUTZ MARC / REINERT MANI (eds.), Basler Kommentar Kartellgesetz, Helbing Lichtenhahn Verlag, Basel 2010.

BAKER MCKENZIE (eds.), Stämpflis Handkommentar SHK, Kartellgesetz, Stämpfli, Berne 2007.

BORER JÜRG, Schweizerisches Kartellgesetz, 3rd ed. Orell Füssli, Zurich 2011.

VON BÜREN ROLAND / DUCREY PATRIK / WILD GREGOR, Immaterialgüter- und Wettbewerbsrecht, 4th ed., Stämpfli, Berne 2017.

VON BÜREN ROLAND / DAVID LUCAS (eds.), Kartellrecht; Schweizerisches Immaterialgüter- und Wettbewerbsrecht, Vol. V/2, Basel, Geneva, Munich 2000.

DAVID LUCAS / JACOBS RETO, Schweizerisches Wettbewerbsrecht, 5th ed., Stämpfli, Berne 2012.

GEISER THOMAS / KRAUSKOPF PATRICK / MÜNCH PETER (eds.), Schweizerisches und europäisches Wettbewerbsrecht; Handbücher für die Anwaltspraxis, Vol. IX, Helbing Lichtenhahn Verlag, Basel, Geneva, Munich 2005.

HEINEMANN ANDREAS / KELLERHALS ANDREAS, Wettbewerbsrecht in a nutshell, Dike, Zurich, St. Gallen 2014.

HOMBURGER ERIC / SCHMIDHAUSER BRUNO / HOFFET FRANZ / DUCREY PATRIK (eds.), Kommentar zum schweizerischen Kartellgesetz, Schulthess, Zurich 1997.

STOFFEL WALTER / ZÄCH ROGER (eds.), Kartellgesetzrevision 2003 – Neuerungen und Folgen, Schulthess, Zurich, Basel, Geneva 2004.

TERCIER PIERRE / BOVET CHRISTIAN / MARTENET VINCENT (eds.), Droit de la concurrence: Loi sur les cartels, Loi sur la surveillance des prix, Loi sur le marché intérieur, Loi sur les entraves techniques au commerce; Commentaire Romand, 2nd ed. Helbing Lichtenhahn Verlag, Geneva, Basel, Munich 2013.

WEBER ROLF H. / VOLZ STEPHANIE, Fachhandbuch Wettbewerbsrecht, Schulthess, Zurich 2013.

ZÄCH ROGER, Schweizerisches Kartellrecht, 2nd ed., Stämpfli, Berne 2005.

ZURKINDEN PHILIPP / TRÜEB HANS RUDOLF, Das neue Kartellgesetz – Handkommentar, Schulthess, Zurich, Basel, Geneva 2004.