

Dominance

in 39 jurisdictions worldwide

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1 Legislation

What is the legislation applying specifically to the behaviour of dominant firms?

The Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (SCartA or the Cartel Act) applies to unilateral practices of dominant undertakings. According to article 7 SCartA, 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. The Swiss Cartel Act is construed independently from EU competition law (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, pt 4.3). Therefore, the legislation and individual solutions diverge from EU case law and the European Commission's decision-making practice.

2 Non-dominant to dominant firm

Does the law cover conduct through which a non-dominant company becomes dominant?

No. The Cartel Act applies only to undertakings that already hold a dominant position on the market. Unlike the Sherman Act, the Cartel Act does not cover the attempt to monopolise or the attempt to acquire a dominant position. Merger control provisions ensure an ex ante control of concentrations that create or strengthen a dominant position liable to eliminate effective competition.

3 Object of legislation

Is the object of the legislation and the underlying standard a strictly economic one or does it protect other interests?

The purpose of the Cartel Act is to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The objective is not limited to economic aspects: general interest considerations are also taken into account.

The Federal Act of 20 June 2003, effective from 1 April 2004, modified the definition of dominant position to encompass situations of economic dependence, among other things to protect small and medium-sized companies.

However, the law grants the Competition Commission the power to assess the economic consequences of restrictions of competition and concentrations between undertakings, and leaves it to the Swiss Federal Council (the Swiss government) to assess the balance with the general public interest. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Competition Commission may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons.

In the field of merger control, the special (and lower) thresholds for the notification of mergers in the media industry set by the law of 1995 to prevent media concentration were repealed in June 2003. With bank mergers, the interests of creditors may be given priority.

In these cases, FINMA (the Supervising Financial Authority) supersedes the Competition Commission, which it invites to submit an opinion.

4 Non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

In the 1970s the former Swiss Cartel Commission carried out extensive research on the buying power of retailers, and described the specific nature of the relationship between retailers and manufacturers as a 'bilateral relation of dominance and dependence' (Publications of the Swiss Commission on Cartels (Publ CCSP), 1976, page 95).

The revision of the Cartel Act of 2003 extended the concept of dominance to cover the vertical economically dependent relationship between a supplier and its customer, respectively between a buyer and its customers. Articles 4 and 7 SCartA apply therefore to the conduct of non-dominant firms. However, the Cartel Act does not contain any specific behavioural provision in relation to the abuse of economic dependence.

In *CoopForte* (RPW/DPC 2005/1, p146), the Competition Commission investigated a bonus scheme put into effect by Coop, the second-largest supermarket chain in Switzerland. In its decision, the Swiss Competition Commission distinguished between economic dependence and dominance in the classical sense: an undertaking having a dominant position behaves independently of its rivals, whereas economic dependence relates to a situation in which an undertaking is independent of its customers. A particular manufacturer is dependent on a distributor when two conditions are met: first, the manufacturer has no other comparable buyer and the marginal demand of other buyers does not allow it to cover its fixed costs. A share of the manufacturer's business with the buyer of more than 30 per cent indicates that the contract is essential for the manufacturer. However, if the manufacturer can sell its products to other buyers or elsewhere, there is no dependence on the latter. Second, the manufacturer specialises in manufacturing the buyer's goods, so that it cannot switch to the production of other goods. The retailer should have been responsible to some degree for the specific investment. The Competition Commission noted, however, that the new dominant position should not be understood as a means to protect inefficient undertakings.

The Federal Act of 19 December 1986 on Unfair Competition (RS 241) applies to certain types of conduct by non-dominant undertakings. One example is the systematic undercutting of prices.

5 Sector-specific control

Is dominance regulated according to sector?

The Telecommunication Act lays down specific ex ante obligations for dominant telecommunication companies. The Price Supervisory Authority is also empowered to control excessive prices, in particular in regulated markets.

6 Status of sector-specific provisions

What is the relationship between the sector-specific provisions and the general abuse of dominance legislation?

According to article 3 SCartA, statutory provisions that do not allow for competition in a market for certain goods or services, in particular provisions that establish an official market or price system or provisions that grant special rights to specific undertakings to enable them to fulfil public duties, take precedence. Sector-specific regulation such as telecommunications or energy law does not preclude the application of the Cartel Act, but it should be taken into account in its application (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, pts 3.4 and 5.1).

7 Enforcement record

How frequently is the legislation used in practice?

The Secretariat and the Competition Commission are active in the field of abuse of dominant position. The number of investigations and final decisions in this field varies from one to four depending on the year; the record is lower compared to agreements between undertakings, and constitutes between 15 and 40 per cent of the investigations on restrictive practices (outside merger control). However, the largest fines have been imposed on companies that have been held responsible for abusive conduct.

8 Economics

What is the role of economics in the application of the dominance provisions?

Economic expertise plays an increasing role in competition proceedings. The Secretariat of the Competition Commission has a competence centre on economics, and is backed by external experts. Undertakings are increasingly using economic expertise during investigative procedures.

9 Scope of application of dominance provisions

To whom do the dominance provisions apply? To what extent do they apply to public entities?

The Cartel Act, and therefore dominance provisions, applies to any undertaking, to private or public entities, as far as they exercise market power (article 2 paragraph 1 SCartA).

10 Definition of dominance

How is dominance defined?

Article 4 paragraph 2 of the Cartel Act defines dominant undertakings as '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'.

11 Market definition

What is the test for market definition?

The test for market definition is the cross-substitutability among products and, in particular, the SSNIP test (small but significant non-transitory increase in price; see RPW/DPC 2001, p239, paragraphs 27ff, *Vertrieb von Werbematerialien*).

The relevant market is defined in article 11 of the Merger Control Ordinance of 17 June 1996 as comprising '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'. It serves as the basis for defining the relevant market in cases of dominance (see RPW/DPC 2012/1,

paragraphs 113ff, *Vertrieb von Tickets im Hallenstadion Zürich*).

The Swiss Competition Commission examines whether the market presents the characteristics of the 'Cellophane Fallacy' in the presence of already high prices both in cases of dominance and of merger control (see, for instance, *Bio-Suisse*, RPW/DPC 2005, p458, paragraph 56, and RPW 2006, p261, paragraph 59, *Emmi AG/Aargauer Zentralmolkerei AG AZM*). In this latter case the substantive test is based on dominance.

12 Market-share threshold

Is there a market-share threshold above which a company will be presumed to be dominant?

Neither the law nor case law refers to any threshold above which a company would be considered as dominant. A market share between 45 and 80 per cent is considered as high. However, such a market share constitutes only an indication, and is not sufficient to prove dominance (REKO/WEF, RPW/DPC 1998/4, p674 paragraph 4.1). The Competition Commission goes through an in-depth analysis of the market characteristics even though the market definition reveals a market share of 100 per cent (RPW/DPC 2008/2, p242, paragraph 39, *Terminierungsgebühren beim SMS-Versand via Large Account*). In particular, when barriers to entry are low and potential competition is strong, high market share does not justify the finding of a dominant position.

The Competition Commission has denied dominance in the case of a market share of 69 per cent, where the company had lost market share due to the entry of new competitors (RPW/DPC 2002/1, p97, paragraph 116, *Mobilfunkmarkt (Swisscom)*). In another case, a market share of 50 to 70 per cent was not sufficient to find dominance because of the strong competition that was facing the company from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (RPW/DPC 2003/2, p245, paragraphs 32ff, *Johnson & Johnson*).

On the other hand, public hospitals were found to be dominant with a market share of 45 per cent. In this case, the absence of potential competition and the existence of particular dependency relationships between public hospitals and insurers in the private insurance field justified the finding of dominance (RPW/DPC 2008/4, p573, paragraphs 155ff, *Zusatzversicherung Kanton Luzern*). A market share of 50 per cent coupled with weak potential competition and high barriers to entry justified the finding of dominance in the market for poster advertising (RPW/DPC 2003/1, p84, paragraphs 48ff, *Plakatierung in der Stadt Luzern*).

Other factors contribute to find dominance when the undertaking under investigation possesses high market share: stable or increasing (high) market share, weak counterparties or competitors in financial difficulty, existence of switching costs, or existence of must-in-stock products.

13 Collective dominance

Is collective dominance covered by the legislation? If so, how is it defined?

As referred to in question 10, dominance is defined as a position held by 'one or more undertakings', and therefore collective dominance is covered by the law. There is, however, no specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Swiss Competition Commission.

The first case that dealt with collective dominance was the merger between Price Waterhouse and STG-Coopers & Lybrand (RPW/DPC 1998/2, 214). In the *Mobilfunkmarkt* case (decision of 3 December 2001, RPW/DPC 2002/1, p97, paragraphs 111ff), the Swiss Competition Commission examined the existence of a collective dominance in parallel to the existence of an agreement in the form of a concerted practice. As a first step, the Commission goes through a static

analysis, and examines the structure of the market; the analysis is followed by an assessment of the conduct of the undertakings on the market (RPW/DPC 2002/1, p97, paragraphs 112ff). According to the Swiss Competition Commission, the criteria for the finding of a collective dominance are similar to that of collusion (horizontal agreement) (*Konsumkredit*, decision of 7 May 2007, RPW/DPC 2007/3, p364, paragraph 47, where the Commission denied both the finding of collective dominance and the existence of an agreement).

One of the most in-depth analyses with regard to collective dominance was carried out in the pork meat market (decision of 15 March 2004, *Migros (Micarna) and Coop (Bell Holding)*, RPW/DPC 2004/3, p674). The following criteria were considered as relevant for the finding of a collective dominance:

- small number of competitors;
- existence or non-existence of fringe competitors;
- an aggregate market share of undertakings under investigation of more than 50 or 60 per cent;
- high transparency on the market, in particular in relation to price;
- mature and stagnant market;
- high barriers to entry and low probability of potential competition;
- symmetry with regard to interests, products and cost;
- weak position of commercial counterparties;
- existence of shareholdings; and
- existence of a credible sanction mechanism (RPW/DPC 2004/3, p674, paragraph 68ff).

The assessment of the Competition Commission was completed with an empirical economic analysis of price margin development in the industry, which allowed the Commission to reject the existence of collective dominance.

14 Dominant purchasers

Does the legislation also apply to dominant purchasers? If so, are there any differences compared with the application of the law to dominant suppliers?

The dominance provisions apply to purchasers. The assessment of dominance goes through the traditional criteria. However, the concept of economic dependence applies to strong purchasers even though they do not hold a dominant position in the classical sense. For the criteria relating to economic dependence, see question 4.

Abuse in general

15 Definition

How is abuse defined? Does your law follow an effects-based or a form-based approach to identifying anti-competitive conduct?

In general, dominant undertakings are considered to behave unlawfully 'if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners' (article 7 paragraph 1 SCartA).

The Cartel Act contains no *per se* prohibitions. The unlawful (or abusive) character of a conduct should be determined on a case-by-case basis, taking into account market conditions. The decision-making practice of the Swiss Competition Commission examines the effect on the market, even though such assessment does not constitute a separate section. WEKO, the former Appeal Competition Commission, has recognised that it is the anti-competitive effect of a practice that justifies its prohibition (REKO/WEF, RPW/DPC 2002/4, p672, point 7.2; see also TAF, DPC 2010/2, p 329, *Publigroupe*, point 8.1.5.1, where the Federal Administrative Tribunal held that the examples of article 7 paragraph 2 should be applied in conjunction with paragraph 1 of article 7; the Competition Commission should therefore demonstrate the exclusionary or exploitative effect of such

practices). Traditionally, the decisions of the Competition Commission are based in large part on the form of the conduct adopted by the dominant company. The Competition Commission applies a blend of a form-based and effects-based approach, and the recent decisions show a trend towards an effects-based approach.

16 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article 7 SCartA covers both exploitative and exclusionary practices (judgment of the Federal Court of 27 April 2010, *Publigroupe SA*, point 7.1.1). Exclusionary practices target mainly competitors, while exploitative practices harm commercial partners or consumers. Excessive pricing is also covered in the list of unlawful practices. The finding of an exclusionary practice does not rule out an exploitative one; the distinction does not have legal consequences.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

The decision-making practice of the Competition Commission requires a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal literature accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (RPW/DPC 2006/4, p625, paragraph 102, *Valet Parking*). In *Valet Parking*, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of dominant position, even though the behaviour had a negative effect on the off-airport parking market (outside the airport). On the other hand, the causal link between dominance and a possible behaviour is not sufficient to show an abusive conduct. The behaviour itself should comprise separate elements that can be qualified as abusive. In the context of unfair (or excessive) prices where the dominance itself is the cause of the dominant undertaking's power to set monopolistic prices, this close link between dominance and price setting is not sufficient to prove that the price was abusive. In addition, it should be demonstrated that the dominant undertaking was able to impose the said price to clients that had no choice (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, points 4.3.4 and 5.6.4).

18 Defences

What defences may be raised to allegations of abuse of dominance? Is it possible to invoke efficiency gains?

Although the law does not provide for defences, decision-making practice and case law have recognised the possibility of successfully invoking such arguments. The Appeal Competition Commission confirmed the possibility of invoking legitimate business reasons, which might be retained if the company's conduct is justified to protect its objective commercial interests, and if the conduct under investigation is not substantially different from what would have prevailed in a competitive market (REKO/WEF, RPW/DPC 2002/4, p672, point 7.3, *Entreprises Electriques Fribourgeoises*). The Appeal Competition Commission mentioned the legitimate business reasons, including the necessity to ensure the quality of products, efficiency reasons, or technical reasons (eg, lack of capacities) (RPW/DPC 2003/4, p925, point 6.5.4).

Efficiency gains may also be invoked. In *TicketCorner*, the Competition Commission discussed efficiencies in the administration of ticket sales, in the improvement of seller agents' training, and the prohibition of free riding (RPW/DPC 2004/3, p778, paragraph 69). However, the exclusivity agreements between the agent seller (*TicketCorner*) and the event organisers were not considered necessary to

achieve such efficiency gains. This case shows that efficiency gains and legitimate business reasons may be invoked, but that the restriction of competition should be proportional to the objective to be attained.

Specific forms of abuse

19 Price and non-price discrimination

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade by a dominant undertaking is unlawful. Both price and non-price discrimination is covered by the prohibition of abusive conduct. Hospitals that lowered tariffs for important insurers, but not for small ones, abused their dominant position (RPW/DPC 2008/4, p544). In one of its earliest decisions, the Competition Commission held that making available a product only to its subsidiary constitutes discrimination against the other operators: refusal to deal was therefore considered also as discrimination (RPW/DPC 1997/2, p161, *Telecom PTT/Blue Window*). Rebate schemes that discriminate against some customers, mainly small ones, may be considered also as abusive price discrimination (REKO/WEF, RPW/DPC 2005/3, p505, point 5.4.3).

One of the leading cases concerned the market for advertising placement, in which the Competition Commission condemned the refusal of Publigroupe to pay certain professional intermediaries and to discriminate against them compared to others (RPW/DPC 2007/2, p190). The practice raised barriers to entry on the market for advertisement placement and discriminated between professional intermediaries. Publigroupe was fined 2.5 million Swiss francs.

20 Exploitative prices or terms of supply

The imposition of unfair prices or other unfair conditions of trade may be considered as unlawful (article 7, paragraph 2(c) SCartA). Unfair prices are considered as exploitative practice and therefore as an abuse of dominance. In general, the price is unfair if it does not correspond to the value of the services rendered (RPW 2005/1, p54, paragraph 300). The 'unfair' criterion is to be construed in relation to the market value of the services offered and to the ability of the dominant undertaking to behave independently; the customer should lack alternative solutions, and hence the ability of the dominant company to exert a certain coercion on the customer (which justifies 'exploitation') (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, points 4.3.4, 5.5 and 5.7).

The Competition Commission imposed a record fine of 333,365,685 Swiss francs on Swisscom for unfair prices in the mobile call termination market. The decision was quashed by the Federal Administrative Tribunal in February 2010. The annulment was confirmed by the Federal Supreme Court in April 2011, which held that due to the regulatory framework pertaining to telecommunications, Swisscom could not exert coercion against the counterparties, and if this were the case, the other counterparties (ie, competitors) could have complained before the Communication Commission (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, point 5.7). It is unclear what effect the ruling of the Federal Supreme Court will have on the scope of ex post abusive control; most probably it will mainly apply to regulated sectors. On the basis of the above-mentioned judgment of the Federal Supreme Court, the Competition Commission decided to close the investigation opened on 15 October 2002 against the three biggest competitors in the mobile telecommunication market (Swisscom, Sunrise and Orange) for abuse of collective dominance (RPW/DPC 2011/4, p522, *Terminierung Mobilfunk*).

21 Rebate schemes

Fidelity and target rebates are considered as abuse of dominance (RPW/DPC 1997/4, p506, paragraphs 32ff, *Telecom PTT-Fachhändler-verträge*). In principle, quantitative rebates that are justified by cost efficiencies are legitimate. Rebates based on quality criteria are not necessarily considered unlawful, in particular if such rebates are justified by true benefits, and that customers are not hindered in their choice to choose another competitor (REKO/WEF, RPW/DPC 1998/4, p655, point 5.2).

The Competition Commission held the rebate scheme applied by Swisscom was abusive, even though the rebates were granted according to a linear scheme that did not depend on individual quantities acquired by each customer (RPW/DPC 2004/2, p407, *ADSL-Angebot der Swisscom*). Swisscom rebates on wholesale DSL services benefited mainly its subsidiary, due to its scale. The latter obtained rebates of 20 per cent, while its competitors were granted rebates of a maximum of 7 per cent. The Appeal Competition Commission upheld the finding of the Competition Commission on this point, stating that the efficiency gains related to the scale of the operations were realised due to the global scale of the operations, and that small operators contributed equally to the overall scale and therefore to efficiency gains. The case is particular in that the rebates enabled the subsidiary to offer better prices downstream, and therefore squeeze out competitors.

22 Predatory pricing

The law considers as unlawful any undercutting of prices or other conditions directed against a specific competitor (article 7, paragraph 2(d) SCartA). The Competition Commission has investigated several cases of alleged predatory pricing, denying predation, however. There is no presumption that prices below the undertaking's own total costs are predatory; the practice is covered by the undercutting provision only when the undercutting is part of a strategy to exclude competitors (RPW/DPC 2004/4, p1002, paragraph 50, *Cornèr Banca/Telekurs AG*). In principle, however, the Competition Commission may infer that prices under average variable cost are directed against competitors.

Four conditions must be fulfilled to find an abuse of dominance in the form of predatory pricing:

- the undercutting must be systematic;
- the undercutting should be directed towards a specific, actual or potential, weak competitor;
- the undercutting should not allow the company to maximise its profits in the short term; and
- the company should be able to raise the prices again (RPW/DPC 2002/3, p431, paragraph 6, *Radio- und TV-Markt St Gallen*).

The Competition Commission considers the 'recoupment' of lost profits as a condition for finding an unlawful predatory pricing strategy (see for example RPW/DPC 2004/4, p1002, paragraph 54, *Cornèr Banca/Telekurs AG*).

23 Price squeezes

Price or margin squeezes may be considered as abuses of a dominant position. The Competition Commission defines price squeeze as a situation where a vertically integrated undertaking sharply lowers retail prices in comparison to its wholesale prices, so that comparable efficient competitors would not be able to compete and make profits in the retail market (RPW/DPC 2004/2, 357, paragraph 58, *Talk & Surf*). The *Swisscom ADSL* case referred to in question 21 was mainly a margin squeeze (RPW/DPC 2004/2, p407, *ADSL-Angebot der Swisscom*).

The leading case with regard to margin squeeze is the *Swisscom* decision, in which the Competition Commission fined Swisscom for price squeeze in the ADSL market (Competition Commission decision of 19 October 2009, *Preispolitik Swisscom ADSL*).

The Competition Commission based its analysis on the profitability of activities of the vertically integrated company and the retail margins of the Swisscom subsidiary active in the high-speed internet sector; in addition, the Competition Commission focused its analysis on the retail margins of a reasonably efficient competitor (the so-called imputation test). The Competition Commission concluded that the wholesale prices applied by Swisscom did not allow its competitors to obtain sufficient margins to compete in the market for high-speed internet. The abusive and anti-competitive effect was also corroborated by Swisscom's profits in the wholesale sector and the losses incurred by its subsidiary in the retail market for ADSL services (Competition Commission decision of 19 October 2009, *Preispolitik Swisscom ADSL*, paragraph 321).

24 Refusals to deal and access to essential facilities

Article 7 paragraph 2(a) SCartA considers as unlawful any refusal to deal (eg, refusal to supply or to purchase goods) which is likely to foreclose competition. Four conditions must be fulfilled to qualify as abusive a refusal to deal: first, the dominant undertaking must refuse to supply a product; second, this product is an input objectively necessary to compete in a neighbouring (upstream or downstream) market; third, the refusal has a foreclosure effect; and fourth, the refusal cannot be justified for legitimate business reasons (RPW/DPC 2011/1, p96, paragraph 308, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*). *Watt/Migros* was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The refusal to transport electricity was considered as an abuse of dominant position (RPW/DPC 2001/2, p255, *Watt/Migros*). The decision of the Competition Commission was also important since it confirmed the application of the Cartel Act to regulated industries; it was upheld by the Appeal Competition Commission and the Swiss Federal Court.

Another leading case on refusal to deal was *ETA (Swatch Group)*. ETA notified its customers that it would reduce gradually the supply of rough watch movements (movement blanks), and that it would assemble the movements itself to supply only assembled watch movements in the future (RPW/DPC 2005/1, p128). The reduction and interruption of the supplies of an input was considered as an abuse of dominant position, in particular because ETA intended to enter the market itself. The investigation was closed following commitments offered by ETA to increase the quantity supplied to its customers and to prolong the interim supply period with three years. The Secretariat of the Competition Commission is at present investigating the decision of Swatch to cease to supply third parties with mechanical watch movements and assortments. On 6 June 2011, the Competition Commission took interim measures to ensure the supply of third parties with movements and assortments during the investigation. These interim measures were confirmed on appeal by the Federal Administrative Court on 14 December 2011 (RPW/DPC 2012/1, p158, *Swatch Group AG*) and were then extended on 7 May 2012 until the end of 2013 by the Secretariat of the Competition Commission.

The Competition Commission fined SIX Group 7 million Swiss francs for refusing to supply interface information to other competitors and render their product incompatible with SIX terminals (RPW/DPC 2011/1, p96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

The essential facility doctrine is partly recognised in practice, in that it justifies the finding of a dominant position and the duty to deal (see RPW/DPC 2003/4, p925, point 6.5.2). However, decision-making practice does not specify under which conditions such access must be granted and a refusal to deal may be considered as abusive without fulfilling the traditional conditions of the essential facility doctrine.

25 Exclusive dealing, non-compete provisions and single branding

Such practices may be covered by the general clause of article 7 of the Cartel Act.

26 Tying and leveraging

The Cartel Act considers as abusive any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services (article 7 paragraph 2(f)). The Competition Commission has investigated tying practices on several occasions, often denying the finding of an abuse, however. The Competition Commission considers that the tying and bundling of two products have negative effects and therefore are abusive if:

- the company holds a dominant position on one of the markets;
- the tying and the tied products are distinct products;
- the dominant company makes the acquisition of the second product conditional upon the acquisition of the first product;
- the tying or bundling have anti-competitive effects on the tied (second) market; and
- the tying is justified for legitimate business reasons (RPW/DPC 2011/1, p96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

27 Limiting production, markets or technical development

The limitation of production, supply or technical development is mentioned as an example of abuse (article 7, paragraph 2(e) SCartA). The Competition Commission has used it on several occasions in conjunction with other type of abuse. The restriction of the supply or technical capacities, the conclusion of exclusive contracts that would exclude other competitors from the market, or the refusal to grant necessary inputs to other competitors or commercial partners may limit production, markets or technical development and therefore be considered as abuse of a dominant position.

28 Abuse of intellectual property rights

Such practices may be covered by the general clause of article 7 of the Cartel Act.

29 Abuse of government process

Such practices may be covered by the general clause of article 7 the Cartel Act.

30 'Structural abuses' – mergers and acquisitions as exclusionary practices

The Cartel Act does not deal with structural abuses. The list of article 7 SCartA contains only examples, and its general clause covers structural abuses if the conduct of dominant companies enables them to exclude rivals or exploit customers or consumers. As mentioned above, the SCartA contains specific provisions on merger control, and therefore mergers that reach the notification threshold are subject to ex ante control. The concept of structural abuse is relevant only with regard to the acquisition of minority shareholding and to the merger of a dominant undertaking not reaching the threshold for ex ante notification.

The Competition Commission has investigated or discussed the acquisition of a minority shareholding in a few cases. In *Publigroupe*, the Competition Commission confirmed the application of article 7 SCartA to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking (RPW/DPC 2006/3, p449, paragraphs 38ff, *Publigroupe*). It defines structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage' (RPW/DPC 2006/3, p449, paragraphs 40ff, *Publigroupe*). However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse, which was denied in this case (RPW/DPC 2006/3, p449,

Update and trends

On 22 February 2012, the Swiss Federal Council submitted to the Federal Parliament a bill aimed at amending the Cartel Act. The prepared bill is now being examined by the relevant commissions of the Federal Parliament. The amendments that could have an effect on dominance provisions are summarised as follows.

The bill foresees some institutional changes in order to reinforce the institutions' independence. Hence, the Secretariat of the Competition Commission would be transformed into a new independent competition authority in charge of the investigations and not of the decisions in antitrust cases. The Competition Authority would no longer include any representatives of industry and trade associations and unions. In merger cases, the Competition Authority would not only conduct investigations but also take decisions. The Competition Commission would become a new chamber of the Federal Administrative Court and would take decisions upon motion of the Competition Authority in antitrust cases. It would further act as a lower appellate court in merger cases. As opposed to the present situation, the Federal Administrative Court would include judges with entrepreneurial experience or specific knowledge of competition economics. The Federal Supreme Court would act as the only appellate court in antitrust cases and as the upper appellate court for merger cases. It is expected that the proposed new institutional setup would more clearly distinguish between the investigative and decision-making tasks and hence improve both the quality and the acceptance

of decisions in competition matters. Furthermore, it is expected that procedures would become more efficient and faster due to the limitation of appeals.

Regarding merger control, the SIEC test (significant impediment to efficient competition) would be applied in the framework of the assessment of concentrations. Moreover, mergers that take place on the EEA as well as on the Swiss markets and that are already assessed by the EU Commission only need to be notified to the Swiss competition authorities, which will not control them further.

The bill also provides for a potential reduction of fines imposed to undertakings if the undertaking shows that it implemented an effective competition compliance programme.

If an undertaking submits notification of a restraint to competition before it takes place, the bill stipulates that no sanction can be imposed on the undertaking if an investigation procedure is not opened by the competition authorities within two months of the notification.

Finally, the following provisions of the bill concerning private antitrust actions could have an indirect effect on dominance: (i) the recognition of legal standing to final consumers; and (ii) the suspension of the statute of limitations for civil actions during an investigation of an alleged anti-competitive practice by the competition authorities.

paragraphs 40ff, *Publigroupe*). The assessment criteria used by the Competition Commission relate to the criteria for finding an input or upstream foreclosure.

A dominant undertaking should notify an acquisition even though the concentration falls under notification thresholds. According to article 9 paragraph 4 SCartA, notification is mandatory for undertakings that have been held to be dominant in a market in Switzerland, and if the merger concerns either that market or an adjacent market or a market upstream or downstream. As a consequence, concentrations conducted by the undertakings already found to be dominant on one market may be investigated.

31 Other types of abuse

Such practices may be covered by the general clause of article 7 of the Cartel Act.

Enforcement proceedings

32 Prohibition of abusive practices

Is there a directly applicable prohibition of abusive practices or does the law only empower the regulatory authorities to take remedial actions against companies abusing their dominant position?

The law considers abusive practices as unlawful. Article 7 SCartA is directly applicable. The Competition Commission or the civil courts may prohibit such conduct by decision.

33 Enforcement authorities

Which authorities are responsible for enforcement and what powers of investigation do they have?

The Competition Commission takes decisions, remedial actions and sanctions against undertakings abusing their dominant positions. Its secretariat is empowered to conduct investigations and, together with a member of the Commission, to issue any necessary procedural rulings. The secretariat submits draft decisions to the Competition Commission and implements the latter's decisions.

The secretariat has large investigative powers, in particular it may order searches and seize any evidence, or hear third parties as witnesses and require the parties to an investigation to give evidence. The company under investigation is obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents.

34 Sanctions and remedies

What sanctions and remedies may they impose?

A dominant company condemned for unlawful (abusive) conduct risks fines up to 10 per cent of the turnover that it achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful behaviour, and is calculated also by taking into account the likely profit that resulted from the unlawful behaviour. If the undertaking assists in the discovery and in the elimination of the restraint of competition, the fine may be waived in whole or in part.

The Competition Commission has large decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify certain business practices. To date, the Competition Commission has not issued any structural remedy in a case of abuse of dominant position.

The largest fine ever issued for abuse of dominant position was 333 million Swiss francs; it was cancelled by the Federal Administrative Tribunal in January 2010 (see question 20, *Swisscom* decision). Swisscom received another fine of 219,861,720 Swiss francs in 2009 for unlawful margin squeeze in the ADSL market (Competition Commission decision of 19 October 2009, *Preispolitik Swisscom ADSL*; the decision is under appeal). The fine on Publigroupe of 2.5 million Swiss francs for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Tribunal in February 2010 (TAF, DPC 2010/2, p329, *Publigroupe*) and by the Federal Supreme Court on 29 June 2012 (the judgment has not been published). In this latter decision, The Federal Administrative Tribunal, referring to article 7 ECHR, distinguishes between practices falling within the list of article 7 paragraph 2 SCartA and those covered by the general clause of article 7 paragraph 1 SCartA: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. The pertinence of this distinction is not yet confirmed by the Federal Supreme Court, but it is expected that the Competition Commission will tend to base its decisions on one of the examples of article 7 paragraph 2 SCartA.

The Cantonal Court of Vaud ordered a European sport federation to invite an athlete to one of its competitions. A recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their past doping offences was considered as infringing rules on abuse of a dominant position (article 7 SCartA) and injuring athletes' personality rights (judgment of 24 June 2011, published in CaS 2011, 282).

35 Impact on contracts

What are the consequences of an infringement for the validity of contracts entered into by dominant companies?

The contracts entered into by dominant companies and that constitute an abuse of dominant position may be declared null and void, in whole or in part, with retroactive effect (*ex tunc*). The issue of the nullity remains controversial, however, and there is no case law with regard to contracts concluded by dominant companies.

36 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or authority to order a dominant firm to grant access (to infrastructure or technology), supply goods or services or conclude a contract?

The courts are expressly empowered to apply the Cartel Act. In particular, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request before the courts the elimination of or desistance from the hindrance, damages and satisfaction in accordance with the Code of Obligations, or the surrender of unlawfully earned profits (article 12 SCartA). Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

The Cartel Act empowers the courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or

that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 SCartA).

37 Availability of damages

Do companies harmed by abusive practices have a claim for damages?

Yes. See question 36.

38 Recent enforcement action

What is the most recent high-profile dominance case?

On 24 February 2010, the Federal Administrative Tribunal cancelled a fine of 333 million Swiss francs set by the Competition Commission against Swisscom for excessive pricing (see questions 23 and 34). The cancellation was confirmed by the Federal Supreme Court in April 2011. SIX Multipay, a subsidiary of the SIX Group (the Swiss stock exchange), was fined 7 million Swiss francs for refusing to supply interface information to other competitors (RPW/DPC 2011/1, p96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*). On 29 June 2012, the Federal Supreme Court confirmed a fine of 2.5 million Swiss francs set by the Competition Commission against Publigroupe for refusal to deal and discriminatory practices (the judgment has not been published to date).

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