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Cartels

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Switzerland

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Overview of the law and enforcement regime relating to cartels

Legal framework

Cartels and monopolies in Switzerland are mainly governed by the Federal Act of 6 October 1995 (revised in 2004) on Cartels and Other Restraints of Competition ("**Cartel Act**"). The regulatory framework is also comprised of several ordinances of the federal government and notices and communications of the Swiss Competition Commission ("**Comco**"), the authority primarily in charge of pursuing violations of Swiss competition law.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from EU competition law (see decision of the Federal Supreme Court of 11 April 2011, 137 II 199, consideration 4.3). Where its content corresponds to EU law and it was adopted to follow EU competition law, the practice by the EU Commission and EU courts is regularly taken into account when deciding Swiss cases (see decision of the Federal Supreme Court of 29 June 2012, 139 I 72, consideration 8.2.3). Yet, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected.

The purpose of the Cartel Act is to prevent 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. However, the objective is not limited to economic aspects. General public interest considerations are also taken into account. The law grants the Comco the power to assess 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 undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco, the Federal Administrative Court or the Federal Supreme Court may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons (article 8 Cartel Act). To date, this has never happened however.

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements. Anti-competitive agreements are defined as binding or non-binding agreements or concerted practices between undertakings operating at the same or at different levels of production which have a restraint of competition as their object or effect (article 4 § 1 Cartel Act).

The Cartel Act is based on the principle of abuse. To be unlawful, an agreement must either eliminate effective competition or significantly impede effective competition without being justified on economic grounds.

According to article 5 § 3 and 4 Cartel Act, the following horizontal and vertical restraints are presumed to eliminate effective competition and are thus considered as hard-core agreements:

- horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners; and
- vertical agreements that set minimum or fixed prices or allocate territories to the extent that (passive) sales by other distributors into those territories are not permitted.

Even though this publication focuses on cartels, it is also important to briefly address article 7 Cartel Act which deals with the abuse of a dominant position by undertakings with market power. 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 following behaviour is in particular considered unlawful and may result in substantial sanctions, as described below:

a) any refusal to deal (e.g. refusal to supply or to purchase goods);
b) any discrimination between trading partners in relation to prices or other conditions of trade;
c) any imposition of unfair prices or other unfair conditions of trade;
d) any under-cutting of prices or other conditions directed against a specific competitor;
e) any limitation of production, supply or technical development (also directed against competitors, e.g. in cases of exclusivity clauses, exclusivity discounts, etc.); and
f) any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services ("tying in", etc.).

Authorities and enforcement regime

The Comco and its Secretariat are the authorities charged with enforcing and administering the Cartel Act.

Based in Berne, the Comco consists of 12 members and is headed by a president and two vice-presidents. The majority of the Comco's members must be independent experts with no interest in or special relationship with any economic group whatsoever. The Comco takes decisions and remedial actions against and imposes sanctions on undertakings which violate Swiss competition law.

The Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. The total headcount of the Secretariat amounted to 75 employees (65.3 full time equivalents) by the end of 2014.

The Federal Administrative Court, which is based in St. Gallen, is the first appellate instance for decisions rendered by the Comco.

The Federal Supreme Court, based in Lausanne, is the second appellate instance, dealing with appeal decisions of the Federal Administrative Court. It is usually also the final instance, unless parties decide to bring a case before the European Court of Human Rights in Strasbourg.

Sanctions

Pursuant to article 49a Cartel Act, direct sanctions are imposed on undertakings that participate in a horizontal cartel or vertical restraints deemed to eliminate competition within the meaning of article 5 § 3 and 4 Cartel Act or abuse their dominant position pursuant to article 7 Cartel Act.

In the *Gaba* case, the Federal Administrative Court addressed for the first time the question – largely debated by commentators – whether a company can be sanctioned if the presumption of article 5 § 3 and 4 Cartel Act is reversed and the agreement merely restricts competition

within the meaning of article 5 § 1 Cartel Act (decision of the Federal Administrative Court of 19 December 2013, B-506/2010). The Federal Administrative Court answered that question affirmatively and confirmed the fine of CHF 4.8m imposed on *Gaba*. An appeal before the Federal Supreme Court against this decision is currently pending.

An undertaking condemned for unlawful agreement within the meaning of article 5 § 3 and 4 Cartel Act or an abuse a dominant position pursuant to article 7 Cartel Act risks a fine of up to 10% of the turnover 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 elimination of the restraint of competition, the fine may be waived in whole or in part. The Cartel Act Sanctions Ordinance ("**CASO**") lays down the method of calculation of the fines in detail.

Furthermore, an undertaking that violates an amicable settlement, a legally enforceable decision of the Comco or a judgment of the Federal Administrative Court or the Federal Supreme Court, can be fined up to 10% of the turnover achieved in Switzerland in the preceding three financial years (article 50 Cartel Act). The likely profit resulting from such unlawful behaviour has to be taken into account when calculating the fine. Through this rule, restraints which "merely" violate article 5 § 1 Cartel Act may also be "indirectly" punishable, i.e., only after the competition authorities have banned an undertaking from continuing a certain conduct and the undertaking disregarded this obligation. In this context, it is important to mention that the Comco has wide decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify certain business practice.

Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligation during an ongoing investigation, can be fined up to CHF 100,000 (article 52 Cartel Act).

Overview of investigative powers in Switzerland

The Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural rulings. The competition authorities may hear the parties who have allegedly committed a violation or hear third parties as witnesses (such as competitors or suppliers; article 42 § 1 Cartel Act). The parties involved have the right to comment on the minutes of such proceedings.

The undertakings under investigation are also obliged to provide the Secretariat with all information required for their investigations and to produce necessary documents (article 40 Cartel Act), however in due consideration of the right against self-incrimination.

The Secretariat may use all kinds of evidence to establish the facts, such as documents, information supplied by third parties, testimonies and expert opinions.

Upon request of the Secretariat, the president or each vice-president of the Comco may order dawn raids and seizures (article 42 § 2 Cartel Act). The Federal Act on Criminal Administrative Law applies by analogy to such proceedings. The notice published by the Secretariat on its procedure during inspections indicates that undertakings subject to an inspection have the right to be assisted by external lawyers who will, however, not be considered as contact persons. Only the CEO or the most senior representative will be considered as a contact person and formally addressed by the Secretariat. The representatives of the Secretariat in charge of the inspection will not wait for the arrival of external lawyers before starting to search the premises or seizing documents and electronic

data. Any evidence discovered while external lawyers are not present will be set aside. Once the external lawyers have arrived on the premises, the collected evidence may be screened by the lawyers who can comment on its content and, if necessary, ask for it to be sealed.

Overview of cartel enforcement activity during the last 12 months

Dawn raids

Since 1 April 2004, when an amendment to the Cartel Act entered into force, the competition authorities are allowed to conduct dawn raids. The Secretariat, which is in charge of conducting such dawn raids, makes often use of this power, as it has proven to be a very effective and efficient tool to discover anticompetitive behaviour. To date, around 100 dawn raids have been conducted.

Ongoing investigations

Numerous investigations in different markets and/or sectors are currently ongoing. These include:

- car leasing;
- construction industry (in particular road construction and civil engineering);
- financial markets/institutions (reference interest rates; foreign exchange trading; trade with precious metals);
- gravel industry;
- medical systems;
- online travel agencies;
- postal services (b2b services);
- sports broadcasting; and
- telecommunication services (broadband internet).

On 12 January 2015, the Comco opened an investigation against eight (groups of) undertakings in the gravel industry (*Kies AG Aaretal KAGA*, *Messerli Kieswerk AG*, *K. & U. Hofstetter AG*, *Kästli Bau AG*, *Kieswerk Daepp A.G.*, *KIESTAG*, *Kieswerk Steinigand AG*, *Kieswerk Heimberg AG*) regarding potential anticompetitive horizontal agreements and potential abuses of dominant positions. Dawn raids were conducted at the premises of the undertakings.

On 10 March 2015, the Comco opened an investigation against *GE Healthcare* (respectively the Swiss *GE Medical Systems (Schweiz) AG*). The purpose of the investigation is to determine whether GE Healthcare illicitly prevented parallel imports of ultrasonic devices.

On 28 September 2015, the Comco opened an investigation against several financial institutions, namely *UBS, Julius Bär, Deutsche Bank, HSBC, Barclays, Morgan Stanley* and *Mitsui*. The investigation aims at establishing whether these undertakings engaged in unlawful agreements regarding the trade with precious metals, i.e. gold, silver, platinum and palladium.

Final cartel decisions

Several final cartel decisions, all mentioned below, were issued or published in the last 12 months by the Comco. The total amount of fines imposed on parties amounts to around CHF 82m for the last 12 months, and the highest cartel fine imposed in an investigation to CHF 80m (horizontal agreement between wholesalers of sanitary equipment; about a dozen involved undertakings). Numerous decisions of the Comco are currently under appeal before the Federal Administrative Court and the Federal Supreme Court.

On 30 June 2014, the Comco approved an amicable settlement between the Secretariat and *Jura Elektroapparate AG*, a manufacturer of coffee machines. Jura agreed to principally

allow its resellers to sell its coffee machines online (RPW/DPC 2014/2, p. 407, *Jura*). By doing so, the Comco confirmed its position regarding restrictions on online sales (see also RPW/DPC 2011/3, p. 372, *Behinderung des Online-Handels*). Other (punishable) violations of the Cartel Act could not be proven.

On 14 July 2014, the Comco approved an amicable settlement between the Secretariat and the biggest Swiss news agency, *Schweizerische Depeschenagentur AG (SDA)*. The news agency, which has a dominant position on the Swiss market, granted special discounts to undertakings which refrained from making use of the services of other news agencies – it is notable that there was basically only one real competitor. By doing so, the news agency abused its dominant position and in particular violated article 7 § 1 and 2 lit. b and e Cartel Act. A fine in the amount of CHF 1,880,000 was imposed (RPW/DPC 2014/4, p. 670, *Preispolitik und andere Verhaltensweisen der SDA*).

Also on 14 July 2014, the Comco terminated an investigation against a manufacturer of mechanical clockworks (*ETA SA Manufacture Horlogère Suisse*) which has a dominant position on the market for such clockworks. The investigation was initiated in 2009 and aimed at determining whether ETA abused its dominant position through unilateral price increases. The suspicion was however not confirmed and therefore the investigation was closed without further consequences (RPW/DPW 2014/2, p. 396, *ETA Preiserhöhungen*).

On 1 December 2014, the Comco approved an amicable settlement between the Secretariat and numerous undertakings regarding domestic interchange fees in credit card payments (RPW/DPC 2015/2, p. 165, *Kreditkarten Domestische Interchange Fees II (KKDMIF II)*). Since these fees, which are to be paid by the acquirer to the issuer of credit cards, are jointly determined by the undertakings involved, the Comco considered them to be horizontal agreements affecting competition in terms of article 5 § 3 Cartel Act. However, the Comco argued that such agreements may be justified on the basis of article 5 § 2 Cartel Act if the fees are so small that for dealers it does not matter anymore whether payments are made in cash or by credit card. As a part of the settlement, the undertakings agreed to a substantial reduction of the domestic interchange fees.

On 9 December 2014, the Comco fined numerous dealers of door hardware with fines of in total of CHF 185,500 (RPW/DPC 2015/2, p. 246, *Türprodukte*). The dealers agreed on minimum margins when selling door hardware to door manufacturers, which built the hardware into their doors. By doing so, the dealers violated article 5 § 3 Cartel Act. All but one dealer concluded an amicable settlement with the Secretariat, which was approved by the Comco. One dealer had not concluded such settlement and was banned from continuing such conduct unilaterally by the Comco. The latter also filed an appeal against the decision of the Comco with the Federal Administrative Court, which is currently pending.

On 23 February 2015, the Comco approved an amicable settlement between the Secretariat and three (groups of) companies active in the field of tunnel cleaning (RPW/DPC 2015/2, p. 193, *Tunnelreinigung)*. The companies engaged in bid-rigging when participating in tenders for the cleaning of street tunnels. By doing so, they violated article 5 § 3 Cartel Act. The aggregated fines imposed by the Comco amounted to CHF 161,000. This decision again confirms that the fight against bid-rigging is one of the priorities of the Comco.

On 3 July 2015, the Comco announced that it fined wholesalers of sanitary equipment with about CHF 80m for violating article 5 § 3 Cartel Act. During a long period, numerous wholesalers agreed on margins, gross prices, transport costs or discounts. Furthermore, they agreed not to market products of manufacturers which refused to deal with them exclusively.

On 29 June 2015, the Comco approved an amicable settlement between the Secretariat and a wholesaler and general importer of music products (*Musik Olar AG*), in particular guitars, drums and accessories. Musik Olar restricted the freedom of dealers to fix their own prices by implementing maximum discounts on the prices pursuant to its own price list. By doing so, Musik Olar introduced minimum prices and violated article 5 § 4 Cartel Act. A fine in the amount of CHF 65,000 was imposed.

In the last 12 months, the Federal Administrative Court has not rendered any judgments on the merits of appeals against decisions of the Comco. The last decisions in the window mountings cases (RPW/DPC 2014/3, p. 548, *Siegenia-Aubi AG;* RPW/DPC 2014/3, p. 589, *SFS unimarket AG;* RPW/DPC 2014/3, p. 610, *Paul Koch AG*) have already been reported on in the last edition of this publication. An appeal against these decisions is currently pending before the Federal Supreme Court.

During the last 12 months, the Federal Supreme Court rendered only one judgment on the merits of a case (decision of the Federal Supreme Court of 28 January 2015, 141 II 66). It overturned decisions of the Federal Administrative Court regarding three pharmaceutical companies (*Pfizer AG*; *Bayer (Schweiz) AG*; *Eli Lilly (Suisse) SA*) for vertical price-fixing in drugs used to treat erectile dysfunction. The Federal Administrative Court had annulled the fines imposed by the Comco on pharmaceutical companies and denied the application of the Cartel Act in the specific case, mainly because of the ban on publicly advertising the products as well as the "shame factor" related to those pharmaceuticals. According to the Federal Administrative Court, these circumstances prevented any intra-brand competition on the market. In contrast, the Federal Supreme Court interpreted article 3 § 1 Cartel Act, which reserves certain areas that are not subject to the Cartel Act (in particular state-regulated prices and markets), stricter than the Federal Administrative Court. Even though the Therapeutic Products Act, to which the pharmaceuticals are subject, restricts competition to a certain extent, this does, in the Federal Supreme Court's view, not exclude the parallel application of the Cartel Act with regard to the remaining competition. The case lies now again with the Federal Administrative Court which has to render a new judgment, taking into consideration the guidelines of the Federal Supreme Court.

Key issues in relation to enforcement policy

Investigations under the Cartel Act are two-staged procedures consisting of a first-stage preliminary investigation that may be followed by a second-stage, in-depth investigation. Nevertheless, the Comco may open an in-depth investigation even without going through a preliminary investigation. The Secretariat can initiate preliminary investigations either on its own initiative, at the request of certain undertakings concerned (e.g., competitors) or based on information received from third parties (complaints). It is at the discretion of the Secretariat to open a preliminary investigation (see decision of the Federal Supreme Court of 13 July 2004, 130 II 521, consideration 2.7). If the Secretariat concludes that there are indications of significant restrictions of competition, an in-depth investigation will be opened, provided a member of the Comco's presiding body consents. The Secretariat must always open an in-depth investigation if asked to do so by the Comco or by the Federal Department of Economic Affairs, Education and Research.

In its annual press conference of 9 April 2015, the Comco stressed that its priorities remained the same. Apart from combating hard cartels, i.e. horizontal agreements between competitors, market foreclosures remain in the focus of the Comco.

In this context, it is worth mentioning that since summer 2011, when the Swiss franc reached its highest level, the Comco repeatedly stated that any restriction of parallel imports and

passive sales, as well as any resale price maintenance, will be held unlawful. Considering that in January 2015 the Swiss National Bank stopped keeping the CHF/EUR exchange rate at a minimum of CHF 1.20 and therefore the Swiss franc became stronger again, this is not likely to change.

Indeed, in the last few years, the Comco has been acting aggressively against any prevention or restriction of parallel and direct imports and opened investigations in this regard. Since 2009, the following cases can be mentioned:

- *Gaba:* CHF 4.8m fine for restricting parallel imports of Elmex toothpaste (November 2009); *an appeal is currently pending before the Federal Supreme Court*;
- *Nikon:* CHF 12.5m fine for restricting parallel imports of cameras and lenses (November 2011); *an appeal is currently pending before the Federal Administrative Court*;
- *BMW:* CHF 156m fine for restricting direct and parallel imports of cars (May 2012); *an appeal is currently pending before the Federal Administrative Court*;
- *IFPI Switzerland* and *Phononet AG*: CHF 3.5m respectively CHF 20,000 fine for restricting parallel imports of sound and video storage mediums such as CDs (July 2012);
- *Altimum SA:* CHF 450,000 fine for restricting parallel imports of sports goods (October 2012); *an appeal is currently pending before the Federal Administrative Court*;
- *10 books distributors* (French-language books): CHF 16.5m total amount of fines for restricting direct and parallel imports of books (May 2013);
- *Steinway & Sons* (musical instruments); ongoing investigation since November 2012; and
- *GE Healthcare* (ultrasonic devices); ongoing investigation since March 2015.

Key issues in relation to investigation and decision-making procedures

In Switzerland, the issue of how decisions are reached is a subject of significant debate. As outlined above, the Comco and its Secretariat are the competition authorities charged with enforcing the Cartel Act. Formally, the Secretariat is in charge of the investigations. The decision itself is not issued by the Secretariat, but by the Comco. Accordingly, the investigating and decision-making bodies are separate. However, the Comco is involved in various ways in the investigations. For instance, the Secretariat conducts the investigation, but the Comco has the power to hold hearings, a power it has made frequent use of in the recent past. Moreover, it is the Comco which decides on the opening of an in-depth investigation or on the conduct of dawn raids.

Concerns were also raised as regards institutional autonomy, especially as now sanctions are available under Swiss law as well. Sanctions under Swiss competition law are considered to be of an administrative nature, but also qualify as criminal sanctions in the meaning of article 6 *et seq*. of the European Convention of Human Rights ("**ECHR**") and article 14 *et seq*. of the International Covenant on Civil and Political Rights ("**ICCPR**"; see decision of the Federal Supreme Court of 29 June 2012, 139 I 72). Hence, an investigation opened on the basis of a hard-core agreement within the meaning of article 5 § 3 and 4 or an abuse of a dominant position in terms of article 7 Cartel Act should respect all procedural rights to a fair trial set forth in article 6 *et seq*. ECHR and article 14 *et seq*. ICCPR. Pursuant to article 6 § 1 ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In light of the case law of the ECHR and of the functioning of the Comco and the Secretariat, the Comco cannot be considered as an independent and impartial tribunal. It is rather to be qualified as

an extra-parliamentary commission that monitors the market and whose works influence the economy. Therefore, an appeal on full merits must be available against the Comco's decisions in order for the system established in the Cartel Act to safeguard and to respect the fundamental requirements of the right to fair trial. The Federal Administrative Court is an independent and impartial tribunal that is empowered to review the Comco's decisions on appeal, both regarding factual and legal aspects. The control performed by the Federal Administrative Court is therefore the counterweight to the system established by the Cartel Act.

As regards procedural rights during the preliminary and the in-depth investigations, they can be outlined as follows.

The preliminary investigation is intended to determine whether a further investigation is necessary. The decision to open an investigation is not a formal decision in terms of the Administrative Procedure Act and cannot be appealed. In fact, the Administrative Procedure Act does not apply during preliminary investigations conducted by the Secretariat and the parties concerned do not have procedural rights, such as the right to consult files or records. By the same token, third parties have no right to demand that the Secretariat opens an investigation (see decision of the Federal Supreme Court of 13 July 2004, 130 II 521, consideration 2.7).

After conclusion of the preliminary investigation and provided that there are sufficient elements, the Secretariat must, by means of an official publication, announce the opening of an in-depth investigation. Such announcement must state the purpose of the investigation and the names of the parties involved. Furthermore, affected third parties have the possibility to join the investigation, albeit with limited procedural rights (the minimum being the right to be heard), upon a corresponding request made within 30 days of the announcement (article 43 Cartel Act). All parties to the investigation are vested with the usual procedural rights contained in the Administrative Procedure Act, unless the Cartel Act stipulates otherwise (article 39 Cartel Act). They may, e.g., consult files and suggest witness statements, and have the right to be heard and to participate in hearings. On the basis of this investigation, the Secretariat drafts and brings forward a motion for a decision. The parties and participating third parties may comment on the motion. If important new facts emerge, another round of hearings and witness statements may take place.

The Comco (but also the Federal Administrative Court and in last instance the Federal Supreme Court deciding on appeals against decisions of the Comco) is not obliged to reach a final decision within a specified period of time – indeed, especially court proceedings tend to take a long time. Moreover, there are no statutory time bars applying to investigations, except that no direct sanctions can be imposed if an in-depth investigation was opened only later than five years after the restriction of competition has ceased (article 49a § 3 lit. b Cartel Act). As an indication, a preliminary investigation can take from one to several months, and a formal investigation nine months to two years or more. However, an appeal can always be lodged in cases of undue delay (article 46a of the Administrative Procedure Act).

The approach of the Secretariat during dawn raids as regards seizure of documents is reflected in its notice of 6 April 2011 on the procedure during dawn raids. The notice mainly states that all documents exchanged with lawyers, irrespective of the location where the documents are kept in custody, are legally privileged to the extent they concern the professional (legal) representation of the party. The scope of that practice has been reinforced and extended by the entry into force on 1 May 2013 of a new provision regarding attorney client privilege (article 40 Cartel Act in fine). If sealing of such documents is

requested by reference to legal privilege, the Secretariat may nevertheless briefly review the respective documents. Advice from in-house counsel is not legally privileged.

Trade secrets such as know-how, a list of business clients or financial accounting documents are specifically protected during the taking of evidence. The parties may request the non-disclosure of documents or censoring of trade secrets. However, should the Comco not consider some information to be trade secrets although the parties request their non-disclosure, the Comco can render a decision in this regard. The non-disclosure of documents covered by trade secrets can be an issue as regards the right to be heard of the other parties.

Under certain circumstances, there is a right to appeal against a procedural decision (interim decision) before the final decision on infringement has been taken.

Under Swiss law, there is no provision for procedural disputes to be dealt with by an independent officer, akin to the Hearing Officer within the EU system.

Leniency/amnesty regime

Leniency is an important aspect of enforcement in Switzerland. However, cartels are also discovered in other ways, for example on the Comco's own initiative or through third party complaints. As the leniency programme has been available since 1 April 2004, there are still not too many decisions dealing with the leniency programme. It is therefore rather difficult to assess courts' review and control of the application of the leniency policy. In April 2014, the Comco indicated that it had received 50 leniency applications since 1 April 2004, i.e., in the first ten years. Concerning the obligations imposed on a leniency applicant (for instance, to cooperate fully with the investigation), they are generally considered to be fair and proportionate.

The leniency programme applies to hard-core horizontal agreements and vertical agreements within the meaning of article 5 § 3 and 4 Cartel Act (article 49a § 2 Cartel Act).

Pursuant to article 8 § 1 CASO, the Comco grants immunity from fines if an undertaking is the first to either: (i) provide information enabling the Comco to open an in-depth investigation pursuant to article 27 Cartel Act and the Comco did not have, at the time of the filing of the leniency application, sufficient information to open a preliminary or an in-depth investigation within the meaning of article 26 and 27 Cartel Act; or (ii) submit evidence enabling the Comco to prove a hard-core horizontal or vertical agreement, provided that no undertaking has already been granted conditional immunity from fines and that the Comco did not have, at the time of the filing of the leniency application, sufficient evidence to find an infringement of the Cartel Act in connection with the alleged hard-core horizontal or vertical agreements.

However, immunity from fines will not be granted if the undertaking: (i) coerced any other undertaking to participate in the infringement and was instigator or leader of the cartel; (ii) does not voluntarily submit to the Comco all information or evidence in its possession concerning the unlawful practice in question; (iii) does not continuously cooperate with the Comco throughout the procedure without restrictions and without delay; or (iv) does not cease its participation in the infringement of competition voluntarily or upon being ordered to do so by the Comco (article 8 § 2 CASO).

Pursuant to the Cartel Act, total immunity is limited to the "first in". It is worth mentioning that the Comco might also grant full immunity from fines to undertakings which decided to cooperate with the Comco when a dawn raid is already conducted. Therefore, it is of utmost importance to decide immediately upon knowledge of the dawn raid whether or not

to cooperate with the competition authorities and, if such cooperation is desired, to submit the leniency application immediately to the Comco (in writing by facsimile). In particular, in cases of investigations where several undertakings are involved, the chronology when leniency applications were received in writing by the Comco and accordingly whether undertakings may qualify for immunity from fines may be a matter of minutes (see e.g. example in RPW/DPC 2009/3, p. 196, *Elektroinstallationsbetriebe Bern*).

Going in second will not allow total exemption from a fine, but it may be an element of discharge with a view to obtaining partial immunity. A reduction of up to 50% is available at any time in the procedure to an undertaking that does not qualify for full exemption and can be granted to several undertakings involved in the same investigation. Further, the amount of the fine can be reduced up to 80% if an undertaking provides information to the Comco about other hard-core restraints of competition within the meaning of article 5 § 3 and 4 Cartel Act, and such hard-core restraints of competition were unknown to the Comco at the time of the disclosure (article 8 § CASO) ("leniency plus"). This reduction is without prejudice to any possible full exemption or partial reduction of fines for the newly disclosed cartel.

The Cartel Act does not expressly regulate the possibility for the Comco to withdraw immunity or leniency after it has been granted in a final decision. However, general principles of administrative procedure law usually enable administrative authorities to withdraw or amend final decisions (including final decisions in relation to full immunity or leniency) under certain circumstances, for example if: (i) additional circumstances are discovered that justify withdrawal or amendment; and/or (ii) a final decision is unjustified. There is no specific case law concerning leniency withdrawal.

In summary, it is always important to approach the Secretariat at an early stage, especially as, according to article 49 § 3 Cartel Act, no fine will be imposed if the undertaking itself notifies the restriction to competition to the Comco before it produces any effects (so-called "notification procedure"). The timing of cooperation is one of the factors determining the amount of reduction. As already mentioned, the Secretariat conducts a full review of leniency applications in chronological order of receipt (provided that they are valid) to determine precedence for full immunity. The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The leniency application will be viewed less favourably if the evidence was already provided by other undertakings.

When applying for leniency, one should keep in mind that leniency applicants are not protected from litigation following a decision by the Comco (follow-on litigation). However, the Comco is under no express legal duty to cooperate and provide judicial assistance to civil courts. It may thus refuse to grant access to documents produced by, and detrimental to, leniency applicants. To date, the Comco has not disclosed documents submitted by leniency applicants to civil courts. Indeed, the Comco endeavours to protect information submitted by leniency applicants in order not to discourage undertakings to submit such applications in future cases. The Comco endeavours to protect leniency applicants from follow-on private litigation, which justifies oral submissions by leniency applicants and restricts the right of access to files for the other members of the cartel (see article 9 § 1 CASO). This objective was clearly stated in decisions of the Comco, whereby it held that the other concerned parties to an investigation have the right to consult documents submitted by leniency applicants only at premises of the Comco, and denied such concerned parties the right to make photocopies (see e.g. RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen-und Tiefbau im Kanton Aargau*).

At the international level, the recent Agreement between Switzerland and the European Union concerning cooperation on the application of their competition laws, which entered into force on 1 December 2014, provides that information obtained under leniency or settlement procedures must not be exchanged if the undertakings concerned have not agreed to the exchange.

Amicable settlement of cases

Amicable settlements are an important feature of the enforcement regime in Switzerland. During the preliminary investigation, the Secretariat may propose measures to eliminate or prevent restraints of competition (article 26 § 2 Cartel Act). In the framework of an in-depth investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose an amicable settlement on the undertakings involved concerning ways to eliminate the restraint for the future (article 29 § 1 Cartel Act). It is important to understand that amicable settlements are solely dealing with an undertaking's conduct in the future, meaning that a company can voluntarily undertake to terminate respectively not to commit certain illicit behaviour. However, the amount of the sanctions to be imposed for acts taken place in the past cannot be agreed on – Swiss cartel law does not know any "plea bargaining".

An amicable settlement shall be formulated in writing and approved by the Comco (article 29 al. 2 Cartel Act). The Comco shall either approve or refuse an amicable settlement. It may send a proposed amicable settlement back to the Secretariat and suggest amendments, but the Comco cannot amend the terms of a settlement on its own (see e.g. decision of the Comco of 29 June 2015, *Saiteninstrumente (Gitarren und Bässe) und Zubehör*, n 22). However, in one case the Comco has nevertheless amended a proposed amicable settlement, namely by setting a time limit to the amicable settlement (RPW/DPC, 2006/1, *Kreditkarten/Interchange Fee*, p. 115). An amicable settlement is binding on the parties and the Comco and may give rise to administrative and criminal sanctions in case of a breach of any of its provisions by the parties (article 50 and 54 Cartel Act).

As already mentioned, concerning infringements to competition leading to direct sanctions (article 5 § 3 and 4 and article 7 Cartel Act), reaching an amicable settlement does not rule out fines in respect of infringements that took place before the amicable settlement's conclusion. Therefore, when approving an amicable settlement, the Comco at the same time regularly imposes sanctions on undertakings. Yet, concluding an amicable settlement is regularly regarded as cooperative attitude by the undertakings and taken into account as a mitigating factor when calculating a fine (article 6 CASO). The practice of the Comco shows that a fine is in general reduced from 3% to 25%, depending also on other factors such as the cooperative attitude of the undertaking in the investigation.

Since 2004, when the possibility to impose direct sanctions entered into force, the following investigations were concluded by amicable agreements:

- *Flughafen Zürich AG (Unique) – Valet Parking:* fine of CHF 248,000 (RPW/DPC 2006/1, p. 141).
- *Publigroupe SA (Richtlinien des Verbandes Schweizerischer Werbegesellschaften VSW über die Kommissionierung von Berufsvermittlern)* – fine of CHF 2.5m (RPW/DPC 2007/2, p. 190).
- *Documed AG (Publikation von Arzneimittelinformationen)* – fine of CHF 50,000 (RPW/DPC 2008/3, p. 385).
- *Sécateurs et cisailles* – fines of CHF 55,000 (RPW/DPC 2009/2, p. 143).

- *Elektroinstallationsbetriebe Bern* – fines of CHF 1.24m (RPW/DPC 2009/3, p. 196).
- *Vorsorgliche Massnahmen in Sachen Kreditkarten-Interchange Fees II* – no fines, preliminary measures (RPW/DPC 2010/3, p. 473).
- *Komponenten für Heiz-, Kühl- und Sanitäranlagen* – fine of CHF 169,000 (RPW/DPC 2012/3, p. 615).
- *Baubeschläge für Fenster und Fenstertüren* – fines of CHF 7.6m (RPW/DPC 2010/4, p. 717).
- *SIX/Terminals mit Dynamic Currency Conversion (DCC)* – fine of CHF 7m (RPW/DPC 2011/1, p. 96).
- *Swatch Group Lieferstopp* – no fine, preliminary measures and final decision (RPW/DPC 2011/3, p. 400 and 2014/1, p. 215).
- *Behinderung des Online-Handels (Electrolux/V-Zug)* – no fine (RPW/DPC 2011/3, p. 372).
- *Recommandations tarifaires de l'Union suisse des professionnels de l'immobilier – Section Neuchâtel* – fines of CHF 35,000 (RPW/DPC 2012/3, p. 657).
- *Vertrieb von Musik* – fines of CHF 3.5m (RPW/DPC 2012/4, p. 820).
- *Abrede im Speditionsbereich* – fines of CHF 6.2m (RPW/DPC 2013/2, p. 142).
- *Jura* – no fine (RPW/DPC 2014/2, p. 407).
- *Preispolitik und andere Verhaltensweisen der SDA* – fine of CHF 1.9m (RPW/DPC 2014/4, p. 670).
- *Türprodukte* – fines of CHF 185,500 (RPW/DPC 2015/2, p. 246).
- *Saiteninstrumente (Gitarren und Bässe) und Zubehör* – fine of CHF 65,000 (decision of 29 June 2015, investigation 22-0441).

Third party complaints

Third parties have two ways of complaining about suspected cartel arrangements.

The first way is to file a complaint with the Secretariat (article 26 Cartel Act). It is at the sole discretion of the Secretariat whether to open a preliminary investigation, and third parties have no right to demand the opening of an investigation. The decision whether to open a preliminary investigation or not is not a formal decision and it cannot be appealed. If the Secretariat does open a preliminary investigation, third parties do not have any rights to consult files. If, after examining it, the Secretariat decides not to pursue a complaint, it usually informs the parties about the reasons leading to such decisions. If the Secretariat concludes that there are indications of an unlawful restraint of competition, the Secretariat shall (as already mentioned above) open an in-depth investigation in consultation with a member of the presiding body of the Comco, and give notice by way of official publication (article 27 and 28 Cartel Act). This publication invites third parties to come forward within 30 days if they wish to participate in the investigation. Third parties that announce themselves might, but do not necessarily acquire the status as parties to the procedure. In order to be considered a party to the investigations, such third parties (e.g. competitors) have to prove that they suffer a clearly perceptible economic disadvantage due to the anticompetitive behaviour (decision of the Federal Supreme Court of 5 June 2013, 139 II 328, consideration 4.5).

It can be noted that the numbers of third parties' complaints lodged by the Comco significantly increased in 2011. In the context of the significant appreciation of the Swiss franc against the US dollar and the euro in summer 2011, consumer protection associations launched a vigorous campaign claiming that only a small part of manufacturers' currency

gains were passed on to Swiss, and accused the Comco of not cracking down on such practices. The Comco reacted by opening a preliminary investigation. The final report, dated 7 November 2013, states that no evidence for unlawful agreements or an abuse of a dominant position could be detected though (RPW/DPC 2013/4, p. 488, *Nichtweitergabe von Währungsvorteilen*).

The second way for a third party affected by a cartel is to sue in front of a civil court for damages. Under article 12 Cartel Act, any person hindered from entering or competing in a market by an unlawful restraint of competition is entitled to request from 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 in accordance with the provisions on agency without authority. Hindrances of competition include in particular the refusal to deal, and discriminatory measures.

A basis for claims against competition restrictions can be also found in article 28 of the Swiss Civil Code ("**CC**"). Article 28 CC protects personality rights, including economic rights. The applicant may ask the court to prohibit a threatened infringement, to order that an existing infringement shall cease, or to make a declaration that an infringement is unlawful if it continues to have a disruptive effect.

Besides the Cartel Act, the Swiss Federal Act against Unfair Competition ("**Unfair Competition Act**") is also pertinent for private antitrust actions. According to article 9 Unfair Competition Act, whoever suffers or is likely to suffer prejudice to his clientele, his credit or his professional reputation, his business or his economic interests in general through an act of unfair competition may request the courts:

- to prohibit an imminent prejudice;
- to remove an on-going prejudice; or
- to establish the unlawful nature of a prejudice if the consequences still subsist.

He may, further, institute proceedings for damages and satisfaction, and may also require the surrender of profits in accordance with the provisions on agency without authority.

The civil actions should be brought before the higher cantonal civil courts. The Swiss Code on Civil Procedure ("**CCP**") requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the Unfair Competition Act. The 'single cantonal court' has exclusive jurisdiction to order interim measures. The parties are exempted from submitting themselves to prior conciliation procedures, which are usually required before litigation may be initiated. Besides the Cartel and Unfair Competition Acts, the plaintiff may base its claim also on other legislation and present it before the single cantonal court. The respondent may, however, only bring counterclaims falling under the jurisdiction of the same single cantonal court.

Administrative and civil sanctions

From an administrative point of view, as already mentioned, any undertaking participating in an unlawful agreement pursuant to article 5 § 3 and 4 and article 7 Cartel Act may be charged with a fine of up to 10% of the turnover generated within Switzerland in the preceding three financial years (article 49a § 1 Cartel Act). This sanction is an administrative sanction, but is considered as a criminal sanction in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (decision of the Federal Supreme Court of 29 June 2012, 139 I 72).

Pursuant to article 5 § 3 and 4 Cartel Act, the law provides for a rebuttable presumption that certain hard-core restrictions eliminate effective competition. In this regard, it remains

unclear to what extent the Comco can impose an administrative fine on an undertaking participating in an unlawful hard-core agreement within the meaning of article 5 § 3 and 4 Cartel Act, but which has succeeded in reversing the presumption that the hard-core restrictions eliminated effective competition. The Comco and the Federal Administrative Court have imposed sanctions regardless whether the presumption of eliminated competition was rebutted (see decisions of the Federal Administrative Court of 19 December 2013, B-463/2010 (*Gebro Pharma GmbH)*, consideration 13.1 and B-506/2010 (*Gaba International AG*), consideration 14.2). Appeals against these decisions are currently pending before the Federal Supreme Court.

Concerning sanctions for an abuse of a dominant position, the Federal Administrative Court, referring to article 7 ECHR, distinguishes between practices falling within the list of article 7 § 2 Cartel Act and those covered by the general clause of article 7 § 1 Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings (decision of the Federal Administrative Court of 27 April 2010, B-2977/2007 (*Publigroupe*), consideration 8.1.5). The pertinence of this distinction is not yet confirmed by the Federal Supreme Court. In its leading case 139 I 72, the Federal Supreme Court left open whether sanctions could be based solely on article 7 § 1 Cartel Act as well.

The amount of the fine depends on the duration and severity of the unlawful conduct. The company's turnover is calculated by analogy with the rules on the calculation of turnover in mergers (article 4 and 5 of the Merger Control Ordinance, "**MCO**") and encompasses the consolidated turnover. The base amount is up to 10% of the consolidated turnover generated on the relevant markets in Switzerland in the previous three business years, depending on the type and severity of the infraction (article 3 CASO). The "normal" profits that resulted from the unlawful behaviour are taken into account in the base amount. The relevant market includes the product market and geographical market, taking into consideration temporal aspects. The product market comprises all products and services that potential partners of the exchange regard as substitutable because of their characteristics and the purpose for which they are intended. The geographic market comprises the area in which potential partners of the exchange are engaged in both the supply or demand side for products and services in the product market. The explanations above regarding the calculation of the turnover by analogy with the rules on the calculation of turnover in mergers are applicable as well. In recent price fixing cases, the Comco applied a percentage between 5% and 10% for the base amount. The base amount will be increased by up to 50% if the agreement was operational for up to five years. Each additional year will lead to an increase of another 10%. In practice, the Comco increased the base amount by 10% for each year of duration.

This amount may increase by a certain percentage reflecting aggravating factors, such as recidivism, high cartel gains, obstruction of justice, ring leaders and measures to enforce cartel discipline (article 5 CASO). The law is not exhaustive and other factors could be taken into account too. In particular, Swiss law does not fix the percentage of each aggravating factor but gives the Comco room to decide, depending on the circumstances of each particular situation. Practice has shown that the Comco does not retain aggravating factors in every case. In the bid rigging case in the road construction sector in Aargau, where aggravating factors were taken into account, the increase sometimes went up to 200% in connection with the number of infringements in case of tenders where competitors were coordinating their prices (RPW/DPC 2012/2, p. 215, *Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau*).

The amount may decrease by a certain percentage reflecting mitigating factors. Examples of mitigating factors are: immediate termination of the illicit behaviour after the Comco has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. The percentage of aggravation of each factor is not set by the law (article 6 CASO). In certain exceptional cases, the Comco may take into account as a mitigating factor that no profit was obtained from the unlawful conduct. The Comco does not always retain mitigating factors. In recent cases the percentages varied from 10% to 60% depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable agreement with the Comco. Reaching an amicable settlement can also be considered as a mitigating factor (article 6 CASO) and led in recent cases to a reduction of the sanctions of about 10 to 20%. However, the Comco takes very much into account the moment of the amicable settlement. In a case of late settlement, the Comco only reduced the sanction by 3% (RPW/DPC 2010, p. 765, *Baubeschläge für Fenster und Fenstertüren*), and announced that it will not reduce fines any more if amicable settlements are signed after the second draft decision of the Secretariat. Concerning leniency, which will also be taken into account for the calculation of the fine, see the paragraph hereinabove, "Leniency/amnesty regime".

In deviation from the abovementioned rules on the calculation of the sanctions, the Comco may also impose lump sum sanctions – especially in case of rather small sanctions (see e.g. *Sécateurs et cisailles* – fines of CHF 55,000 (RPW/DPC 2009/2, p. 143; *Türprodukte* – fines of CHF 185,500 (RPW/DPC 2015/2, p. 246)).

The undertaking usually liable for the payment of the fine is the receiver of the decision. In a group of companies, should the subsidiary be effectively controlled by the parent company, it is the parent company that will be considered liable for the payment of the imposed fine. In the *BMW* decision (RPW/DPC 2012/3, p. 540), the Comco reaffirmed this point by imposing the total fine on the parent company BMW AG in Germany and not BMW Switzerland. The Federal Supreme Court confirmed that practice in the *Publigroupe* case, where only the parent company was the addressee of the decision and none of the five wholly owned subsidiaries (decision of the Federal Supreme Court of 29 June 2012, 139 I 72, considerations 1 and 3).

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question (see decision of the Federal Supreme Court of 12 June 2008, 134 III 438). Furthermore, as already mentioned above (section "Third party complaints"), civil liability claims (e.g. by competitors) may be filed with the competent courts, in particular under article 12 Cartel Act.

Right of appeal against administrative and civil sanctions

Decisions of the Comco and, to a limited extent, also interim procedural decisions, can be challenged before the Federal Administrative Court. An appeal can be lodged on the following grounds: (i) wrongful application of the Cartel Act; (ii) the facts established by the Comco were incomplete or wrong; or (iii) the Comco's decision was unreasonable. Hence, the appeal before the Federal Administrative Court is a "full merits" appeal on both the findings of fact and law.

The addressees of the decision have the right to appeal, whereas it is still uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether and to what extent third parties are affected by the Comco's decision. In its leading case 139 II 328 of 5 June 2013, the Federal Supreme Court explained that only

competitors which suffer a clearly perceptible economic disadvantage as a consequence of an anticompetitive conduct shall be regarded as parties to an investigation and thus have legal standing to appeal against a decision. Such disadvantage requires a concrete and individual concern and is given if the agreement or abuse of the dominant position has disadvantageous effects on the competitor, in particular in case of a diminished turnover. The requirements for the legal standing have to be proven by the competitor which claims to be a party.

The Federal Administrative Court can produce evidences such as hearing witnesses or seeking expert reports. However, the case law shows that this was very rarely done, as the appeal file is usually very well documented, and the Federal Administrative Court tends to render its judgments on the basis of the file.

Concerning the effective judicial control carried out by the Federal Administrative Court, one must say that it remains currently difficult to properly assess or to analyse its work, as the Federal Administrative Court took office in January 2007 and has not yet rendered many competition-related judgments. Numerous cases are still pending. Till now, the Federal Administrative Court carried out complex economic analyses quite thoroughly. Therefore its judicial control regarding competition law cases seems effective. The Federal Administrative Court does not hesitate to overturn decisions of the Comco. The largest fine ever issued for abuse of dominant position by the Comco – CHF 333m – was cancelled by the Federal Administrative Court (decision of 24 February 2010, B-2050/2007, *Swisscom (Schweiz) AG*) and subsequently also by the Federal Supreme Court (decision of 11 April 2011, 137 II 199). In contrast, the fine imposed on *Publigroupe* of CHF 2.5m for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Court in February 2010 (RPW/DPC 2010/2, p. 329, *Publigroupe*) and by the Federal Supreme Court on 29 June 2012 (decision of 29 June 2012, 139 I 72).

It is worth mentioning that most of the judges of the Federal Administrative Court do not have specific in-depth qualifications on competition law. The second division of the Federal Administrative Court, which decides appeals against decisions of the Comco, is basically in charge of all public economic law issues, of which competition law is just one part. There is no specialised competition law court in Switzerland.

The judgments of the Federal Administrative Court may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, one may not claim that the judgment of the Federal Administrative Court is unreasonable, and claiming the fact-finding of the inferior instances to be incomplete or wrong is only permissible to a very limited extent (in case of arbitrariness). In principle, the Federal Supreme Court can only review the application of the Cartel Act or of fundamental rights such the guarantees set forth in the ECHR or other international treaties or in the Swiss Federal Constitution.

It is important to mention that there are currently numerous cases pending before the Federal Supreme Court. Some of these cases raise fundamental questions under the Cartel Act, such as the question whether sanctions can imposed in cases where the presumption of eliminated competition under article 5 § 3 and 4 Cartel Act was successfully rebutted, but an agreement is declared unlawful pursuant to article 5 § 1 Cartel Act. Another highly controversial issue is whether certain qualitatively severe agreements are to be considered *per se* as qualitatively significant, i.e., without an analysis of the specific circumstances on the market. The case law of the Federal Administrative Court is unclear in this regard.

The judgments of single cantonal courts rendered in civil actions may also be ultimately challenged before the Federal Supreme Court. If the legality of a restraint of competition

is disputed before a civil court, the case must be referred to the Comco for an expert report. However, the Comco's opinion is not binding for the civil judge.

Criminal sanctions

There are only limited criminal sanctions for cartel activities in Switzerland. Unlike in other states (such as the United States), imprisonment is not (yet) provided for. However, there are administrative sanctions which are considered as criminal sanctions in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (see "Administrative and civil sanctions" section).

Anyone who wilfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of an appellate body is liable for a fine not exceeding CHF 100,000 (article 54 Cartel Act).

Anyone who wilfully does not comply, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine not exceeding CHF 20,000 (article 55 Cartel Act).

Both these provisions mainly aim at persons who have the power to decide whether an undertaking shall commit a breach of the Cartel Act, such as members of the board of directors or the management.

If the same matter is prohibited by the Swiss Criminal Code, aggrieved parties may raise a civil claim for damages within the framework of the criminal procedure or separately, based on article 41 of the Swiss Code of Obligations. In principle, the court in charge of the criminal procedure also rules on civil claims, except where the damage was not sufficiently substantiated in the request or the damage calculation requires substantial efforts. In the latter case, however, the criminal court should at least render a judgment regarding the general obligation to pay damages and refer solely for the specification of the amount to be paid to the civil courts. The judgment of a criminal court as to the guilt and to the determination of the damage, and the provisions of the criminal law concerning criminal responsibility, are generally not binding upon a civil judge. Yet, they will certainly have a strong influence on the civil court.

Cross-border issues

The Cartel Act applies to all concerted practices and agreements that have an economic effect within Switzerland (article 2 § 2 Cartel Act). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland but has effects in Switzerland, may fall under Swiss jurisdiction. In May 2012 the Comco imposed a fine of CHF 156m on *BMW AG*, the parent company with registered offices in Germany, for restrictions to parallel and direct imports, as the contracts with its authorised distributors in the EEA were prohibiting them from selling cars to customers outside the EEA. These unlawful provisions had an economic effect in Switzerland. With the *Gaba* decision, the Federal Administrative Court confirmed the broad application of the effects doctrine and hence the territorial scope of the Cartel Act. The specific kind or intensity of the effects of a certain behaviour, whether they are direct or indirect and potential or actual, shall be a question within the proceedings, but not influence the applicability of the Cartel Act from the outset (decision of the Federal Administrative Court of 19 December 2013, B-506/2010, consideration 3.3). Therefore, it is important for undertakings whose activities produce

effects in Switzerland to be fully aware of the potential implications of Swiss competition law rules for their agreements and practices.

On 17 May 2013 Switzerland and the EU signed an agreement concerning the cooperation on the application of their competition law ("**Cooperation Agreement**"). The Cooperation Agreement is the first agreement of a "second generation", providing for the transmission of certain information even without the consent of the undertakings concerned. The aim of the Cooperation Agreement is to strengthen the cooperation between the Comco and the EU Commission. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the Comco and the EU Commission seek to combat cross-border anticompetitive practices more effectively. The Cooperation Agreement, which was ratified by the Federal Parliament and the EU Parliament, entered into force on 1 December 2014.

The core element of the Cooperation Agreement is the intended exchange of specific, case-related information between Swiss and EU competition authorities. As a major change in contrast to the previous legal setting, the transmission of information and documents between the competition authorities shall be possible even if the concerned company does not consent thereto. Also, the concerned company does not dispose of a right to appeal against such transmission, but it has solely a right to be heard before the information is transmitted. An important exception is that information previously submitted to the Comco under a leniency application may not be transferred without the consent of the applicant. Moreover, the competition authorities must investigate the same or related conduct in order for the exchange to be admissible. The use of exchanged information is limited to the enforcement of the competition laws of the EU and Switzerland. Like the exchange of information, the use of information is restricted to the same or related conduct.

The Cooperation Agreement will have to be taken into account, in particular in the preparation of dawn raid situations and in the assessment of multi-jurisdictional leniency applications (i.e. whether or not to include Switzerland).

For the purposes of implementing the Cooperation Agreement, a new article 42b § 3 has been inserted in the Cartel Act, laying down general requirements for sharing information with a foreign competition authority. Information may only be transmitted based on international agreements or with the consent of the undertakings concerned. The additional requirements mirror to a large extent those contained in the Cooperation Agreement. The revised article 42b § 3 Cartel Act merely sets out that the undertakings concerned are to be consulted before the transmission of information. Whether or not the exclusion of *ex ante*-legal remedies against an unlawful transmission of information is compatible with the Swiss Federal Constitution and the ECHR will be for courts to decide. At least in the first nine months after the entering into force of the Cooperation Agreement, no transmission of information without the consent of the undertaking concerned has taken place.

The Cooperation Agreement concerns solely the cooperation with the EU Commission, but not with European national competition authorities. The EU Commission can however provide certain information, e.g. regarding the coordination of enforcement measures, to its Member States and the EFTA Surveillance Authority. Moreover, on an informal basis, the Comco and its Secretariat cooperate with various antitrust authorities in Europe, especially national European authorities such as the German *Bundeskartellamt* as well as with the US antitrust authorities. This cooperation does usually not go beyond the exchange of non-confidential information.

The Cartel Act provides in article 42a for a specific regime with regard to investigations in

the air transportation industry. Accordingly, in this sector the Comco may cooperate with the EU Commission on a formal legal basis.

Investigations, prosecutions and sanctions decided by antitrust authorities abroad have no binding effect on the Comco. Even if the EU regulatory framework and case law have often made significant inroads into the practice of the Comco and are therefore regularly taken into account by Swiss competition authorities as well (decision of the Federal Supreme Court of 29 June 2012, 139 I 72, consideration 8.2.3), the Federal Supreme Court explicitly held that Swiss competition law must be construed independently from EU law (decision of the Federal Supreme Court of 11 April 2011, 137 II 199, consideration 4.3).

Developments in private enforcement of antitrust laws

In Switzerland, the third party private enforcement level is currently relatively low as regards follow-on claims as well as stand-alone claims. The most relevant reason is the difficulty in gathering evidence and the high costs related thereto. In comparison, lodging a complaint before the Comco leads to a free administrative procedure, in which the Comco will take care of "everything". Another factor is that, according to the prevailing doctrine, consumers are not authorised to bring claims based on the Cartel Act. However, consumers would have legal standing to bring a claim for damages under tort law. Finally, the short period of the statute of limitations for a claim for damages is an additional reason which explains this low level. Indeed, the limitation period for a claim for damages or reparations expires one year after the claimant is aware of both the complete damage and the identity of the injuring party, but in any case at the latest 10 years after the restraint of competition has ended (article 60 of the Swiss Code of Obligations). The same rules apply regarding the claim for surrender of unlawfully earned profits.

The legal standing of consumers' associations as regards private enforcement actions based on the Cartel Act remains unclear. Trade or consumer organisations possess legal standing provided they are undertakings under the Cartel Act (which means that they exercise a commercial activity) and are hindered in the process of competition. However, the legal standing to protect their members' interests remains disputed. The legal doctrine tends to recognise trade or consumer organisations' active legal standing with regard to actions for injunctions to terminate a restriction of competition, but not with regard to actions for damages incurred by their members. The new CCP recognises the active standing of associations and other organisations of national and regional importance to bring actions in their own name against violations of the personality rights of their members under article 28 CC. In principle, personality rights also include economic rights and thus, at least in theory, trade or consumer organisations could claim for the prohibition of an existing or threatened violation of personality rights (for instance, prohibition of a boycott or a refusal to deal). Beyond that, it is currently not possible for a representative body to bring a collective follow-on claim in Switzerland on behalf of consumers. These are additional factors which make private enforcement unattractive in Switzerland.

Concerning the gathering of evidence, effective and practical pre-trial discovery is not available in Switzerland. Furthermore, an exchange of information between the Comco and the civil courts does not take place in general. It is therefore difficult to obtain any documents before the start of the proceedings. However, one should note that potential claimants are often in a position to gain access to the file of the Comco by requesting to be treated as a party to the administrative proceedings. The damaged party can then use copies from the file to support its civil claim. This may result in a considerable facilitation

of proof for civil competition actions in cases where administrative proceedings are pending or have already been terminated (follow-on actions). A potential claimant might be inclined to initiate administrative proceedings first by filing a request with the Comco. Important information may, however, qualify as trade business and remain inaccessible.

Preliminary measures, which also focus on avoiding or terminating restraints of competition, are generally available under Swiss law, both in the investigation by the competition authorities (see decision of the Federal Supreme Court of 19 December 2003, 130 II 149, consideration 2) and in case of civil actions (article 261 to 269 CCP). Whereas preliminary measures ordered by the competition authorities focus on the protection of the effective competition, preliminary measures in civil proceedings mainly aim at safeguarding an undertaking's interests. All appropriate and reversible measures for such interim execution may be ordered, e.g. the interim obligation to enter into a contract or to grant admission to a trade fair. However, the interim payment of a sum of money is not possible and therefore, interim awards of damages are not available in Switzerland.

An example of private enforcement of the Cartel Act through civil proceedings in a stand-alone case regarding an abuse of a dominant position in the cheese market can be found in a rather new decision of the Federal Supreme Court (decision of 23 May 2013, 4A_449/2012). At the request of the plaintiff – a cheesemaker – the Federal Supreme Court confirmed that the company managing a cheese-maturing cellar with regard to the production of an AOC cheese had abused its dominant position by preventing the cheesemaker from being admitted to the cheese-maturing cellar. The said company was then forced to admit the cheesemaker to the cheese-maturing cellar and was compelled to pay damages. However, the damages were low as the plaintiff did not sufficiently prove the link between the abuse of the dominant position by the cheese company and the loss of earnings he had suffered. This case demonstrates once again the difficulty of proving facts for a plaintiff in a stand-alone case.

Reform proposals

The highly controversial amendments to the Cartel Act, proposed by the Swiss Federal Council on 22 February 2012, were finally rejected by the Federal Parliament on 17 September 2014. However, in the aftermath, a new proposal was filed by a member of the Federal Parliament, asking for submitting undertakings with "relative market power" (a concept already known in German competition law) to the scope of application of article 7 Cartel Act, i.e. the prohibition of the abuse of a dominant position. An undertaking would have relative market power if other enterprises, as suppliers or purchasers of certain kinds of goods or services, depend on them in such a way that sufficient and reasonable possibilities of resorting to other undertakings do not exist. By submitting such undertakings to the scope of application of article 7 Cartel Act, the high prices in Switzerland shall be combated and the price level brought closer to the level around Switzerland. It remains to be seen whether this proposal will make its way through the parliament.

Moreover, it also remain to be seen whether a new attempt to adopt (some of) the non-controversial proposals of the failed revision of the Cartel Act will be undertaken, as, e.g., also desired by members of the Comco. The Federal Council indicated on 12 November 2014 that it does currently not plan to prepare any new amendments to the Cartel Act.

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