

Switzerland

Christophe Rapin, Mario Strebel, Renato Bucher and Jacques Johner

Meyerlustenberger Lachenal

General

1 Legislation

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

The Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (Cartel Act) applies to unilateral practices of market dominant undertakings. According to article 7 of the Cartel Act, market dominant undertakings act unlawfully if they abuse such position and thus hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. In addition, also the Federal Price Surveillance Act of 20 December 1985, *inter alia*, is relevant for market dominant undertakings.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from European Union (EU) competition law; it shall, however, be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

This holds particularly true for article 7 of the Cartel Act, which was shaped on the basis of article 101 of the Treaty on the Functioning of the European Union. Therefore, according to the Federal Administrative Court, it is not only the responsibility of Swiss competition authorities and courts, but also of undertakings, to pay due attention to European competition law by conducting a reasonable comparative legal analysis (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). However, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected, particularly regarding the sanctioning of violations of article 7 of the Cartel Act.

2 Definition of dominance

**How is dominance defined in the legislation and case law?
What elements are taken into account when assessing dominance?**

Article 4 paragraph 2 of the Cartel Act defines a dominant undertaking as 'one or more undertakings that are able, as suppliers or consumers, to behave to a significant extent independently of the other participants (competitors, suppliers or consumers) in a specific market'. Dominance is characterised by freedom of action of the concerned undertaking. Dominance could be either individual or collective.

The Cartel Act does not contain any assessment criteria. In practice, the main elements that are taken into account when assessing dominance are market shares, the existence of barriers to entry or expansion and potential competition, the market structure as well as the countervailing buyer power. These elements constitute mere indications and are not, as such, sufficient to establish a dominant position, which should be assessed in the light of all relevant circumstances relating to a particular case.

In specific circumstances, the concept of dominance could also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, for example, *Comco*, RPW/DPC 2005/1, p. 160 – *CoopForte*; *Comco*, RPW/DPC 2008/4, p. 572 – *Tarifverträge Zusatzversicherung Kanton Luzern*).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

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. The objective is not limited to economic aspects: general public interest considerations are taken into account as well.

However, the law grants the Competition Commission (Comco), which is the authority primarily in charge of pursuing violations of Swiss competition law (including abuses of dominant positions), solely with the power to assess economic consequences of restrictions of competition and concentrations between undertakings. It is up to the Swiss Federal Council (the Swiss government) to assess the balance with general public interests. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons (article 8 Cartel Act). However, to date, this has never happened.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is sector-specific regulation of dominance but, however, in constant interplay with the Cartel Act when it comes to the assessment of a dominant position. Indeed, 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 the latter's application (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). Only sector-specific provisions that aim at effectively excluding competition (but not other policy regulations) might lead to the non-applicability of the Cartel Act (Federal Supreme Court, RPW/DPC 2015/1, p. 131, *Hors-Liste Medikamente*).

The Federal Act on Telecommunication of 30 April 1997 lays down specific *ex ante* obligations for dominant telecommunication providers. The latter must provide access to their facilities and their services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. They may bundle their services, provided they also offer the services included in the bundle individually.

The Federal Act on Radio and Television of 24 March 2006 provides for special measures in the area of radio and television in cases where an undertaking active in the radio and television market has jeopardised the diversity of opinion and offerings because of an abuse of its dominant position.

The Federal Act on Electricity Supply of 23 March 2007 lays down specific regulation for historic monopoly electricity suppliers in order to ensure access to other providers. The Federal Postal Act contains similar provisions.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Cartel Act and, therefore, the provisions on dominance apply to any undertaking (private or public entities) as far as they exercise market power (article 2 paragraph 1 of the Cartel Act) and that are commercially active irrespective of their legal or organisational form. The limitation that the Cartel Act only applies to undertakings that 'exercise market power' should, however, not be overestimated. In terms of article 7 of the Cartel Act, finally, it is decisive whether an undertaking has a dominant position in a relevant market, and this term is defined in article 4 paragraph 2 of the Cartel Act (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*; with regard to the authorisation of an abusive conduct for compelling public interest reasons, see question 3).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

With regard to abusive conduct, the Cartel Act only applies to undertakings that hold a dominant position on a relevant market. Unlike, for example, the Sherman Act, the Cartel Act does not cover the attempt to monopolise or acquire a dominant position. Indirectly, however, the merger control provisions of the Cartel Act provide for an ex ante control of concentrations that create or strengthen a dominant position liable to eliminate effective competition.

According to article 7 of the Cartel Act, it is not unlawful for an undertaking to hold a dominant position. This provision only bans abusive conduct of dominant undertakings as exemplified in article 7 paragraph 2 of the Cartel Act.

The Cartel Act does not contain any behavioural provision specifically dealing with abuses in relation to the concept of economic dependence. However, the concept of dominance could, under specific circumstances, also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, question 2).

Furthermore, the Federal Act on Unfair Competition of 19 December 1986 applies to certain types of conduct by non-dominant undertakings. One example is the systematic undercutting of prices, which is considered unlawful and may result, upon request, in criminal prosecution.

Finally, the Price Surveillance Act, which empowers the Price Supervisor to control excessive prices, particularly in regulated markets, also applies to undertakings with market power.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

As mentioned in question 2, dominance is defined as a position held by 'one or more undertakings'. Therefore, collective dominance is also covered by the law. However, the Cartel Act does not provide for any specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Comco.

The first case that dealt with collective dominance was the merger between Revisuisse Price Waterhouse and STG-Coopers & Lybrand (RPW/DPC 1998/2, p. 214). In the *Mobilfunkmarkt* case (RPW/DPC 2002/1, p. 97), the Comco examined the existence of collective dominance in parallel to the existence of an anticompetitive agreement. In doing so, the Comco goes through a static analysis, and examines the market structure, followed by the assessment of the market conduct of the undertakings. According to the Secretariat of the Comco (Secretariat; with regard to the role of the Secretariat, see question 26), the criteria for the finding of collective dominance are similar to that of collusion (horizontal anticompetitive agreements; see RPW/DPC 2007/3, p. 364, final report of the Secretariat of the Comco in the *Konsumkredit* matter).

In the *Kreditkarten-Akzeptanzgeschäft* case (RPW/DPC 2003/1, p. 106), the Comco affirmed collective dominance of acquirers of credit cards, which abused this collective dominant position. The Comco listed the following criteria, which shall be applicable to an assessment

of potential collective dominance: market concentration; market shares; market transparency and stability; entry barriers; symmetry of interests, products and costs between undertakings; countervailing buyer power; and price elasticity of demand.

Another in-depth analysis with regard to collective dominance was carried out in the pork-meat market (RPW/DPC 2004/3, p. 674, *Markt für Schlachtschweine*).

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

Also in the case of the planned concentration between France Télécom SA and Orange Communications SA, the Comco used the above-mentioned criteria (RPW/DPC 2010/3, p. 499, *France Télécom SA/Sunrise Communications AG*). In this case, the Comco prohibited the concentration between these two companies because in its assessment, the new company would, together with Swisscom, have assumed a collectively dominant position in the mobile communications market and in the absence of new competitors entering the market, the companies would have had no incentive to challenge the position of competitors by means of price reductions.

In a recent case, the Comco has investigated on a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. The Comco finally considered that there were not enough elements to retain that these undertakings individually or jointly hold a dominant position (RPW/DPC 2016/1, p. 67, *Online-Buchungsplattformen für Hotels*). However, in its ruling dated 19 October 2015, the Comco prohibited the three operators of booking platforms to extensively restrict hotels in their supply policy by imposing comprehensive best price rules in the sense of illegal anti-competitive agreements (RPW/DPC 2016/1, p. 67, *Online-Buchungsplattformen für Hotels*).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The dominance provisions apply also to purchasers. The assessment of dominance goes through the traditional criteria. However, under specific circumstances, the concept of economic dependence could apply to strong purchasers even though they do not hold a dominant position in the classical sense (see question 6).

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Article 11 of the Merger Control Ordinance of 17 June 1996 defines the relevant product market 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 also defines the relevant geographical market as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases. In principle, the relevant test for market definition is the substitutability of products and services and, in particular, the cross-price elasticity and small but significant and non-transitory increase in price (SSNIP) test (see Federal Supreme Court in RPW/DPC 2013/1, p. 114, *Publigroupe*).

The Comco also examines whether the market presents the characteristics of the 'Cellophane Fallacy' (ie, whether a market is erroneously defined too broad due to the presence of already monopolistic prices; see, for instance, RPW/DPC 2005/3, p. 458, *Bio-Suisse*; RPW/DPC 2006/2, p. 261, *Emmi AG/Aargauer Zentralmolkerei AG AZM*; RPW/DPC 2015/1, p. 105, *Valora Holding AG/LS Distribution Suisse SA*).

Neither the law nor the case law refers to any threshold above which an undertaking must be considered to be dominant. As a rule of thumb, market shares below 30 per cent should not be sufficient for an undertaking to hold a dominant position. The 'critical' threshold, in general, is set at a market share of above 50 per cent, where an undertaking could hold a dominant position. For example, a market share

of 50 per cent was deemed sufficient in the *Plakatierung in der Stadt Luzern* case (RPW/DPC 2003/1, p. 75, *Plakatierung in der Stadt Luzern*). Market share thresholds, however, constitute mere indications and are, stand-alone, never sufficient to prove dominance. In practice, the Comco still maintains 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, p. 242, *Terminierungsgebühren beim SMS-Versand via Large Account*). In particular, when barriers to entry are low and potential competition is strong, high market shares do not, per se, justify the finding of a dominant position.

The Comco has denied dominance, for example, in the case of a market share of 69 per cent, where the company had lost market shares owing to the entry of new competitors (RPW/DPC 2002/1, p. 97, *Mobilfunkmarkt*). In another case, a market share of 50 to 70 per cent was not sufficient to find dominance, inter alia, because of the strong competition 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, p. 240, *Johnson & Johnson*).

On the other hand, public hospitals were found to be dominant with a market share of 37 to 48 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, p. 544, *Zusatzversicherung Kanton Luzern*).

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

In general, dominant undertakings are considered to act 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 of the Cartel Act). Article 7 paragraph 2 of the Cartel Act lists examples of conduct that may be considered as abusive (see question 6).

The Cartel Act contains no per se prohibitions. The abusive character of a conduct is to be determined on a case-by-case basis, taking into account the specific market conditions. In practice, the Comco and the courts examine the effects of a specific conduct on the market, particularly in cases where the conduct of a dominant undertaking falls under the categories covered by article 7 paragraph 2 of the Cartel Act. The former Competition Appeal Commission recognised that it is the anti-competitive effect of a practice that justifies its prohibition, which position is also confirmed by the Federal Supreme Court's requirement that examples of article 7 paragraph 2 of the Cartel Act should be applied in conjunction with its paragraph 1 (Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*).

Particularly when it comes to conduct solely covered by the umbrella clause of article 7 paragraph 1 of the Cartel Act, the recent decisions of the Comco show a trend towards an effects-based approach. Indeed, in its Swisscom decision, the Federal Administrative Court imposed a substantial fine on Swisscom for a price squeeze in the broadband internet sector (ADSL), which falls solely under the general provision of article 7 paragraph 1 of the Cartel Act (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*).

11 Exploitative and exclusionary practices

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

Article 7 of the Cartel Act covers both exploitative and exclusionary practices. Exclusionary practices target mainly competitors, while exploitative practices aim at harming commercial partners or consumers. However, the distinction between exploitative and exclusionary practices is rather academic.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In practice, the Comco 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 doctrine accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (RPW/DPC 2006/4, p. 625, *Valet Parking*). In the *Valet Parking* case, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of a dominant position, even though the behaviour had a negative effect on the off-airport parking market (ie, outside the airport).

On the other hand, the causal link between dominance and a possible abusive behaviour, in itself, is not sufficient to effectively establish an abusive conduct. The behaviour itself should comprise separate elements that qualify it 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 indeed able to coerce clients to accept monopolistic prices (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). Yet, there is considerable legal uncertainty as to what kind of coercion the dominant undertaking must have been able to impose.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Although the law does not provide for defences, the case law recognises the possibility to successfully invoke defence arguments such as legitimate business reasons. Ultimately, the interests of the individual undertaking have to be balanced with the interests in the 'institutional' competition on the market (Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*). In any case, however, it is crucial that the specific conduct is proportional, namely, that it does not go beyond what is required to achieve the legitimate business reasons' goal.

The former Competition Appeal Commission has already 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 (RPW/DPC 2002/4, p. 276, *Entreprises Electriques Fribourgeoises*). The Competition Appeal Commission mentioned legitimate business reasons, including the necessity to ensure the quality of products, efficiency or technical reasons (eg, lack of capacity).

In *TicketCorner* (RPW/DPC 2004/3, p. 778), the Comco discussed efficiency gains in the administration of ticket sales, in the improvement of seller agents' training, and the prohibition of free riding. However, the exclusivity agreements between the agent seller (TicketCorner) and the event organisers were not considered necessary to achieve such efficiency gains (see also, decision B-3618/2013 of the Federal Administrative Court of 24 November 2016 – *Vertrieb von Tickets im Hallenstadion Zürich*).

Specific forms of abuse

14 Rebate schemes

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade by a dominant undertaking is unlawful.

Fidelity and target rebates are, under certain circumstances, considered as an abuse of dominance. In principle, quantitative rebates based on cost efficiencies are considered to be 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 of another competitor.

Rebate and pricing schemes that discriminate against some customers may be considered also as abusive price discrimination (see, for example, RPW/DPC 2008/3, p. 385, *Publikation von Arzneimittelinformationen*, where only bigger customers above a specific threshold benefitted from special agreements). In the *SDA* case, the Comco fined the leading Swiss news agency with an amount of about 1.9 million Swiss francs for offering certain customers exclusivity rebates, namely, discounts of about 10 to 20 per cent if these customers agreed to purchase several specific media services from SDA as a package (RPW/DPC 2014/4, p. 670, *Preispolitik und andere Verhaltensweisen der SDA*). In general, rebates should not aim at impeding the freedom of customers to change the supplier (in particular, loyalty rebates), and quantity rebates should be economically justified, for example, owing to existing economies of scale.

15 Tying and bundling

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 Comco has investigated tying practices on several occasions, often denying the finding of an abuse, however. The Comco considers that the tying and bundling of two products have negative effects and, therefore, are abusive if:

- the undertaking holds a dominant position on one of the markets;
- the tying and the tied products are distinct products;
- the dominant undertaking makes the acquisition of the second product conditional upon the acquisition of the first product;
- the tying or bundling have anticompetitive effects on the tied (second) market; and
- the tying is not justified for legitimate business reasons (RPW/DPC 2011/1, p. 96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

16 Exclusive dealing

Exclusive dealing practices may be covered by the general clause of article 7 paragraph 1 of the Cartel Act.

On 24 November 2016, the Federal Administrative Court annulled the Comco decision to close the investigation against the ticketing and live entertainment provider Ticketcorner AG and the operator of the event location Hallenstadion in Zurich (Aktiengesellschaft Hallenstadion [AGH]) in an interim decision. The Federal Administrative Court found (likely) abuses of the dominant positions of Ticketcorner and AGH. It also held that the obligation for event organisers to sell at least 50 per cent (resulting de facto in 100 per cent) of all tickets for events in the Hallenstadion via Ticketcorner, or the agreement between Ticketcorner and AGH in that regard, respectively constitute illegal anticompetitive agreements. In its decision, the Federal Administrative Court handed down the matter to the Comco. This matter is currently pending before the Federal Supreme Court (Federal Administrative Court, 24 November 2016, B-3618/2013, *Vertrieb von Tickets im Hallenstadion*).

17 Predatory pricing

The law considers as unlawful any undercutting of prices or other conditions directed against a specific competitor (article 7, paragraph 2(d) of the Cartel Act). The Comco 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, p. 1002, *Cornèr Banca SA/Telekurs AG*). In principle, however, the Comco may infer that prices under average variable cost are directed against competitors.

In the *Radio- und TV-Markt St Gallen* case (RPW/DPC 2002/3, p. 431), the Comco stated four conditions that must be fulfilled to find an abuse of dominance in the form of predatory pricing: the undercutting must be systematic; should be directed towards a specific, actual or potential, weak competitor; should not allow the company to maximise its profits in the short term; and the company should be able to raise the prices again.

The Comco considers the 'recoupment' of lost profits as a condition for finding an unlawful predatory pricing strategy (see, for example, RPW/DPC 2004/4, p. 1002, *Cornèr Banca SA/Telekurs AG*).

18 Price or margin squeezes

Price or margin squeezes may be considered as abuses of a dominant position. The Comco defines price squeeze as a situation where a vertically integrated undertaking sharply lowers retail prices in comparison to its wholesale prices, so that comparably efficient competitors would not be able to compete and make profits in the retail market.

The leading case with regard to price squeezing is the *Swisscom* decision, in which the Comco fined Swisscom about 220 million francs for price squeezing in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). The Federal Administrative Court upheld Comco's finding but reduced the fine to about 186 million francs (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). The Comco 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 Comco focused its analysis on the retail margins of a reasonably efficient competitor (the imputation test). The Comco 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 anticompetitive 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.

Recently, the Comco fined Swisscom about 7.9 million Swiss francs for a price squeeze in the wide area network sector. Indeed, in 2008 the Swiss Post issued a tender process for services with regard to the networking of its offices. Swisscom offered a price that was 30 per cent lower than its competitor's price, taking advantage of the fact that, in order to provide its facilities, it has to acquire prior facilities from Swisscom on a wholesale level. Swisscom fixed the price for the prior facilities so high that its competitors were unable to compete with their downstream services. By the same token, the Comco found that Swisscom imposed excessive prices (RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*).

19 Refusals to deal and denied access to essential facilities

Article 7 paragraph 2(a) of the Cartel Act considers as unlawful any refusal to deal (eg, refusal to supply or to purchase goods), which is likely to foreclose competition. In the practice of the Comco, four conditions must be fulfilled to qualify a refusal to deal as abusive: first, the dominant undertaking must refuse to supply a product; second, this product has to constitute 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, p. 96, *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 a dominant position (RPW/DPC 2001/2, p. 255, *Watt/Migros-EEF*). The decision of the Comco confirmed the application of the Cartel Act to regulated industries; it was upheld by the Competition Appeal Commission and the Federal Supreme Court.

Another leading case on refusal to deal was *ETA SA Manufacture Horlogère Suisse* (RPW/DPC 2005/1, p. 128). ETA notified its customers that it would phase out (ie, gradually reduce) the supply of rough watch movements (movement blanks), and that it would supply only already assembled watch movements in the future. The reduction and interruption of the supplies of an input was considered as an abuse of a 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 by three years. The Secretariat of the Comco (as to the role of the Secretariat, see question 26) was also investigating the decision of Swatch to cease to supply third parties with mechanical watch movements and assortments (RPW/DPC 2014/1, p. 215). In the course of this investigation, the Comco issued interim measures to ensure the supply of third parties with movements and assortments during the investigation (RPW/DPC 2011/3, p. 400, *Terminierungspreise im Mobilfunk*). These interim measures were confirmed by the Federal Administrative Court (RPW/DPC 2012/1, pp. 158, 162).

The Comco fined SIX Group with 7 million Swiss francs for refusing to supply interface information to other competitors and therefore rendering their product incompatible with SIX terminals (RPW/DPC 2011/1, p. 96, *SIX/ Terminals mit Dynamic Currency Conversion (DCC)*).

In a recent decision, the Comco fined Swisscom with about 72 million francs for refusing to supply some competitors with broadcasts of live sports for their platforms entirely and for having only granted limited access to a reduced range of sports content to others (Comco, 9 May 2016, *Sport on Pay-TV*). Swisscom decided to challenge this decision of the Comco before the Federal Administrative Court.

Civil courts are likely to find a refusal to deal abuse more easily. In a judgment of 23 May 2013, the Federal Supreme Court confirmed that a company managing a cheese-maturing cellar with regard to the production of an AOC cheese (ie, a cheese with a protected designation of origin label) had abused its dominant position by preventing the plaintiff, a cheese manufacturer, from being admitted to the cheese-maturing cellar (Federal Supreme Court, 23 May 2013, 139 II 316, *Etivaz*). In addition to ordering access to the maturing cellar, the Federal Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing the cheese-maturing cellar.

The essential facility doctrine is partly recognised in practice, in that it justifies the finding of a dominant position and the duty to deal. However, the existing case law 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.

20 Predatory product design or a failure to disclose new technology

Such practices may be covered by the general clause of article 7 paragraph 1 of the Cartel Act.

21 Price discrimination

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade, in particular also through specific rebate and pricing schemes, by a dominant undertaking is unlawful (see also question 14).

22 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) of the Cartel Act). Unfair prices are, in general, considered an exploitative practice and, therefore, as an abuse of dominance. In principle, the 'unfair' criterion of a price 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 in the price setting; customers should lack alternative solutions, and hence the ability of the dominant company to exert a certain coercion on the customers (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

The Comco imposed a record fine of 333 million francs on Swisscom, the incumbent Swiss telecom provider, for imposing unfair prices in the mobile call termination market (RPW/DPC 2007/2, p. 241, *Terminierungspreise im Mobilfunk*). The decision was quashed by the Federal Administrative Court in February 2010 (RPW/DPC 2010/2, p. 242). The annulment was confirmed by the Federal Supreme Court in April 2011, which held that, owing 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 to the Swiss Federal Communications Commission ComCom (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). On the basis of the above-mentioned judgment of the Federal Supreme Court, the Comco decided to close the investigation it had opened on 15 October 2002 against the three competing mobile network operators Swisscom, Sunrise and Orange for an abuse of a (collective) dominant position (RPW/DPC 2011/4, p. 522, *Terminierungspreise im Mobilfunk*).

In the *Swisscom WAN* case, the Comco also fined Swisscom for imposing unfair prices with regard to its WAN connection wholesale offerings for competitors (RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*).

23 Abuse of administrative or government process

Such practices may be covered by the general clause of article 7 paragraph 1 the Cartel Act.

24 Mergers and acquisitions as exclusionary practices

The Cartel Act does not deal with structural abuses specifically. Article 7 paragraph 2 of the Cartel Act sets forth merely examples, and its general clause in paragraph 1 covers structural abuses if the conduct of dominant undertakings enables them to exclude rivals or exploit customers or consumers. As mentioned above, the Cartel Act contains specific provisions on merger control, and, therefore, mergers that exceed the specific turnover thresholds are subject to ex ante control. However, notwithstanding these thresholds, a merger control notification is mandatory if one of the undertakings concerned has been held to be dominant in a market Switzerland in a final and binding decision under the Cartel Act, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof (article 9 paragraph 4 of the Cartel Act; see, in particular, decision of the Federal Administrative Court, 29 April 2014, B-6180/2013, *The Swatch Group AG*).

The concept of structural abuse is relevant in particular with regard to the acquisition of minority shareholdings and to mergers of a dominant undertaking not reaching the thresholds or not being held dominant respectively for ex ante notification.

The Comco has investigated or discussed the acquisition of a minority shareholding in a few cases. In *Minderheitsbeteiligungen der Publigroupe SA (und ihrer Tochtergesellschaften) an Zeitungsverlagen* (RPW/DPC 2006/3, p. 449), the Comco confirmed the application of article 7 of the Cartel Act to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking. It defines structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage'. However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse.

25 Other abuses

Other possible abuses of dominant undertakings, eg, strategic capacity construction, underinvestment in capacity, predatory advertising or excessive product differentiation must be assessed on a case by case basis, may be covered by the umbrella clause of article 7 paragraph 1 of the Cartel Act and thus, according to the recent case law of the Federal Administrative Court, also be sanctioned (RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*).

Enforcement proceedings

26 Enforcement authorities

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

The Comco 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 Comco, to issue any necessary procedural ruling. The Secretariat submits draft decisions to the Comco and implements the latter's decisions.

The Secretariat has broad investigative powers, in particular, it may order searches (ie, dawn raids) and seize any evidence, or hear third parties as witnesses, and require the parties to an investigation to give evidence. Upon specific request for information, the undertakings under investigation are obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents, however in due consideration of the nemo tenetur principle, ie the right against self-incrimination (see Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, P. 561, *Preispolitik Swisscom ADSL*).

The Secretariat published a note on selected instruments of investigation in January 2016. Therein, it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

A dominant company condemned for unlawful (abusive) conduct risks fines up to 10 per cent of the turnover that it cumulatively 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. The Cartel Act Sanctions Ordinance (CASO) lays down the method of calculation of the fines in detail.

The largest fine ever issued for abuse of a dominant position, 333 million francs, was cancelled by the Federal Administrative Court and, subsequently, also by the Federal Supreme Court (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*; see, question 22). Swisscom received another fine of 220 million francs in 2009 for an unlawful price squeeze in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). The Federal Administrative Court, however, reduced the fine to about 186 million francs (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). With decision of 21 September 2015, Comco imposed a fine on Swisscom in the WAN-Anbindung case of about 7.9 million francs ((RPW/DPC 2016/1, p. 128, *Swisscom WAN-Anbindung*) and with decision of 9 May 2016, Comco imposed a fine of about 72 million francs on Swisscom with regard to an abusive conduct against competing TV platform operators in the live sports broadcasting markets (Comco, 9 May 2016, *Sport on Pay-TV*).

The fine on Publigroupe of 2.5 million francs for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Court in April 2010 (RPW/DPC 2010/2, p. 329) and by the Federal Supreme Court on 29 June 2012 (RPW/DPC 2013/1, p. 114).

In the *Publigroupe* case, the Federal Administrative Court, referring to article 7 of the European Convention of Human Rights, distinguished between practices falling within the list of article 7 paragraph 2 of the Cartel Act and those covered by the general clause of article 7 paragraph 1 of the 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. However, in the recent decision on the *Swisscom ADSL* case, the Federal Administrative Court changed its position and based a fine in the amount of 186 million francs solely on the general clause of article 7 paragraph 1 of the Cartel Act, basically arguing that Swisscom must have known that a price squeeze constitutes an abusive conduct (Federal Administrative Court, 14 September 2015, RPW/DPC 2015/3, p. 561, *Preispolitik Swisscom ADSL*). It remains to be seen whether the Federal Supreme Court will share this view; the judgment of the Federal Administrative Court is currently under appeal before the Federal Supreme Court.

Besides the possibility to impose fines (indeed, imposing a fine is compulsory in the case of an unlawful abuse of a dominant position), the Comco has a wide range of decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify specific business practices (for instance, to grant access or to modify rebate schemes or discriminatory pricing practices).

As compared to some other jurisdictions, the Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking which abused its dominant position. Individuals, however, may be fined in a few other cases, particularly in the case of a violation of a binding decision of the Comco (article 54 of the Cartel Act) or if the individual itself qualifies as an undertaking in the sense of the Cartel Act.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Sanctions can be imposed by the Comco autonomously, without having to petition any court. In that regard, the Federal Administrative Court and the Federal Supreme Court come only into play where a sanction decision of the Comco is challenged by the undertaking concerned (see question 33).

Update and trends

On 17 September 2014, the Federal Parliament finally rejected a planned major revision of the Cartel Act. Subsequent to the rejected revision, individual proposals were submitted. One new attempt aims at the adoption of (some of) the non-controversial proposals of the failed revision of the Cartel Act. The other proposals relate to more controversial topics. First, the parliamentary initiative 'Excessive Import Prices. End Compulsory Procurement on the Domestic Market' of 25 September 2014 was filed and admitted. Secondly, the federal popular initiative 'Stop to the Swiss Island of High Prices – Pro Fair Import Prices (Fair-Price Initiative)' was launched. Both legislative attempts aim to introduce new regulation with regard to abuses of undertakings with 'relative market power' (a concept already known in the national German competition law). According to the initiatives, subject to legitimate business reasons, undertakings shall particularly abuse their relative market power if they either refuse to contract with Swiss domestic customers willing to purchase products abroad to the corresponding foreign conditions or charge Swiss prices anyhow. The motion 'For a More Effective Cassis de Dijon Principle' of 18 June 2015 aims to ensure that manufacturers expressly permit in their distribution agreements Swiss domestic distribution partners, inter alia, to carry out installation, maintenance or guarantee work for their products, irrespective of whether these products have been purchased directly in the EEA. The Parliament has approved this motion and it now is for the Economic Affairs and Taxation Committees to draft a proposal for legislative amendments.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

There are usually only a few investigations opened and final decisions rendered each year with regard to abusive conduct of dominant undertakings, if any. The enforcement record is certainly lower compared to opened investigations and rendered decisions with regard to anticompetitive agreements between undertakings. However, notwithstanding these numbers, the largest fines have been imposed on companies that have been held responsible for abusive conduct (see questions 19 and 27).

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The contracts entered into by dominant undertakings that constitute an abuse of a dominant position may be declared null and void, in whole or in part, with retroactive effect (*ex tunc*; see also, article 13 of the Cartel Act and the decision of the Federal Supreme Court, 12 June 2008, 134 III 438). The issue of the nullity remains, however, controversial, and there is no specific case law with regard to contracts concluded by dominant undertakings.

31 Private enforcement

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

Civil 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 civil 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 of the Cartel Act). Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

The Cartel Act empowers civil 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 of the Cartel Act).

The Federal Supreme Court upheld an order of a lower civil court to a cooperative society managing a cheese maturing cellar to accept a company as a member and to grant, therefore, access to the maturing cellar (Federal Supreme Court, 23 May 2013, 139 II 316, *Etivaz*).

In another case, 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 of the Cartel Act) and injuring athletes' personality rights (Cantonal Court of Vaud, 24 June 2011, published in CaS 2011, 282).

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes. See question 31.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

Undertakings that receive a decision of Comco holding them responsible for unlawful abusive conduct and, to a limited extent, also Comco's 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 judgments of the Federal Administrative Court may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims, ie the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, or in the European Convention of Human Rights or other international treaties. The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

The judgments of upper cantonal civil courts rendered in civil actions may also be ultimately challenged before the Federal Supreme Court.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

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

The Cartel Act does not set forth specific rules which apply to the unilateral conduct of non-dominant firms. However, under specific circumstances, the Cartel Act may nevertheless be applicable to such undertakings, as the concept of dominance has already been applied to cases of vertical economically dependent relationships (see question 2). Moreover, such rules are also contained in the Unfair Competition Act (see question 6). Finally, some new proposals that aim at restricting certain conduct by non-dominant firms are currently being debated (see Update and trends).

meyerlustenberger | lachenal

Christophe Rapin
Mario Strebel
Renato Bucher
Jacques Johner

christophe.rapin@mll-legal.com
mario.strebel@mll-legal.com
renato.bucher@mll-legal.com
jacques.johner@mll-legal.com

Forchstrasse 452, PO Box 1432
8032 Zurich
Switzerland
Tel: +41 44 396 91 91
Fax: +41 44 396 91 92

65 rue du Rhône, PO Box 3199
1211 Geneva 3
Switzerland
Tel: +41 22 737 10 00
Fax: +41 22 737 10 01

222 avenue Louise
1050 Brussels
Belgium
Tel: +32 2 646 02 22
Fax: +32 2 646 75 34

www.mll-legal.com