

Dominance

In 35 jurisdictions worldwide

Contributing editors

Thomas Janssens and Thomas Wessely



2015

GETTING THE
DEAL THROUGH 

GETTING THE
DEAL THROUGH 

Dominance 2015

Contributing editors

Thomas Janssens and Thomas Wessely
Freshfields Bruckhaus Deringer

Publisher
Gideon Robertson
gideon.roberton@lbresearch.com

Subscriptions
Sophie Pallier
subscriptions@gettingthedealthrough.com

Business development managers
Adam Sargent
adam.sargent@lbresearch.com

Alan Lee
alan.lee@lbresearch.com

Dan White
dan.white@lbresearch.com



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Switzerland

Christophe Rapin, Martin Ammann and Pranvera Këllezi

Meyerylustenberger Lachenal

General

1 Legislation

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

The Federal Act of 6 October 1995 on Cartels and other Restraints of Competition (the Cartel Act) applies to unilateral practices of dominant undertakings. According to article 7 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. The Swiss Cartel Act is construed independently from EU competition law (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010, pt 4.3). Therefore, the legislation and individual solutions diverge from EU case law and the European Commission's decision-making practice.

2 Non-dominant to dominant firm

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

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

3 Object of legislation

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

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

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

In the field of merger control, the special (and lower) thresholds for the notification of mergers in the media industry set by the law of 1995 to prevent media concentration were repealed in June 2003. With bank mergers, the interests of creditors may be given priority. In these cases, FINMA (the supervising financial authority) supersedes the Competition Commission, which it invites to submit an opinion.

4 Non-dominant firms

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

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

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

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.

5 Sector-specific control

Is dominance regulated according to sector?

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

6 Status of sector-specific provisions

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

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

7 Enforcement record

How frequently is the legislation used in practice?

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

8 Economics

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

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

9 Scope of application of dominance provisions

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

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

10 Definition of dominance

How is dominance defined?

Article 4 paragraph 2 of the Cartel Act defines a dominant undertaking as '[O]ne or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market'.

11 Market definition

What is the test for market definition?

The test for market definition is the cross-substitutability among products and, in particular, the SSNIP test; see *Vertrieb von Werbematerialien* (2001) and the 29 June 2012 judgment of Federal Supreme Court in *Publigruppe*.

The relevant market is defined in article 11 of the Merger Control Ordinance of 17 June 1996 as comprising 'all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use'. It serves as the basis for defining the relevant market in cases of dominance (*Vertrieb von Tickets im Hallenstadion Zürich* (2012)).

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

12 Market-share threshold

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

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

The Competition Commission has denied dominance in the case of a market share of 69 per cent, where the company had lost market share due to the entry of new competitors (*Mobilfunkmarkt (Swisscom)* (2002)). In

another case, a market share of 50 to 70 per cent was not sufficient to find dominance because of the strong competition that was facing the company from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (*Johnson & Johnson* (2003)).

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

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

13 Collective dominance

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

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

The first case that dealt with collective dominance was the merger between Price Waterhouse and STG-Coopers & Lybrand (1998). In the *Mobilfunkmarkt* case (2001), the Swiss Competition Commission examined the existence of a collective dominance in parallel to the existence of an agreement in the form of a concerted practice. As a first step, the Commission goes through a static analysis, and examines the structure of the market; the analysis is followed by an assessment of the conduct of the undertakings on the market. According to the Swiss Competition Commission, the criteria for the finding of a collective dominance are similar to that of collusion (horizontal agreement) (*Konsumkredit* (2007)) where the Commission denied both the finding of collective dominance and the existence of an agreement).

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

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

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

14 Dominant purchasers

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

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

Abuse in general

15 Definition

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

In general, dominant undertakings are considered to behave unlawfully 'if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners' (article 7 paragraph 1 Cartel Act). Article 7 paragraph 2 lists examples of conduct that may be considered as abusive.

The Cartel Act contains no per se prohibitions. The unlawful (or abusive) character of a conduct should be determined on a case-by-case basis, taking into account market conditions. The decision-making practice of the Swiss Competition Commission examines the effect on the market. WEKO, the former Competition Appeal Commission, recognised that it is the anti-competitive effect of a practice that justifies its prohibition, which position is confirmed by the Supreme Court requirement that examples of article 7 paragraph 2 should be applied in conjunction with paragraph 1 of article 7 (judgment of the Federal Supreme Court of 29 June 2012, *Publigroupe*). The Competition Commission applies a blend of a form-based and effects-based approach, and the recent decisions show a trend towards an effects-based approach.

16 Exploitative and exclusionary practices

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

Article 7 of the Cartel Act covers both exploitative and exclusionary practices. Exclusionary practices target mainly competitors, while exploitative practices harm commercial partners or consumers. Excessive pricing is also covered in the list of unlawful practices. The finding of an exclusionary practice does not rule out an exploitative one; the distinction does not have legal consequences.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

The decision-making practice of the Competition Commission requires a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal literature accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (*Valet Parking* (2006)). In *Valet Parking*, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of dominant position, even though the behaviour had a negative effect on the off-airport parking market (outside the airport). On the other hand, the causal link between dominance and a possible behaviour is not sufficient to show an abusive conduct. The behaviour itself should comprise separate elements that can qualify as abusive. In the context of unfair (or excessive) prices where the dominance itself is the cause of the dominant undertaking's power to set monopolistic prices, this close link between dominance and price setting is not sufficient to prove that the price was abusive. In addition, it should be demonstrated that the dominant undertaking was able to impose the said price on clients (judgment of the Federal Supreme Court of 11 April 2011, joint cases 2C_343/2010 and 2C_344/2010).

18 Defences

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

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

Efficiency gains may also be invoked. In *Ticketcorner* (2004), the Competition Commission discussed efficiencies 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. This case shows that efficiency gains and legitimate business reasons may be invoked, but that the restriction of competition should be proportional to the objective to be attained.

Specific forms of abuse

19 Price and non-price discrimination

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

One of the leading cases concerned the market for advertising placement, in which the Competition Commission condemned the refusal of Publigroupe to pay certain professional intermediaries and to discriminate against them compared with others. The practice raised barriers to entry on the market for advertisement placement and discriminated between professional intermediaries. Publigroupe was fined 2.5 million Swiss francs (fine confirmed by judgment of Federal Supreme Court of 29 June 2012, *Publigroupe*).

20 Exploitative prices or terms of supply

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

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

21 Rebate schemes

Fidelity and target rebates are considered as abuse of dominance (*Telecom PTT-Fachhändler-verträge* (2007)). In principle, quantitative rebates that are justified by cost efficiencies are legitimate. Rebates based on quality criteria are not necessarily considered unlawful, in particular if such rebates are justified by true benefits, and that customers are not hindered in their choice to choose another competitor.

The Competition Commission held the rebate scheme applied by Swisscom was abusive, even though the rebates were granted according to a linear scheme that did not depend on individual quantities acquired by each customer (*ADSL-Angebot der Swisscom* (2004)). Swisscom rebates on

wholesale DSL services mainly benefited its subsidiary, due to its scale. The latter obtained rebates of 20 per cent, while its competitors were granted rebates of a maximum of 7 per cent. The Competition Appeal Commission upheld the finding of the Competition Commission on this point, stating that the efficiency gains related to the scale of the operations were realised due to the global scale of the operations, and that small operators contributed equally to the overall scale and, therefore, to efficiency gains. The case is peculiar in that the rebates enabled the subsidiary to offer better prices downstream, and, therefore, squeeze out competitors.

22 Predatory pricing

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

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

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

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

23 Price squeezes

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

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

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

24 Refusals to deal and 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. 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 is an input objectively necessary to compete in a neighbouring (upstream or downstream) market; third, the refusal has a foreclosure effect; and fourth, the refusal cannot be justified for legitimate business reasons (*SIX/Terminals mit Dynamic Currency Conversion (DCC)* (2011)). *Watt/Migros* was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The refusal to transport electricity was considered as an abuse of dominant position (*Watt/Migros* (2001)). The decision

of the Competition Commission was also important as it confirmed the application of the Cartel Act to regulated industries; it was upheld by the Competition Appeal Commission and the Swiss Federal Court.

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

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

Civil ordinary courts are liable to find a refusal to deal abuse more easily. In a judgment of 23 May 2013, the Federal Supreme Court upheld the abuse in the case of a cooperative that refused access to its cheese-maturing cellar to a non-member (judgment of the Supreme Court of 23 May 2013, *Etivaz*). The lower civil court had issued such an order ignoring the Competition Commission's expert opinion against the duty to deal. In addition to ordering access to the maturing cellar, the 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, decision-making practice does not specify under which conditions such access must be granted and a refusal to deal may be considered as abusive without fulfilling the traditional conditions of the essential facility doctrine.

25 Exclusive dealing, non-compete provisions and single branding

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

26 Tying and leveraging

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

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

27 Limiting production, markets or technical development

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

28 Abuse of intellectual property rights

Such practices may be covered by the general clause of article 7 of the Cartel Act. Intellectual property rights do not exclude the application of article 7 of the Cartel Act.

29 Abuse of government process

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

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

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

The Competition Commission has investigated or discussed the acquisition of a minority shareholding in a few cases. In *Publigroupe* (2006) the Competition Commission 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, which was denied in the *Publigroupe* case. The assessment criteria used by the Competition Commission relate to the criteria for finding an input or upstream foreclosure.

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

31 Other types of abuse

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

Enforcement proceedings

32 Prohibition of abusive practices

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

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

33 Enforcement authorities

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

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

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

34 Sanctions and remedies

What sanctions and remedies may they impose?

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

The largest fine ever issued for abuse of dominant position was 333 million Swiss francs was cancelled by the Federal Administrative Tribunal in January 2010 (see question 20, *Swisscom* decision). Swisscom received another fine of 220 million Swiss francs in 2009 for unlawful margin squeeze in the ADSL market (Competition Commission decision of 19 October 2009, *Preispolitik Swisscom ADSL*; the decision is under appeal). The fine on Publigroupe of 2.5 million Swiss francs for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Tribunal in February 2010 (*Publigroupe*) and by the Federal Supreme Court on 29 June 2012 (*Publigroupe*). In this latter case, The Federal Administrative Tribunal, referring to article 7 ECHR, distinguishes 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. The question of the pertinence of this distinction for imposing fines was left open by the Federal Supreme Court, but it is expected that the Competition Commission will tend to base its decisions on one of the examples of article 7 paragraph 2 of the Cartel Act when imposing sanctions.

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

35 Impact on contracts

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

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

36 Private enforcement

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

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

The Cartel Act empowers the courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 of the Cartel Act). For instance, 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 (judgment of 24 June 2011, published in CaS 2011, 282). The Supreme Court upheld an order of a lower civil court to a cooperative society managing the cheese maturing cellar to accept a company as a member and to grant, therefore, access to the maturing cellar (judgment of the Supreme Court of 23 May 2013, *Etivaz*).

37 Availability of damages

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

Yes. See question 36.

38 Recent enforcement action

What is the most recent high-profile dominance case?

On 24 February 2010, the Federal Administrative Tribunal cancelled a fine of 333 million Swiss francs set by the Competition Commission against

Swisscom for excessive pricing (see questions 23 and 34). The cancellation was confirmed by the Federal Supreme Court in April 2011. SIX Multipay, a subsidiary of the SIX Group (the Swiss stock exchange), was fined 7 million Swiss francs for refusing to supply interface information to other competitors (*SIX/Terminals mit Dynamic Currency Conversion (DCC)* (2011)). In 2012, the Federal Supreme Court confirmed a fine of 2.5 million Swiss francs set by the Competition Commission against Publigroupe for refusal to deal and discriminatory practices (judgment of the Federal Supreme Court of 29 June 2012, *Publigroupe*).

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Christophe Rapin
Martin Ammann
Pranvera Këllezi

christophe.rapin@mll-legal.com
martin.ammann@mll-legal.com
pranvera.kellezi@mll-legal.com

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

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

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