Cartels

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Switzerland

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Legal framework

Cartels and monopolies in Switzerland are mainly governed by the Federal Act of 6 October 1995 (revised in 2003) on Cartels and Other Restraints of Competition ("**Cartel Act**").

The purpose of the Cartel Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. However, the objective is not limited to economic aspects. General public interest considerations may also be taken into account. The law grants the Swiss Competition Commission ("**Comco**") the power to assess economic consequences of restrictions of competition and concentrations between undertakings, and leaves it to the Federal Council (the Swiss government) to assess the balance with the general public interest. Upon specific request by the undertakings subject to a decision by the Comco or the appeal courts, the Federal Council may authorise anti-competitive conduct in exceptional cases if such conduct is deemed necessary for compelling public interest reasons (article 8 Cartel Act). To date, this has never happened.

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements. Anti-competitive agreements are defined as binding or non-binding agreements or concerted practices between undertakings operating at the same or different market levels that have a restraint of competition as their object or effect (article 4 § 1 Cartel Act). To be unlawful, an agreement must either eliminate effective competition or significantly restrict competition without being justified on economic efficiency grounds (article 5 § 1 Cartel Act).

According to article 5 § 3 and 4 Cartel Act, the following agreements are presumed to eliminate effective competition and are thus considered as hard-core restrictions ("**hard-core agreements**"):

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

In addition to the Cartel Act, the regulatory framework also comprises several ordinances of the federal government as well as notices and communications of the Comco, in particular the Notice regarding the Competition Law Treatment of Vertical Agreements of 28 June 2010 and the recently revised Notice regarding the Competition Law Treatment of Vertical

Agreements in the Motor Vehicle Sector of 29 June 2015, which entered into force on 1 January 2016.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from the competition law of the European Union ("**EU**"). Under specific circumstances, however, European competition law can and shall serve as an interpretative aid (see section, "Cross-border issues" below).

Aside from the cartel regulation dealing with anti-competitive agreements set out above, article 7 Cartel Act deals with abusive conduct by dominant undertakings.

Authorities and enforcement regime

The Comco and the Secretariat of the Comco ("**Secretariat**") are the authorities charged with enforcing and administering the Cartel Act.

The Comco is based in the Swiss capital Berne and consists of 12 members. One president and two vice-presidents head the Comco. The majority of the Comco's members must be independent experts with no interest in or special relationship with any economic group whatsoever. The Comco takes decisions and remedial actions against, and also imposes fines on, undertakings that violate Swiss competition law. The Comco has wide decision-making and remedial powers. It can, *inter alia*, also issue injunctions to terminate a specific conduct or to change and modify a specific business practice. With the revised organisational regulation of the Comco that entered into force on 1 November 2015, a specific chamber is empowered to render partial decisions on the closure of proceedings, the approval of amicable settlements including other measures, in particular fines and costs, for some of the parties while the proceeding is continued for the other parties.

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Comco, to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. The total headcount of the Secretariat amounted to 76 employees (66.7 FTEs) by the end of 2015.

The Federal Administrative Court ("**FAC**"), based in St. Gall, is the first appellate instance against Comco decisions.

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

The Federal Criminal Court, based in Bellinzona, is the competent court to decide on the unsealing of seized documents and electronic data upon specific request by the Comco.

Sanctions

Pursuant to article 49a Cartel Act, direct fines are imposed on undertakings that participate in hard-core agreements or that abuse their dominant position.

In its landmark decision *Gaba*, the FSC confirmed for the first time that undertakings that participate in hard-core agreements can be directly fined even if the presumption of the elimination of effective competition (article 5 § 3 and 4 Cartel Act) is rebutted and the agreement in question merely significantly restricts competition within the meaning of article 5 § 1 Cartel Act (decision 2C_180/2014 of the FSC of 18 June 2016 – *Gaba*).

The maximum fine amounts to 10% of the undertaking's turnover cumulatively achieved in Switzerland in the preceding three financial years. The Cartel Act Sanctions Ordinance ("**CASO**") lays down the method of calculation of the fines in detail (see section, "Administrative and civil sanctions" below). And it is the CASO that also lays down the

legal prerequisites for leniency applications because of which a fine may be waived in whole or in part (see section, "Leniency regime" below).

Furthermore, an undertaking that violates an amicable settlement or a legally enforceable decision of the Comco or its appeal courts can be fined up to 10% of the turnover cumulatively achieved in Switzerland in the preceding three financial years (article 50 Cartel Act). Through this rule, recidivists with regard to binding findings of illegal competition restrictions that did not qualify as hard-core agreements may be fined (indirectly) as well.

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

Overview of investigative powers in Switzerland

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Comco, to issue any necessary procedural ruling. Both the Comco and the Secretariat may hear the parties or witnesses (article 42 § 1 Cartel Act). The parties involved in particular have the right to be present at such hearings and to comment on the hearing minutes.

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

The Secretariat may use all kinds of evidence to establish the facts. In practice, it typically relies on information gathered in dawn raids and information provided in (written or oral) party and witness statements.

Upon request of the Secretariat, one presidium member of the Comco may order dawn raids and seizures (see article 42 § 2 Cartel Act). 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. The representatives of the Secretariat in charge of the inspection will, *inter alia*, not wait for the arrival of external lawyers before starting to search the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, the undertakings being dawn-raided may request the sealing of specific or even all documents and electronic data.

Overview of cartel enforcement activity during the last 12 months

Dawn raids

Since 1 April 2004, when an amendment to the Cartel Act entered into force, not only were direct fines introduced but the competition authorities were also empowered to conduct dawn raids. Dawn raids have proven to be an effective and efficient tool to discover anti-competitive conduct. To date, the Secretariat has conducted dawn raids in 26 proceedings at over 100 premises.

Ongoing and newly opened cartel investigations

Numerous cartel investigations in different industry sectors are currently ongoing. These include, *inter alia*, the car-leasing sector, road construction and civil engineering services, financial markets with regard to reference rates (interest rates, foreign exchange rates and rates for precious metals), the gravel and the galvanising industry.

- On 23 September 2015, the Comco opened an investigation against the Swiss ratio AG and its affiliates as well as against the German *gym80 International GmbH*. The purpose of the investigation is to determine whether parallel imports of *gym80*-branded fitness equipment have been illegally prevented.
- On 28 September 2015, the Comco opened an investigation against several financial institutions, namely *UBS, Julius Bär, Deutsche Bank, HSBC, Barclays, Morgan Stanley* and *Mitsui*. The investigation aims at establishing whether these undertakings engaged in unlawful agreements regarding the trade in precious metals, i.e. gold, silver, platinum and palladium.
- On 16 December 2015, the Comco opened an investigation against *Husqvarna Switzerland Ltd* and its affiliates. The purpose of the investigation is to determine whether Husqvarna illegally maintained resale prices and granted absolute territorial protection by preventing parallel trade with its products. Dawn raids were conducted at the premises of Husqvarna.
- On 15 February 2016, the Comco opened an investigation against several companies active in the galvanising industry and two respective industry associations. The Comco conducted dawn raids at several premises. The parties under scrutiny allegedly fixed prices by the common setting of price surcharges and allocated markets territorially and by trading partners.
- On 31 May 2016, the Comco opened an investigation against *Husqvarna Switzerland Ltd* and *Bucher AG Langenthal* and their respective affiliates. The purpose of the investigation is to determine whether the parties illegally fixed prices and allocated markets by customers with regard to the distribution of the Aspen-branded engine fuel. The Comco conducted a dawn raid at the premises of Bucher.

Aside these cartel investigations, Comco has also been active with regard to investigations of potential abuses of a dominant position, and opened new investigations in this regard or issued decisions respectively.

Cartel decisions

The Swiss Competition Commission (Comco) issued several cartel decisions in the last 12 months.

- With a decision of 19 October 2015, the Comco fined four Swiss licensed *Volkswagen distributors* with lump sum fines in the amounts between CHF 10,000 and CHF 320,000 (not yet published in Comco's publication journal "Law and Policy of Competition"; "**RPW**"). The four distributors together with *AMAG RETAIL*, the retail business of the Swiss main importer for Volkswagen cars AMAG Automobil- und Motoren AG, agreed on common terms and conditions with regard to discounts and delivery charges for initial offers for the sale of new Volkswagen cars. AMAG was leniency applicant and received full immunity from a fine. Already in 2014, the Comco closed the proceeding against AMAG in a preliminary ruling, which was subsequently annulled by the FAC, however (see below). The Comco decision against the four distributors is currently under appeal before the FAC.
- On 19 October 2015, the Comco closed its investigation against *Booking.com*, *Expedia* and *HRS*. It prohibited the booking platforms to extensively restrict hotels in their supply policy by imposing comprehensive best price rules (RPW 2016/1, p. 67 – *Online-Buchungsplattformen für Hotels*). The less restricting contract conditions ("*narrow best price rules*"), as modified by Booking.com and Expedia shortly before the Comco's decision was issued, do not fall under this prohibition. However, Comco reserved

the right to monitor the developments on the market and, if necessary, to open a new investigation in this regard. No fines were imposed, as the undertakings' conduct did not fall under the category of hard-core agreements, i.e. practices subject to direct fines.

- On 14 December 2015, the Comco fined *Musik Hug AG* and *AKHZ Management AG*, two distributors of grand and upright pianos of the brands Steinway & Sons and Grotrian-Steinweg for illegal price fixing by agreeing on common list prices and rebates (decision of the Comco of 14 December 2015 – *Flügel und Klaviere*; not yet published in the RPW). The aggregated fine amounted to CHF 518,000. *La Bottega del Pianoforte SA* was leniency applicant and received full immunity from a fine. Even though the two manufacturers Steinway & Sons and Grotrian-Steinweg did not issue minimum or fix resale prices, they supported the dealers' anti-competitive agreements by issuing their agreed list prices, a conduct they committed to refrain from in the future in amicable settlements approved by the Comco.
- On 23 May 2016, Comco approved an amicable settlement between the Secretariat and the G*eneral Electric Company (GE),* including its affiliates in Germany and Switzerland (RPW 2016/2, p. 434 – *GE Healthcare*). The investigation showed that GE agreed to maintain absolute territorial protection with German domiciled distribution partners and thereby prevented parallel trade to Switzerland. In the amicable settlements, GE committed to refrain from such conduct in the future and to amend or clarify its distribution agreements' wording where necessary. GE received full immunity from a fine because of its leniency application.
- On 4 October 2016, the Comco fined eight *road construction and civil engineering undertakings* because of anti-competitive bid rigging in the district of See-Gaster (Canton of St. Gallen) and the districts of March and Höfe (both Canton of Schwyz) (not yet published in the RPW). The aggregated fines amounted to about CHF 5m. One undertaking that was the first leniency applicant received full immunity from a fine. With this decision, Comco again confirmed that the fight against illegal bid rigging is one of its top priorities. The Comco decision is currently under appeal before the FAC.

In the last 12 months, the Federal Administrative Court (FAC) rendered several judgments, both on the merits and on procedural questions:

- On 7 October 2015, the FAC issued a Cartel Act-related judgment (decision B-1570/2015 of the FAC of 7 October 2015 – *Warnblitzleuchte*). In a public tender appeals proceeding under the Federal Public Procurement Act against a direct award, the court found that a potential competitor is not admitted to claim that adequate sourcing alternatives would have existed if parallel imports were not illegally restricted. According to the FAC, the Comco or the civil courts respectively would have to decide whether it was illegal to prevent parallel trade and, where appropriate, to impose a supply obligation. According to the FAC, in public tender appeal proceedings, it is only admissible to claim that the requirements for a direct award proceeding were not met, i.e. that the authority was not allowed to question only one provider or supplier because *de facto*, adequate alternatives would have existed. The judgment of the FAC is final and binding.
- On 13 November 2015, the FAC confirmed the Comco's decision and the fine against the *Bayrische Motoren Werke AG* (BMW) in the amount of CHF 156m for restricting parallel imports into Switzerland (RPW 2015/4, p. 801 – *Bayrische Motoren Werke AG*). According to the Comco, BMW's dealer contracts for the EEA contained export ban clauses that prohibited dealers within the EEA from selling new cars of the brands BMW and MINI to customers outside the EEA, including customers in

Switzerland. According to the Comco, such foreclosure of the Swiss market also prevented competitive pressure on the retail prices for these cars and customers in Switzerland could not benefit from the significant euro exchange rate advantages. The FAC confirmed that according to the applicable effects doctrine, anti-competitive restrictions committed outside Switzerland fall within the geographic scope of the Cartel Act in case they may have had an effect on the Swiss market, irrespective of its actual effects. The FAC also fully endorsed its practice established with the Gaba judgment and found that absolute territorial protection agreements within the meaning of Article 5 § 4 Cartel Act are *per se* to be qualified as significant restrictions of competition, irrespective of and without need to assess actual (quantitative) effects on competition. However, the possibility to justify such restrictions because of economic efficiency grounds (theoretically) remains, which BMW failed to demonstrate in the case at hand. The judgment of the FAC is currently under appeal before the FSC.

- On 17 December 2015, the FAC annulled the decision of the Comco and the corresponding fine of CHF 470,000 in the sports article matter for alleged resale price maintenance (RPW 2016/2, p. 580 – *Altimum SA*). According to the Comco, Altimum's price recommendations, and its pressure to adhere to these recommendations, overrode the distributors' possibility to set their prices autonomously, and led to illegal anti-competitive resale price maintenance. The FAC annulled the Comco's decision and clarified that price recommendations only constitute an illegal resale price maintenance if (i) there is an agreement between the manufacturer/main importer and the distributors to accept the recommendations as resale prices, or (ii) the distributor's freedom to set its own resale prices is restricted, e.g. due to pressure or incentives to follow the recommendations by the manufacturer/main importer, and cumulatively if the price recommendations are effectively followed by the distributors to a large extent. For the FAC, proven resale price-fixing with about 12% of distributors is no such large extent of adherence. As a consequence, it found that there was no agreement on resale prices at all. Regarding the question of *per se* significance, the FAC ruled that besides qualitative, also quantitative effects had to be taken into account in order to assess significance. The FAC's decision contrasts its own judgments in both the *Gaba* and the *BMW* matter as well as the later *Gaba* judgment of the FSC. The *Altimum* judgment is currently under appeal and it remains to be seen how the FSC will align this judgment with its established practice in the *Gaba* case (see below).
- On 12 February 2016, the FAC confirmed a decision of the Comco president that case handlers of the Secretariat were not required to stay out of a specific investigation because of statements made in the course of the negotiations for an amicable settlement (RPW 2016/1, p. 38 – *Ausstand von Sekretariatsmitarbeitenden*). The two main reasons were the following. First, the Comco is not bound by the Secretariat's proposals. It is the Comco that finally decides the cases, which includes the approval of amicable settlements. As a consequence, the outcome of the proceeding remained unresolved and undecided at the time the statements in question were made. Second, according to article 29 § 1 Cartel Act ("*If the Secretariat considers that a restriction on competition is inadmissible, […]*"), a "negative" decision-making forecast of the Secretariat is a prerequisite for negotiations for amicable settlements. Therefore, the Secretariat's employees cannot be considered biased because of the fact that they have expressed such forecast, also in cases where the negotiations finally fail, as was the case in the proceeding at hand. This judgment is final and binding.
- On 17 March 2016, the FAC issued a decision with regard to third party handling services at the north terminal of the airport Berne-Belp (decision A-696/2015 of the

FAC of 17 March 2016 – *Drittabfertigungen Terminal Nord, Flughafen Bern-Belp*). The court was, *inter alia*, faced with the question whether article 36a § 2 of the Federal Aviation Act excludes the application of the Cartel Act within the meaning of article 3 § 1 Cartel Act. Article 36a § 2 Federal Aviation Act regulates operating concessions granting concessionaires the right to commercially operate airports and, in particular, to levy fees. The FAC held that this article suggests being a valid reservation to the application of the Cartel Act, but left the question open. In the case at hand, the FAC particularly held that the Federal Aviation Act itself constituted a sufficient legal basis to lawfully exclude the appellant from the provision of third-party handling services. For the court, it was also not apparent how the exclusion distorted competition among direct competitors or how the principle of equal treatment of competitors was violated. The judgment of the FAC is currently under appeal before the FSC.

- On 13 April 2016, the FAC declared a preliminary ruling of the Comco and a subsequent decision of a Comco vice-president to close a proceeding against the leniency applicant *AMAG* and approve an amicable settlement in that matter void (decisions B-5290/2014, B-5293/2014, B-5294/2014 and B-5332/2014 of the FAC of 13 April 2016 – *Volkswagen Konzessionäre*). The decision on the approval of the amicable settlement was delegated to a Comco vice-president in accordance with the Comco's organisational rules in force at that time. According to the FAC, however, these rules constituted an insufficient legal basis for such delegation. As a consequence, the vice-president's decision was adopted by an incompetent authority and is therefore null and void. These judgments are final and binding.
- On 23 August 2016, the FAC issued three judgments that upheld the decision of the Comco to grant two municipalities – upon request – conditional access to specific data of a closed bid-rigging cartel investigation in the construction sector (decisions A-6315/2014, A-6320/2014 and A-6334/2014 of the FAC of 23 August 2016 – *Zugang zu Verfahrensakten*). The Comco's decision on the merits in the underlying case was final and binding. The FAC held for the first time that municipalities have a right to access the files of the Comco investigation for the preparation of civil damage claims, which are important to ensure a careful management of the taxpayers' money and to reverse the harmful effects on competition. However, access was restricted with regard to several aspects. In particular, the data access was limited to the extent necessary, i.e. data retention for later use was prohibited, as well as to data that directly affected the requesting municipality. Neither the Comco nor the FAC had to decide on access requests by private undertakings, or on the protection of information provided by leniency applicants. With regard to the latter, however, the court explicitly endorsed the Comco's practice to entirely exclude leniency information from access by third parties. These judgments are final and binding.
- On 16 September 2016, the FAC confirmed Comco's decision against the camera manufacturer *Nikon* (decision B-581/2012 of the FAC of 16 September 2016 – *Nikon AG*). According to the court, Nikon maintained absolute territorial protection by means of illegal contractual restrictions on parallel trade in both foreign distribution agreements and domestic wholesaler agreements, including exclusivity clauses liable to limit passive sales, as well as by putting pressure on parallel importers in that regard. The FAC however reduced the fine by CHF 0.5m to about CHF 12m. This decision is in line with recent judgments such as *BMW* (see above) and *Gaba* (see below). All of these judgments confirm, firstly, the broad territorial scope of application of the Cartel Act in case specific clauses are objectively capable of affecting parallel trade into

Switzerland and, secondly, that hard-core agreements in principle constitute *per se* significant restrictions of competition which are illegal subject to their justification on grounds of economic efficiency. The *Nikon* judgment of the FAC is final and binding.

- On 24 November 2016, the FAC 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 (decision B-3618/2013 of the FAC of 24 November 2016 – *Vertrieb von Tickets im Hallenstadion Zürich*). Aside from the (likely) abuses of the dominant positions of Ticketcorner and AGH, the FAC also found that the obligation for event organisers to sell at least 50% (resulting *de facto* in 100%) of all tickets for events in the Hallenstadion via Ticketcorner, or the agreement between Ticketcorner and AGH in that regard, respectively constitutes an illegal anti-competitive agreement in the sense of article 5 § 1 Cartel Act. The FAC handed down the matter to the Comco. Absent an appeal before the FSC (the judgment has not yet become final), it is for the Comco to clarify further facts, to re-assess the matter and to decide whether and in what amounts fines have to be imposed.

During the last 12 months, the Federal Supreme Court (FSC) particularly rendered the judgment on the merits in the leading case *Gaba,* as well as several other judgments on the merits and with regard to procedural issues:

- With the judgment of 6 July 2015, the FSC rejected hearing an appeal against a decision of the Comco granting a third party legal standing in a proceeding (decision 2C_1009/2014 of the FSC of 6 July 2015 – *Parteistellung in der Untersuchung Sport im Pay-TV*). The court denied that the claimants, i.e. the parties under investigation, have an irreparable disadvantage within the meaning of article 93 § 1 letter a. of the Federal Supreme Court Act, due to the admission of a third party to the proceeding with full legal standing. An irreparable disadvantage in the sense of article 93 § 1 letter a. of the Federal Supreme Court Act must be one of a legal nature, and presupposes in particular that it cannot (or at least not completely) be eliminated by means of a subsequent final decision in favour of the claimants. The question whether it was legal to grant the request for full legal standing in the case at hand must therefore be claimed in an appeal against the Comco's final decision, if any.
- With the judgment of 5 October 2015, the FSC rejected an appeal of a manufacturer of cheese labelled with the protected designation of origin "Gruyère (AOC)" (decision 2C_1004/2014 of the FSC of 5 October 2015 – *Gruyère (AOC)*). For some of the products, the cheese manufacturer used milk from outside the region as defined in the Gruyère AOC rules. As a consequence, the manufacturer was not allowed to label the cheese that was manufactured with such milk Gruyère (AOC). The FSC, *inter alia*, rejected the cheese manufacturer's claim that the imposed prohibition on the use of such label would illegally foreclose him from access to the relevant market. The court expressly confirmed that in the field of protected designations of origin, the delineation of a geographical area of production is an indispensable prerequisite for the protection of such label. As a consequence, outsiders who are not part of the defined region are excluded from protection, which is inherent to such system and therefore compliant with the Cartel Act.
- On 26 May 2016, the FSC issued a landmark judgment with regard to the publication of specific passages in decisions of the Comco and the protection of business secrets (decision 2C_1065/2014 of the FSC of 26 May 2016 – Nikon – *Publikation einer*

Sanktionsverfügung). In November 2011, the Comco imposed a fine on Nikon for illegal parallel trade restrictions. Nikon appealed the Comco's decision which, however, was upheld by the FAC (see above). In a separate proceeding, Nikon claimed that several verbatim quotes of self-incriminating and partly disparaging e-mails must be redacted because of possible negative effects on its reputation and future business. The FSC upheld the FAC's decision that dismissed Nikon's appeal to a large extent. The FSC found that facts serving as necessary to prove or substantiate anti-competitive practices are neither protected as business secrets under the Cartel Act nor sensitive as personal data (subject to the anonymisation of the employees' names in the e-mails) under the Swiss Data Protection Act. According to the court, some reputational damage must be accepted with the fine-imposing decision of the Comco, even if such decision is reversed at a later stage. It is noteworthy that the FAC confirmed in its judgment that communication that is not necessary for the reasoning of a decision shall not be disclosed at all, or at least only by way of a non-confidential description; a question the FSC did not have to deal with any more. With regard to the claimed violation of the presumption of innocence, the FSC emphasised that article 6 of the European Convention of Human Rights ("**ECHR**") does not prevent the authorities from informing the public about ongoing (criminal) investigations, including the disclosure of the suspect's identity subject to a given legitimate interest. According to the FSC, such interest is generally given in competition law matters, particularly considering the fact that the Comco is legally required to name the undertakings involved when officially publishing the opening of a cartel investigation (article 28 Cartel Act). The FSC also stressed that the Comco's proceedings with a potential direct fine are only similar to criminal law and that, as a consequence, the guarantees under article 6 ECHR for criminal law proceedings do not necessarily apply with full stringency. The case did not involve leniency applications and the court's view on the protection of information provided by leniency applicants remains open (see also section, "Leniency regime" below).

- On 28 June 2016, the FSC confirmed in a landmark judgment (decision 2C_180/2014 of the FSC of 28 June 2016 – *Gaba*) the decision of the FAC imposing a fine in the amount of CHF 4.8m on the toothpaste manufacturer *Gaba International AG* (now *Colgate-Palmolive Europe Sàrl*) for restricting parallel imports of Elmex toothpaste into Switzerland. According to the licence agreement, licensee *Gebro Pharma GmbH* was not allowed to sell outside its contract territory Austria. The FSC found that this clause constitutes an illegal absolute territorial protection agreement that significantly restricts competition and is subject to direct fines. The FSC upheld the FAC's finding that the significance of a restriction of competition in general is assumed for hard-core agreements due to their quality without the need to examine actual (quantitative) effects, such as market shares. The reasoning of the FSC's judgment has not been published yet. However, according to the court's oral debate on this ruling, significance could only be ruled out for cases of minor importance such as "bagatelle offences". As a consequence, hard-core agreements in principle constitute *per se* significant restrictions of competition and are only permissible if they can be justified on grounds of economic efficiency. The FSC also clarified that direct fines may be imposed for hard-core agreements in the sense of article 5 § 3 and § 4 Cartel Act even if they "only" significantly restrict but do not eliminate effective competition. The Swiss doctrine has controversially discussed this question since direct fines were introduced in the Cartel Act.
- With judgment of 26 September 2016, the FSC clarified that fines and other sanctions

of a criminal nature are not tax-deductible for legal entities, as they are not deemed to be business-related expenses that would be tax-deductible under Swiss law (decision 2C_916/2014 of the FSC of 26 September 2016 – *Abzugsfähigkeit einer Wettbewerbsbusse*). According to the FSC, tax deductibility is only possible insofar as fines aim at disgorging illegally obtained profits, i.e. fines that do not have a criminal or punitive purpose, but aim at correcting an unlawful situation. It is thus essential for Swiss (corporate) income tax purposes to distinguish sanctions with a penal nature from such aiming at disgorging illegally obtained profits. The FSC handed down the judgment to the lower instance to assess this question without specific guidance for such differentiation. The judgment was rendered in a case of violation of European competition law (see Judgment of the European Court of Justice C-194/14 of 22 October 2015 – *AC-Treuhand AG*). The same outcome may be expected in case of violations of the Cartel Act. In this context, it is noteworthy that in a draft bill submitted to the Swiss parliament, an explicit legal basis provides that financial administrative sanctions of criminal nature, such as direct fines under the Cartel Act, as well as the related cost of proceedings, shall not be deductible, whereas profit disgorgement sanctions with non-penal purpose, shall be tax-deductible.

Key issues in relation to enforcement policy

Proceedings under the Cartel Act can be two-staged. The Secretariat can initiate preliminary investigations on its own initiative, at the request of certain undertakings concerned (e.g. competitors) or based on third party complaints. It is at the discretion of the Secretariat to open a preliminary investigation (see landmark decision 130 II 521 of the FSC of 13 July 2004 – *Cornèr Banca SA*, consideration 2.7). If the Secretariat finds indications of a significant restriction of competition, it opens an investigation with the consent of a presidium member of the Comco. However, the Comco may open an investigation directly. The Secretariat must always open an investigation if asked to do so by the Comco or by the Federal Department of Economic Affairs, Education and Research. Also dawn-raids and seizures of documents and electronic data require the opening of an investigation. These coercive measures are not possible in preliminary proceedings.

In its annual press conference of 14 April 2016, the Comco confirmed that its enforcement priorities remained the same. Apart from combating horizontal hard-core agreements, in particular, restrictions of parallel trade remain in the focus of the Comco. Considering that in January 2015 the Swiss National Bank stopped keeping the CHF/EUR exchange rate at a minimum of CHF 1.20 and thereafter the Swiss franc became stronger again, this is unlikely to change. Indeed, in the last few years, the Comco has been acting effectively against restrictions of parallel trade. The above outlined decisions of the Comco and appeal courts, *inter alia* in the *Gaba*, *Nikon*, *BMW*, *Altimum* and *GE Healthcare* matters, confirm this.

Key issues in relation to investigation and decision-making procedures

In Switzerland, the Comco's decision-making process is a subject of controversy. Formally, the Secretariat conducts the investigations, but the Comco itself issues the decisions. Accordingly, the investigating and decision-making bodies are separate, even though at least one of the presidium members of the Comco is involved in some of the investigatory actions. For instance, the opening of an investigation, or the approval to conduct a dawn raid and seize documents and electronic data, is subject to the consent of one presidium member of the Comco. And for its decision-making, the Comco also has the power to hold hearings, which it

has frequently used in the past. Given this overlap, concerns were raised that Comco is biased and cannot exercise effective judicial control over the Secretariat's work.

Concerns were also raised as regards the Comco's institutional autonomy, in particular since direct fines are available. Under Swiss competition law, fines are considered to be of an administrative nature, but also qualify as criminal sanctions in the meaning of the ECHR and the International Covenant on Civil and Political Rights ("**ICCPR**"; see landmark decision 139 I 72 of the FSC of 29 June 2012 – *Publigroupe SA*). Hence, an investigation opened on the basis of alleged hard-core agreements that are subject to direct fines should in principle respect the procedural rights to a fair trial set forth in the ECHR and ICCPR. Pursuant to article 6 § 1 ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In light of the case law of the ECHR and of the functioning of the Comco and the Secretariat, the Comco cannot be considered as an independent and impartial tribunal. Therefore, an appeal on full merits with regard to both factual and legal aspects must be available against the Comco's decisions to safeguard and respect the fundamental requirements of the right to fair trial. In the FSC's view, the FAC does meet these requirements and its performed control is therefore the counterweight to the system established by the Cartel Act (see landmark decision 139 I 72 of the FSC of 29 June 2012 – *Publigroupe SA*, consideration 4).

Procedural rights during the preliminary investigations and investigations can be outlined as follows:

Preliminary investigations aim to identify whether indications of illegal anti-competitive agreements exist which require an in-depth analysis with further investigatory actions. The decision to open an investigation is not a formal decision in terms of the Administrative Procedure Act ("**APA**") and cannot be appealed. In fact, the parties concerned only have limited procedural rights. In particular, the parties have no right to access the case files. By the same token, third parties have no right to demand that the Secretariat opens an investigation (see also section, "Key issues in relation to enforcement policy" above).

In case the preliminary investigation reveals sufficient indications of illegal anti-competitive agreements, in principle, the Comco must open an investigation and announce this by means of an official publication. Such announcement must state the purpose of the investigation and the names of the parties involved. All parties subject to the investigation are vested with the usual procedural rights contained in the APA, unless the Cartel Act stipulates otherwise (article 39 Cartel Act). They particularly have the right to consult and comment on the case files and to suggest witness hearings, and they have the right to be heard and to participate in oral party and witness hearings. On the basis of the conducted investigation, the Secretariat brings forward a draft of a decision, which is comparable to the statement of objections in the EU. The parties may also comment on such draft decision. Affected third parties have the possibility to join the investigation. Third parties that qualify as a party have full legal standing and are vested with all procedural rights. According to the FSC's practice, third parties shall not easily qualify as a party. Particularly with regard to competitors, aside from a close proximity to the subject matter, it is required that they suffer a clear economic disadvantage. Such disadvantage requires a specific and individual concern, and is given if an illegal anti-competitive agreement or abusive conduct by a dominant undertaking has disadvantageous effects on the competitor, in particular diminished turnover. The requirements for the full legal standing have to be proven by the competitor that claims to be a party (see landmark decision 139 II 328 of the FSC of 5 June 2013 – *Parteistellung in der Untersuchung Vertrieb von Tickets im Hallenstadion Zürich*, consideration 4.5). Third parties without full legal standing must request their participation within 30 days of the

announcement (article 43 Cartel Act) and their procedural rights (the minimum being the right to be heard) may be limited.

The Comco and the appeal courts are not obliged to reach a final decision within a specified period of time. The question of whether statutory time bars apply is controversial and currently on appeal before the FAC. In Comco's view, no statutory time bars exist except that no direct fines can be imposed if an investigation was opened only later than five years after the restriction of competition has ceased (article 49a § 3 letter b Cartel Act; see also RPW 2016/1, p. 128 – *Swisscom WAN-Anbindung,* consideration B.4.1.4). In any case, the parties can always lodge a separate appeal and claim undue delay (article 46a APA) or invoke the claim of an unduly long proceeding in the appeal against the decision on the merits. With regard to the length of investigations, the FAC has already pronounced once that a duration of four years and four months is at the upper bound of the legally allowed investigation duration (RPW 2010/2, p. 329 – *Publigroupe SA*; see also e.g. RPW 2015/3, p. 561 – *Preispolitik Swisscom ADSL*).

The approach of the Secretariat with regard to the seizure of documents and electronic data during dawn raids and the triage of legally privileged documents, particularly with regard to the attorney-client privilege, is reflected in its note on selected instruments of investigation from January 2016. The Secretariat therein, *inter alia*, endorses the law by explicitly stating that all documents exchanged with attorneys-at-law allowed to represent parties before the Swiss courts are legally privileged, irrespective of the location where the documents are kept in custody, but only to the extent they concern the professional (legal) advice and/or representation (article 40 Cartel Act *in fine*). Hence, in-house counsel cannot invoke attorney-client privilege with regard to their advice. If sealing of documents or electronic data to be seized is requested, the Secretariat may nevertheless briefly review them to verify the invoked privilege.

The Secretariat and the Comco are legally obliged to respect and protect business secrets such as know-how, client lists or financial accounting documents during their proceedings and in particular in all publications (article 25 Cartel Act). Typically, the Secretariat requests the parties to identify their business secrets. In case the Secretariat does not consider the identified information to constitute business secrets, it tries to reach an amicable arrangement before the Comco must render a formal decision in this regard (see RPW 2016/2, p. 622 – *Nikon − Publikation einer Sanktionsverfügung*).

Under specific circumstances, procedural decisions (interim decisions) may be appealed even before a final decision on the merits has been taken.

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

Leniency regime

Leniency is an important aspect of cartel enforcement in Switzerland. Already in the first 10 years after the entry into force of the leniency regime, the competition authorities had received about 50 leniency applications. However, as the leniency programme has been available since 1 April 2004, there are only a few decisions dealing with the leniency programme. In general, the Comco and the Secretariat are considered to be fair and proportionate, in particular with regard to the obligations imposed on a leniency applicant such as the obligation to fully cooperate with the authorities during the investigation.

The leniency programme particularly applies to (horizontal and vertical) hard-core agreements (article 49a § 2 Cartel Act).

Pursuant to article 8 § 1 CASO, the Comco grants immunity from a fine if an undertaking is the first to either: (i) provide information enabling the Comco *to open* an investigation and the Comco itself did not have, at the time of the leniency filing, sufficient information to open a preliminary investigation or an investigation; or (ii) submit evidence enabling the Comco *to prove* a hard-core agreement, provided that no other undertaking must already be considered first leniency applicant qualifying for full immunity and that the Comco did not have, at the time of the leniency filing, sufficient evidence to prove an infringement of the Cartel Act in connection with the denounced conduct.

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

Pursuant to the Cartel Act, full immunity is limited to the "first in". As outlined above, full immunity from a fine is also possible for cooperation that enables the Comco to prove a Cartel Act infringement and therefore when an investigation has already been opened and a dawn raid conducted. Therefore, it is import to decide immediately upon knowledge of an opened investigation and conducted dawn raid whether or not to cooperate with the competition authorities and, if such cooperation is desired, to submit a leniency marker or application to the Comco without delay (in writing, such as by facsimile, or orally by protocol declaration). In investigations with several leniency applicants, it may be a matter of days or even hours whether and which undertaking may qualify for full immunity from a fine (see e.g. RPW 2009/3, p. 196 – *Elektroinstallationsbetriebe Bern*).

Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50% is available at any time in the proceeding to undertakings that do not qualify for full immunity. Further, the fine amount can be reduced up to 80% if an undertaking provides information to the Comco about other hard-core agreements that were unknown to the Comco at the time of their submission (article 8 § CASO; "leniency plus"). This reduction is without prejudice to any possible full immunity or partial reduction of a fine for the newly disclosed infringements.

The Cartel Act does not expressly regulate the possibility for the Comco to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example if: (i) facts are discovered that justify withdrawal or amendment; and/or (ii) a final decision is unjustified. There is no cartel specific case law in that regard. However, the bar for immunity revocation has to be set very high.

The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The Secretariat and the Comco conduct a full review of the leniency applications in chronological order of receipt (provided that they are valid) to determine precedence for full immunity. Therefore, the extent and timing of the cooperation are determining factors for the amount of the fine reduction.

When applying for leniency, one should keep in mind that the leniency applications do not provide immunity from civil litigation following a decision by the Comco (follow-on litigation). However, the Comco is under no express legal duty to cooperate and provide

judicial assistance to civil courts. It may thus refuse to grant access to documents produced by and detrimental to leniency applicants. To date, the Comco endeavours to protect information submitted by leniency applicants in order not to discourage undertakings to submit such applications in future cases and to thereby protect the leniency programme under the Cartel Act (see also the decisions of the FAC in the matter "*Zugang zu Verfahrensakten*", as outlined above). The Comco typically pursues this objective in its proceedings, *inter alia*, by granting the other parties of the proceeding the right to consult the leniency files, which are separated from the other case files only at the premises of the Comco and without the right to make photocopies in any form or manner whatsoever. The Comco is also willing to implement use restrictions by decision before granting access to leniency files.

At an international level, the Agreement between Switzerland and the European Union concerning the Cooperation on the Application of their Competition Laws, which entered into force on 1 December 2014 ("**Cooperation Agreement**"), provides that information obtained under leniency or settlement proceedings cannot be exchanged without the consent of the undertakings concerned (see also section, "Cross-border issues" below).

Amicable settlements

Amicable settlements are an important feature of the Swiss cartel enforcement regime. During preliminary investigations, the Secretariat may propose measures to eliminate or prevent restrictions of competition (article 26 § 2 Cartel Act). In the framework of an investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose to the undertakings involved an amicable settlement concerning ways to eliminate future restrictions (article 29 § 1 Cartel Act). Hence, amicable settlements solely deal with an undertaking's conduct in the future, meaning that a party can voluntarily undertake to terminate respectively not to commit certain illegal conduct anymore. However, the fine amounts to be imposed for illegal conduct in the past cannot be agreed on – Swiss competition law does not know any "plea bargaining". This also means that an undertaking is allowed to appeal against a Comco decision and the imposed fine even if it has entered into an amicable settlement (see e.g. decision of the Comco of 14 December 2015 – *Flügel und Klaviere*, as referred to above and against which an appeal is pending before the FAC; the decision of the Comco is not yet published in the RPW).

Amicable settlements shall be formulated in writing and approved by the Comco, typically in its decision on the merits (article 29 § 2 Cartel Act). The Comco shall either approve the amicable settlement as proposed by the Secretariat, or refuse to do so and send it back to the Secretariat and suggest amendments. According to the Comco, it cannot amend the terms of a settlement on its own (see e.g. decision of the Comco of 29 June 2015 – *Saiteninstrumente (Gitarren und Bässe) und Zubehör*, para. 22, not yet published in the RPW). However, it did so in one case, namely by setting a time limit to the amicable settlement (RPW 2006/1, p. 115 – *Kreditkarten/Interchange Fee*). Amicable settlements are binding on the parties and the Comco and may give rise to administrative and criminal sanctions in case of a breach of any of its provisions by the parties (article 50 and 54 Cartel Act).

As already mentioned, amicable settlements do not hinder the Comco from imposing fines on the parties in case they have committed illegal hard-core infringements in the past. Yet concluding an amicable settlement is generally regarded as cooperative conduct, and taken into account as a mitigating factor when calculating the fine (article 6 CASO). In recent cases, reaching an amicable settlement has led to a reduction of the fines of about 10% to 20%. However, the Comco takes very much into account the moment of the amicable settlement. In a case of late settlement, the Comco only reduced the fine by 3% (RPW 2010, p. 765 –

Baubeschläge für Fenster und Fenstertüren), and indicated that it will not reduce fines any more if amicable settlements are signed after the Secretariat's second draft decision.

Since 2004, when the possibility to impose direct fines entered into force, 21 investigations were closed together with approved amicable settlement agreements (including dominance cases). In the past year, this namely concerned the cases *Saiteninstrumente (Gitarren und Bässe) und Zubehör* (not yet published in the RPW), *GE Healthcare* (Ultraschallgeräte; RPW 2016/2, p. 434) and *Flügel und Klaviere* (not yet published in the RPW).

Third party complaints

Third parties have two ways of complaining about suspected anti-competitive agreements.

The first way is to file a complaint with the Secretariat (article 26 Cartel Act; see sections, "Key issues in relation to enforcement policy" and "Key issues in relation to investigation and decision-making procedures", above).

The number of third party complaints submitted particularly increased in and after the summer of 2011, in the context of the significant appreciation of the Swiss franc against the euro and the US dollar. However, in its preliminary investigation with regard to the passing-on of currency gains, the Secretariat did not find any evidence for unlawful agreements or an abuse of a dominant position (RPW 2013/4, p. 488 – *Nichtweitergabe von Währungsvorteilen*).

A second way for a third party affected by allegedly illegal anti-competitive agreements is to claim damages before civil courts. Under article 12 Cartel Act, any person hindered from entering or competing in a market by an unlawful restraint of competition is entitled to request from the courts: (i) the elimination of, or desistance from the hindrance; (ii) damages and reparation payment in accordance with the Swiss Code of Obligations ("**CO**"); or (iii) the surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Hindrances of competition include in particular refusal to deal, and discriminatory measures.

A basis for claims against competition restrictions – subject to specific preconditions – can also be found in article 28 of the Swiss Civil Code ("**CC**"), which protects personality rights, including economic rights, and the Swiss Federal Act against Unfair Competition ("**UCA**").

The civil actions should be brought before the higher cantonal civil courts. The Swiss Code on Civil Procedure ("**CCP**") requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the UCA. The 'single cantonal court' has exclusive jurisdiction to order interim measures. If the legality of a restraint of competition is disputed before a civil court, this question shall be referred to the Comco for an expert report. However, civil courts rarely refer such cases and the Comco's opinion is not binding for the civil judge.

Administrative and civil sanctions

From an administrative law point of view, any undertaking participating in an illegal hard-core agreement or violating article 7 Cartel Act may be charged with a fine of up to 10% of the turnover cumulatively *generated within Switzerland* in the preceding three financial years before the decision is issued (article 49a § 1 Cartel Act). These fines are administrative sanctions, but considered as a criminal sanction in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (see the landmark decision of the FSC of 29 June 2012, 139 I 72 – *Publigroupe SA*).

The amount of the fine depends on the duration and severity of the unlawful conduct. The

turnover of the undertakings is calculated by analogy with the rules on the calculation of turnover in merger control cases (article 4 and 5 of the Merger Control Ordinance; "**MCO**") and encompasses the consolidated net turnover. The base amount is up to 10% of the consolidated net turnover generated *on the relevant markets* in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the type and severity of the Cartel Act violation (article 3 CASO). The 'normal' profits that resulted from the unlawful conduct are taken into account in the base amount. The turnover relevant for the base amount of the fine is calculated by analogy with the rules of the MCO. In recent price-fixing cases, absent specific circumstances, the Comco applied a percentage between 5% and 10% for the base amount. The base amount will then be increased by up to 50% if the Cartel Act violation was implemented for up to five years. Each additional year thereafter will lead to an increase of another 10% or 0.833% for each month respectively (see RPW 2015/3, p. 561 – *Preispolitik Swisscom ADSL*, para. 754).

This interim base amount may increase by a certain percentage reflecting aggravating factors, such as recidivism, high cartel gains, obstruction of justice, ring-leading and measures to enforce cartel discipline (article 5 CASO). The law is not exhaustive and other factors may be taken into account too. In particular, Swiss law does not fix the percentage of each aggravating factor but provides the Comco with wide discretion, depending on the circumstances of each particular situation.

For calculating the fine, also mitigating factors have to be taken into account and the interim fine amount may be reduced accordingly. Examples of mitigating factors are: termination of the illegal conduct before or immediately after the Comco has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. The law does not set the percentage of mitigation of each factor (article 6 CASO) and the Comco has wide discretion also in this regard. In recent cases, the reduction percentages have varied from 10% to 60% depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable settlement (with regard to fine immunity for leniency applicants, see section "Leniency regime" above).

In extraordinary cases, the Comco may also impose lump sum fines – in particular in case of rather small fines (for the last 12 months, see e.g. the decision of the Comco of 19 October 2015 – *Volkswagen Konzessionäre*, with fines between CHF 10,000 and CHF 320,000; and not yet published in the RPW).

The legal entities liable for the payment of the fines are the decision's addressees. However, addressees can form part of a group of companies. In such cases, decisive influence is the pertinent criterion of demarcation, i.e. the question of whether the companies of this group can be and effectively are controlled by their parent company. If this is the case, then the entire group of companies qualifies as the undertaking in the sense of the Cartel Act, which is considered to be a functional term. In its landmark case *Publigroupe*, the FSC held that if a group of companies forms the undertaking in the sense of the Cartel Act, in principle every company, i.e. every legal entity of such group, qualifies as potential addressee of a decision. In the *Publigroupe* case, the FSC upheld the lower instances' decisions that were only addressed to the parent company and to none of the five controlled subsidiaries that were actively involved in the conduct in question (decision 139 I 72 of the FSC of 29 June 2012 – *Publigroupe SA*, considerations 1 and 3).

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question (see landmark decision 134 III 438 of the FSC of 12 June 2008 – *Abfallentsorgung*) and civil liability claims (e.g. by customers) may be

filed with the competent courts, in particular under article 12 Cartel Act (see section, "Third party complaints" above).

Right of appeal against administrative and civil sanctions

Decisions of the Comco and, to a limited extent, also its interim procedural decisions, can be challenged before the FAC. 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 FAC is a "full merits" appeal on both the findings of fact and law.

The addressees of the decision have the right to appeal, whereas it is still uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether and to what extent third parties are affected by the decision of the Comco. As outlined above, only competitors that suffer a clearly perceptible economic disadvantage as a consequence of an anti-competitive conduct shall be regarded as parties to an investigation and thus have the legal standing to appeal a decision (see section, "Key issues in relation to investigation and decision-making procedures" above)

The FAC can produce evidence such as hearing parties and witnesses and seeking expert reports. With the exception of instruction hearings with the parties and the Comco, this is rarely done in practice, as the FAC tends to render its judgments based on the existing case file and briefs exchanged during the appeal.

Concerning effective judicial control, one must consider that the FAC has not rendered many competition-related judgments yet and numerous cases are still pending. In general, the FAC tends to exercise restraint with regard to Comco's technical discretion such as economic and effects analyses. However, effective judicial control is, *inter alia*, shown by the fact that it does not hesitate to annul Comco decisions in full. It annulled, for example, the highest fine ever in the amount of CHF 333m that was imposed on the Swiss incumbent telecoms operator Swisscom in an abuse case. This annulment decision then was upheld by the FSC (see landmark decision 137 II 199 of the FSC of 11 April 2011 – *Terminierung Mobilfunk*). Other such examples exist, but the appeal courts also upheld important decisions of the Comco, e.g. in particular the landmark cases *Publigroupe*, finally upheld by the FSC (see landmark decision 139 I 72 of the FSC of 29 June 2012 – *Publigroupe SA*), and *Gaba*, also upheld by the FSC (see landmark decision 2C_180/2014 of 28 June 2016 – *Gaba*).

There is no specialised competition law (appeal) court in Switzerland. The second division of the FAC is basically in charge of all public economic law issues, of which competition law is just one part.

The judgments of the FAC may be challenged before the FSC. In proceedings before the FSC, judicial review is limited to legal claims, i.e. the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, or in the ECHR 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.

As outlined above, numerous Comco cases are currently still pending before the two appeal courts, in particular before the FAC. Some of these cases also raise fundamental questions, such as the questions of: whether and if so, what statutory time bars apply for Cartel Act proceedings; what conditions must vertical non-binding price recommendations meet to comply with the Cartel Act; and what requirements must be proven to find an illegal single overall infringement, i.e. a single overarching conspiracy.

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

Criminal sanctions

There are only limited criminal sanctions for cartel activities in Switzerland. Unlike in other states (such as the United States), the Cartel Act does not provide for imprisonment. However, there are administrative sanctions that are considered to constitute criminal sanctions in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (see section, "Administrative and civil sanctions" above).

Anyone who wilfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of the appeal courts, is liable for a fine not exceeding CHF 100,000 (article 54 Cartel Act). Anyone who wilfully does not comply, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine not exceeding CHF 20,000 (article 55 Cartel Act). Both of these provisions mainly aim at persons who have the power to decide whether an undertaking shall commit a breach of the Cartel Act, such as board members or the management.

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

Cross-border issues

The Cartel Act applies to all concerted practices and agreements that have an economic effect within Switzerland (article 2 § 2 Cartel Act). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland but may have effects in Switzerland, fall under Swiss jurisdiction. In May 2012, the Comco imposed a fine of CHF 156m on *Bayerische Motoren Werke AG*, the ultimate parent company of the BMW group with registered offices in Munich, Germany, for illegal restrictions of parallel trade, as the contracts with its authorised distributors in the EEA were prohibiting them from selling BMW and MINI branded cars to customers outside the EEA, i.e. also to customers in Switzerland. The Comco found that these provisions had an economic effect in Switzerland and applied the Cartel Act. The FAC upheld this finding (decision B-3332/2012 of the FAC of 13 November 2015 – *Bayerische Motoren Werke AG*). It confirmed that the effects doctrine applies under the Cartel Act and hence that its territorial scope must be interpreted broadly. With this finding, the court confirmed its practice set forth in the *Gaba* judgment, which was finally upheld by the FSC. In both judgments, the FAC clarified that the specific kind or intensity of the agreements' effects and whether they are direct or indirect, potential or actual, shall be questions of the substantive test, but not influence the applicability of the Cartel Act from the outset (decision B-3332/2012 of the FAC of 13 November 2015 – *Bayerische Motoren Werke AG*,

consideration 2.3.10, *inter alia* referring to its judgment B-506/2010 of 19 December 2013 – *Gaba*, consideration 3.3). Therefore, it is important for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law rules for their agreements and business practices (see also decision B-581/2012 of the FAC of 16 September 2016 – *Nikon AG*).

On 1 December 2014, the Cooperation Agreement with the EU entered into force, which is the first "second generation" agreement, providing for the exchange of some information even without the consent of the undertakings concerned. The aim of the Cooperation Agreement is to strengthen the collaboration between the Comco and the European Commission. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the Comco and the European Commission seek to combat cross-border anti-competitive practices more effectively.

The core element of the Cooperation Agreement is the possible exchange of specific, case-related information between the Comco and the European Commission. As a major contrast to the previous legal setting, under the Cooperation Agreement the exchange of information and documents between the competition authorities shall be possible even if the concerned undertaking does not consent thereto. An important statutory exception for the exchange of information and documents without the consent of the undertakings concerned applies to information previously submitted to the competition authorities under a leniency application. Moreover, as a precondition, the competition authorities must investigate the same or related conduct in order for the exchange to be admissible, and the use of any exchanged information is restricted to such same or related conduct and, additionally, limited to the enforcement of the competition laws of the EU and Switzerland.

The Cooperation Agreement must be taken into account particularly by the authorities in the preparation of dawn raids and – also by the undertakings – in the preparation and assessment of multi-jurisdictional leniency applications, i.e. whether or not to include Switzerland.

For the purposes of implementing the Cooperation Agreement, a new article 42b § 3 has been inserted in the Cartel Act, laying down general requirements for sharing information with a foreign competition authority. Information may only be transmitted based on international agreements or with the consent of the undertakings concerned. The additional requirements mirror to a large extent those contained in the Cooperation Agreement. The new article 42b § 3 Cartel Act merely sets out that the undertakings concerned are to be consulted before the transmission of information. Whether or not the exclusion of *ex ante*-legal remedies against an unlawful transmission of information is compatible with the Swiss Federal Constitution and the ECHR remained untested yet and will be for the courts to decide.

The Cooperation Agreement solely allows cooperation between the Comco and the European Commission, but not with national competition authorities of the EU member states. The European Commission can, however, provide some information, e.g. regarding the coordination of enforcement measures, to the competition authorities of the EU member states and the EFTA Surveillance Authority. Moreover, on an informal basis, the Comco and its Secretariat cooperate with various national antitrust authorities in Europe such as the German *Bundeskartellamt* as well as with the US antitrust authorities. Absent specific future cooperation agreements, such cooperation, however, is not allowed to go beyond the exchange of non-confidential information. The Cartel Act provides in article 42a for a specific regime with regard to investigations in the air transportation industry. Such investigations are governed by the Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999. Accordingly, in this sector the Comco may cooperate with the European Commission on a formal legal basis.

Investigations, decisions and sanctions issued by competition authorities abroad have no binding effect on the Comco. The FSC held that, in principle, Swiss competition law must be construed independently from the competition law of the EU; it shall, however, be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules (see landmark decision 137 II 199 of the FSC of 11 April 2011 – *Terminierung Mobilfunk*, consideration 4.3). In practice, however, the EU competition rules and case law have always had a significant impact on the interpretation of the substantive provisions of the Cartel Act by the Comco. In its *Altimum* judgment, the FAC even went further and held that distribution agreements compliant with European competition law rules shall also be considered lawful under Swiss competition law (RPW 2016/2, p. 580 – *Altimum SA*, consideration 4.2.1). The *Altimum* case, however, is currently under appeal before the FSC.

Developments in private enforcement of antitrust laws

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

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

Concerning the gathering of evidence, effective and practical pre-trial discovery is not available in Switzerland. Furthermore, an exchange of information between the Comco and the civil courts does not take place in general. It is therefore difficult to obtain any documents before the start of the proceedings. However, in recent decisions of the FAC, (conditional) file access at least for municipalities was made less difficult (see section, "Overview of cartel enforcement activity during the last 12 months" above). Third parties with full legal standing in principle also have (conditional) file access. A potential claimant might therefore be inclined to initiate an administrative proceeding first, and file a request for full legal standing.

Important information may, however, qualify as business secrets and remain inaccessible.

Preliminary measures, which also focus on avoiding or terminating restrictions of competition, are generally available under Swiss law, both in the investigation by the competition authorities (see landmark decision 130 II 149 of the FSC of 19 December 2003 – *Sellita Watch Co SA vs. ETA SA Manufacture Horlogère Suisse (Vorsorgliche Massnahmen)*, consideration 2) and in case of civil actions (article 261 to 269 CCP). Whereas preliminary measures ordered by the competition authorities focus on the protection of effective competition, preliminary measures in civil proceedings mainly aim at safeguarding an undertaking's interests. All appropriate and reversible measures for such interim execution may be ordered, e.g. the interim obligation to contract or to grant admission to a trade fair. However, interim payments are not possible and therefore, interim awards of damages are not available in Switzerland.

An example of the difficulties of private enforcement of the Cartel Act through civil proceedings in a stand-alone case can be found in a rather new decision of the FSC (see decision 4A_449/2012 of the FSC of 23 May 2013 – *L'Etivaz*). At the request of the plaintiff (a cheese manufacturer), the FSC confirmed that the company managing a cheese-maturing cellar with regard to the production of an AOC cheese (i.e. a cheese with a protected designation of origin label) had abused its dominant position by preventing the plaintiff from being admitted to the cheese-maturing cellar. The said company was then forced to admit the cheese manufacturer to the cheese-maturing cellar and was compelled to pay damages. However, the damages were low, as the plaintiff could not sufficiently prove the link between the abuse of the dominant position and the suffered loss of earnings.

Reform proposals

On 17 September 2014, the Federal Parliament finally rejected a planned major revision of the Cartel Act as proposed by the Swiss Federal Council on 22 February 2012. Some of the amendments of the comprehensive reform package were too controversial. Subsequent to the rejected revision, individual proposals were submitted. One new attempt, the parliamentary motion of Viola Amherd of 26 September 2014, aims at the adoption of (some of) the non-controversial proposals of the failed revision of the Cartel Act. The other proposals relate to controversial topics on how to fight Switzerland's status as the "Island of High Prices" in Europe, as follows:

Firstly, the parliamentary initiative "Excessive Import Prices. End Compulsory Procurement on the Domestic Market" (14.449) of Hans Altherr 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" (15.3631) of Hans Hess 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 ETAC to draft a proposal for legislative amendments.

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