Dominance

Contributing editors
Thomas Janssens and Thomas Wessely

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GETTING THE DEAL THROUGH

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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 (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.

In general, the Cartel Act is autonomous Swiss law and, as such, is to be construed independently from European Union (EU) competition law (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). However, where its content corresponds to EU law and it was adopted to follow EU competition law, the practice of the EU Commission and EU courts is regularly taken into account when deciding Swiss cases (Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*). This holds particularly true for article 7 of the Cartel Act, which was shaped on the basis of article 101 of the Treaty on the Functioning of the European Union. Therefore, according to the Federal Administrative Court, it is not only the responsibility of Swiss competition authorities and courts, but also of undertakings, to pay due attention to European competition law by conducting a reasonable comparative legal analysis (Federal Administrative Court, 14 September 2015, B-7633/2009, *Swisscom*). However, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected, particularly regarding the sanctioning of violations of article 7 of the Cartel Act.

2 Non-dominant to dominant firm

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

Not directly. 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. Indirectly, however, 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 public interest considerations are taken into account as well.

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

4 Non-dominant firms

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

The concept of dominance also covers vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers. Articles 4 and 7 Cartel Act apply, therefore, also to the conduct of non-dominant firms, namely, firms that do not necessarily hold a dominant position on a specific market 'as such'. However, the Cartel Act does not contain any behavioural provision specifically dealing with abuses in relation to the concept of economic dependence (see also question 14).

In *CoopForte* (RPW/DPC 2005/1, p. 146), the Comco investigated a bonus scheme put into effect by Coop, the second-largest supermarket chain in Switzerland. In its decision, the Comco distinguished between dominance in the classical sense and economic dependence: an undertaking having a dominant position in a specific market behaves independently of its rivals, whereas economic dependence relates to a situation in which an undertaking is dependent on 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 Comco noted, however, that the concept of economic dependence should not be understood as a means to protect inefficient undertakings.

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

5 Sector-specific control

Is dominance regulated according to sector?

There are few sector-specific controls of dominance, but there is a constant interplay between sector-specific regulations and the Cartel Act when it comes to assess dominance (see question 6).

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

The Federal Act on Radio and Television provides for special measures in the area of radio and television in cases where an undertaking active in

the radio and television market has jeopardised the diversity of opinion and offerings as a result of its abuse of its dominant position.

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, however, not preclude the application of the Cartel Act, but it should be taken into account in its application (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). Indeed, only sector-specific provisions that aim at modifying competition (but not other police regulations) might lead to the non-applicability of the Cartel Act (Federal Supreme Court, RPW/DPC 2015/1, p. 131, *Hors-Liste Medikamente*).

7 Enforcement record

How frequently is the legislation used in practice?

The Secretariat of the Comco (which, inter alia, is empowered to conduct investigations, submits draft decisions to the Comco and implements the latter's decisions (Secretariat)) and the Comco itself are active in the field of abuse of dominant position. There are usually only a few investigations opened and final decisions rendered each year in this field. The record is certainly lower compared with agreements between undertakings. However, notwithstanding these numbers, the largest fines have been imposed on companies that have been held responsible for abusive conduct (see, for example, the *Swisscom* cases (RPW/DPC 2007/2, p. 241, *Terminierung Mobilfunk*: CHF 333m (rescinded on appeal); RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom* ADSL: 220 million Swiss francs (in principle confirmed, but reduced to 186 million Swiss francs by the Federal Administrative Court, 14 September 2015, B-7633/2009)).

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 runs a Competence Centre for Law and Economics. Among the 75 employees of the Secretariat, around a quarter to a third are economists. Similarly, undertakings targeted by the Comco and the Secretariat 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, the provisions on dominance apply to any undertaking (private or public entities) as far as they exercise market power (article 2 paragraph 1 of the Cartel Act). The limitation that the Cartel Act only applies to undertakings that 'exercise market power' should, however, not be overestimated. Indeed, it has only descriptive character, but does not have any legally relevant meaning. In terms of article 7 of the Cartel Act, it is solely decisive whether an undertaking has a dominant position in a specific relevant market, and this term is defined in article 4 paragraph 2 of the Cartel Act (Federal Administrative Court, 14 September 2015, B-7633/2009, *Swisscom*).

10 Definition of dominance

How is dominance defined?

Article 4 paragraph 2 of the Cartel Act defines a dominant undertaking as 'one or more undertakings that are able, as suppliers or consumers, to behave to a significant extent independently of the other participants (competitors, suppliers or consumers) in a specific market'. As already mentioned in question 4, vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers, are covered as well.

11 Market definition

What is the test for market definition?

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 also serves as the basis for defining the relevant market in cases of dominance. The test for market definition is the substitutability of products and services and, in particular, the cross-price elasticity and SSNIP (small but significant and non-transitory increase in price) test (see Federal Supreme Court in RPW/DPC 2013/1, p. 114, *Publigroupe*).

The Comco also examines whether the market presents the characteristics of the '*Cellophane* fallacy' in the presence of already high prices both in cases of dominance and of merger control (see, for instance, RPW/DPC 2005/3, p. 458, *Bio-Suisse*; RPW/DPC 2006/2, p. 261, *Emmi AG/Aargauer Zentralmolkerei AG AZM*; RPW/DPC 2015/1, p. 105, *Valora Holding AG/LS Distribution Suisse SA*).

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. In principle, market shares below 30 per cent should, usually, not be sufficient for a dominant position. The 'critical' threshold is at a market share of about 30 to 40 per cent, whereas market shares of more than 75 per cent usually show a dominant position. However, such market shares constitute only an indication, but are alone not sufficient to prove dominance. The Comco goes through an in-depth analysis of the market characteristics even though the market definition reveals a market share of 100 per cent (RPW/DPC 2008/2, p. 242, *Terminierungsgebühren beim SMS-Versand via Large Account*). In particular, when barriers to entry are low and potential competition is strong, high market shares do not, per se, justify the finding of a dominant position.

The Comco has denied dominance in the case of a market share of 69 per cent, where the company had lost market shares due to the entry of new competitors (RPW/DPC 2002/1, p. 97, *Mobilfunkmarkt*). In another case, a market share of 50 to 70 per cent was not sufficient to find dominance because of the strong competition that was faced by the company from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (RPW/DPC 2003/2, p. 240, *Johnson & Johnson*).

On the other hand, public hospitals were found to be dominant with a market share of 37 to 48 per cent. In this case, the absence of potential competition and the existence of particular dependency relationships between public hospitals and insurers in the private insurance field justified the finding of dominance (RPW/DPC 2008/4, p. 544, *Zusatzversicherung Kanton Luzern*). A market share of more than 50 per cent coupled with 'atomistic' (ie, numerous small) competitors and weak potential competition justified the finding of dominance in the market for poster advertising (RPW/DPC 2003/1, p. 75, *Plakatierung in der Stadt Luzern*).

Besides high market shares, other factors indicating that an undertakings holds a dominant position on a specific market are, for example, stable or increasing (high) market shares, weak counterparties or competitors in financial difficulties, 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'. Therefore, collective dominance is also covered by the law. There is, however, no specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Comco.

The first case that dealt with collective dominance was the merger between *Revisuisse Price Waterhouse and STG-Coopers & Lybrand* (RPW/DPC 1998/2, p. 214). In the *Mobilfunkmarkt* case (RPW/DPC 2002/1, p. 97),

the Comco examined the existence of collective dominance in parallel to the existence of an agreement in the form of a concerted practice. As a first step, the Comco 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 Comco, the criteria for the finding of collective dominance are similar to that of collusion (horizontal agreement) (RPW/DPC 2007/3, p. 364, *Konsumkredit*, where the Comco denied both the finding of collective dominance and the existence of an agreement).

In the *Kreditkarten-Akzeptanzgeschäft* case (RPW/DPC 2003/1, p. 159), the Comco affirmed collective dominance of acquirers of credit cards, which abused this collective dominant position. The Comco listed the following criteria, which shall be applicable to an assessment of potential collective dominance:

- market concentration;
- market shares;
- market transparency;
- market stability;
- market entry barriers;
- symmetries between undertakings (symmetry of interests, products and costs);
- power of the commercial counterparties; and
- price elasticity of demand.

One of the most in-depth analyses with regard to collective dominance was carried out in the pork-meat market (RPW/DPC 2004/3, p. 674, *Markt für Schlachtschweine*). The following criteria were considered as relevant for the finding of 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;
- a 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 Comco was completed with an empirical economic analysis of price margin development in the industry, which allowed the Comco to reject the existence of collective dominance.

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 also 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 and, in particular, the findings of the *CoopForte* case (RPW/DPC 2005/1, p. 146), 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 Comco and Swiss courts examines the effect on the market. The former Competition Appeal Commission recognised that it is the anti-competitive effect of a practice that justifies its prohibition, which position is also confirmed by the Federal Supreme Court's requirement that examples of article 7 paragraph 2 should be applied in conjunction with paragraph 1 of article 7 (Federal Supreme Court, RPW/DPC 2013/1, p. 114, *Publigroupe*). The Comco applies a blend of a form-based and effects-based approach, and the recent decisions show a trend towards an effects-based approach. Indeed, in its recent *Swisscom* decision, the Federal Administrative Court imposed a substantial fine on Swisscom for price-squeezing in the broadband internet sector (ADSL), which falls solely under the general provision of article 7 paragraph 1 Cartel Act (Federal Administrative Court, 14 September 2015, B-7633/2009).

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 aim at harming commercial partners or consumers. Excessive pricing may be regarded as an obvious example of exploitative practices. However, the importance of the distinction between exploitative and exclusionary practices should not be overestimated. Indeed, it is rather academic, as many practices contain both exploitative and exclusionary elements.

17 Link between dominance and abuse

What link must be shown between dominance and abuse?

The decision-making practice of the Comco requires a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal doctrine accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (RPW/DPC 2006/4, p. 625, *Valet Parking*). In the *Valet Parking* case, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of a dominant position, even though the behaviour had a negative effect on the off-airport parking market (ie, outside the airport).

On the other hand, the causal link between dominance and a possible 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 (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

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. These arguments or legitimate business reasons may exist if a dominant undertaking simply follows commercial principals, for example, by assuring the solvency of the counterparty. Other legitimate reasons may be a changed demand, cost savings, administrative simplifications, transport and distribution costs, etc. Ultimately, the interests of the individual undertaking have to be balanced against the interests in the 'institutional' competition on the market (Federal Supreme Court, RPW/DPC 2013/1, p 114, *Publigroupe*). In any case, however, it is crucial that such defences are proportional, namely, that they do not go beyond what is required to achieve their goal.

It is noteworthy that the former Competition Appeal Commission has already confirmed the possibility of invoking legitimate business reasons, which might be retained if the company's conduct is justified to protect its objective commercial interests, and if the conduct under investigation is not substantially different from what would have prevailed in a competitive market (RPW/DPC 2002/4, p. 276, *Entreprises Electriques Fribourgeoises*). The Competition Appeal Commission mentioned legitimate business reasons, including the necessity to ensure the quality of products, efficiency reasons, or technical reasons (eg, lack of capacity).

Efficiency gains may also be invoked. In *TicketCorner* (RPW/DPC 2004/3, p. 778), the Comco 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, as already mentioned above.

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.

In one of its earliest decisions, the Comco 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 (RPW/DPC 1997/2, p. 161, *Telecom PTT/Blue Window*).

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

One of the leading cases concerned the market for advertising placement, in which the Comco condemned Publigroupe for refusing to pay to certain commissions and for discriminating certain professional intermediaries compared with others. This practice raised barriers to entry on the market for advertisement placement. Publigroupe was fined 2.5 million Swiss francs (fine confirmed by the Federal Supreme Court, RPW/DPC 2013/1, p. 114, *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') (Federal Supreme Court, RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*).

The Comco imposed a record fine of 333 million Swiss francs on Swisscom for unfair prices in the mobile call termination market (RPW/DPC 2007/2, p. 241, *Terminierung Mobilfunk*). The decision was quashed by the Federal Administrative Court in February 2010 (RPW/DPC 2010/2, p. 242). The annulment was confirmed by the Federal Supreme Court in April 2011, which held that 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 Comco (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*). On the basis of the above-mentioned judgment of the Federal Supreme Court, the Comco decided to close the investigation that opened on 15 October 2002 against the three biggest competitors in the mobile telecommunication market (Swisscom, Sunrise and Orange) for abuse of collective dominance (RPW/DPC 2011/4, p. 522, *Terminierung Mobilfunk*).

21 Rebate schemes

Fidelity and target rebates are, under certain circumstances, considered as an abuse of dominance. 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.

See also question 19.

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 Comco has investigated several cases of alleged predatory pricing, denying predation, however. There is no presumption that prices below the undertaking's own total costs are predatory; the practice is covered by the undercutting provision only when the undercutting is part of a strategy to exclude competitors (RPW/DPC 2004/4, p. 1002, *Cornèr Banca SA/Telekurs AG*). In principle, however, the Comco may infer that prices under average variable cost are directed against competitors.

In the *Radio- und TV-Markt St. Gallen* case (RPW/DPC 2002/3, p. 431), the Comco stated four conditions that must be fulfilled to find an abuse of dominance in the form of predatory pricing:

- the undercutting must be systematic;
- 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.

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

23 Price squeezes

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

The leading case with regard to price squeezing is the *Swisscom* decision, in which the Comco fined Swisscom about 220 million Swiss francs for price squeezing in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). The Comco based its analysis on the profitability of activities of the vertically integrated company and the retail margins of the Swisscom subsidiary active in the high-speed internet sector. In addition, the Comco focused its analysis on the retail margins of a reasonably efficient competitor (the imputation test). The Comco concluded that the wholesale prices applied by Swisscom did not allow its competitors to obtain sufficient margins to compete in the market for high-speed internet. The abusive and 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. In principle, the decision was confirmed by the Federal Administrative Court in September 2015, which, however, reduced the fine to about 186 million Swiss francs (Federal Administrative Court, 14 September 2015, B-7633/2009, *Swisscom*).

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 (RPW/DPC 2011/1, p. 96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

Watt/Migros was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The refusal to transport electricity was considered as an abuse of a dominant position (RPW/DPC 2001/2, p. 255, *Watt/Migros-EEF*). The decision of the Comco 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 Federal Supreme Court.

Another leading case on refusal to deal was *ETA SA Manufacture Horlogère Suisse* (RPW/DPC 2005/1, p. 128). ETA notified its customers that it would 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 a dominant position, in particular because ETA intended to enter the market itself. The investigation was closed following commitments offered by ETA to increase the quantity supplied to its customers and to prolong the interim supply period by three years. The Secretariat of the Comco was also investigating the decision of Swatch to cease to supply third parties with mechanical watch movements and assortments (RPW/DPC 2014/1, p. 215). In the course of this investigation, the Comco took on 6 June 2011 interim measures to ensure the supply of third parties with movements and assortments during the investigation (RPW/DPC 2011/3, p. 400). These interim measures were confirmed on appeal by the Federal Administrative Court on 14 December 2011 (RPW/DPC 2012/1, pp. 158, 162) and were extended until the end of 2013 by the Secretariat (RPW/DPC 2012/2, p. 260).

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

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 (Federal Supreme Court, 23 May 2013, 139 II 316, *Etivaz*). The lower civil court had issued such an order ignoring the Comco's expert opinion against the duty to deal. In addition to ordering access to the maturing cellar, the Federal Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing the cheese-maturing cellar.

The essential facility doctrine is partly recognised in practice, in that it justifies the finding of a dominant position and the duty to deal. However, 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 paragraph 1 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 Comco has investigated tying practices on several occasions, often denying the finding of an abuse, however. The Comco considers that the tying and bundling of two products have negative effects and, therefore, are abusive if:

- the 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 not justified for legitimate business reasons (RPW/DPC 2011/1, p. 96, *SIX/Terminals mit Dynamic Currency Conversion (DCC)*).

27 Limiting production, markets or technical development

The limitation of production, supply or technical development is mentioned as an example of abuse (article 7, paragraph 2(e) of the Cartel Act). The Comco 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 an abuse of a dominant position.

28 Abuse of intellectual property rights

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

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

The Cartel Act does not deal with structural abuses. Article 7 paragraph 2 of the Cartel Act sets forth merely examples, and its general clause in paragraph 1 covers structural abuses if the conduct of dominant 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 Comco has investigated or discussed the acquisition of a minority shareholding in a few cases. In *Minderheitsbeteiligungen der Publigroupe SA (und ihrer Tochtergesellschaften) an Zeitungsverlagen* (RPW/DPC 2006/3, p. 449), the Comco confirmed the application of article 7 of the Cartel Act to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking. It defines structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage'. However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse, which was denied in the *Publigroupe* case. The assessment criteria used by the Comco relate to the criteria for finding an input or upstream foreclosure.

A dominant undertaking should notify an acquisition even though the concentration does not reach the 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 paragraph 1 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 Comco or civil courts may prohibit such conduct by decision. Often, however, undertakings subject to an investigation by the Comco agree to enter into an amicable settlement, in which they undertake to cease certain conduct.

33 Enforcement authorities

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

The Comco takes decisions, remedial actions and sanctions against undertakings abusing their dominant positions.

Its Secretariat is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions.

The Secretariat has broad investigative powers, in particular, it may order searches (ie, dawn raids) and seize any evidence, or hear third

parties as witnesses, and require the parties to an investigation to give evidence. The company under investigation is obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents, however, taking into account the right against self-incrimination (see Federal Administrative Court, 14 September 2015, B-7633/2009, *Swisscom*).

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 a dominant position, 333 million Swiss francs, was cancelled by the Federal Administrative Court in February 2010 and, subsequently, also by the Federal Supreme Court (RPW/DPC 2011/3, p. 440, *Terminierungspreise im Mobilfunk*; see also question 20). Swisscom received another fine of 220 million Swiss francs in 2009 for unlawful price squeezing in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). On appeal, it was confirmed in principal, but reduced to about 186 million Swiss francs (Federal Administrative Court, 14 September 2015, B-7633/2009). The fine on Publigroupe of 2.5 million Swiss francs for refusal to deal and discriminatory practices was confirmed by the Federal Administrative Court in April 2010 (RPW/DPC 2010/2, p. 329) and by the Federal Supreme Court on 29 June 2012 (RPW/DPC 2013/1, p. 114).

In the *Publigroupe* case, the Federal Administrative Court, referring to article 7 ECHR, distinguished between practices falling within the list of article 7 paragraph 2 of the Cartel Act and those covered by the general clause of article 7 paragraph 1 of the Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. The question of the pertinence of this distinction for imposing fines was left open by the Federal Supreme Court. However, in the recent decision on the *Swisscom ADSL* case, the Federal Administrative Court changed its position and based a fine in the amount of 186 million Swiss francs solely on the general clause of article 7 paragraph 1 of the Cartel Act, basically arguing that Swisscom must have known that price squeezing constitutes an abusive behaviour (Federal Administrative Court, 14 September 2015, B-7633/2009). It remains to be seen whether the Federal Supreme Court will share this view – Swisscom has already announced that they will challenge the decision of the Federal Administrative Court before the Federal Supreme Court.

Update and trends

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

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

Besides the possibility to impose fines (indeed, imposing a fine is compulsory in the case of an abuse of a dominant position according to article 7 of the Cartel Act, if it can be established), the Comco has wide-ranging 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).

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

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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?

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

The Cartel Act empowers civil courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 of the Cartel Act).

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

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

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?

In 2009, Swisscom received a fine of 220 million Swiss francs for unlawful price squeezing (see question 23) in the ADSL market (RPW/DPC 2010/1, p. 116, *Preispolitik Swisscom ADSL*). Very recently, it was confirmed in principle on appeal, but the fine was reduced to about 186 million Swiss francs (Federal Administrative Court, 14 September 2015, B-7633/2009). Swisscom announced that it will challenge this fine before the Federal Supreme Court. Notably, already the highest fine ever imposed on an undertaking by the Comco, 333 million Swiss francs, concerned Swisscom (RPW/DPC 2007/2, p. 241, *Terminierung Mobilfunk*). However, the latter fine has been rescinded on appeal both by the Federal Administrative Court and the Federal Supreme Court.

Getting the Deal Through

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