Switzerland: Fighting Against Being a High-Price Island

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IN SUMMARY

In respect of legal developments, the Parliament's counterproposal to the Fair Prices initiative has been adopted by both of its chambers. It aims to put an end to Switzerland being an 'island' of high prices and it introduces the concept of relative market power into Swiss law. A partial revision of the Cartel Act is also planned, which is likely to affect the merger control procedure. Finally, this article gives an insight into judicial practice through the discussion of recent cases. Cases such as the *Ticketcorner and Hallenstadion* decision and the *Pfizer* decision contribute to further development of the law.

DISCUSSION POINTS

- Possible effects of the indirect counterproposal of the Fair Price initiative on competition
- Introduction of SIEC-test into Swiss Merger Regulation
- The requirement for jurisdiction clauses from an antitrust law perspective according to the FSC
- The questioning of former executive bodies as witnesses by the competition authorities

REFERENCED IN THIS ARTICLE

- Indirect counterproposal to the Fair Price initiative
- Partial revision of the Cartel Act
- *Tamedia/Adextra* merger
- Opening of the gas market in Switzerland
- FSC decision in the *Ticketcorner and Hallenstadion* case
- FSC decision in the *Pfizer* case

Legal developments

The situation with regard to the covid-19 pandemic has had a major effect on competition law in Switzerland and worldwide. The measures to contain the virus have caused a global economic crisis of considerable proportion. The various government aid measures, particularly those implemented for an extended period, have considerably distorted markets and competition, and any changes in the situation must be closely monitored.

Competition law is governed by the Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (the Cartel Act). The regulatory framework is complemented by numerous federal ordinances and general notices, as well as communications by the Federal Competition Commission (COMCO).

The more general recent developments in Swiss competition law are set out below.

Adoption of the indirect counterproposal to the Fair Price Initiative

The popular Fair Price initiative aimed to put an end to Switzerland being seen as an island of high prices. The initiative proposed to

- introduce an obligation for entities based outside Switzerland to sell products and services to customers based in Switzerland at the same prices as to local customers;
- introduce the concept of relative market power into Swiss law; and
- protect non-discriminatory online sales.

The National Council discussed the initiative during its spring session 2020 and rejected it; however, it adopted an indirect counterproposal, which incorporates the initiative's demands with almost no changes. The Cartel Act should cover not only market-dominant companies but also companies with relative market power. Those companies will be deemed as behaving inappropriately if, for example, they refuse business relations or dictate discriminatory prices; however, they will not need to fear the harsh sanctions that can be imposed on dominant companies.

The indirect counterproposal was adopted in the final vote by both chambers of Parliament in the spring session of 2021. Provided the referendum deadline of 18 July 2021 expires unused, the corresponding amendments to the law are expected to enter into force relatively quickly, possibly by January 2022.

It is doubtful whether this indirect counterproposal will really protect Swiss consumers or help Swiss companies to compete on an international level. In particular, it is unclear whether potential COMCO decisions could be enforced outside Switzerland.

However, it is foreseeable that the counterproposal will initially give rise to considerable legal uncertainty. Further, it can be assumed that antitrust cases before the civil courts will increase as relative market power relates to bilateral relationships.

Plans to introduce SIEC-test into Swiss merger regulation

The Federal Council is making a new attempt to revise the Cartel Act after the revision in 2012 was rejected. It has instructed the Federal Department of Economics, Education and Research to prepare a bill for a partial revision of the Cartel Act, which would affect the merger control procedure.

One important element of the revision is to implement the significant impediment of effective competition (SIEC) test into the merger regulation. The SIEC test would allow COMCO to prohibit mergers or put conditions in place if a merger looks likely to lead to a significant impediment to competition. According to the current qualified market dominance test, a merger can only be blocked if it would create or strengthen a dominant position that could lead to the elimination of effective competition.

Compared to the SIEC test of the European Union, the threshold to block a merger or to impose obligations and conditions of the current Swiss merger control regulation is very high. According to two studies commissioned by the State Secretariat for Economic Affairs, positive effects on competition can be expected from the change. Further, regulatory deadlines will be introduced for the competition authorities and courts to speed up cartel and abuse of dominance procedures. Moreover, companies that are investigated by COMCO will be entitled to demand compensation for their legal fees for all phases of the administrative proceedings, including first-instance proceedings before the COMCO.

Finally, the civil antitrust law should be strengthened, and the individual exemption procedure (known as the opposition procedure) should be improved. It should become easier to bring antitrust law claims before the civil courts, but this modernisation should not be done at the expense of the administrative antitrust regulations, and a balance must be found so that self-accusations under the leniency regulation remain an attractive option for undertakings involved in a cartel. The revision should contribute to fostering competition law overall, in both its administrative and civil forms.

The consultation process was expected to take place in the fourth quarter of 2020, but this process has been delayed owing to covid-19 . It is now expected in the fourth quarter of 2021. The message of the Federal Council is not expected until the third quarter of 2022. This time, the partial revision focuses on points that are not highly controversial, such as the improvement of the merger control regulation. This leaner draft may increase the chances that Parliament will vote in its favour.

Motion to clarify the Cartel Act

Olivier Français, a member of the Council of States, submitted a motion to clarify the requirements of article 5 of the Cartel Act. The motion wants to clarify that both qualitative and quantitative criteria must be taken into account when assessing whether there is an unlawful competition agreement within the meaning of article 5 of the Cartel Act. Since the *Gaba* ruling of the Federal Supreme Court (FSC), the competition authorities assume that agreements on quantity, prices or market allocation are in principle or per se significant. A potential impairment of competition is sufficient for the imposition of penalties; an effective impact on the market is not required.

The Federal Council requested the rejection of the motion; however, the Council of States accepted it on 15 December 2020.

The motion takes up an issue that had long been controversial before the FSC *Gaba* decision. The motion would reverse the decision and give undertakings more room for defence by arguing that a competition agreement is not material owing to lack of qualitative importance (eg, a very low market share).

Recent cases

SBB Cargo merger

COMCO cleared the participation in SBB Cargo by Planzer and Camion Transport after an in-depth examination. The merger does not lead to the elimination of effective competition and can, therefore, be approved.

Planzer and Camion Transport intend to acquire a 35 percent stake in SBB Cargo through their joint subsidiary Swiss Combi. Galliker and Bertschi also each have a 10 per cent stake in Swiss Combi.

With this merger, Planzer and Camion Transport intend to contribute their logistics expertise to SBB Cargo to optimise existing products and develop new ones. The merger aims to improve the profitability and competitiveness of SBB Cargo. COMCO found that the planned merger will lead to a dominant position in the market for transshipment services in combined transport in the Gossau, St Gallen area. However, it does not give the parties the possibility to eliminate effective competition.

Tamedia/Adextra merger

In contrast to many other jurisdictions, Switzerland not only has a notification obligation based on exceeding turnover thresholds, but also a notification obligation based on a finding of market dominance. According to article 9, paragraph 4 of the Cartel Act, a notification obligation exists if:

1 an undertaking has been held in a final and non-appealable decision to be dominant in a market in Switzerland; and
2 the concentration concerns either this market or an adjacent market, or a market upstream or downstream thereof.

Tamedia sought to acquire sole control of Adextra AG. After a complete notification was filed, the Secretariat cleared the concentration and demanded the flat fee of 5,000 Swiss francs for the examination of the proposed concentration. Tamedia disputed having to pay this fee and argued that the proposed concentration had been wrongly qualified as notifiable because requirement (2) had not been met.

In its decision, the Federal Administrative Court (FAC) upheld COMCO's extensive interpretation of requirement (2). According to the practice of the COMCO, the proximity between a market affected by a merger and the dominated market must be interpreted extensively. Competition effects could also arise between more distant markets. It is, therefore, not a prerequisite that the markets to be assessed are immediately upstream, downstream or neighbouring; rather, it was decisive that competitive effects between the markets could not be excluded from the outset.

The FAC justified the deviation from its own restrictive interpretation of article 9, paragraph 4 of the Cartel Act in the *Swatch Group/WEKO* ruling by stating that *Swatch Group/WEKO* concerned sanction proceedings. In contrast, *Tamedia/Adextra* involved purely administrative merger control proceedings.

The different interpretation depending on the type of proceedings is likely to be difficult to comprehend for companies. Furthermore, the broad interpretation of requirement (2) increases legal uncertainty as companies must now assess whether competitive effects between two markets can be excluded.

Opening of the gas market in Switzerland

COMCO has concluded an amicable settlement with ewl Energie Wasser Luzern Holding AG (ewl) and Erdgas Zentralschweiz AG (EGZ). In this agreement, ewl and EGZ committed themselves to transit via their natural gas grids.

Previously EGZ and ewl had refused to allow third parties to supply end customers via their natural gas networks. With this decision, COMCO is fully opening up the natural gas market in central Switzerland. This step has a similar signal effect as the decision against the Fribourg electricity works in 2001, which opened up the electricity market on the basis of the Cartel Act.

EGZ and ewl supply end customers in central Switzerland with natural gas. Up to now, they have abused their dominant position in the transport and distribution of natural gas via their pipeline networks, according to COMCO; for example, ewl and EGZ refused to allow a third-party supplier to pass through their networks to supply certain customer groups. In doing so, they prevented end customers from freely choosing their supplier.

EGZ and ewl cooperated with COMCO. They mutually undertook to enable all end customers connected to their networks to change their supplier in the future. When calculating the penalty, COMCO took into account the fact that EGZ and ewl are opening up their network area on their own initiative. The reduced fine amounts to around 2.6 million Swisss francs.

UPC abuse of dominant market position

In accordance with its previous practice, COMCO defined a market for the transmission of live ice hockey events. In this market, UPC holds comprehensive exclusive rights for the transmission of Swiss ice hockey matches on pay-TV for the years 2017 to 2022. As a result, UPC was held dominant in the market for live broadcasting of ice hockey matches on pay TV.

According to COMCO, UPC abused its market dominance by unjustifiably completely denying Swisscom, as the TV platform operator, the transmission of live ice hockey matches. Through this conduct, UPC illegally impeded Swisscom in competition.

COMCO imposed a fine of 30 million Swiss francs on UPC. In addition, UPC was obliged to offer all requesting TV platforms in Switzerland either the raw signal of the ice hockey broadcasts or the transmission of the MySports programme on non-discriminatory terms until the end of the exclusive rights.

Precautionary measures concerning mechanical watch movements

On 19 December 2019, COMCO announced that it would decide, in summer 2020, on a possible extension of the supply obligation granted to ETA SA Manufacture Horlogère Suisse (ETA), a subsidiary of Swatch. In 2013, it had approved an amicable settlement with the Swatch Group after concluding that ETA was dominant in the market for mechanical movements and assortments (the regulating components of a mechanical watch movement). The Swatch Group had expressed its intention to phase out the supply of those products to Swiss watch manufacturers.

The amicable settlement provided that the Swatch subsidiary ETA was allowed to reduce its supply of mechanical movements gradually until the end of 2019. Because there was uncertainty on whether the market conditions had developed differently than had been assumed, COMCO opened a reconsideration procedure and issued precautionary measures until the time of the decision. ETA's deliveries were suspended to ensure that the outcome of the reconsideration procedure remained open.

Based on the investigations conducted, COMCO came to the conclusion that ETA was still dominant, but that the markets had responded to the incentives set and that the competitive conditions had largely developed as expected. On this basis, COMCO decided in June 2020 not to extend ETAs obligations and closed the case.

The way COMCO proceeded in this case lead to mixed reactions. Swatch criticised that first it had been obliged to supply mechanical movements until it was then prohibited from doing so in 2020. Furthermore, Swatch took the opinion that the precautionary measures decided by COMCO had negative financial consequences and were unnecessary.

FAC confirms fine against Naxoo for abuse of dominant position

In its ruling of 16 February 2021, the FAC found that Naxoo SA (Naxoo) held a dominant position on the market for cable connections in the city of Geneva. The FAC concluded that Naxoo abused this position with regard to property owners, third-party system providers and end customers by including unfair terms and conditions in its house connection contracts.

Naxoo took advantage of the fact that its services were essential in the eyes of the owners; thus, it secured control over the operation of the in-house distribution systems and prevented the owners from installing third-party systems over the same coaxial cable connection. In doing so, it secured exclusive use of the in-house facilities necessary to distribute the coaxial signal to end users.

Naxoo's behaviour, therefore, prevented the property owners from setting up a parallel competing system and freely disposing of their in-house cabling. The providers of other system connections, for example satellite systems, were hindered. End-users were also prevented from accessing complementary telecommunication services or competing cable network services, especially those via satellite.

The FAC has, in principle, confirmed the sanction imposed by COMCO; however, it took into account Naxoo's effective turnover and thereby reduced the fine from 3.6 million to around 3.25 million Swiss francs.

FSC on requirement for jurisdiction clauses from antitrust law perspective

A car dealer based in Switzerland brought an action against a car manufacturer based in Italy. The two parties had signed a letter of intent (LOI) in connection with negotiations on the conclusion of an exclusive distribution agreement. The LOI stated, among other things, that a court in Italy would have exclusive jurisdiction over any disputes arising from the LOI.

After the distribution agreement did not materialise, the car dealer brought an action against the manufacturer before the higher court in the canton of Solothurn (Switzerland). In its action, the car dealer asserted a claim against the manufacturer. The failure to conclude the contract constituted an unlawful refusal to enter into a business relationship according to the dealer.

The higher court in Solothurn did not hear the action for lack of territorial jurisdiction. The FSC also dismissed the complaint of the car dealer. It held that the decisive factor for the question of whether antitrust claims were covered by abstract agreements on jurisdiction was whether the litigation was sufficiently foreseeable for the party concerned at the time it agreed to the clause. In the present case, there was a close connection between the LOI and the manufacturer's alleged inadmissible conduct, and the car dealer was not inexperienced in antitrust litigation. There had, therefore, been sufficient foreseeability.

FSC confirms former executive bodies may be examined as witnesses

In its ruling, the FSC stated that former bodies of companies in investigation proceedings could be questioned as witnesses without restriction. Only current de facto and formal bodies could invoke the company's right to remain silent. In doing so, it contradicted the FAC, which had held that it was possible to question former executive bodies as witnesses, but had stated restrictively that the questioning of witnesses was only permissible if it was limited to information that was not directly incriminating for the undertaking concerned.

The competition authorities can question persons either as witnesses or as parties. This is of practical importance because witnesses are obliged to testify truthfully, while parties can refuse to testify. Undertakings affected by an investigation act through their current formal and de facto bodies; therefore, according to the FSC, they are to be examined as parties and not as witnesses.

Statements by former executive bodies, on the other hand, cannot be attributed to the company concerned. According to the FSC, former executive bodies also no longer have a direct interest in the outcome of the proceedings. This ruling by the FSC confirmed COMCO's practice.

However, in view of the fact that former bodies are in a particularly close relationship to the companies concerned, it may be questionable whether this practice does not undermine the company's right to refuse to testify by allowing former bodies to be questioned without restriction.

FSC fines Ticketcorner and AGH for ticketing clause

The FSC upheld the decision of the FAC for the most part. The FSC concluded that the conduct of Ticketcorner and Aktiengesellschaft Hallenstadion (AGH) constitutes both an unlawful agreement and an abuse of a dominant market positon. AGH had undertaken, in relation to Ticketcorner, to ensure and enforce that organisers renting the Hallenstadion for an event would transfer at least 50 per cent of the ticketing to AGH, which would then be carried out by Ticketcorner as AGH's ticketing cooperation partner at standard conditions (the ticketing cooperation clause). AGH implemented this obligation by means of a clause in its general terms and conditions (the ticketing clause).

COMCO had originally discontinued the proceedings owing to the lack of market dominance and the absence of an unlawful competition agreement. The FAC overturned this decision and referred the case back to COMCO for a reassessment in accordance with the considerations.

When assessing the case with regard to the relevant market, the FSC held that the Hallenstadion, with its various services, concerned not just one but several markets. One of those markets is the market for large-scale music events in the sense of rock and pop concerts, which are based on the layout of the arena in the Hallenstadion. The other market concerns the event organisers. According to the FSC, the event organisers are not asking for the Hallenstadion as such, but rather for it in a specific layout to attract performers for the staging of specific events.

According to the FSC, the relevant market had to be narrowly defined. It only included indoor stadiums with a capacity of more than 7,300 people and was geographically limited to the German-speaking part of Switzerland. In the market defined in this way, the FSC went on to state that AGH had a dominant position because of its extraordinarily high market share of 75 per cent.

The FSC confirmed that AGH had abused its dominant position by using the ticketing clause in the sense of a tying practice within the meaning of article 7, paragraph 2(f) of the Cartel Act. There was tying because, first, the business object of the event location and that of the ticketing were obviously different products, which were designed for different needs and for which there were separate markets with their own demands.

Second, by using the ticketing clause in relation to event organisers as a market counterparty, AGH had linked the main product (the rental of event locations in the Hallenstadion) with a factually unrelated additional product (the obligation to sell 50 per cent of all tickets for the respective event via Ticketcorner). It emphasised that in the vast majority of cases, the 50 per cent clause had the same effect as a 100 per cent clause and that all ticket sales were effectively in the hands of Ticketcorner. This conduct had adversely affected competition, and there were no apparent grounds for justification.

The FSC further confirmed that the ticketing cooperation clause agreed between AGH and Ticketcorner constituted an unlawful significant restriction of competition within the meaning of article, 5 paragraph 1 of the Cartel Act. The case has been referred back to COMCO for the determination of necessary administrative sanctions or measures.

This decision shows that the FSC sets high standards for the conduct of market-dominant companies, especially with regard to how contractual agreements might affect them.

FSC tightens the previous jurisprudence on price recommendations

In contrast to the lower court, the Federal Supreme Court concluded in its judgment that the pharmaceutical manufacturer Pfizer had entered into inadmissible price agreements with pharmacies and physicians by issuing price recommendations concerning erectile dysfunction medicines. The price recommendations were announced to the service providers on several occasions and were displayed through a third-party database that was connected to the pharmacies' cash registers.

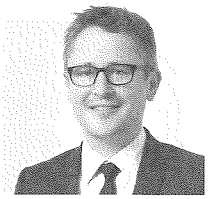
Investigations showed that the price recommendations were followed fully or partly to a high degree by almost 90 per cent of the pharmacies and 82 per cent of the physicians (the critical threshold is 50 per cent). According to the FSC, those circumstances were sufficient to establish an unlawful price agreement, even though Pfizer did not use a system of incentives or pressure to enforce the price recommendation.

For there to be an inadmissible agreement, there must at least be a concerted practice. According to the FSC, the concerted practice consisted of Pfizer being able to assume that the pharmacies were aware of the recommended price owing to the third-party database and that they accepted this method of communication. In addition, the pharmacies requested manufacturers such as Pfizer to issue price recommendations. Pfizer, therefore, knew that pharmacies were interested in price recommendations. The pharmacies, in turn, could assume that the other pharmacies also had the same price recommendations.

In the view of the FSC, this was sufficient to assume concerted practice. It further concluded that the high level of adherence showed that the concerted practice was having an impact on the conduct of the services providers, and there was a causal connection between the concerted practice and the conduct.

In its decision, the FSC emphasised above all that the price recommendations had been given to the service providers several times. Since this is likely to be the case with most price recommendations, the general admissibility of price recommendations appears questionable after this ruling. This new practice leads to a difference with European law, which is less strict.

In practice, there are voices in favour of a narrow interpretation of this ruling, in that price recommendations are considered problematic if they are shared with resellers via third-party systems.



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