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EUROPE, MIDDLE EAST AND AFRICA

ANTITRUST REVIEW 2021

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Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's Europe, Middle East and Africa Antitrust Review 2021 is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister reports covering the Americas and the Asia-Pacific region, this book provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this edition, Sweden is a new jurisdiction alongside updates from the European Commission (including a new article on the abuse of dominance), Cyprus, Denmark, France, Germany, Greece, Norway, Portugal, Russia, Spain, Switzerland, Turkey, the United Kingdom, Ukraine, COMESA, Angola, Israel, Mauritius and Mozambique.

In preparing this report, Global Competition Review has worked with leading competition lawyers and government officials. Their knowledge and experience – and above all their ability to put law and policy into context – give the report special value. We are grateful to all the contributors and their firms for their time and commitment to the publication.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com.

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Switzerland: Overview

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In summary

In respect of legal developments, a partial revision of the Cartel Act is likely to affect the merger control procedure by implementing the SIEC-test. And the Fair Prices popular initiative aims to put an end to Switzerland being an 'island' of high prices by introducing an obligation for undertakings based outside Switzerland to sell products and services to Switzerland-based customers at the same prices as to local customers. The initiative also proposes to introduce the concept of relative market power into Swiss law.

The 'Recent cases' section gives an insight into judicial practice. Cases such as the SIX decision of the Federal Administrative Court or the ADSL decision of the Federal Supreme Court contribute to further developing the law.

Discussion points

- Introduction of SIEC-test into Swiss Merger Regulation
- Possible effects of the Fair Price initiative or its indirect counter-proposal on competition
- Merger clearance based on the grounds that the improvement of competition in another market outweighs the harmful effects of the dominant position
- Compensation payments and their recognition when calculating the fine
- The right to be heard when accusations and theories of harm change
- Theory of harm when examining the possible abuse of a dominant position

Referenced in this article

- Partial revision of the Cartel Act
- Fair Price initiative
- Gateway Basel Nord merger
- Bid rigging cartels
- Stöckli Ski
- French books, SIX and ADSL cases

Legal developments

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, and communications by the Federal Competition Commission (COMCO). The current situation with regard to covid-19 will certainly also have a major effect on competition law in Switzerland and worldwide. The measures to contain the virus have already caused a global economic crisis of considerable proportion. It is to be expected that the various government aid measures, particularly if they have to be implemented for an extended period, could considerably distort markets and competition, and any changes in the situation must be closely monitored.

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

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 Swiss Cartel Act, which would affect the merger control procedure. One important element of the revision is to implement the test on significant impediment to effective competition (the SIEC-test) into the merger regulation. The SIEC-test would allow COMCO to prohibit mergers or put conditions in place if a merger looked 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 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 such a 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 shall 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 civil actions under competition law, 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 is expected to take place in the fourth quarter of 2020. 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.

Prohibition of price differentiation

The Fair Price popular initiative aims to put an end to Switzerland being seen as an island of high prices. The initiative proposes to introduce (1) 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, and (2) the concept of relative market power into Swiss law. Further, it aims to protect non-discriminatory online sales. The National Council discussed the initiative during its spring session 2020 and rejected it. However, the National Council has 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. They also would behave inadmissibly in the future if, for example, they refuse business relations or dictate discriminatory prices. However, they need not fear the harsh sanctions that can be imposed on dominant companies. The National Council agreed to a reimportation clause, which is provided in the initiative and is intended to prevent cheap products delivered abroad from being imported back into Switzerland at a lower price. This new counterproposal will be further discussed in Parliament but as yet it is unclear when.

It is doubtful whether the suggested revision of the Cartel Act or the implementation of the Fair Prices initiative would 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 both the popular initiative and the counterproposal would initially give rise to considerable legal uncertainty.

Recent cases

Merger project Gateway Basel Nord cleared by COMCO

The companies SBB, Hupac and Rethmann SE sought to gain joint control over Gateway Basel Nord AG. The aim of the merger was to set up and run a joint trans-shipment terminal for combined transport in the north of Basle. In a first stage, a bimodal trans-shipment terminal for goods transported by trucks and trains was planned. Later, the trans-shipment terminal was to become trimodal (trucks, trains and ships). To realise this important project, the parent companies relocated some trans-shipment operations to new facilities and partially shut down some of their own facilities. The project was supported by the Federal Office of Transport with 83 million Swiss francs. The Ordinance for Goods' Transport provides for non-discriminatory access to trans-shipment terminals. Furthermore, the Federal Office of Transport imposed various conditions to ensure equal terms of use for all companies. COMCO conducted a Phase II examination, as a result of which the merger strengthens the dominant position relating to handling services for containers, swap containers, semi-trailers in import and export traffic in trans-shipment from rail to rail and from ship to rail. There is no disciplinary effect of other trans-shipment facilities because of the time and cost advantages of Gateway Basel Nord. Effective competition remains in respect of trans-shipment from rail to road and from ship to road because smaller trans-shipment facilities are a genuine alternative to Gateway Basel Nord.

The proposed merger leads, however, to a considerable improvement in competition in the overall combined transport system and since COMCO expects the merger to lead to substantial cost and time savings for all players in the combined transport system (lower handling costs,

faster handling of international trains and shorter standing times of loading units), COMCO concluded that these advantages outweighed the harmful effects of the strengthened dominant position of Gateway Basel Nord. The proposed merger was therefore cleared without any obligations or conditions by COMCO.

This is the first merger cleared by COMCO based on the grounds that the improvement of competition in another market outweighs the harmful effects of the dominant position. COMCO is of the view that the merger will lead to major cost and time savings in combined transport, from which all undertakings will benefit.

UPC–Sunrise merger

The planned merger between the two telecommunications companies UPC and Sunrise was examined by COMCO in a Phase II examination. COMCO concluded that the merger would not lead to the creation or strengthening of a dominant position in any of the analysed markets. Therefore, the merger was cleared. With the acquisition of UPC and its cable network infrastructure, Sunrise would have become the second largest telecommunications company in Switzerland (after Swisscom). Like Swisscom, Sunrise would have been able to offer fixed network, broadband internet and mobile telephony services as well as digital television on its own infrastructure. In contrast to the Sunrise–Orange merger project, which was prohibited by the COMCO in April 2010, the parties to the UPC–Sunrise merger complement each other in many respects. COMCO examined whether the planned merger would lead to a joint market dominance with Swisscom. It found that no such joint market dominance would occur and coordination between the merger parties and Swisscom appeared unlikely because they are positioned differently.

Although the merger was cleared, it did not take place because a major shareholder of Sunrise did not agree with the purchase price.

COMCO closes investigations into bid rigging cartels

COMCO announced on 3 September 2019 the end of the last two of 10 investigations into bid rigging at building and civil engineering companies in the Canton of Graubünden: Road Construction and Engadine II. COMCO had started investigations in 2012 involving a number of building and civil engineering companies. For procedural reasons, the investigations were divided into 10 proceedings. The first, which was concluded on 10 July 2017, concerned Münstertal, where, COMCO stated, there had been hundreds of unlawful agreements in tenders between 2004 and 2012. COMCO concluded six further decisions on 2 October 2017, which concerned eight individual tenders in the Engadine region. In 2019, COMCO concluded the Engadine I decision.

Two of the aforementioned decisions are legally binding and several are pending before the Federal Administrative Court (FAC). In the Road Construction decision, COMCO found that a group of 12 building companies had regularly held meetings to decide which company would get which project and at what price. Eight of these 12 companies either submitted a voluntary report or have acknowledged the facts of the case as stated by the Secretariat. This led to a reduction of the sanction, which had totalled 14 million Swiss francs. One of the buildings companies, Implenia AG, received no sanction because it was the first company to submit a voluntary report. Nine companies concluded settlement agreements with the victims of the cartel. The companies agreed to

payments in the amount of 6 million Swiss francs. As a consequence, COMCO reduced the fines of the other nine companies by 3 million Swiss francs, bringing the total sanction down to 11 million Swiss francs. In the Engadine II decision, COMCO found 10 unlawful bid rigging agreements.

This is one of the biggest investigations the Secretariat of the COMCO has undertaken to date. It is also the first time the Secretariat has indicated that a settlement agreement, which obliges parties to pay compensation, can be taken into account during a current investigation when the fine is being decided. Considering the many obstacles in civil law when a claimant bears the cost risk and has to prove the unlawful agreement and the damage, it is understandable that the Secretariat encourages the parties to reach a settlement agreement. However, the application of the presumption of innocence during an investigation must be taken into consideration. If parties feel under pressure to reach a settlement agreement, this presumption may be difficult to maintain.

Amicable settlement with Stöckli Ski and Bucher Landtechnik

COMCO also reached amicable settlements with undertakings Stöckli Ski and Bucher Landtechnik in respect of vertical agreements.

Stöckli Ski had put unlawful vertical price-fixing agreements in place with its ski retailers. The retailers were not permitted to undercut the Swiss sales prices that Stöckli stipulated. Stöckli Ski cooperated fully and committed to no longer set any minimum or fixed retail prices, or to allow online trading, cross-supplies between Stöckli retailers and parallel imports of Stöckli products. COMCO imposed a sanction of 140,000 Swiss francs on Stöckli Ski.

Bucher Landtechnik had obliged its dealers to purchase all their spare parts for New Holland tractors from them. Additionally, Bucher Landtechnik had implemented an incentive scheme that linked the volume of spare parts purchased to the discount terms for New Holland tractors. These measures prevented their dealers from buying from foreign suppliers. COMCO imposed a fine of approximately 150,000 Swiss francs.

Investigation against driving instructors in the Oberwallis

In March 2018, COMCO opened an investigation into the practices of driving instructors in the Oberwallis region. The instructors had agreed on recommended prices for practical driving instructions and for theory lessons. In its decision of 25 February 2019, COMCO concluded that these price recommendations constituted unlawful price-fixing agreements and imposed a sanction of 50,000 Swiss francs. At the same time, COMCO reached an amicable settlement with the Oberwallis Association of Driving Instructors (FVO). The FVO and its active members committed themselves not to issue recommended prices in the future and to stop exchanging information on prices and tariffs.

COMCO investigations into foreign exchange agreements

In June 2019, COMCO concluded two investigations in connection with agreements on foreign exchange spot transactions between banks (FOREX). Traders at several international banks had coordinated their activities with regard to certain currencies via discussions in chat rooms. COMCO fined the cartels around 9 million Swiss francs. An investigation into one of the banks is still under way.

Precautionary measures concerning mechanical watch movements

On 19 December 2019, COMCO announced that it would decide this summer on a possible extension of the supply obligation granted to ETA SA Manufacture Horlogère Suisse (ETA), a subsidiary of Swatch. In 2013, COMCO 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 these 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 the market conditions developed differently than had been assumed, COMCO opened a reconsideration procedure and issued precautionary measures until the time of the decision. ETA's deliveries will be suspended temporarily to ensure that the outcome of the reconsideration procedure remains open.

FAC upholds fine imposed on French book wholesalers

The competition authority opened a procedure in 2008 focusing on a possible abuse of dominant positions by marketers-distributors (wholesalers) in Switzerland. During the investigation, COMCO focused mainly on illicit price recommendations and horizontal agreements regarding the allocation of territories. COMCO concluded in 2013 that nine wholesalers had entered into unlawful vertical agreements with their suppliers or logistics operators that prevented passive sales into Switzerland.

The FAC considered the appeals against the COMCO decision regarding wholesalers of books written in French. It confirmed the decision, holding that the wholesalers had prevented parallel imports into Switzerland. However, the reasoning of the FAC's decision differs in essential points from that of COMCO. The FAC reduced the sanctions for some undertakings. The total sanction is now 14.3 million Swiss francs.

The FAC came to the conclusion that actors in this market are (1) the publishers, who are mainly focused on book production, (2) the marketers (in French, *diffuseurs*), who manage the commercialisation and representation of publishers, and (3) the distributors (in French, *distributeurs*), who take care of logistics, such as order entries, processing deliveries and managing returns. Some marketers subcontract the distribution to third parties, while others engage intragroup logistics operators.

The FAC stated that the agreements made between (1) the marketers and third-party distributors, (2) marketers and third-party publishers, and (3) marketers and wholesalers outside Switzerland, contained clauses that prevented passive sales into Switzerland. The distribution systems of the involved wholesalers were different. Some of the contracts between the marketers and the logistics operators in Switzerland contained the obligation of the marketer to make sure that books could not be imported into Switzerland outside the official channels. However, in none of the contractual relationships between the wholesalers and the resellers outside Switzerland could clear evidence for a passive sale prohibition be demonstrated. Therefore, the FAC had to rely on circumstantial evidence. The FAC held that between 2005 and 2011, Swiss retailers and bookshops imported only a few books written in French without going through the official channels.

The FAC stated that it would have been in the interest of the Swiss retailers and bookshops to import directly from France because of the price difference. The FAC thus took the view that passive sales were prohibited by the wholesalers.

The judgments have been appealed to the Federal Supreme Court (FSC) by several of the concerned undertakings. However, the FSC does not have full cognition and can review the determination of the facts only to a limited extent.

Cases like this one illustrate how difficult it can be for undertakings to defend themselves, especially when accusations and theories of harm change during the procedure. This can lead to questions about the right to be heard. Furthermore, in the case at hand, only the mere absence of parallel imports into Switzerland and other pieces of circumstantial evidence led to the sanctions. In most of the previous cases, COMCO had relied on written passive sale prohibitions in distribution (*BMW* case) or production licensing contracts (*Gaba* case).

FAC mostly confirms decision of COMCO in the SIX case

On 29 November 2010, COMCO sanctioned the SIX Group AG (SIX), having concluded that SIX Multipay had abused its dominant position to give preference to the payment card terminals of its affiliated company, SIX Card Solutions. The dynamic currency conversion (DCC) function launched by SIX Multipay in 2005 had been made available on the terminals of the affiliate company but not on those of other terminal providers. DCC allowed holders of foreign credit or debit cards to choose directly at the terminal whether they wanted to pay the cost of their purchase in Swiss francs or in their home currency. The fine was approximately 7 million Swiss francs. Almost nine years later, the FAC upheld the COMCO decision, whereby it clarified that the absolute time limit of 10 years applies as of the end of the conduct that violates the Cartel Act and specified that the time limit according to article 60 of the Swiss Code of Obligation applies analogously.

In its decision, the FAC concluded that SIX indeed had a dominant position and had abused its position. The decision contains several interesting statements. First, the FAC confirmed that the group is the relevant antitrust subject. The decisive factor for the acceptance of a group is the possibility of the parent company to control the other group companies, whereby actual exercise of control is not required. Furthermore, the reservation of intellectual property rights in article 3, paragraph 2 of the Cartel Act is to be interpreted restrictively and must not be understood as a reservation of application, which would mean that antitrust law would not be applicable in certain circumstances. Rather, the reservation aims to ensure that the objectives of intellectual property law are sufficiently taken into account. The FAC also stated that market shares above 50 per cent lead to a presumption of a dominant position, which can only be rebutted if contradictory facts are presented. Regarding the refusal to deal, the FAC identified several different types of refusals: refusal to supply, interruption of supply, refusal of access, refusal to grant a licence and exclusion from contracts.

Depending on the type of refusal, there are different test criteria. The refusal of interoperability is a special form of the refusal to deal. According to the FAC, the refusal of interface information represents a separate type of refusal. This form is characterised by the fact that access to a primary product is not impeded, but interoperability is only possible with the primary product. For this reason, the requirements for the circumstances of the refusal to deal are not set as high as for those for the refusal to license. The FAC further stated that the restraints of competition provided

in article 7 of the Cartel Act do not require an examination of the economic damage (theory of harm). Finally, one of the most important statements the FAC made concerned the actual effects on competition. According to the FAC, no actual verifiable effects need to have occurred to meet the requirements of the abuse of a dominant position. Instead, it is sufficient that the conduct has a potentially adverse effect on competition. However, the decision of the FSC in the *Swisscom ADSL* case puts this into perspective, since the actual effects were examined there (see below).

FSC upholds COMCO decision in Swisscom ADSL case

For the first time, the FSC examined an alleged price squeeze (ie, an insufficient margin between the input price and end-customer price). The FSC upheld COMCO's decision and confirmed the sanction in the amount of 186 million Swiss francs. In line with the practice of the European Commission, the FSC stated that the following three conditions must be met for the conduct to qualify as a price squeeze: (1) there is a vertical integration along the supply chain. An undertaking is active on two different markets, whereby on the upstream market, the undertaking offers an input that is used to produce the final product. The final product is produced by the same vertically integrated undertaking and is offered on the downstream market; (2) the input is necessary to produce the final product; and (3) the vertically integrated undertaking has a dominant position, at least on the upstream market. In its *Swisscom ADSL* decision, the FSC concluded that these three conditions were met. By setting a high price for the input and a moderate price for the final product, according to COMCO, Swisscom prevented its competitors from achieving a sufficient margin. The FSC considered that the 'as-efficient competitor test' should be used in the present case to determine whether there is a price squeeze. Interestingly, the FSC examined the actual effects of Swisscom's conduct. This puts the FAC statement in the *SIX* case, according to which potential adverse effects are sufficient, into perspective (see above). Moreover, the FSC confirmed that article 7 of the Cartel Act is sufficiently clear within the meaning of article 7 of the European Convention on Human Rights. In this context, the FSC considered that there was an international practice concerning price squeezes in the European Union and the United States and that Swisscom had been contacted previously concerning potentially inadmissible price squeezes. The FSC also clarified that the turnover from business activities between the undertakings of one group are to be taken into account when calculating the basic amount of the sanction. Finally, the FSC confirmed COMCO's view that the conduct was considered a medium to serious competition restraint. According to the FSC, the price squeeze had anticompetitive effects in the upstream market. Swisscom reduced the possible profit margin of its competitors in such a way that they would have needed to leave the market in the long term.

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