# Switzerland – recent developments

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**In 2009 the competition law landscape in Switzerland has been marked by intense discussions regarding the effectiveness of the Swiss Act on Cartels (ACart), increasing intervention in the area of vertical agreements, and a large domestic newspaper merger. This article provides a brief overview of these and other recent developments in Swiss competition law.**

## Legal and organisational developments

### Reorganisation of the Swiss Competition Commission (ComCo)

The division of the ComCo into three chambers (presided by the president and by the two vice-presidents), in place since the enactment of the ACart in 1995, has been abolished. Since February 2009 decisions of the ComCo are rendered by the plenary meeting of its 12 members.

Simultaneously, the position of ComCo's President, towards ComCo's Secretariat that carries out investigations and prepares decisions, has been significantly strengthened. These changes are likely to foster a more consistent approach to case-handling by the Secretariat and will probably also streamline the decision-making process of the ComCo.

### Personnel changes in the Secretariat of the ComCo

Patrick Krauskopf left the Secretariat at the end of 2008. His position as head of the product market division has been assumed by deputy director Patrik Ducrey. Ms Carole Söhner-Bührer has been appointed vice director and is the new head of the Secretariat's infrastructure division.

### Evaluation of the Swiss Act on Cartels (ACart)

The evaluation of the ACart commissioned by the Swiss Federal Council (SFC) resulted in a voluminous report published early in 2009. The report has been intensly debated by scholars and practitioners in Switzerland since it identifies various areas where the ACart should be improved. Most particularly, the report calls for: (i) a professionalisation of the ComCo; (ii) the abolishment of *per se* rules in the area of vertical restraints; (iii) a harmonisation of the Swiss merger control regime with the EU regime; (iv) a treaty to facilitate information exchange with major trading partners of Switzerland; and (v) a facilitation of private enforcement. In March the SFC acknowledged the report and asked the Federal Department of Economic Affairs to elaborate a proposal for amendments to the ACart in the above-mentioned areas (i), (ii), (iii) as well as for the acceleration of proceedings carried out by the competition authorities. On the basis of such a proposal, the SFC will decide early in 2010 on further steps.

### Merger control

In a notice published in March 2009, the ComCo clarified its approach to certain types of concentrations. Firstly, joint ventures that are neither active nor achieve turnover in Switzerland are not considered subject to a notification duty even if the companies holding the joint venture exceed the turnover thresholds in Switzerland. Secondly, concentrations that are carried out in consecutive steps are considered as one single concentration only if the time period between the implementation of the transaction agreement that leads from joint control to sole control does not exceed one year. Thirdly, the ComCo has overruled its former practice (for the purpose of assessing merger control notification duties) to geographically allocate turnover at a customer's billing address rather than where the products have been placed on the market. The latter development is of particular interest for raw material trading companies that are domiciled in Switzerland and use a billing address in Switzerland, but do not achieve significant turnover with Swiss customers.

## Cartel enforcement

### Horizontal agreements

In July 2009 the ComCo imposed fines totalling SFr1.24m on eight companies for rigging bids in private and public tenders for electrical equipment in construction projects between 2006 and 2008. All undertakings fully cooperated with the authority in the investigation proceeding. The procedure was closed with a consent decree whereby the leniency applicant was granted total immunity from fines.

Furthermore, the ComCo has opened two investigations into horizontal agreements. They involve: a) companies active in the areas of road construction for allegedly rigging bids in public tenders; and b) acquirers and issuers of credit cards regarding their multilateral agreement to set domestic interchange fees. In the former case, it is quite likely that the ComCo will impose fines on the parties of the agreement. The latter agreement was already criticised by the ComCo in 2005. Since it then settled the matter by a consent decree that expires early in 2010, it may well be that a new consent decree will be agreed.

The Secretariat's investigations into: a) allegedly critical exchanges of price-related information amongst manufacturers and importers of cosmetics and perfumes; b) alleged price fixing amongst suppliers of door elements; c) allegedly critical information exchanges amongst manufacturers of components for heating, cooling and sanitary installations; d) alleged price-fixing amongst freight-forwarders; and e) alleged price-fixing amongst air cargo companies are still pending. Where parallel proceedings are pending in the EU (freight-forwarding and air cargo), it is generally expected that the ComCo will await a decision of the European Commission before moving forward.

## Vertical agreements

Vertical agreements have been a major cause of concern for the ComCo over the last few years. Oddly enough, because of a lack of cases the authority has not been able to take significant decisions in this area. The below cases, however, show that enforcement against vertical restraints has picked up steam in 2009.

### Resale price maintenance and price recommendations

Agreements on resale price maintenance (RPM) have become very difficult to defend before the ComCo following an amendment of the ACart effective since 2004. In May 2009 a Swiss manufacturer of cutters and pruning shears, and one of its resellers with whom it had entered into an RPM agreement, entered into an amicable settlement with the ComCo under which both parties accepted a fine of SFr50,000 (supplier) and SFr5,000 (reseller) respectively.

In a Notice on Vertical Restraints adopted in 2007 the ComCo developed a test according to which price recommendations must be considered critical if: a) they are not made publicly available; b) they are implemented due to pressure exerted or incentives given by the supplier; c) they are not explicitly declared non-binding; d) the price level in Switzerland is significantly higher than in neighbouring countries; and/or e) they are applied by a significant quota of resellers and distributors. Nonetheless, a first investigation into prices recommended by bike manufacturer, Scott, to resellers was closed by the ComCo in 2008 although a majority of resellers considered the recommended prices to be binding, subject to individual rebates. The closure was made possible by Scott, which undertook to make its recommendations publicly available and to declare them non-binding. In turn, in an investigation into recommended prices for Cialis, Levitra and Viagra, the Secretariat issued a statement of objections according to which the recommendations must be considered as unlawful RPM due to the very high level of adherence of retailers/pharmacists. If the ComCo supports this view, it will likely impose fines on the parties involved.

### Absolute territorial protection

The ComCo is currently investigating whether Gaba, a manufacturer of dental care products, and one of its foreign independent manufacturers and distributors have excluded passive sales into Switzerland. By the same token, the Secretariat is investigating whether exclusivity clauses in contracts between two foreign breweries and their Swiss distributors have been impeding parallel imports into Switzerland. A finding of absolute territorial protection arrangements would be very difficult to defend by the parties involved. If the ComCo were to base its decision on such a finding, it would likely impose fines on the parties involved.

## Mergers

### Tamedia/Edipresse

In September 2009 the ComCo cleared the concentration between Tamedia, one of the largest media groups in the German speaking part of Switzerland, and Edipresse, one of the largest media groups in the French speaking part of Switzerland, without imposing remedies following a second-phase investigation. Given the different geographical strengths of the two groups, the concentration has largely been considered complementary and, therefore, has not been criticised by the ComCo. Particular concerns have been raised in view of the intent of the parties to merge the two French-language daily newspapers *Le Matin Bleu* and *20 Minutes* that are offered to readers free of charge. The reduction of the number of free daily newspapers from two to one was, however, considered unavoidable given that the exit of *Le Matin Bleu* from the market was imminent.

### Early distribution of newspapers

In November 2009 the ComCo cleared the merger of the companies held by the two media groups Tamedia and NZZ as well as Swiss Post that deal with the early morning distribution of newspapers. The clearance given after a second-phase investigation is subject to the condition that neither Tamedia nor NZZ shall be entitled to hold any stake in the merged entity. The ComCo has stated that such a condition is necessary to enable third parties to enter the Swiss newspaper market.

### Heineken/Eichhof

In Heineken/Eichhof, the ComCo had to assess the absorption of the third-largest brewery and distributor in Switzerland by one of the two largest breweries in Switzerland. It did not consider Heineken as holding a single dominant position, but it thoroughly investigated whether the two major players Heineken and Carlsberg, which hold combined market shares of between 70% and 95% in the relevant markets would have to be considered collectively dominant. In its assessment the ComCo took the following elements into consideration: a) the number of companies involved, their respective market shares and the market concentration;
b) properties of/similarities between the two potentially dominant groups; c) market growth; d) level of transparency in the markets; e) multi-market contacts, i.e., the occurrence of similar positions of the two groups in other geographical markets;
f) position of customers and suppliers; and
g) potential competition. Since not all of these criteria were considered to have been fulfilled, the ComCo did not consider Heineken to hold a collective dominant position. It, therefore, cleared the merger without imposing any remedies.

## Abuse of a dominant position

In November 2009, the ComCo rendered a decision asserting that the incumbent national telecom company Swisscom holds a dominant position in the market of high bandwidth internet services and abuses this position by charging its wholesale customers prices that do not allow them to viably compete with Swisscom in the end-customer market. The fine imposed on Swisscom amounts to SFr220m. This substantial fine adds to the SFr333m

fine already imposed on Swisscom in 2007 for abusive termination charges. Swisscom immediately issued a statement that it would challenge this decision.

## Private enforcement

Particularly due to the difficulties faced by plaintiffs in putting forward proof of illicit profits of cartel members or companies that abuse a dominant position, private antitrust enforcement remains very rare in Switzerland. The only case likely to be decided in 2009 involves an action brought by several internet providers against Switch, the registry for '.ch' and '.li' domains to put an end to its preferential treatment of its own subsidiary company that recently entered the markets for internet and e-mail services as against other players in the market. The commercial court of Zurich granted the plaintiffs provisional interim relief. It will be interesting to see whether these measures will be upheld in regular proceedings and, if yes, whether damages claims will follow.

## Procedure

### Request for preliminary consummation of a merger

EU competition law explicitly allows the consummation of a public takeover pending a clearance decision subject, *inter alia* that the acquiring undertaking does not use the voting rights it has acquired. The ACart lacks such a clear rule. In Schaeffler/Continental the bidder was unfriendly and access to the target was, therefore, insufficient to submit a merger control notification. Nonetheless, the parties requested the ComCo to grant them the right to implement the concentration prior to submitting the notification. The ComCo held that early consummation can be allowed, subject to the bidders' obligation not to use its voting rights in the target, since the following conditions were fulfilled: Firstly, the parties must comprehensively inform the ComCo about the contemplated transaction so that the ComCo is in a position to assess the effects of its decision. Secondly, the parties must put forward qualified reasons why the concentration must be immediately realised. Thirdly, it must be possible for the consummation to be reversed if later on the concentration is not cleared by the ComCo.

### Useless notification proceeding

As a collateral to the right of the ComCo introduced in 2003 to impose direct fines for certain antitrust infringements, companies were given the right to notify planned restraints to the Competition Commission to obtain clarity on their risk of being fined. In practice, this notification proceeding (ironically introduced in Switzerland almost simultaneously with the EU replacing its notification system by a self-assessment system) does, however, not fulfil its purpose to improve legal certainty. In a decision rendered in 2009 the Swiss Supreme Court confirmed the ComCo's practice as consistent with constitutional law – that notifying companies do not have any right whatsoever to get a final and conclusive answer as to whether the notified conduct is lawful or not. The Supreme Court's decision makes it depressingly clear that the notification proceeding will remain dead letter: in uncritical circumstances there is, at the outset, no need for a clarification. The same is true for agreements that are obviously unlawful. In all other critical but unclear cases, the Court has clearly stated that the parties concerned do not have any claim to an authoritative clarification of the lawfulness of a project. It may well be that legal uncertainty will now lead to companies refraining from implementing potentially critical projects even though they might be justifiable.

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