

# Report

## Switzerland

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### Annual Review in Competition Law

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As shown below, in competition law matters, the past year was interesting and busy in Switzerland.

#### I. Jurisprudence

##### 1. Cartels and Abuse of Dominance

Jurisprudence in cartels and abuse of dominance shows some quite important decisions. In December 2019, the Swiss Federal Supreme Court confirmed a sanction against the Swiss former telecom monopolist Swisscom for abusing its dominant position in broadband network services<sup>1</sup>. The Competition Commission (ComCo) found that Swisscom's pricing policy on the upstream market squeezed its competitors' margin on the downstream broadband network services (ADSL) market. The sanction decision of the ComCo was highly discussed as at the time the relevant behaviour of Swisscom occurred, no clear Swiss and EU practice existed on how such behavior should be treated under Article 7 ACart (abuse of dominance) and Article 102 TFEU. This judgment of the Federal Court will likely serve as a precedent for pending and future proceedings. Just very recently, in August 2020, the ComCo launched a new investigation against Swisscom in the broadband market.

In July 2020, the ComCo suspended the supply obligation imposed on the leading Swiss watch maker Swatch by an amicable settlement in 2013<sup>2</sup>. This settlement regulated the

provision of its customers/competitors with mechanical clockworks to secure competition in the watch industry. The ComCo states in his decision that the 2013 settlement had positive effects on competition and therefore the supply obligation could be suspended. It, however, also states that Swatch still holds a dominant position in this market.

In the energy sector, an amicable settlement between the ComCo and Erdgas Zentralschweiz AG, the central Switzerland gas company opened the gas market in central Switzerland to the effect that third parties may now serve customers in central Switzerland with natural gas through the gas networks of Erdgas Zentralschweiz AG and the local gas company in the City of Lucerne<sup>3</sup>.

Apart from the aforementioned new investigation in the broadband sector, the ComCo has opened, in the course of the year, new cartels investigations in the construction, food retail and the tobacco sectors.

##### 2. Mergers

2019/2020 saw also noteworthy merger decisions. The first case concerned a joint venture between SBB, the Swiss national (State-owned) railway group, Hupac, a rail company active mainly in the north-south corridor and Rethmann, the parent company of Rhenus Logistics<sup>4</sup>. The joint venture partners aimed at creating the Gateway Basel Nord hub (GBN) for import and export movements and the trans-Alpine transit traffic of goods. Once completed, GBN shall provide both landside (road and track) and shipborne goods handling services. Although the ComCo considered that GBN could eliminate effective competition in the transshipment of containers, swap bodies and semi-trailers in import and export traffic, it took into account, when clearing the joint venture, legal requirements for non-discriminatory

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<sup>1</sup> Judgment of the Swiss Federal Court regarding Swisscom, dated 9 December 2019 (2C\_985/2015).

<sup>2</sup> Decision of ComCo regarding ETA, dated 15 July 2020.

<sup>3</sup> Decision of ComCo regarding EGZ and ewl, dated 25 May 2020.

<sup>4</sup> Opinion of ComCo regarding SBB/Hupac/Rethmann/GBN, dated 27 May 2020

access to GBN and that GBN would likely lead to substantial cost and time savings in combined transport. Furthermore, the ComCo assumed that competition in import and export transport by rail will improve to some extent. In sum, the ComCo took the view that these advantages would outweigh the disadvantages of GBN's dominant position in the market for transportation services. The merger decision was not appealed, however, the project has been blocked by complaints of a competitor, for instance against the federal government's decision on funding for the GBN or a complaint based on procurement laws.

The second case concerned the merger between Sunrise and Liberty Global Switzerland<sup>5</sup>. In its preliminary opinion after the one-month assessment period, ComCo stated serious concerns, in particular about the creation of collective dominance of the newly merged entity with the Swiss incumbent Swisscom. Our firm was, together with a team of economist experts of Polynomics, after the launch of the in-depth period, mandated by Sunrise to draft a legal and economic opinion to mainly show that the merger project would, contrary to the abovementioned prohibited merger in the Telecom sector (France Telecom Switzerland/Sunrise) not create a collective dominant position. The merger project was finally approved by ComCo without any conditions.

### 3. State aid

Finally, the ComCo also dealt with State aid law Switzerland does not have a proper State aid law but has adopted the EU State aid rules in the bilateral air transport agreements with the EU. According to this agreement the Swiss Government has to control public funding to companies in the air transport sector. The ComCo is involved in the control process as it has to give its comments which are however not binding for the Swiss Government.

Due to Covid-19 the airline carriers Swiss and Edelweiss as well as the maintenance and repair company SR Technics were faced with serious economic problems and asked for financial support which was approved by the Swiss government. The ComCo, in its two opinions, declared the support of Swiss and Edelweiss compatible with EU State aid rules where as it raised objections against the State aid for SR Technics.<sup>6</sup> The Swiss Confederation, despite

the negative opinion of the ComCo regarding the SR Technics support, approved the funding of Swiss and Edelweiss as well as the funding of SR Technics.

The EU and Switzerland are about to discuss an Institutional Framework Agreement (IFA). The proposed general rules shall be applicable for the existing sectorial bilateral agreements between the EU and Switzerland and also to future agreements. The IFA also contains State aid rules and, if the IFA is signed, State aid rules might to a certain degree be in the future applicable in Switzerland not only in the air transport area but also in other sectors.

## II. Reform of the Swiss Cartels Act

In 1995, a preventive merger control system was introduced in the new Federal Act on Cartels and other Restraints of Competition (CartA). Accordingly, a proposed merger must be notified to the ComCo if in the business year preceding the notification the turnover figures of the undertakings concerned (i) exceeded CHF 2 billion worldwide or CHF 500 million in Switzerland and (ii) if at least two of the undertakings concerned each had a turnover of more than CHF 100 million in Switzerland.

As a substantive assessment criteria, the dominance test was introduced. Accordingly, a proposed merger may only be prohibited by the ComCo if the newly merged entity would create or strengthen a dominant position that results in an elimination of effective competition (qualified dominance). Practice shows that this qualified dominance-test makes it very difficult to prohibit mergers. Furthermore, as a matter of law, unilateral effects below the market dominance threshold are not within the scope of the ComCo's review powers.

Proposed concentrations that are subject to notification under the CartA may in principle only be implemented after their approval by the ComCo, however, the ComCo may authorize an early implementation for good cause (eg in case of rescue mergers). The merger control procedure is divided into two phases. Following the submission of a complete merger notification, the ComCo and respectively its Secretariat examine within a period of one month whether there are indications that the proposed concentration would create or strengthen a

<sup>5</sup> Opinion of ComCo regarding Sunrise/Liberty Global, dated 23 September 2019

<sup>6</sup> Opinion of ComCo regarding Swiss/Edelweiss, dated 20 May 2020/Opinion of ComCo regarding SR Technics, dated 29 June 2020.

dominant position. Absent such indications, the ComCo is barred from further examining the proposed concentration and it may be implemented without reservations. Although a formal notice that no in-depth investigation will be conducted is not foreseen in the CartA, the ComCo regularly informs the undertakings concerned of this fact. Conversely, if the preliminary examination shows indications that the concentration would create or strengthen a dominant position, the ComCo and respectively its Secretariat conduct an in-depth investigation which can take up to four months. The ComCo may approve, prohibit or approve subject to conditions notified concentrations.

From the rough description above it results that the current Swiss merger control system was mainly inspired by the first EU Merger Control Regulation.

On 12 February 2020, the Swiss Federal Council instructed the Federal Department for Economy, Education and Research (EER) to draft amendment proposals to the CartA, mainly aimed at reforming the current merger control approach. Apart from some procedural adaptations to EU law, the change from the current substantive dominance test to the Significant Impediment to Effective Competition test (SIEC test) will be the main element of the amendment proposals of the EER.<sup>7</sup>

The current substantive dominance test (qualified dominance) makes it difficult for the competition authorities to prohibit merger projects. This is proven by the fact that since the introduction of the preventive merger system in 1995 only three (!) merger projects were prohibited; only one prohibition decision became final and binding. The first case was a merger in the media sector which was approved on appeal. The second case was the merger between France Telecom Switzerland (Orange) and Sunrise.<sup>8</sup> The ComCo took the view that the merger would create collective dominance between the newly merged entity and the Swiss incumbent Swisscom. The decision was not appealed. The third case concerned a merger between Ticketcorner and Starticket, the two only significant ticketing enterprises active in Switzerland.<sup>9</sup> The ComCo determined that the proposed merger between Ticketcorner and Starticket would have strengthened Ticketcorner's dominance and eliminated effective competition in the market of the

distribution of tickets by third parties. In its competition assessment, the ComCo examined the position of the current providers of ticketing services active in Switzerland as well as potential market entries. It examined the market development as well as the role technology could play, such as Spotify, Facebook or Google. Despite advances in technology, the ComCo concluded that current and potential competitors would not be able to exert sufficient competitive pressure on the merged entity. This decision is currently under appeal before the Federal Supreme Court after the first appeals instance, the Federal Administrative Court, dismissed the appeal.

Before mandating the EER with the drafting of amendment proposals the Swiss government and the Swiss Federal office for Economy asked our firm and a specialised team of experts of Polynomics for an opinion on the consequences of a change to the SIEC test.<sup>10</sup>

In this legal and economic opinion, we analysed merger decisions of the ComCo concerning wholesalers and retailers, telecommunication companies and media and compared them with comparable transactions examined by competition authorities applying the SIEC test. We concluded that the SIEC test is suitable for preventing harmful merger below the qualified dominance threshold whereas the current Swiss substantive test allows a prohibition or approval subject to conditions only in such cases where the concentration would result in qualified dominance.

Two further points to which the EER shall draft amendment proposals are the strengthening of private enforcement of competition law and the opposition proceeding. In civil antitrust law which is part of the CartA, only undertakings could proceed against undertakings participating in an unlawful agreement, or in an abuse of dominance. The amendment shall introduce the right to file suit also for natural persons, ie, consumers. The current opposition proceeding is similar to the 'comfort letter' system in the EU before the introduction of the EU procedural Regulation 1/2003 but now appears to be too long in time and too complicated. In this context it is interesting to see that with the Covid-19 pandemic situation the European Commission is apparently offering this

<sup>7</sup> [www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm](http://www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm).

<sup>8</sup> Decision of ComCo regarding Orange/Sunrise, dated 22 April 2010.

<sup>9</sup> Decision of ComCo regarding Ticketcorner/Starticket, dated 23 May 2017.

<sup>10</sup> [www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm](http://www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm).

'comfort' guidance policy again, even if in a much more informal way.<sup>11</sup>

After the EER will have issued its amendment proposals, the Swiss Parliament will discuss the proposals.

Apart from the official reform process another important amendment could be introduced in the CartA in the near future. A popular initiative demands to enlarge the abuse of dominance provision (Article 7 CartA), which corresponds to Article 102 TFEU, in that not only dominant undertakings shall be addressed by the abuse prohibition but also undertakings with market power. A second demand of the same popular initiative is the introduction of a geoblocking clause into the CartA.<sup>12</sup> The popular vote on these rather revolutionary amendments will not take place before next year. The Swiss Federal Council has issued an alternative proposal to submitted to the Swiss parliament. The alternative differs from the original popular initiative text in that they delete the geo-blocking clause and that international undertakings with market power shall just be obliged to offer their products in Switzerland to the same price they offer them outside Switzerland without undertakings with market power in general being covered by the abuse provision in Article 107 CartA. The latter alternative would correspond best with the original popular initiative as its purpose was to adapt Swiss consumer prices to those abroad. It is however not to be expected that an eventual introduction of market power into the CartA will in any manner affect current merger control reform as described above.

#### Keywords

Annual review on Swiss competition policy

Jurisprudence

State aids

Reform of Swiss Cartels Act

Popular initiative

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<sup>11</sup> [www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm](http://www.seco.admin.ch/seco/de/home/wirtschaftslage---wirtschaftspolitik/wettbewerbspolitik/kartellgesetz.htm).

<sup>12</sup> [www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?affair/d=20190037](http://www.parlament.ch/en/ratsbetrieb/suche-curia-vista/geschaeft?affair/d=20190037).