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Fourth Edition

Editor

Ilene Knable Gotts

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EDITOR'S PREFACE

Ilene Knable Gotts

Private antitrust litigation has been a key component of the antitrust regime for decades in the United States and reflects the societal views generally towards the objectives and roles of litigation. The United States litigation system is highly developed – using extensive discovery, pleadings and motions, use of experts and, in a small number of matters, trials, to resolve the rights of the parties. As a result, the process imposes high litigation costs (in time and money) on all participants and promises great rewards for prevailing plaintiffs. The usual rule that each party bears its own attorneys' fees is amended for private antitrust cases such that a prevailing plaintiff is entitled to its fees as well as treble damages. The costs and potential rewards to plaintiffs has created an environment in which a large percentage of cases settle on the eve of trial. Arbitration and mediation are still rare, but not unheard of, in antitrust disputes. Congress and the US Supreme Court have attempted to curtail some of the more frivolous litigation and class actions by adopting tougher standards and ensuring that follow-on litigation exposure does not discourage wrongdoers from seeking amnesty from the competition authorities. Although these initiatives may, on the margin, decrease the volume of private antitrust litigation in the United States, the environment remains ripe for high litigation activity in the near-term, particularly involving intellectual property rights and cartels.

The United States has not been alone, however, in having a long-established private litigation history. Brazil, for example, has had private litigation arise involving non-compete clauses since the beginning of the twentieth century, and on monopoly and market closure claims since the 1950s. Nonetheless, Brazil – as well as most of the other jurisdictions discussed in this book – has seen an increasing role for private antitrust litigation in the past few years. In addition, other jurisdictions have more recently initiated private litigation regimes (for instance, Israel and Poland) as a complement to increased public antitrust enforcement.

The European Union remains in a state of flux. In April 2008, the European Commission published a White Paper suggesting a new private damages model for achieving compensation for consumers and businesses who are victims of antitrust violations, noting that 'at present, there are serious obstacles in most EU Member States

that discourage consumers and businesses from claiming compensation in court in private antitrust damages actions […]. The model is based on compensation through single damages for the harm suffered'. The key recommendations include collective redress, in the form of representative actions by consumer groups and victims who choose to participate, as opposed to class actions of unidentified claimants; disclosure of relevant evidence in the possession of parties; and final infringement decisions of Member States' competition authorities constituting sufficient proof of an infringement in subsequent actions for damages. Commissioner Kroes was unable to achieve adoption of the legislation on private enforcement before the end of her term. Commissioner Almunia instead entered into a new round of consultations and may combine the initiative with forthcoming legislation on consumer protection. Both proposals will likely contain some form of collective redress. In the meantime, the EU issued a report regarding quantifying damages that might be of interest to the Member States.

Even in the absence of the issuance of final EU guidelines, the Member States throughout the European Union (and indeed in most of the world) have increased their private antitrust enforcement rights or are considering changes to legislation to provide further rights to those injured by antitrust law infringement. Indeed, private enforcement developments in many of these states have supplanted the EU's initiatives. The English and German courts are emerging as major venues for private enforcement actions. Collective actions are now recognised in Denmark, Finland and Sweden. Italy also recently approved legislation allowing for collective damages actions and providing standing to sue to representative consumers and consumer associations, and England and France are currently also contemplating collective action legislation. Some jurisdictions have not to date had any private damages awards in antitrust cases, but changes to their competition legislation could favourably affect the bringing of private antitrust litigation seeking damages (e.g., Lithuania or Romania).

Almost all jurisdictions have adopted an extraterritorial approach premised on 'effects' within their borders. Canadian courts may also decline jurisdiction for a foreign defendant based on the doctrine of *forum non conveniens* as well as comity considerations. In contrast, some jurisdictions, such as the UK, are prepared to allow claims in their jurisdictions where there is relatively limited connection, such as where only one of a large number of defendants is located. In South Africa, the courts will also consider 'spill-over effects' from antitrust cartel conduct as providing a sufficient jurisdictional basis. Jurisdictions also vary regarding how difficult they make it for a plaintiff to have standing to bring the case. Most jurisdictions impose a limitation period for bringing actions that commences only when the plaintiff knows of the wrongdoing and its actors; a few, however, apply shorter, more rigid time frames without a tolling period for the commencement of damages (e.g., Brazil or Canada with respect to Competition Act claims) or injunctive litigation. Some jurisdictions base the statute of limitations upon when a final determination of the competition authorities is rendered (e.g., Romania or South Africa) or from when the agency investigation commences (e.g., Hungary). In other jurisdictions (e.g., Australia or Chile), it is not as clear when the statutory period will be tolled.

The litigation system in each jurisdiction to some extent reflects the perceptions of what private rights should protect. Most of the jurisdictions view private antitrust rights as an extension of tort law (e.g., Canada, France, Hungary, Israel, Japan, Korea, Norway, the Netherlands or the UK), with liability arising for actors who negligently or knowingly

engage in conduct that injures another party. Turkey, while allocating liability on the basis of tort law, will in certain circumstances award treble damages as a punitive sanction. Some jurisdictions treat antitrust concerns as a defence for breaching a contract (e.g., Norway or the Netherlands), others (e.g., Australia) value the deterrent aspect of private actions to augment public enforcement, while yet others are concerned that private antitrust litigation might thwart public enforcement and may require what is in essence consent of the regulators before allowing the litigation or permit the enforcement officials to participate in the case (e.g., in Brazil, and in Germany as well, the competition authorities may act as *amicus curiae*). A few jurisdictions believe that private litigation should only be available to victims of conduct that the antitrust authorities have already penalised (e.g., Spain, until legislation loosened this requirement somewhat). Interestingly, no other jurisdiction has chosen to replicate the United States system of routinely awarding treble damages for competition claims; instead, the overwhelming majority of jurisdictions take the position that damages awards should be compensatory rather than punitive (Canada does, however, recognise the potential for punitive damages for common law conspiracy and tort claims, as does Turkey). Neither does any other jurisdiction permit the broad-ranging and court-sanctioned scope of discovery permitted in the United States. Only Australia seems to be more receptive than the United States to suits being filed by a broad range of plaintiffs – including class-action representatives and indirect purchasers – and to increased access for litigants to information and materials submitted to the antitrust authorities in a cartel investigation. Finally, in almost all jurisdictions, the prevailing party has some or all of its costs compensated by the losing party, discouraging frivolous litigation.

Varying cultural views also clearly affect litigation models. Outside of the EU and North America, the availability of group or class actions varies extensively. Some jurisdictions (e.g., Turkey) only permit group actions by associations and other legal entities for injunctive (rather than damages) relief. Jurisdictions such as Germany or Korea generally do not permit representative or class actions, but instead have as a founding principle the use of courts for pursuing individual claims. In some jurisdictions (e.g., Korea, Switzerland) several claimants may lodge a collective suit against the same defendant if the claims are based on similar facts or a similar legal basis that courts are permitted to join similar lawsuits (Romania, Switzerland). In Japan, class actions are not available except to organisations formed to represent consumer members. In contrast, in Switzerland, consumers and consumer organisations do not currently have legal standing and cannot recuperate damages they have incurred as a result of an infringement of the Competition Act. In Poland, only entrepreneurs, not individuals, have standing to bring claims under the Unfair Competition Act, but the Group Claims Act is available if no administrative procedure has been undertaken concerning the same case.

Jurisdictions that are receptive to arbitration and mediation as an alternative to litigation (e.g., Germany, Hungary, Korea, the Netherlands, Spain, Switzerland) also encourage alternative dispute mechanisms in private antitrust matters. Some courts prefer the use of experts and statements to discovery (e.g., in Chile; in France, where the appointment of independent experts is common; in Japan, which does not have mandatory production or discovery except in narrowly prescribed circumstances; and in Germany, which even allows the use of statements in lieu of documents). In Korea, economic experts are mainly used for assessment of damages rather than to establish violations. In

Norway, the Civil Procedure Act allows for the appointment of expert judges and advisory opinions of the EFTA court. Other jurisdictions believe that discovery is necessary to reach the correct outcome (e.g., Canada, which provides for broad discovery, and Israel, which believes 'laying your cards on the table' and broad discovery are important). Views towards protecting certain documents and information on privilege grounds also cut consistently across antitrust and non-antitrust grounds (e.g., no attorney–client, attorney work-product or joint work-product privileges in Japan, limited recognition of privilege in Germany; extensive legal advice, litigation and common interest privilege in the UK and Norway), with the exception that some jurisdictions have left open the possibility of the privilege being preserved for otherwise privileged materials submitted to the antitrust authorities in cartel investigations. Interestingly, Portugal, which expressly recognises legal privilege for both external and in-house counsel, nonetheless provides for broad access to documents to the Portuguese Competition Authority. Some jurisdictions view settlement as a private matter (e.g., France, Japan and the Netherlands); others view it as subject to judicial intervention (e.g., Israel and Switzerland).

The culture in some places, such as Germany, so strongly favours settlement that judges will require parties to attend hearings, and even propose settlement terms. In Canada, the law has imposed consequences for failure to accept a reasonable offer to settle and, in some jurisdictions, a pre-trial settlement conference is mandatory.

Private antitrust litigation is largely a work in progress in most parts of the world. Change occurs slowly in some jurisdictions, but clearly the direction appears to be to acknowledge that private antitrust enforcement has a role to play. In Japan, for example, for the first time in the 10-year history of the enabling provisions, a private plaintiff prevailed in an injunction case. Also, a derivative shareholder action was filed in Japan in the last year against directors for negligence in 'not filing a leniency application' in a cartel matter. In other jurisdictions, the transformation has been more rapid. During the last year in Korea, for example, private actions have been brought against an alleged oil refinery cartel, sugar cartel, school uniform cartel and credit card VAN cartel. In addition, the court awarded damages to a local confectionery company against a cartel of wheat flour companies. In the last year alone, some jurisdictions have had decisions that clarified the availability of pass-on defence (e.g., France, Korea) as well as indirect purchaser claims (e.g., Korea).

Many of the issues raised in this book, however, such as pass-on defence and the standing of indirect purchasers, remained unresolved by the courts in many countries and our authors have provided their views regarding how these issues are likely to be clarified. Also unresolved in some jurisdictions is the availability of information obtained by the competition authorities during a cartel investigation, both from a leniency recipient and a party convicted of the offence. Other issues such as privilege are subject to proposed legislative changes. The one constant cutting across all jurisdictions is the upwards trend in cartel enforcement activity, which is likely to be a continuous source for private litigation in the future.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
New York
September 2010

Chapter 22

SWITZERLAND

Christoph Tagmann and Bernhard C Lauterburg[*]

I OVERVIEW OF RECENT PRIVATE ANTITRUST LITIGATION ACTIVITY

In Switzerland, competition and antitrust law is primarily considered administrative law. Examples of the enforcement of competition law through the civil courts are sparse and the enforcement of antitrust and competition law largely rests upon the competition authorities. Since the enactment of the Act on Cartels and other Restraints of Competition ('the ACart') in 1995, only roughly 50 cases are known to have been brought before the civil courts.[1] The reasons for this lack of private competition law enforcement are manifold.

First, it seems more appealing for an aggrieved party to file a complaint with the competition authorities, rather than bearing the burden of proof in a civil proceeding and filing a civil lawsuit only after the competition authorities have rendered their decision. Unlike claimants in private enforcement proceedings who regularly face evidentiary difficulties, the competition authorities may enforce the taking of evidence. However, if (eg, for discovery reasons) the claimant opts to file a complaint with the competition authorities, the claimant should be aware that his or her civil claim may become time-barred (see Section X, *infra*), an issue that shall be resolved with the current revision of the ACart. Also, an aggrieved party filing a complaint with the competition authority normally is not subject to costs, unlike in a civil proceeding. Moreover, upstream market participants may regularly pass on an overcharge incurred as a result of a cartel or other

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1 See Recht und Politik des Wettbewerbs (RPW; 'Law and Policy of Competition' [LPC]), Systematisches Verzeichnis aller RPW ab 1997.

infringement of antitrust law to downstream market participants and therefore sustain no damages in the legal sense.[2]

Finally, according to the current majority view among Swiss legal scholars, consumers do not have standing under the ACart. Thus, an entire group of persons that may be potentially harmed by an unlawful restraint of competition is precluded from seeking damages pursuant to the rules set forth in the ACart.[3]

The official bulletin of the Swiss Competition Commission, 'Law and Policy on Competition' ('the LPC'), reported only four decisions by cantonal courts from 2010 to date in antitrust litigation (one being an appeal of a decision of the commercial court of the Canton of Zurich rendered in 2009); no case was reported from the Federal Supreme Court.

i Lucerne – car dealer – petition for interim measures

A principal dealer for Renault and Dacia (defendant 1) cars who was authorised by the general importer (defendant 2) to enter into dealer agreements with 'second-tier' dealers terminated a dealership agreement with such second-tier dealer (claimant) to the end of September 2010. The claimant notified the defendants that it would continue to offer maintenance and warranty services pursuant to the principles set forth in the Swiss Competition Commission's guidelines on vertical agreements in the automobile sector. When, among others, defendant 1 informed the claimant that defendant 2 would inform Renault and Dacia customers that the claimant may no longer provide warranty services, the claimant reacted by requesting interim measures and claimed that the existing contractual framework did not allow such measures. A provisional injunction was granted by the court and a hearing scheduled. In its decision, the District Court of Lucerne finally concluded that the claimant had failed to properly apply for an agreement authorising him to provide warranty services and that it was permitted under Swiss law to subject such agreements to certain objective criteria. The Court further held that a dealer who was also authorised to provide warranty services could withdraw from selling cars but continue to provide warranty services under the dealership agreement (clause 17(2) of the Guidelines). In the instant case, however, the dealership agreement was terminated, and for this reason, the claimant could not invoke this provision.[4] On appeal, the Supreme Court of the Canton of Lucerne upheld the District Court's decision.[5]

ii Zurich – exclusive distribution agreement – unlawful termination

On 17 May 2010, the Commercial Court of the Canton of Zurich issued a decision in a dispute between a Swiss exclusive distributor (claimant) and a manufacturer domiciled

2 In this respect, see the explanatory notes of the Federal Council of 30 June 2010 on the legislative proposal, p32.

3 *Id.*, pp25-26, 32-33.

4 Decision of the District Court of Lucerne *Land* of 9 November 2010, reported in LPC 2011/1, pp216-222.

5 Decision of the Supreme Court of the Canton of Lucerne of 11 January 2011, reported in LPC 2011/1, pp223-225.

in the United States (defendant). The claimant, among others, claimed that the defendant's unilateral termination of the exclusive distribution agreement was unlawful and further claimed damages for alleged direct supplies by the defendant into the claimant's exclusive territory.

The following clause was at issue:

> *The Manufacturer has no right to sell directly or by other distributors or by any other way the products in the Territory according to §2. If the Manufacturer receives any order by internet from the territory according to §2 or any order concerning delivery of the product to the territory according to §2 the Manufacturer will pass the order on to the Distributor.*

The defendant argued that this clause would prohibit the defendant from carrying out passive sales into Switzerland and therefore violated Swiss law. Based on the ACart and standing jurisprudence, the Court held, without referring the matter to the Competition Commission for a separate opinion (Article 15(1) ACart), that a clause by which a manufacturer limited or forfeited its right to sell its products directly or through channels other than the exclusive distributor into the territory assigned to the exclusive distributor was valid under Swiss law. Moreover, the Court stated that such limitations were already implied in the system of exclusive distribution, which – subject to certain limitations – is permitted under Swiss law. Accordingly, the claim was upheld with respect to the termination of the exclusive distribution agreement, to the extent it was admissible. The Court, however, dismissed the claimant's claim for damages because of insufficient substantiation of the claim.[6]

iii Change to Swiss law on civil procedure and future revision of the ACart

Swiss law on civil procedure has recently undergone a significant change. On 1 January 2011, the Swiss Code of Civil Procedure ('CCP') entered into force and replaced the various laws on civil procedure of the cantons that previously regulated private enforcement of competition law.

A major revision of the ACart is also under preparation. The federal government is currently analysing the results gained from a public consultation process and will then prepare a legislative proposal with accompanying explanatory notes to be sent to Parliament (see Section XV, *infra*).

II GENERAL INTRODUCTION TO THE LEGISLATIVE FRAMEWORK FOR PRIVATE ANTITRUST ENFORCEMENT

Unlawful restraints of competition may be prosecuted under both civil and administrative law. While every person may file an administrative complaint with the competition authorities, only persons who are impeded by an unlawful restraint of competition from entering or competing in a market may seek civil remedies such as damages and

6 Decision of the Commercial Court of the Canton of Zurich of 17 May 2010, reported in LPC 2010/3, pp793-806; the litigation concerned other issues as well, in particular a counterclaim with respect to the use and transfer of intellectual property rights.

injunctions. Thus, according to a majority view, consumers who may be affected by an unlawful restraint of competition are not entitled to seek damages in civil courts based on the ACart, and therefore may only initiate an investigation of the authorities, while competitors and market entrants may opt for both civil and administrative enforcement of antitrust regulation.

The competition authorities enjoy significant discretion regarding whether an investigation shall indeed be opened. The *ratio legis* for the ACart was primarily the protection of the institute of competition. Only on a secondary level does the ACart serve the protection of individual interests. Accordingly, if public interests do not outweigh the private interests of the complainant, the competition authorities will likely not initiate formal proceedings and will refer the claimant to the civil courts.

Domestic antitrust claims before civil courts in Switzerland are governed by Articles 12-17 of the ACart (Articles 14, 16 and 17 of the ACart were repealed with effect from 1 January 2011 by the CCP). Article 12 ACart sets forth the remedies that are available to a claimant, these being the elimination of or the desistance from the hindrance, damages and satisfaction or the surrender of unlawfully earned profits. Article 13 ACart governs the enforcement of the right to elimination and desistance and Article 15 ACart stipulates an obligation for the civil courts to refer questions on the lawfulness of a restraint of competition to the Competition Commission.[7] If the context of the antitrust litigation is international, the applicable substantive law is determined by Article 137(1) of the Act on Private International Law ('PILA'), which provides that the applicable law shall be the law of the country in which the restraint of competition has a direct effect on the claimant.

In domestic antitrust cases, the venue for a civil proceeding is governed by the CCP, according to which the case shall be heard by the competent court at the place of business of the claimant or the respondent. The claim may also be lodged at the place where the restraint of competition was perpetrated or where it has taken effect (Article 36 CCP).[8] In international cases, the venue is determined by Articles 2 and 5 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Lugano Convention'), or by Article 129 PILA if the Convention is not applicable. Both the Lugano Convention and PILA provide for the same venues as the CCP, except for the place of business of the claimant, which is not available in international contexts.

The CCP requires each canton to designate a court that shall act as the sole cantonal authority to hear claims with respect to antitrust law in its territory (Article 5(1)(b) CCP). In those cantons that have established a commercial court, notably the cantons of Aargau, Berne, Saint Gall and Zurich, civil antitrust disputes must be brought before the respective commercial courts. The judgments of the commercial

7 Note that, if the necessity of a restraint of competition that is as such unlawful is claimed for reasons of compelling public interest, the matter shall be referred to the Federal Council (Article 15(2) ACart).

8 Suter-Somm/Hedinger in: Kommentar zur Schweizerischen Zivilprozessordnung (Suter-Somm *et al.*, eds.), Art. 36 N 12.

courts may be appealed to the Federal Supreme Court. A party seeking to initiate civil antitrust proceedings must file a detailed statement of claim with the competent court, which will then serve process on the respondent and set a deadline for filing a statement of defence. If the court considers it necessary, it may order the parties to file a reply and a rejoinder respectively, particularly if a party raises new facts. Frequently, courts encourage the parties to hold settlement talks under their guidance, and in this context may give an indication on their preliminary view of the case and the legal assessment.

The recognition and enforcement of foreign judgments is subject to the Lugano Convention and the PILA. Serving process in foreign proceedings is subject to the applicable domestic rules, the 1954 Convention on Civil Procedure and the 1965 Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, to which Switzerland is a contracting party.

A civil antitrust proceeding based on the ACart is subject to the same substantive rules as an administrative proceeding conducted by the competition authorities. Although the substantive rules set forth in the ACart must be interpreted and applied by both the competition authorities and the civil courts in the same fashion, diverging interpretations may arise as the decision of one authority in principle does not have a binding effect on another authority.[9] However, if the legality of a restraint on competition is questioned during the course of a civil procedure, the civil court must refer the matter to the Competition Commission and obtain an expert report. Thus, in practice, the primacy of interpreting the ACart lies with the Competition Commission, and on appeal the administrative law sections of the federal court system, as the courts normally respect such expert opinion.

The ACart is silent on the applicable statute of limitations. Rather, as the ACart refers to the rules set forth in the Code of Obligations (CO) with respect to claims for damages and the forfeiture of unlawfully earned profits, the applicable statute of limitations is governed by the CO. Both for damage claims and the forfeiture of illicit profits, the statute of limitations is one year from the time the harmed person becomes aware of the damage and has knowledge of the tortfeasor, and becomes time barred after 10 years from the date of the action causing the damage. However, if the action for damages is derived from an offence for which criminal law envisages a longer limitation period, the latter also applies to the civil law claim. Note that the opening of a formal investigation by the competition authorities does not hinder the statute of limitations for a civil action to run (see Section X, *infra*).

III EXTRATERRITORIALITY

The ACart applies to practices that have an effect in Switzerland, irrespective of their origin. Accordingly, the competition authorities may investigate conduct that occurred in foreign countries and that have an effect in Switzerland.

Whether Swiss or foreign antitrust law must be applied by the court in a civil proceeding is subject to the relevant statutes on private international law, such as the PILA

9 Jacobs/Giger in: BSK Kartellgesetz, Vor Art.. 12-17 N 21 *et seq.*

in Switzerland. In a Euro-international context, at least, the application of Article 5 of the Lugano Convention, which provides for jurisdiction at the place where the harmful event occurred or may occur, and Article 137 PILA, may result in the application of Swiss competition law before a Swiss court even if the tortfeasors are domiciled abroad. Also, Swiss competition law may apply in proceedings before foreign courts where the law of that country refers to Swiss competition law.

IV STANDING

Private enforcement of competition law is limited to persons who are hindered by an unlawful restraint of competition from entering or competing in a market. As already explained above, the majority legal opinion concludes therefrom that this precludes consumers from seeking damages in cartel cases based on the provisions set forth in the ACart. Thus, only undertakings affected by a hindrance of competition have standing in civil court to seek the cessation of or the desistance from the hindrance as well as damages.

However, a minority view proposes that consumers may seek redress against members of a cartel or entities abusing their market dominance through an ordinary tort claim and directly invoke the relevant provisions in the ACart as remedial statute.[10]

V THE PROCESS OF DISCOVERY

US style discovery is not available in Switzerland, and the parties primarily must rely on the evidence available to them when filing the lawsuit. However, parties to a court proceeding as well as third parties are under a duty to assist the court to establish the facts of the matter at issue once the trial has commenced, if ordered to do so by the court.[11] A party seeking documentary evidence may request the court to issue an order against the opposing party or a third party to produce certain documents. The requesting party must describe and identify the evidence sought in sufficient detail and demonstrate that it is relevant to establish the case. In the alternative, the requesting party may demonstrate that it is unreasonable or impossible for it to identify the sought evidence. Mere general statements as to the nature of the evidence sought and its possible relevance for the case are not sufficient to obtain a disclosure order.[12] Evidence can also be obtained by way of provisional measures before the filing of a lawsuit. This requires the requesting party to credibly demonstrate that there is a realistic and imminent threat that the evidence sought will be destroyed and that it is likely to prevail on the merits of the case.[13]

The law provides for certain means to facilitate the claimant's burden of proof, for example through a so-called 'action by stages', in which the claimant first establishes

10 See, e.g., Spitz in: Das Kartellrecht und seine Zukunft nach der Revision des Kartellgesetzes 2003, SZW 2005, pp120-121; Brunner, Konsumentenkartellrecht, AJP/PJA 8/96, p941.

11 Article 160 CCP.

12 Schmid in: Basler Kommentar – Schweizerische Zivilprozessordnung, Art. 160 N 23.

13 Article 158 CCP in connection with Article 261 CCP.

the case and only at a later stage specifies the amount of damages. Also, where the exact amount of damages cannot be quantified, the claimant can request the court to estimate the amount at its discretion.[14]

Evidence obtained in an administrative proceeding carried out by the competition authorities may be used in a civil proceeding without limitation.[15] Note, however, that documents relating to a leniency application with the competition authorities may not be copied or otherwise reproduced or duplicated. Access to those documents is restricted to the premises of the competition authorities and the documents may only be manually transcribed.

If the taking of evidence compromises legitimate interests of a party or a third party, for example with respect to business secrets, the court can take the necessary measures to preserve the concerned interests, such as excluding the public from the proceedings or limiting access to certain documents.[16]

VI USE OF EXPERTS

If the court decides that expert knowledge is necessary, it can appoint an expert. Court-appointed experts act on behalf of the court and are therefore subject to the same rules on independence and impartiality as the court. If the lawfulness of a restraint of competition is questioned in the course of the civil proceeding, the court must obtain an expert report from the Competition Commission.[17] The court is not legally bound by the expert opinion of the Competition Commission or the opinion of a court-appointed expert and may depart from their findings;[18] however, it must give reasons for doing so.[19] Expert opinions provided by party-appointed experts are considered by the court as party statements, and for this reason have no additional evidentiary weight.[20]

VII CLASS ACTIONS

A typical class action, as known for example in US law, is not possible under Swiss law. Claims must be brought by individual claimants. However, several claimants may lodge a collective suit against the same defendant provided that the claims of each individual

14 Article 42(2) of the CO.

15 Jacobs/Giger in: BSK Kartellgesetz, Vor Art. 12-17 N 28.

16 Article 156 CCP.

17 Article 15(1) ACart.

18 Borer in: Wettbewerbsrecht I – Kommentar (3rd ed.), Art. 15 N 11; Reymond in: Commentaire Romand – Droit de la Concurrence (Tercier/Bovet eds.), Art. 15 LCart N 98.

19 Guyan in: Basler Kommentar – Schweizerische Zivilprozessordnung, Art. 157 N 6, with further references.

20 Botschaft zur Schweizerischen Zivilprozessordnung, BBl 2006, p7325; Decision of the Federal Supreme Court (DTF) 132 III 87 (4P.145/2005) of 21 September 2005.

claimant are based on similar facts or a similar legal basis.[21] Moreover, civil procedure permits the court to join similar lawsuits.[22]

VIII CALCULATING DAMAGES

A claimant may petition the elimination of or desistance from the hindrance of competition, and either damages and satisfaction in accordance with the CO or the remittance of unlawfully earned profits in accordance with the provisions on agency without authority set forth in the CO.

The rules for calculating damages are set forth in the CO.[23] Civil courts can award damages in the amount of the actual loss incurred by the claimant and caused by the tortfeasor, including both property loss and lost profits. According to long-standing jurisprudence of the Federal Supreme Court, damages are defined as the (hypothetical) difference between the value of the assets of the injured person taking into account the restraint of competition and the value of the assets of the injured person under the assumption that no restraint of competition had occurred. Where the exact value of the loss or damage cannot be quantified, the court shall, at the request of the claimant, estimate the value at its discretion in the light of the normal course of events and the steps taken by the injured party.[24] Punitive damages are not available in Switzerland, even if the court must apply foreign antitrust law. Article 137(2) PILA provides that if a claim for damages is based on foreign antitrust law, no award may be rendered by a Swiss court in excess of what would be available under Swiss law. The claimant bears the burden of proof and must therefore demonstrate that he or she incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor and that the tortfeasor's conduct was culpable. Negligence by the tortfeasor is sufficient for this purpose.

The court determines the form and extent of the compensation provided for the loss or damage incurred, with due regard to the circumstances and the degree of culpability.[25] The undertaking harmed by an unlawful restraint of competition is under a duty to reduce the damages it incurs to the extent possible and reasonable; the cost of such measures must, however, be borne by the undertaking causing the damage by virtue of participating in an unlawful restraint of competition. Accordingly, the court may reduce the amount of damages claimed where the harmed undertaking gave rise to or compounded the loss or damage or otherwise exacerbated the position of the party liable for it.[26] The court may further reduce the damages award where the loss or damage was caused neither wilfully nor by gross negligence, which will rarely be the case in antitrust matters, or where the damages award would leave the liable party in financial

21 Article 71(1) CCP.

22 Article 125(c) CCP.

23 Article 41 *et seq.* CO.

24 Article 42(2) CO.

25 Article 43(1) CO.

26 Article 44(1) CO.

hardship.[27] The statutory interest rate in Switzerland on monetary claims is 5 per cent per annum on the amount of the damages awarded.[28] Note that interest will only be awarded if the claimant specifically claims interest, as otherwise the award of interest is considered *ultra petita*.

Alternatively, the claimant can move the court to order the remittance of unlawfully earned profits by the tortfeasor to the former.[29] Similarly as with a claim for damages, the claimant must demonstrate the tortfeasor's earned profits that are attributable to the unlawful restraint of competition and that the tortfeasor acted with malice.

Costs of a proceeding are normally borne by the losing party.[30] If none of the parties prevails in full, costs are borne by both parties in accordance with the outcome of the proceeding.[31] In certain special cases, the court may award costs at its own discretion.[32] Both the court and attorney fees are subject to statutory tariffs set by the cantons and depend largely on the amount in dispute (such as in the cantons of Berne and Zurich).[33] With respect to awarding attorney fees, the courts enjoy considerable discretion and take into account such factors as the complexity of the matter or the duration of the proceeding. Prospective claimants should therefore be aware that they will likely not recover all costs they incur in a civil court proceeding.

IX PASS-ON DEFENCES

The institute of pass-on defences is not regulated in Swiss law. Under Swiss law, an injured party may only claim actual damages and a claim for damages must not result in an unjust enrichment of the injured party. Thus, if the injured party (mostly distributors and retailers) passed on the overcharge in part or in full to downstream market participants (mostly consumers), such behaviour will be taken into account by the courts when calculating the damages.[34]

X FOLLOW-UP LITIGATION

Antitrust proceedings before the competition authorities and the civil courts are inherently distinct and concern different objectives. The competition authorities are not competent to award damages to parties affected by the restraint of competition, and the injured party that brings a matter to the attention of the competition authorities cannot by means of an adhesive proceeding claim damages before the competition authorities.

27 Article 44(2) CO.

28 Article 73(1) CO.

29 Article 419 CO *et seq.*, rules on agency without authority.

30 Article 106(1) CCP.

31 Article 106(2) CCP.

32 Article 107 CCP.

33 Article 96 CCP.

34 In this respect, see the explanatory notes of the Federal Council of 30 June 2010 on the legislative proposal, p32.

Therefore, civil antitrust cases will likely be follow-up proceedings after the competition authorities have ruled on a matter (e.g., declared a certain practice unlawful).

Prospective claimants should, however, be aware that the opening of formal proceedings of the competition authorities against the tortfeasor does not hinder the statute of limitations for a civil action to run. Unless the tortfeasor does not cease or change the concerned business practice upon the opening of an investigation by the competition authorities, the injured party should file a civil action within a year and move the court to stay proceedings until the competition authorities have rendered a decision in the matter.

XI PRIVILEGE

Parties to a proceeding and third parties may refuse to testify if they can invoke a statutory privilege. Parties may only refuse to testify or disclose documentary evidence for limited grounds. In particular, a party may not refuse to testify or disclose documentary evidence to avoid civil or criminal liability. Refusal is only justified if a closely related natural person would be exposed to civil and criminal liability or if the testifying person would breach professional confidentiality. If a party fails to disclose documents that it is not legally entitled to hold back, the court will take this into consideration in its deliberation of the matter and often render an adverse finding upon this party with respect to the content of the concerned document.

Swiss law generally recognises attorney–client privilege. However, in civil antitrust proceedings it may not play a similar role as is found, for example, in the US, where pre-trial discovery is available.

As stated above, the parties are under a duty to assist the court to establish the facts of the matter at issue. However, the law expressly protects correspondence of external counsel, irrespective of its location. Thus, a party may refuse to disclose communication from and to its external counsel to the extent that such correspondence relates to the typical task of the external counsel.[35] Legal privilege does not extend to in-house counsel. A recent proposal for a law on in-house lawyers has been withdrawn.

Controversy exists regarding the extent companies with a registered office in Switzerland or Swiss subsidiaries of foreign companies may be subject to pre-trial discovery in foreign proceedings. It is important to note in this respect that surrendering evidence located in Switzerland to foreign authorities or parties may constitute a violation of Article 271 (prohibited acts for a foreign state) and Article 273 (economic intelligence service) of the Swiss Criminal Code or other special statutory provisions (e.g., banking regulation, data protection regulation).

35 Article 160(1)(b) CCP; Schmid in: Basler Kommentar – Schweizerische Zivilprozessordnung, Art. 160 N 17. Note also that the new Code on Criminal Procedure, which also entered into force on 1 January 2011, protects attorney correspondence, irrespective of its location. Accordingly, attorney correspondence may not be seized by the competition authorities during dawn raids (see Article 264 Code on Criminal Procedure; Guidelines of the Competition Commission on Dawn Raids).

Governmental authorities, in particular the competition authorities, are bound by the rules on official secrecy. The authorities may use the information obtained in the performance of their duties only for the purpose it was obtained for or for the purpose of the investigation. However, as already noted, during an administrative proceeding the parties may request access to the files and use the information obtained in this manner in a civil proceeding.

XII SETTLEMENT PROCEDURES

The parties may at any time during court proceedings try to negotiate a settlement by their own volition and without the knowledge of the court, or the court may encourage the parties to settle the dispute and facilitate a settlement among the parties (Article 124(3) CCP). The court may schedule a special hearing or submit to the parties a written proposal for a settlement. The settlement can cover all claims or only a part of the claims.

A court-sanctioned settlement acquires the same legal effect as a judgment rendered by the court. Monetary claims set forth in the court settlement can be enforced through ordinary debt enforcement proceedings pursuant to the Act on Debt Enforcement and Bankruptcy. Judgments for specific performance can be enforced pursuant to the rules set forth in the CCP in a summary proceeding.

An out-of-court settlement is a mere contract between two or more private parties, and as such cannot acquire legal force unless the settlement is formally notified to the court.

During settlement discussions, parties frequently circulate proposals that they do not want to use in (subsequent) court proceedings. Courts generally respect such agreements, provided that the intention of the parties that any such proposal shall not prejudice their position in court proceedings is clearly and unambiguously expressed in their correspondence.

Note that an administrative proceeding before the competition authorities may also be settled amicably (Article 29 ACart). Such settlement, however, does not in principle release the tortfeasor from being sanctioned. It may, however, result in a reduction of the sanction.

XIII ARBITRATION

Civil antitrust matters may be brought before an arbitral tribunal.[36] Arbitral proceedings with a tribunal having its seat in Switzerland are governed by Part III of the CCP unless the provisions in the PILA apply. Domestic arbitration is normally governed by the CCP while international arbitration is governed by the PILA. In international arbitration, the arbitral tribunal shall decide the matter according to the law chosen by the parties, or in the absence of a choice of law clause, according to the law with which the matter is most closely connected.[37] In Swiss legal doctrine there is, however, widespread agreement

36 DTF 132 III 389 (4P.278/2005) of 8 March 2006.

37 Article 187(1) PILA.

that substantive competition law – Swiss or foreign – must be taken into account by an arbitral tribunal having its seat in Switzerland, irrespective of the parties' choice of law.[38] However, a misapplication of competition law by the arbitral tribunal does not result in the award being overturned by the Federal Supreme Court. Only if the arbitral tribunal fails to consider issues of competition law notwithstanding their obvious existence or an application by one of the parties would the Federal Supreme Court quash the award. On the other hand, an arbitral award that clearly violates European competition law may be unenforceable in Switzerland.[39]

In many jurisdictions, arbitration has been recognised as a valuable tool in post-merger disputes regarding, for example, divestments that have been ordered for merger clearance, or with respect to interim measures. In a recent decision on interim measures, an arbitration clause was inserted in an amicable settlement between the Swatch Group and the Swiss competition authorities.[40] In late 2009, the Swatch Group announced that it would cease to supply to customers certain components used to manufacture movements outside the Swatch Group. As a subsidiary of the Swatch Group presumably had a dominant position on the market for certain of those components, the competition authorities went to investigate whether Swatch's conduct would constitute an unlawful refusal to deal under Article 7(2)(a) ACart. Pursuant to the order, Swatch shall continue to supply competitors with the concerned components for the duration of the investigation. It further consented to submit any dispute arising out of its obligations in this order in relation to its customers to an arbitral tribunal established pursuant to the Swiss Rules on International Arbitration and the Supplemental Rules on the Application of the Swiss Rules on International Arbitration in Domestic Arbitration.

XIV INDEMNIFICATION AND CONTRIBUTION

As stated earlier, claims for damages and forfeiture of unlawfully earned profits are subject to the rules of the CO. The CO states that in cases where two or more persons have together caused damage, whether as instigator, perpetrator or accomplice, they are jointly and severally liable to the injured party (Article 50(1) CO). Therefore, the injured party may bring suit against multiple parties if they have jointly engaged in the same restraint of competition. It is within the discretion of the court to determine whether and to what extent multiple tortfeasors have a right of recourse against each other.

XV FUTURE DEVELOPMENTS AND OUTLOOK

When the ACart was undergoing its first revision in 2003 and 2004 (in force since 1 April 2004), a provision was inserted according to which the Federal Council shall arrange for

38 *Id.*, DTF 132 III 389; see also Weber-Stecher in: Basler Kommentar – Kartellgesetz, Nach Art. 12-17 N 30 *et seq.*; Heinemann, Die Privatrechtliche Durchsetzung des Kartellrechts – Empfehlungen für das Schweizer Recht auf rechtsvergleichender Grundlage (2008), at pp102-103.

39 DTF 118 II 193 of 18 April 1992.

40 Decision of the Swiss Competition Commission of 6 June 2011.

the evaluation of the effectiveness of the measures and the application of the ACart within five years and submit proposals to Parliament for further action. The proposal that is currently being discussed consists of a reform of the organisational structure of the competition authorities on the one hand and amendments of the substantive provisions of the ACart on the other.

With respect to private competition enforcement, the proposal on establishing legal standing for consumers and consumer organisations is of particular interest. As described above, consumers today have no standing in antitrust proceedings pursuant to Articles 12 to 17 ACart and therefore cannot recuperate damages that they incurred as a result of an infringement of the ACart. The new proposal shall provide that anyone who is harmed or in danger of being harmed as a result of an unlawful restraint of competition may seek remedies before a civil court (new Article 12 ACart). Moreover, the statute of limitations for civil remedies will not begin to run or will be suspended when the Competition Authority initiates an investigation against the tortfeasor. Arguably, a preliminary investigation will not suffice for the statute of limitations to be interrupted or suspended. With the amended provisions on private enforcement, consumers would be able to seek damages from undertakings that participated in an agreement to restrict competition or by means of which they abused their dominant position. What has long been reality in other jurisdictions such as the US shall become available to consumers in Switzerland as well.

As discussed above, evidentiary difficulties are a major impediment for claimants in civil antitrust proceedings. Several options to address this issue have been discussed by the evaluation group and proposed to the federal administration.[41] The evaluation group favoured a combination of a court's power to order, under specific conditions, parties or third parties to disclose relevant evidence (thus following the EU Commission's proposal in its White Paper on Damages Actions for Breach of the EC antitrust rules) and the introduction of legal presumptions leading to a reversal of the burden of proof. Although courts may order parties or third parties to disclose certain documents, it has been found that these remedies are only of limited effectiveness. To date, the proposals of the evaluation group have not been taken into account in the legislative project.

41 Evaluation gemäss Art. 59a KG – Synthesebericht der Evaluationsgruppe Kartellgesetz (2008), p79; Heinemann, *supra* note 38, pp95-99.

Appendix 1

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