Cartels

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Switzerland

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Overview of the law and enforcement regime relating to cartels

Legal framework

Cartels and monopolies in Switzerland are mainly governed by the Federal Act of 6 October 1995 on Cartels and Other Restraints of Competition ("**Cartel Act**"; last major revision in 2003).

The purpose of the Cartel Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. However, the objective is not limited to economic aspects. General public interest considerations may also be taken into account. The law grants the Swiss Competition Commission ("**Comco**") the power to assess economic consequences of restrictions of competition and concentrations between undertakings, and leaves it to the Federal Council (the Swiss government) to assess the balance with the general public interest. Upon specific request by the undertakings, subject to a decision by the Comco or the appellate courts, the Federal Council may authorise anti-competitive conduct in exceptional cases if such conduct is deemed necessary for compelling public interest reasons (article 8 Cartel Act). To date, this has never happened.

The Cartel Act prohibits unlawful restraints of competition such as anti-competitive agreements. Anti-competitive agreements are defined as binding or non-binding agreements or concerted practices between undertakings operating at the same or different market levels that have a restraint of competition as their object or effect (article 4 § 1 Cartel Act). To be unlawful, an agreement must either eliminate effective competition or significantly restrict competition without being justified on economic efficiency grounds (article 5 § 1 Cartel Act).

According to article 5 § 3 and 4 Cartel Act, the following agreements are presumed to eliminate effective competition and are thus considered as hardcore restrictions ("**hardcore agreements**"):

- horizontal agreements that directly or indirectly fix prices, restrict quantities of goods or services to be produced, purchased or supplied, or allocate markets geographically or according to trading partners; and
- vertical agreements that set minimum or fixed prices or allocate territories to the extent that (passive) sales by other distributors into those territories are not permitted.

The presumption of elimination of effective competition is rebuttable. However, even if such rebuttal is successful, according to recent decisions of the Federal Supreme Court, hardcore agreements in principle still amount to significant restrictions of competition in terms of article 5 § 1 Cartel Act, regardless of any quantitative considerations or actual effects, respectively.

In addition to the Cartel Act, the regulatory framework also comprises several ordinances of the Swiss government, as well as notices and communications of the Comco, in particular the Notice regarding the Competition Law Treatment of Vertical Agreements of 28 June 2010 ("**Verticals Notice**"), which has been partly revised on 22 May 2017, and the Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Sector of 29 June 2015, which entered into force on 1 January 2016. On 12 June 2017, the Comco published for the first time explanatory guidelines on the Verticals Notice which aim at summarising the existing practice of the Comco and the case law of the appellate courts regarding vertical agreements.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from the competition law of the European Union ("**EU**"), the United States or other countries. However, particularly the EU competition law can and shall serve as an interpretative aid (see section, "Cross-border issues", below).

Aside from the cartel regulation dealing with anti-competitive agreements set out above, article 7 Cartel Act deals with abusive conduct by dominant undertakings.

Authorities and enforcement regime

The Comco and the Secretariat of the Comco ("**Secretariat**") are the authorities charged with enforcing and administering the Cartel Act.

The Comco is based in the Swiss capital Berne and consists of 12 members. One president and two vice-presidents head the Comco. The majority of the Comco's members must be independent experts with no interest in or special relationship with any economic group whatsoever. The Comco takes decisions and remedial actions against, and also imposes fines on, undertakings that violate Swiss competition law. The Comco has wide decision-making and remedial powers. It can, *inter alia*, also issue injunctions to terminate a specific conduct or to change and modify a specific business practice. Specific chambers of the Comco are empowered to render partial decisions on the closure of proceedings, the approval of amicable settlements including other measures, in particular fines and costs, for some of the parties while the proceeding is continued for the other parties.

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Comco, to issue any necessary procedural rulings. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. The total headcount of the Secretariat amounted to 73 employees (63.7 FTEs) by the end of 2016.

The Federal Administrative Court ("**FAC**"), based in St. Gall, is the first appellate instance against Comco decisions.

The Federal Supreme Court ("**FSC**"), based in Lausanne, is the second appellate instance, dealing with appeal decisions of the FAC. It is usually also the final instance, unless the parties decide to bring a case before the European Court of Human Rights in Strasbourg.

The Federal Criminal Court, based in Bellinzona, is the competent court to decide on the unsealing of seized documents and electronic data upon specific request by the Comco.

Sanctions

Pursuant to article 49a Cartel Act, direct fines are imposed on undertakings that participate in hardcore agreements, regardless of whether such agreements eliminate or merely significantly restrict effective competition, or that abuse their dominant position.

The maximum fine amounts to 10% of the undertaking's turnover cumulatively achieved in Switzerland in the preceding three financial years. The Cartel Act Sanctions Ordinance ("**CASO**") lays down the method of calculation of the fines in detail (see section,

"Administrative and civil sanctions" below). And it is the CASO that also lays down the legal prerequisites for leniency applications because of which a fine may be waived in whole or in part (see section, "Leniency regime" below).

Furthermore, an undertaking that violates an amicable settlement or a legally enforceable decision of the Comco or its appellate courts can be fined up to 10% of the turnover cumulatively achieved in Switzerland in the preceding three financial years (article 50 Cartel Act). Through this rule, recidivists with regard to binding findings of illegal competition restrictions that did not qualify as hardcore agreements may be fined (indirectly) as well.

Finally, an undertaking that fails to provide information or produce documents, or that only partially complies with its obligations during an ongoing investigation, can be fined up to CHF 100,000 (article 52 Cartel Act).

Overview of investigative powers in Switzerland

The Secretariat is empowered to conduct investigations and, together with one presidium member of the Comco, to issue any necessary procedural ruling. Both the Comco and the Secretariat may hear the parties or witnesses (article 42 § 1 Cartel Act). The parties involved in particular have the right to be present at such hearings and to comment on the hearing minutes.

Upon a specific request for information, the undertakings under investigation are also obliged to provide the Secretariat with all information required for their investigation and to produce necessary documents (article 40 Cartel Act); however, this is in due consideration of the right against self-incrimination (*nemo tenetur* principle).

The Secretariat may use all kinds of evidence to establish the facts. In practice, it typically relies on information gathered in dawn raids and information provided in (written or oral) party and witness statements.

Upon request of the Secretariat, one presidium member of the Comco may order dawn raids and seizures (see article 42 § 2 Cartel Act). The Secretariat published a note on selected instruments of investigation in January 2016. Therein, it laid out its best practice particularly with regard to inspections and the seizure of documents and electronic data. The representatives of the Secretariat in charge of the inspection will, *inter alia*, not wait for the arrival of external lawyers before starting to search the premises. Any evidence discovered while the external lawyers were not present will, however, be set aside and only be screened once the lawyers are present. If deemed necessary, the undertakings being dawn raided may request the sealing of specific or even all documents and electronic data.

Overview of cartel enforcement activity during the last 12 months

Ongoing and newly opened cartel investigations

Numerous cartel investigations of the Swiss Competition Commission (Comco) in different industry sectors are currently (still) ongoing. The industry sectors include, *inter alia*, construction (in particular road construction), building materials, financial markets with regard to reference rates (benchmark and interest rate derivatives, foreign exchange rates and rates for precious metals) and leasing.

In addition to these pre-existing investigations, only a few new investigations have been launched during the last 12 months:

- On 13 March 2017, the Comco opened an investigation against *Bucher Landtechnik AG* and its affiliates, which offer tractors of the manufacturers New Holland, Case IH

and Steyr, as well as spare parts for tractors. The investigation focuses on the question of whether Bucher Landtechnik AG makes the supply of spare parts for tractors of the mentioned manufacturers dependent on the sale of tractors of these manufacturers. Moreover, there are also indications that Bucher Landtechnik AG imposed restrictions on its resellers regarding the territory into which the resellers were allowed to sell.

- On 4 July 2017, the Comco opened an investigation against the German luggage manufacturer *RIMOWA GmbH*. The investigation aims at establishing whether RIMOWA GmbH imposed export bans on its distributors from outside Switzerland, thereby restricting parallel and direct imports of RIMOWA products into Switzerland.
- On 21 November 2017, the Comco opened an investigation against *Bucher AG Langenthal* and *Brenntag Schweizerhall AG*. In the course of the investigation, the Comco wants to establish whether these two undertakings allocated customers with regard to the distribution of "AdBlue®", an aqueous urea solution used in order to lower NOx concentration in the diesel exhaust emissions from diesel engines. It is noteworthy that Bucher AG Langenthal is already involved in another ongoing investigation opened in May 2016 with regard to the distribution of the Aspen-branded engine fuel.

Cartel decisions

The Comco issued several cartel decisions in the last 12 months:

- On 19 December 2016, the Comco fined *Eflare Corporation Pty Ltd* ("**Eflare**"), an Australian manufacturer of warning lights, and its Swiss distributor *Waseg-Handel GmbH* ("**Waseg**") with amounts of about CHF 8,700, respectively CHF 24,600. Armasuisse, the procurement division of the Swiss Armed Forces, planned to buy Eflare warning lights for an amount of about CHF 1.26m. In order to be able to tender an offer, a Swiss independent dealer asked the Polish distributor of Eflare warning lights to provide an offer who, in turn, requested Eflare for an offer. Eflare then contacted its Swiss distributor Waseg in order to discuss how to react to that request. Referring to its "exclusive" distribution right, Waseg argued that the warning lights of Eflare would in any case have to be supplied to the independent dealer by Waseg and therefore asked Eflare not to provide the Polish distributor with an offer. Eflare acted accordingly and informed the Polish distributor that the request for an offer would have to be addressed to Waseg as the Swiss distributor. Since the Swiss independent dealer was therefore not able to import the warning lights of Eflare parallel to Switzerland through the Polish distributor, it filed a complaint with the Comco. The Comco came to the conclusion that the behaviour of Eflare and Waseg amounted to an unlawful anti-competitive agreement relating to an absolute territorial protection in terms of article 5 § 4 and 1 Cartel Act. The parties concluded an amicable settlement.
- On 21 December 2016, the Comco announced that it rendered its first seven decisions in its five benchmark and interest rate derivatives investigations. Comco's decisions relate to anti-competitive agreements with regard to the benchmarks Swiss franc LIBOR and Yen TIBOR as well as to the interest rate derivatives of the Swiss franc spread, the EURIBOR and the Yen LIBOR/Euroyen TIBOR. The proceedings originally arose from one investigation opened on 2 February 2012 that, however, revealed several unconnected facts with regard to the complex benchmarks and interest rate derivatives markets. This ultimately led to the split into five investigations that the Comco now closed in full or partly, i.e., against those of the investigated 16 banks and five brokers who agreed to conclude an amicable settlement. In total, fines in the amount of about CHF 99m were imposed in the different investigations on different parties (except in

the Yen TIBOR investigation which did not lead to fines). Anyhow, the EURIBOR and Yen LIBOR/Euroyen TIBOR cartel investigations are being continued against the non-settling parties. The investigations were very complex, both on the merits (by way of example, more than nine million pages of correspondence had to be analysed) and with regard to the procedure itself. For instance, the Comco had to negotiate amicable settlements with several parties in parallel and different undertakings qualified for full immunity or a partial reduction of a fine in the various investigations.

- On 22 May 2017, the Comco imposed a fine on *Husqvarna Schweiz AG* and its Swedish mother company *Husqvarna AB* ("**Husqvarna**") with an amount of about CHF 657,000 (RPW 2017/2, p. 284 – *Husqvarna*). The Comco came to the conclusion that there were, at least between 2009 and 2015, anti-competitive agreements on minimum prices (retail price maintenance) in terms of article 5 § 4 and 1 Cartel Act between Husqvarna and its dealers with regard to the Husqvarna "Automower" products, which are robotic lawn mowers. The Comco found further indications towards potential restrictions of parallel and direct imports into Switzerland, but decided not to continue the investigation in this respect since Husqvarna agreed to conclude an amicable settlement and benefitted from a partial (80%) reduction of the fine by making use of "leniency plus" (see section "Leniency/amnesty regime" below). Full immunity was not possible since Husqvarna was considered to be a ring leader. In its decision, the Comco also briefly discussed whether the retail price maintenance at stake could be justified on the grounds of economic efficiency in terms of article 5 § 2 Cartel Act, namely with a temporary protection of investments for entering new markets (a special case of the free-rider problem). However, the Comco held that the duration of the retail price maintenance at stake was clearly beyond what could be justified. It is noteworthy that Husqvarna is currently also involved in a second investigation opened in 2016 in the course of which Husqvarna had filed the above mentioned "leniency plus" application. This first investigation against Husqvarna concerns allegedly illegally fixed prices and allocated markets by customers with regard to the distribution of the Aspen-branded engine fuel.
- On 10 July 2017, the Comco decided that several construction companies engaged in bid rigging in the *Val Müstair*, a geographically rather isolated valley in the Romanic-speaking part of Switzerland (RPW 2017/3, p. 421 – *Hoch- und Tiefbauleistungen Münstertal*). According to the Comco's decision, the construction companies – indeed, there are only a handful of construction companies, some of which already went out of business – jointly discussed and decided both who shall execute a major part of all publicly and privately procured construction projects in the *Val Müstair* and at what prices. The cartel lasted at least from 2004, when direct sanctions were introduced into the Cartel Act, until 2012. Until 2008, it was administered by means of special meetings conducted by the Builders' Association of the Canton of Grisons and subsequently, the companies continued their collaboration without the association's help. The Comco came to the conclusion that the bid rigging cartel fell within the scope of application of article 5 § 3 letters a and c Cartel Act (horizontal agreements that fix prices and allocate trading partners). Unlike in most other cartel decisions, the presumption of eliminated effective competition pursuant to article 5 § 3 Cartel Act could not be rebutted. Nonetheless, the Comco decided not to impose any fines on two undertakings involved since the affiliated *Foffa Conrad AG* and *Scandella Bau AG* received full immunity from a fine based on their leniency application and *Hohenegger SA in Liquidation* already went into bankruptcy. Other undertakings who took part in the illegal bid rigging already went out of business several years ago and were therefore

not subject to the investigation. It is noteworthy that the Val Müstair investigation is only one out of 10 investigations relating to the construction industry in the Canton of Grisons, which all have their origin in a dawn raid conducted in 2012. For procedural reasons, the initial investigation, which was extended several times, has been split into 10 separate investigations which in total concern about 40 undertakings.

- On 3 November 2017, the Comco announced that it has fined nine undertakings active in the galvanising sector with fines of about CHF 8m. The undertakings concerned agreed to charge their customers certain surcharges, namely relating to the costs of raw materials and transportation, and to abide by minimum prices. Moreover, they repeatedly agreed on price increases. These hardcore agreements in terms of article 5 § 3 Cartel Act have been concluded in the framework of several meetings organised by the Swiss Association of the Galvanizing Companies *VSV* and its specialist unit *SFF*. One undertaking benefitted from a full immunity from the fine based on the leniency regime. Moreover, all undertakings involved in the investigation cooperated well with the Comco and agreed to enter into amicable settlements, which could therefore close the case in less than two years of investigation with partial reductions of the imposed fines for all undertakings concerned.

In the last 12 months, the FAC rendered several judgments, in particular relating to the publication of decisions rendered by the Comco but also concerning other substantial and procedural questions:

- On 12 October 2016, the FAC confirmed the Comco's decision to use German as the language of the proceedings 22-0420 (judgment B-2577/2016 of the FAC of 12 October 2016 – *Stanze da bagno*). X SA (Appellant) is a company based in the Canton of Ticino and one of the largest wholesalers in the sanitary and bathroom sector. In the context of an investigation against the Appellant and 10 other companies active in the German-speaking part of Switzerland, the Comco decided on 29 June 2015 that these companies were involved in illegal price and quantity fixing agreements under the Cartel Act. The Appellant claimed an infringement of the right to be heard, of the principle of equal treatment and of non-discrimination, since both the Secretariat's draft decision of 21 May 2014 and the Comco's decision of 29 June 2015 were notified in German. The FAC, however, stated that there is no legal provision that grants an undertaking concerned an unlimited right to choose the language of the proceedings freely. The authorities have some discretion in the choice of language and must weigh the interests at stake. In multiparty proceedings where the parties' submissions are filed in several official languages, it is necessary to choose the language which causes as little cost and delay as possible and ensures that the decision is as comprehensible as possible. Moreover, it is equally important to take into account the official language that the majority of the parties speak. In the present case, the FAC ruled that it was correct to choose German as the language of the proceeding. The FAC observed that the majority of the parties were from the German-speaking part of Switzerland. Moreover, during the proceedings, the Applicant had been able to file all its submissions in Italian. The FAC also considered that the Applicant's lawyer understood German. The FAC further denied a right to a translation of the draft decision of the Secretariat and the subsequent decision of the Comco and of all procedural documents. Indeed, according to the FAC, the fact that the Appellant's submissions were all well motivated shows that it duly understood the accusations.
- On 24 November 2016, the FAC annulled the decision of the Comco to close the investigation in the case *Ticketcorner/Hallenstadion* and remitted the matter to the

Comco in order for the latter to reassess it (judgment B-3618/2013 of the FAC of 24 November 2016 – *Vertrieb von Tickets im Hallenstadion Zürich*). The investigation concerns the cooperation in the field of ticket distribution between the ticket service provider Ticketcorner AG and the operator of the Hallenstadion in Zurich, a big multi-purpose facility located in Zurich. According to a Ticketing Cooperation Agreement, the operator of the Hallenstadion had to impose on organisers of public events in the Hallenstadion in the rental terms the obligation to sell at least 50% of the tickets via Ticketcorner AG. In practice, economic considerations *de facto* led to 100%. Against this background, competitors of Ticketcorner AG felt illegally foreclosed from the market. The Comco, however, found that there were no grounds for action against the denounced conduct and closed its investigation (RPW 2012/1, p. 74, *Vertrieb von Tickets im Hallenstadion Zürich*). The FAC now upheld appeals of competitors of Ticketcorner AG against this decision, stating that the Comco wrongfully closed the investigation. According to the FAC, the obligation of organisers of public events in the Hallenstadion to contract with Ticketcorner AG, as imposed by the operator of the Hallenstadion, fundamentally and seriously restricted the freedom of choice for event organisers as, in principle, independent purchasers of ticketing services. The FAC did not hear the Comco's argument of comparative equality of the Ticketing Cooperation Agreement with exclusive purchase and non-compete undertakings between distribution partners or sole and exclusive supply obligations of suppliers, respectively. According to the FAC – referring to oral deliberations of the FSC in *Gaba* case (the written reasoning of *Gaba* was not yet published when the decision was rendered) – the Ticketing Cooperation Agreement qualifies as a restriction of competition by object that is qualitatively and quantitatively significant, unjustified and therefore illegal in the sense of article 5 § 1 Cartel Act. The FAC also found sufficient grounds to assume abusive conduct (*cf.* article 7 Cartel Act) by Ticketcorner AG and the operator of the Hallenstadion, which were both considered to be market dominant undertakings. An appeal against the decision of the FAC has been lodged with FSC, which means that the judgment is not yet final. In the context of this appeal, the FSC also will have to decide on the question as to whether the FAC's judgment is an interim decision, as the FAC itself qualified its annulment decision, or *de facto* a final judgment.

- On 30 November 2016, the FAC ruled on a request of an undertaking which requested to obtain access to the Comco's *Air Freight* decision of 2 December 2013 (judgment BVGE 2016/28 of the FAC of 30 November 2016 – *Air Freight*). With that decision, the Comco fined eleven airlines with CHF 11m for having participated in a price fixing cartel in the context of air freight. Appeals relating to the merits of the *Air Freight* decision are currently pending before the FAC. The decision of the Comco has not yet been published since separate appeal proceedings relating to the publication of the Comco's decision are ongoing before the FAC as well (see below). The undertaking which requested access to the (still) unpublished decision of the Comco is active in the air freight sector as well, but has not been a party to the Comco's investigation. Nevertheless, it was concerned that the Comco's decision might also contain its name or other direct or indirect indications and hints towards its identity. Therefore the undertaking requested the Comco to obtain access to the version of the Comco's decision to be published and, if that version should contain such indications or hints to its identity, to delete them prior to its publication. The undertaking based its request on article 8 of the Federal Act of 19 June 1992 on Data Protection ("**DPA**"), which provides persons (including legal entities) with the right to request information from

the controller of a data file as to whether data concerning them is being processed. The Secretariat of the Comco refused to provide such access for the time being, mainly since the publication of the Comco's decision is still contested and the subject of ongoing appeal proceedings before the FAC. The FAC, however, came to the conclusion that a deferment of access to the Comco's decision constituted a violation of the DPA which also applies to the Comco and the Secretariat. The FAC stated that solely business secrets of the airlines involved in the investigation could militate against providing access to the Comco's decision. However, deferring access cannot serve this purpose since the question how business secrets shall be protected will have to be answered anyhow once the decision relating to the publication of the Comco's decision on the merits becomes final and binding. The case was therefore remitted to the Comco to check how the legitimate interests of the airlines involved in the investigation may be protected.

- On 25 April 2017, the FAC ruled on the publication of a decision of the Comco from 2013, in which the Comco imposed fines of about CHF 16.5m on 10 wholesalers of French speaking books domiciled in the French speaking part of Switzerland (judgment B-6547/2014 of the FAC of 25 April 2017 – *publication de la décision relative au marché du livre en français*). The Comco accused the wholesalers of having prevented parallel imports (especially from France) by Swiss bookstores between 2005 and 2011. By doing so, the wholesalers shall have violated article 5 § 4 Cartel Act. An appeal pertaining to the merits of this decision is currently pending before the FAC. As to the publication of the Comco's decision on the merits, one of the parties to the investigation did agree with the publication as such, but requested the Comco to redact several parts of the decision prior to the publication. In particular, this undertaking did not want its affiliation with a group of companies, information pertaining to its internal organisation and dates of contracts to become public. According to the FAC, this kind of information could, however, not qualify as business secrets, partly because the information concerned was already publicly accessible, e.g. on the group's website or on Wikipedia, or that there was no sufficient interest on the part of the undertaking in keeping such information secret. According to the Comco, the latter was partly shown through the fact that the undertaking disclosed alleged business secrets during the investigation without taking any measures in order to keep these secrets confidential, thereby making such information accessible also to its competitors who were involved in the investigation too. Finally, the FAC stated that the DPA cannot prevent a publication as intended by the Comco, as it was claimed by the undertaking concerned. The judgment of the FAC has not become final since the undertaking concerned filed an appeal with the FSC against that ruling.
- On 15 August 2017, the FAC upheld a preliminary decision of the Comco in which the latter decided not to remove certain passages from specific hearing minutes (judgment B-1286/2016 of the FAC of 15 August 2017 – *Beweisverwertungsverbot*). The investigation which is directed against several undertakings active in the gravel market relates, *inter alia*, to potential horizontal prices and quantity fixing agreements. One undertaking claimed that specific passages of the hearing minutes shall be inadmissible and must therefore be deleted from the proceeding's case file, since the questions and answers shall be covered by the attorney-client privilege. The FAC decided, firstly, that the Secretariat has the right and competence to render preliminary decisions regarding the admissibility of pieces of evidence, although such decision cannot bind the Comco. Given that the question of whether the respective questions and answers

shall be admissible can again be raised before the Comco and the courts deciding on potential appeals against the Comco's decision on the merits, the FAC stated, secondly, that the undertaking concerned did not possess a sufficient interest in the annulment of the preliminary decision of the Secretariat. Appeals against such preliminary decisions are admissible only if the decisions are capable of causing an irreparable disadvantage to the undertaking concerned. Therefore, the FAC refused to deal with the merits of the appeal and declared it inadmissible. The ruling is final and binding.

- On 24 October 2017, the FAC rendered two further decisions relating to the publication of a decision of the Comco, with which the Comco fined several undertakings for unlawful price and quantity fixing agreements pursuant to article 5 § 3 Cartel Act (judgments B-7768/2016 and B-149/2017 of the FAC of 24 October 2017 – *Publikation der Sanktionsverfügung*). The Comco intended to publish that decision, both on its website and in its publication journal "Law and Policy of Competition" ("**RPW**"). Since the undertakings disagreed with the publication of the decision at all, the Comco formally ordered the publication by way of publication decision dated 21 November 2016. Further, the Comco decided that an appeal against its publication decision shall remain without suspensive effect. The FAC, however, restored the suspensive effect and ordered the Comco not to publish the decision on the merits, which was in fact already online for a short period of time, until it has decided on the publication. In its final decision, however, the FAC upheld the Comco's decision to publish the decision on the merits and rejected the appeal of the undertakings concerned. Referring to the FSC's leading case *Nikon* (judgment 142 II 268 of the FSC of 26 May 2016 – *Nikon*) concerning the publication of decisions of the Comco, the FAC stated that the decision of whether or not to publish the decision in question was in the discretion of the Comco, and that the Comco correctly exercised its discretion. The FAC reiterated the public interest in a publication of decisions of the Comco. Based on the facts of the case, the FAC further confirmed that the publication is also proportionate, in particular since the publication of the mere press release or summary did not suffice to satisfy the public interest (in particular the interest of other addressees of the Cartel Act, of other authorities applying the Cartel Act as well as the general public) in being informed about the decision. Finally, the FAC refused to grant the undertakings concerned another opportunity to designate business secrets in the Comco's roughly 700-page decision which shall be redacted since the Comco itself had already invited the undertakings several times to do so. The undertakings have, however, not made use of that opportunity.
- On 30 October 2017, the FAC rendered another nine decisions relating to the publication of a decision of the Comco dated 2 December 2013, in which the Comco prohibited a price cartel in the context of air freight and fined 11 airlines involved with about CHF 11m (judgments B-5936/2014, B-5869/2014, B-5920/2014, B-5911/2014, B-5903/2014, B-5858/2014, B-5927/2014, B-5896/2014, B-5943/2014 of 30 October 2017 – *Air Freight*). The decision on the merits of the case has not yet entered into force since appeals are currently still pending before the FAC. Due to a disagreement between the Comco and the airlines concerned with regard to the publication of the decision on the merits, the Comco formally ordered such publication in a separate decision which gave rise to the present judgment of the FAC. In its judgment, the FAC, *inter alia*, confirmed that decisions of the Comco may be published regardless whether they are already final and binding. Moreover, the FAC reiterated that decisions of the Comco shall generally be published entirely, i.e., mere summaries or press releases are

not sufficient. In that context, the length of the decision (about 400 pages in the case at hand) is irrelevant. Notwithstanding the above, the FAC, however, also stated that the interest and in particular the protection of the personality rights of the undertakings concerned have to be taken into account as well, in particular since the publication of decisions of the Comco itself does not serve a corrective purpose. By doing so, the FAC explicitly confirmed that not only business secrets (which may never be published; article 25 § 4 of the Cartel Act) but also other interests of the parties to an investigation may prevent or restrict publications of decisions of the Comco. In the case at hand, the interests of the undertakings concerned have not been sufficiently taken into account by the Comco. Concretely, the FAC criticised that the Comco's decision on the merits contained explanations, attributable to specific airlines, regarding the global behaviour of airlines concerning certain routes which might violate foreign competition laws as well, but did not give rise to the sanctions imposed by the Comco since the Comco had no competence with regard to such conduct. Therefore, the FAC remitted the case to the Comco which has to draft a new version of the decision of the Comco to be published, taking into account the FAC's guidelines.

- On 14 November 2017, the FAC upheld an appeal filed by *Immer AG* ("**Immer**"), a distributor of mountings for doors (judgment B-552/2015 of the FAC of 14 November 2017 – *Türbeschläge*). With the decision dated 17 November 2014, Immer has been fined by the Comco with CHF 5,500 for participating in a horizontal price fixing agreement in terms of article 5 § 3 of the Cartel Act concerning mountings for doors of the manufacturer "GLUTZ". The Comco's decision was directed against six distributors, of which Immer was the only one who has not agreed to enter into an amicable settlement. According to the Comco, the distributors met annually between 2002 and 2007 to discuss and agree on minimum margins on the wholesale of GLUTZ products to commercial customers. Immer undisputedly participated in one meeting only. Moreover, there was no proof that Immer actively participated in the discussion or disclosed any information regarding its own pricing strategy to the other distributors. According to the FAC, passively participating in one meeting only does not amount to an anti-competitive agreement in terms of article 4 § 1 of the Cartel Act, unless special circumstances justify such qualification. However, the FAC could not recognise any indications which could justify the existence of an agreement. In that context, the FAC stated that the ordinary burden of proof is applicable with regard to the existence of an agreement since there are no competition law specific difficulties relating to such proof. The FAC also denied that Immer had participated in a concerted practice in terms of article 4 § 1 of the Cartel Act. There was no proof that Immer engaged in a parallel behaviour with the other distributors or changed its conduct in the aftermath of the sole meeting it has attended, respectively. This, however, would be required to justify the finding of a concerted practice. Thus, there was no anti-competitive agreement in terms of article 4 § 1 of the Cartel Act and the FAC consequently annulled the decision against Immer, including the fine, in full. The judgment of the FAC is final and binding. Taking into consideration the new leading case *Gaba* (see below), it can be expected that proof of the existence of an agreement in terms of article 4 § 1 of the Cartel Act will become an even more important and controversial topic in future cases.

During the last 12 months, the Federal Supreme Court (FSC) rendered several judgments, mainly on the merits but also on procedural questions:

- On 21 April 2017, the FSC published its written reasoning in the leading case *Gaba*, which answers some of the most controversial questions regarding Swiss competition

law from the last few years (judgment 143 II 297 of the FSC of 28 June 2016 – *Gaba*). The public deliberation of the judgment had already taken place on 28 June 2016, meaning that it took the FSC about 10 months to publish its written reasoning. Gaba, the manufacturer of the toothpaste "Elmex", was fined by the Comco with about CHF 4.8m in 2009 for prohibiting its Austrian licensee *Gebro Pharma GmbH* from passively selling "Elmex" products outside the assigned territory (in the case at hand Austria). Upon appeal, the FAC upheld that decision in 2014. The three most important issues discussed and decided in the FSC's Gaba reasoning can be summarised as follows: First, with regard to the (extra)territorial application of the Cartel Act, article 2 § 2 of the Cartel Act shall be interpreted in the sense that any practices which could have effects in Switzerland shall fall within the scope of application of the Cartel Act. It is neither necessary nor admissible to assess the intensity of such effects. Second, hardcore agreements within the meaning of article 5 § 3 and 4 of the Cartel Act, i.e., agreements which lead to the presumption of eliminated competition, "generally" amount to significant restrictions of competition in terms of article 5 § 1 Cartel Act even where the presumption of eliminated competition has been successfully rebutted. That means that such agreements are admissible only if they can be justified on economic efficiency grounds (article 5 § 2 Cartel Act). It is not necessary to assess any actual effects of hardcore agreements on competition. Indeed, it is already sufficient if such agreements have a potential effect on competition, regardless of whether they have been effectively implemented. It remains, however, unclear whether a *de minimis* threshold may apply in exceptional cases (as suggested, e.g., in the later judgment B-552/2015 of the FAC of 14 November 2017 – *Türbeschläge*). Third, agreements covered by article 5 § 3 and 4 of the Cartel Act may lead to direct fines in terms of article 49a Cartel Act even if the presumption of eliminated competition has been successfully rebutted.

- On the same day as the Gaba reasoning, the FSC published its judgment dated 4 April 2017 in the *Gebro* case (judgment 2C_172/2014 of the FSC of 4 April 2017 – *Gebro*), which relates to the same "Elmex" investigation as the *Gaba* matter mentioned above, and upheld the (symbolic) fine imposed on Gebro in the amount of CHF 10,000. The FSC refers in its Gebro judgment mainly to its reasoning in the Gaba case. The FSC further confirms its rather apodictic approach by emphasising that the contractual reality is irrelevant with regard to the question of whether a hardcore agreement exists. The mere fact that such an agreement has been concluded is sufficient.
- On 9 October 2017, the FSC upheld appeals filed by the authorities and rescinded two judgments of the FAC in which the latter annulled fines in the amount of about CHF 6.8m imposed on, amongst others, two dealers of mountings for windows and window doors due to horizontal price fixing agreements in terms of article 5 § 3 Cartel Act (judgments 2C_1016/2014 and 2C_1017/2014 of the FSC of 9 October 2017 – *Baubeschläge für Fenster und Fenstertüren*). Several dealers of mountings for windows and window doors, including *Siegenia-Aubi AG* and *KOCH Group AG Wallisellen*, were found guilty by the Comco in 2010 of having agreed on the timing and the amount of price increases. In contrast thereto, the FAC held in 2014 that the Comco failed to sufficiently establish the facts and that there were still reasonable doubts regarding the existence of horizontal price fixing agreements and the effects thereof on the market, thereby referring to the *in dubio pro reo* principle. The FSC remitted both cases back to the FAC and ruled that the FAC itself failed to establish the facts, emphasising that appeals before the FAC are "full merits" appeals on both the findings of fact and law. Therefore, it would have been up to the FAC to assess any additional evidence required.

Moreover, the FSC held that the FAC also erred in applying substantive competition law by arguing that it is necessary to prove the elimination of effective competition in cases of horizontal price fixing agreements pursuant to article 5 § 3 Cartel Act. Due to the presumption of eliminated competition for hardcore agreements, not the absence but the existence of such effective competition must be proven. Moreover, even in the event that effective competition should exist, agreements in terms of article 5 § 3 Cartel Act generally still amount to a significant restriction of competition in terms of article 5 § 1 Cartel Act, as has been decided in the leading "Elmex" toothpaste cases mentioned above. According to the FSC, it is now on the FAC to establish the facts and rule along the lines drawn in FSC's judgment.

- On 24 October 2017, the FSC rejected an appeal brought by *Bayerische Motoren Werke AG* ("**BMW**") against the judgment of the FAC dated 13 November 2015 and thereby confirmed the FAC's and ultimately the Comco's decision to impose a fine in the amount of CHF 156m on BMW for restricting parallel imports to Switzerland (judgment 2C_63/2016 of the FSC of 24 October 2017 – *BMW*). BMW's contracts with dealers located in the European Economic Area ("**EEA**"), in force since 2003, contained a provision stating that the dealers shall not be allowed, directly or through third parties, to sell new BMW vehicles and original BMW parts to customers in countries outside the EEA, nor to re-equip cars for that purpose. The Comco, which has received 16 complaints from customers who stated that they unsuccessfully tried to import new BMW vehicles, subsequently the FAC and finally also the FSC came to the conclusion that this clause amounts to an absolute territorial protection in terms of article 5 § 4 Cartel Act. The presumption of eliminated competition was successfully rebutted, in particular since it was shown that parallel imports were not entirely prevented. However, the FSC confirmed its position adopted in the *Gaba* case by stating that it was neither necessary to assess nor admissible to require specific effects on competition in cases of agreements falling under article 5 § 3 and 4 Cartel Act. These hardcore agreements are generally unlawful, unless they can be justified on the grounds of economic efficiency in terms of article 5 § 2 Cartel Act. BMW did, however, not assert any such justification. The BMW judgment is the first major decision post-*Gaba*. The FSC furthermore confirmed the wide (extra) territorial scope of application of the Cartel Act, stating that agreements which could potentially have effects on competition in Switzerland shall be subject to competition law scrutiny in Switzerland pursuant to article 2 § 2 Cartel Act, without any requirements as to the intensity of such effects.

Key issues in relation to enforcement policy

Proceedings under the Cartel Act can be two-staged. The Secretariat can initiate preliminary investigations on its own initiative, at the request of certain undertakings concerned (e.g. competitors) or based on third-party complaints. It is at the discretion of the Secretariat to open a preliminary investigation (see judgment 130 II 521 of the FSC of 13 July 2004 – *Cornèr Banca*). If the Secretariat finds indications of a significant restriction of competition, it opens an investigation with the consent of a presidium member of the Comco. However, the Comco may open an investigation directly. The Secretariat must always open an investigation if asked to do so by the Comco or by the Federal Department of Economic Affairs, Education and Research. Also dawn raids and seizures of documents and electronic data require the opening of an investigation. These coercive measures are not possible in preliminary proceedings.

In its annual press conference on 11 April 2017, the Comco stated that in the last year, it has already dealt with and will continue dealing with competition law related aspects of the

digital economy. Thereby, the Comco emphasised the complexity of these developments and warned of wrong assessments which could prevent innovation. Besides that, the priorities set by the Comco do not seem to have changed. Apart from combatting horizontal hardcore agreements, in particular, restrictions of parallel trade remain in the focus of the Comco. Indeed, in the last few years, the Comco has been acting effectively against restrictions of parallel trade. The above outlined decisions of the Comco and appellate courts, *inter alia,* in the Eflare, Gaba or BMW matters, confirm this.

Key issues in relation to investigation and decision-making procedures

In Switzerland, the Comco's decision-making process is a subject of controversy. Formally, the Secretariat conducts the investigations, but the Comco itself issues the decisions. Accordingly, the investigating and decision-making bodies are separate, even though at least one of the presidium members of the Comco is involved in some of the investigatory actions. For instance, the opening of an investigation, or the approval to conduct a dawn raid and seize documents and electronic data, is subject to the consent of one presidium member of the Comco. And for its decision-making, the Comco also has the power to hold hearings, which it has frequently used in the past. Given this overlap, concerns were raised that Comco is biased and cannot exercise effective judicial control over the Secretariat's work.

Concerns were also raised as regards the Comco's institutional autonomy, in particular since direct fines are available. Under Swiss competition law, fines are considered to be of an administrative nature, but also qualify as criminal sanctions in the meaning of the European Convention on Human Rights ("**ECHR**") and the International Covenant on Civil and Political Rights ("**ICCPR**"; see judgment 139 I 72 of the FSC of 29 June 2012 – *Publigroupe*). Hence, an investigation opened on the basis of alleged hardcore agreements that are subject to direct fines should in principle respect the procedural rights to a fair trial set forth in the ECHR and ICCPR. Pursuant to article 6 § 1 ECHR, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. In light of the case law of the ECHR and of the functioning of the Comco and the Secretariat, the Comco cannot be considered as an independent and impartial tribunal. Therefore, an appeal on full merits with regard to both factual and legal aspects must be available against the Comco's decisions to safeguard and respect the fundamental requirements of the right to fair trial. In the FSC's view, the FAC does meet these requirements and its performed control is therefore the counterweight to the system established by the Cartel Act (see judgment 139 I 72 of the FSC of 29 June 2012 – *Publigroupe*).

Procedural rights during the preliminary investigations and investigations can be outlined as follows: preliminary investigations aim to identify whether indications of illegal anti-competitive agreements exist which require an in-depth analysis with further investigatory actions. The decision to open an investigation is not a formal decision in terms of the Administrative Procedure Act ("**APA**") and cannot be appealed. In fact, the parties concerned only have limited procedural rights. In particular, the parties have no right to access the case files. By the same token, third parties have no right to demand that the Secretariat opens an investigation (see also section, "Key issues in relation to enforcement policy", above).

In case the preliminary investigation reveals sufficient indications of illegal anti-competitive agreements, in principle, the Comco must open an investigation and announce this by means

of an official publication. Such announcement must state the purpose of the investigation and the names of the parties involved. All parties subject to the investigation are vested with the usual procedural rights contained in the APA, unless the Cartel Act stipulates otherwise (article 39 Cartel Act). They particularly have the right to consult and comment on the case files and to suggest witness hearings, and they have the right to be heard and to participate in oral party and witness hearings. On the basis of the conducted investigation, the Secretariat brings forward a draft of a decision, which is comparable to the statement of objections in the EU. The parties may also comment on such draft decision. Affected third parties have the possibility to join the investigation. Third parties that qualify as a party have full legal standing and are vested with all procedural rights. According to the FSC's practice, third parties shall not easily qualify as a party. Particularly with regard to competitors, aside from a close proximity to the subject matter, it is required that they suffer a clear economic disadvantage. Such disadvantage requires a specific and individual concern, and is given if an illegal anti-competitive agreement or abusive conduct by a dominant undertaking has disadvantageous effects on the competitor, in particular diminished turnover. The requirements for the full legal standing have to be proven by the competitor that claims to be a party (see judgment 139 II 328 of the FSC of 5 June 2013 – *Parteistellung in der Untersuchung Vertrieb von Tickets im Hallenstadion Zürich*). Third parties without full legal standing must request their participation within 30 days of the announcement (article 43 Cartel Act) and their procedural rights (the minimum being the right to be heard) may be limited.

The Comco and the appellate courts are not obliged to reach a final decision within a specified period of time. The question of whether statutory time bars apply is controversial and currently on appeal before the FAC. In Comco's view, no statutory time bars exist except that no direct fines can be imposed if an investigation was opened only later than five years after the restriction of competition has ceased (article 49a § 3 letter b Cartel Act; see also RPW 2016/1, p. 128 – *Swisscom WAN-Anbindung*). In any case, the parties can always lodge a separate appeal and claim undue delay (article 46a APA) or invoke the claim of an unduly long proceeding in the appeal against the decision on the merits. With regard to the length of investigations, the FAC has already pronounced once that a duration of four years and four months is at the upper bound of the legally allowed investigation duration (judgment B-2977/2007 of the FAC of 27 April 2010 – *Publigroupe*; see also, e.g. judgment B-7633/2009 of the FAC of 14 September 2015 – *Preispolitik Swisscom ADSL*).

The approach of the Secretariat with regard to the seizure of documents and electronic data during dawn raids and the triage of legally privileged documents, particularly with regard to the attorney-client privilege, is reflected in its note on selected instruments of investigation from January 2016. The Secretariat therein, *inter alia*, endorses the law by explicitly stating that all documents exchanged with attorneys-at-law allowed to represent parties before the Swiss courts are legally privileged, irrespective of the location where the documents are kept in custody, but only to the extent they concern the professional (legal) advice and/or representation (article 40 Cartel Act *in fine*). Hence, in-house counsel cannot invoke attorney-client privilege with regard to their advice. If sealing of documents or electronic data to be seized is requested, the Secretariat may nevertheless briefly review them to verify the invoked privilege.

The Secretariat and the Comco are legally obliged to respect and protect business secrets such as know-how, client lists or financial accounting documents during their proceedings and in particular in all publications (article 25 Cartel Act). Typically, the Secretariat requests the parties to identify their business secrets. In case the Secretariat does not consider the

identified information to constitute business secrets, it tries to reach an amicable arrangement before the Comco must render a formal decision in this regard (see judgment 142 II 268 of the FSC of 26 May 2016 – *Nikon*).

Under specific circumstances, procedural decisions (interim decisions) may be appealed even before a final decision on the merits has been taken.

Under Swiss law, there is no provision for procedural disputes to be dealt with by an independent officer, akin to the Hearing Officer within the EU system.

Leniency/amnesty regime

Leniency is an important aspect of cartel enforcement in Switzerland. Already in the first 10 years after the entry into force of the leniency regime, the competition authorities had received about 50 leniency applications. However, as the leniency programme has been available since 1 April 2004, there are only a few decisions dealing with the leniency programme. In general, the Comco and the Secretariat are considered to be fair and proportionate, in particular with regard to the obligations imposed on a leniency applicant such as the obligation to fully cooperate with the authorities during the investigation.

The leniency programme particularly applies to (horizontal and vertical) hardcore agreements (article 49a § 2 Cartel Act).

Pursuant to article 8 § 1 CASO, the Comco grants immunity from a fine if an undertaking is the first to either: (i) provide information enabling the Comco *to open* an investigation and the Comco itself did not have, at the time of the leniency filing, sufficient information to open a preliminary investigation or an investigation; or (ii) submit evidence enabling the Comco *to prove* a hardcore agreement, provided that no other undertaking must already be considered first leniency applicant qualifying for full immunity and that the Comco did not have, at the time of the leniency filing, sufficient evidence to prove an infringement of the Cartel Act in connection with the denounced conduct.

However, immunity from a fine will not be granted if the undertaking: (i) coerced any other undertaking to participate in the infringement and was the instigator or ring leader (see e.g. RPW 2017/2, p. 284 – *Husqvarna*); (ii) does not voluntarily submit to the Comco all information or evidence in its possession concerning the illegal anti-competitive practice in question; (iii) does not continuously cooperate with the Comco throughout the investigation without restrictions or delay; or (iv) does not cease its participation in the Cartel Act infringement voluntarily or upon being ordered to do so by the competition authorities (article 8 § 2 CASO).

Pursuant to the Cartel Act, full immunity is limited to the "first in". As outlined above, full immunity from a fine is also possible for cooperation that enables the Comco to prove a Cartel Act infringement and therefore when an investigation has already been opened and a dawn raid conducted. Therefore, it is important to decide immediately upon knowledge of an opened investigation and conducted dawn raid whether or not to cooperate with the competition authorities and, if such cooperation is desired, to submit a leniency marker or application to the Comco without delay (in writing, such as by facsimile, or orally by protocol declaration). In investigations with several leniency applicants, it may be a matter of days or even hours whether and which undertaking may qualify for full immunity from a fine (see, e.g. RPW 2009/3, p. 196 – *Elektroinstallationsbetriebe Bern*).

Applying for leniency second or later in the same investigation will only allow for partial immunity. A reduction of up to 50% is available at any time in the proceeding to

undertakings that do not qualify for full immunity. Further, the fine amount can be reduced by up to 80% if an undertaking provides information to the Comco about other hardcore agreements that were unknown to the Comco at the time of their submission (article 8 § CASO; "leniency plus"; see, e.g. RPW 2017/2, p. 284 – *Husqvarna*). This reduction is without prejudice to any possible full immunity or partial reduction of a fine for the newly disclosed infringements.

The Cartel Act does not expressly regulate the possibility for the Comco to withdraw immunity after it has been granted in a final decision. However, general principles of administrative procedural law usually enable administrative authorities to withdraw or amend final decisions (including final decisions with regard to immunity) under certain exceptional circumstances, for example, if: (i) facts are discovered that justify withdrawal or amendment; and/or (ii) a final decision is unjustified. There is no cartel specific case law in that regard. However, the bar for immunity revocation has to be set very high.

The Secretariat will confirm receipt of the notification and inform the applicant of the time of receipt. The Secretariat and the Comco conduct a full review of the leniency applications in chronological order of receipt (provided that they are valid) to determine precedence for full immunity. Therefore, the extent and timing of the cooperation are determining factors for the amount of the fine reduction.

When applying for leniency, one should keep in mind that leniency applications do not provide immunity from civil litigation following a decision by the Comco (follow-on litigation). However, the Comco is under no express legal duty to cooperate and provide judicial assistance to civil courts. It may thus refuse to grant access to documents produced by and detrimental to leniency applicants. To date, the Comco endeavours to protect information submitted by leniency applicants in order not to discourage undertakings to submit such applications in future cases and to thereby protect the leniency programme under the Cartel Act (see judgments A-6315/2014, A-6320/2014 and A-6334/2014 of the FAC of 23 August 2016 – *Zugang zu Verfahrensakten*). The Comco typically pursues this objective in its proceedings, *inter alia*, by granting the other parties of the proceeding the right to consult the leniency files, which are separated from the other case files only at the premises of the Comco and without the right to make photocopies in any form or manner whatsoever. The Comco is also willing to implement use restrictions by decision before granting access to leniency files.

At an international level, the Agreement between Switzerland and the European Union concerning the Cooperation on the Application of their Competition Laws, which entered into force on 1 December 2014 ("**Cooperation Agreement**"), provides that information obtained under leniency or settlement proceedings cannot be exchanged without the consent of the undertakings concerned (see also section, "Cross-border issues", below).

Administrative settlement of cases

Amicable settlements are an important feature of the Swiss cartel enforcement regime. During preliminary investigations, the Secretariat may propose measures to eliminate or prevent restrictions of competition (article 26 § 2 Cartel Act). In the framework of an investigation, if the Secretariat considers that a restraint of competition is unlawful, it may propose to the undertakings involved in an amicable settlement concerning ways to eliminate future restrictions (article 29 § 1 Cartel Act). Hence, amicable settlements solely deal with an undertaking's conduct in the future, meaning that a party can voluntarily undertake to terminate, respectively not to commit certain illegal conduct anymore. However, the

fine amounts to be imposed for illegal conduct in the past cannot be agreed on – Swiss competition law does not know any "plea bargaining". This also means that an undertaking is allowed to appeal against a Comco decision and the imposed fine even if it has entered into an amicable settlement (see, e.g. RPW 2016/3, p. 652 – *Flügel und Klaviere*, against which an appeal is pending before the FAC).

Amicable settlements shall be formulated in writing and approved by the Comco, typically in its decision on the merits (article 29 § 2 Cartel Act). The Comco shall either approve the amicable settlement as proposed by the Secretariat, or refuse to do so and send it back to the Secretariat and suggest amendments. According to the Comco, it cannot amend the terms of a settlement on its own (see, e.g. RPW 2016/3, p. 722 – *Saiteninstrumente (Gitarren und Bässe) und Zubehör*). However, it did so in one case, namely by setting a time limit to the amicable settlement (RPW 2006/1, p. 115 – *Kreditkarten/Interchange Fee*). Amicable settlements are binding on the parties and the Comco and may give rise to administrative and criminal sanctions in case of a breach of any of its provisions by the parties (article 50 and 54 Cartel Act).

As already mentioned, amicable settlements do not hinder the Comco from imposing fines on the parties in case they have entered into illegal hardcore agreements in the past. Yet concluding an amicable settlement is generally regarded as cooperative conduct, and taken into account as a mitigating factor when calculating the fine (article 6 CASO). In recent cases, reaching an amicable settlement has led to a reduction of the fines of about 10% to 20%. However, the Comco takes very much into account the moment of the amicable settlement. In a case of late settlement, the Comco only reduced the fine by 3% (RPW 2010, p. 765 – *Baubeschläge für Fenster und Fenstertüren*), and indicated that it will not reduce fines any more if amicable settlements are signed after the Secretariat's second draft decision.

Since 2004, when the possibility to impose direct fines entered into force, numerous investigations were closed together with approved amicable settlement agreements (including dominance cases). In the past year, this namely concerned the cases: *Eflare Corporation Pty Ltd; Swiss franc spread; LIBOR; EURIBOR* (closed only with regard to some undertakings)*; Yen LIBOR/Euroyen TIBOR* (closed only with regard to some undertakings)*; Husqvarna Schweiz AG;* and *Galvanizing Companies*.

Third-party complaints

Third parties have two ways of complaining about suspected anti-competitive agreements.

The first way is to file a complaint with the Secretariat (article 26 Cartel Act; see sections, "Key issues in relation to enforcement policy" and "Key issues in relation to investigation and decision-making procedures", above).

The number of third-party complaints submitted particularly increased in and after the summer of 2011, in the context of the significant appreciation of the Swiss franc against the euro and the US dollar. However, in its preliminary investigation with regard to the passing-on of currency gains, the Secretariat did not find any evidence for unlawful agreements or an abuse of a dominant position (RPW 2013/4, p. 488 – *Nichtweitergabe von Währungsvorteilen*).

A second option for a third party affected by allegedly illegal anti-competitive agreements is to claim damages before civil courts. Under article 12 Cartel Act, any person hindered from entering or competing in a market by an unlawful restraint of competition is entitled to request from the courts: (i) the elimination of, or desistance from the hindrance; (ii) damages

and reparation payment in accordance with the Swiss Code of Obligations ("**CO**"); or (iii) the surrender of unlawfully earned profits in accordance with the provisions on agency without authority. Hindrances of competition include in particular refusal to deal, and discriminatory measures.

A basis for claims against competition restrictions – subject to specific preconditions – can also be found in article 28 of the Swiss Civil Code ("**CC**"), which protects personality rights, including economic rights, and the Swiss Federal Act against Unfair Competition ("**UCA**").

The civil actions should be brought before the higher cantonal civil courts. The Swiss Code on Civil Procedure ("**CCP**") requires cantons to designate one court having sole cantonal jurisdiction for disputes related to the Cartel Act and to the UCA. The "single cantonal court" has exclusive jurisdiction to order interim measures. If the legality of a restraint of competition is disputed before a civil court, this question shall be referred to the Comco for an expert report. However, civil courts rarely refer such cases and the Comco's opinion is not binding for the civil judge.

Civil penalties and sanctions

From a civil law point of view, the sanction for cartel activities lies in the total or partial nullity of the agreement in question (see judgment 134 III 438 of the FSC of 12 June 2008 – *Abfallentsorgung*) and civil liability claims (e.g. by customers) may be filed with the competent courts, in particular under article 12 Cartel Act (see section, "Third-party complaints" above).

From an administrative sanctions law point of view, any undertaking participating in an illegal hardcore agreement or violating article 7 Cartel Act may be charged with a fine of up to 10% of the turnover cumulatively generated within Switzerland in the preceding three financial years before the decision is issued (article 49a § 1 Cartel Act). These fines are administrative sanctions, but considered as a criminal sanction in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (see judgment of the FSC of 29 June 2012, 139 I 72 – *Publigroupe*).

The amount of the fine depends on the duration and severity of the unlawful conduct. The turnover of the undertakings is calculated by analogy with the rules on the calculation of turnover in merger control cases (article 4 and 5 of the Merger Control Ordinance; "**MCO**") and encompasses the consolidated net turnover. The base amount is up to 10% of the consolidated net turnover generated on the relevant markets in Switzerland cumulatively in the preceding three business years before the illegal conduct has ended, depending on the type and severity of the Cartel Act violation (article 3 CASO). The "normal" profits that resulted from the unlawful conduct are taken into account in the base amount. The turnover relevant for the base amount of the fine is calculated by analogy with the rules of the MCO. In recent price-fixing cases, absent specific circumstances, the Comco applied a percentage between 5% and 10% for the base amount. It is noteworthy that the FSC clarified that limited effects of hardcore agreements on competition in Switzerland must be taken into account when setting the percentage of the base amount (judgment 143 II 297 of the FSC of 28 June 2016 – *Gaba*). The base amount will then be increased by up to 50% if the Cartel Act violation was implemented for up to five years. Each additional year thereafter will lead to an increase of another 10% or 0.833% for each month, respectively (see judgment B-7633/2009 of the FAC of 14 September 2015 – *Preispolitik Swisscom ADSL*).

This interim base amount may increase by a certain percentage reflecting aggravating factors, such as recidivism, high cartel gains, obstruction of justice, ring-leading and

measures to enforce cartel discipline (article 5 CASO). The law is not exhaustive and other factors may be taken into account too. In particular, Swiss law does not fix the percentage of each aggravating factor but provides the Comco with wide discretion, depending on the circumstances of each particular situation.

For calculating the fine, mitigating factors also have to be taken into account and the interim fine amount may be reduced accordingly. Examples of mitigating factors are: termination of the illegal conduct before or immediately after the Comco has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. The law does not set the percentage of mitigation of each factor (article 6 CASO) and the Comco has wide discretion also in this regard. In recent cases, the reduction percentages have varied from 10% to 60% depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable settlement (with regard to fine immunity for leniency applicants, see section "Leniency/amnesty regime" above).

In extraordinary cases, the Comco may also impose lump sum fines – in particular in the case of rather small fines (see, e.g., the decision of the Comco of 19 October 2015 – *Volkswagen Konzessionäre*, with fines between CHF 10,000 and CHF 320,000).

The legal entities liable for payment of the fines are the decision's addressees. However, addressees can form part of a group of companies. In such cases, decisive influence is the pertinent criterion of demarcation, i.e. the question of whether the companies of this group can be and effectively are controlled by their parent company. If this is the case, then the entire group of companies qualifies as "the undertaking" in the sense of the Cartel Act, which is considered to be a functional term. In its landmark case *Publigroupe*, the FSC held that if a group of companies forms the undertaking in the sense of the Cartel Act, in principle every company, i.e. every legal entity of such group, qualifies as potential addressee of a decision. In the *Publigroupe* case, the FSC upheld the lower instances' decisions that were only addressed to the parent company and to none of the five controlled subsidiaries that were actively involved in the conduct in question (judgment 139 I 72 of the FSC of 29 June 2012 – *Publigroupe*).

Right of appeal against civil liability and penalties

The judgments of the upper cantonal civil courts, the only cantonal instance for civil competition law claims, rendered in civil actions may be ultimately challenged before the FSC.

From an administrative sanctions law point of view, the Comco's decisions and, to a limited extent, also its interim procedural decisions can be challenged before the FAC. An appeal can be lodged on the following grounds: (i) wrongful application of the Cartel Act; (ii) the facts established by the Comco were incomplete or wrong; or (iii) the Comco's decision was unreasonable. Hence, the appeal before the FAC is a "full merits" appeal on both the findings of fact and law.

The addressees of the decision have the right to appeal, whereas it is still uncertain to what extent competitors, suppliers or customers have the same right. The decisive factor is whether and to what extent third parties are affected by the decision of the Comco. As outlined above, only competitors that suffer a clearly perceptible economic disadvantage as a consequence of an anti-competitive conduct shall be regarded as parties to an investigation and thus have the legal standing to appeal a decision (see section, "Key issues in relation to investigation and decision-making procedures", above).

The FAC can produce evidence such as hearing parties and witnesses and seeking expert reports. With the exception of instruction hearings with the parties and the Comco, this is

rarely done in practice, as the FAC tends to render its judgments based on the existing case file and briefs exchanged during the appeal.

Concerning effective judicial control, one must consider that the FAC has not rendered many competition-related judgments yet and numerous cases are still pending. In general, the FAC tends to exercise restraint with regard to Comco's technical discretion such as economic and effects analyses. However, effective judicial control is, *inter alia*, shown by the fact that it does not hesitate to annul Comco decisions in full. It annulled, for example, the highest fine ever in the amount of CHF 333m that was imposed on the Swiss incumbent telecoms operator Swisscom in an abuse case. This annulment decision then was upheld by the FSC (see judgment 137 II 199 of the FSC of 11 April 2011 – *Terminierung Mobilfunk*). Other such examples exist such as in the recent judgment B-552/2015 of the FAC of 14 November 2017 – *Türbeschläge* (see above). However, the appellate courts also upheld important decisions of the Comco, e.g. in particular the landmark cases Publigroupe, finally upheld by the FSC (see judgment 139 I 72 of the FSC of 29 June 2012 – *Publigroupe*), and Gaba, also upheld by the FSC (see judgment 143 II 297 of the FSC of 28 June 2016 – *Gaba*).

There is no specialised competition law (appeal) court in Switzerland. The second division of the FAC is basically in charge of all public economic law issues, of which competition law is just one part.

The judgments of the FAC may be challenged before the FSC. In proceedings before the FSC, judicial review is limited to legal claims, i.e. the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, or in the ECHR or other international treaties. The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

As outlined above, numerous Comco cases are currently still pending before the two appellate courts, in particular before the FAC. Some of these cases also raise fundamental questions, such as the questions of: whether and if so, what statutory time bars apply for Cartel Act proceedings; what conditions must vertical non-binding price recommendations meet to comply with the Cartel Act; and what requirements must be proven to find an illegal single overall infringement, i.e. a single overarching conspiracy.

Criminal sanctions

There are only limited criminal sanctions for cartel activities in Switzerland. Unlike in other states (such as the United States), the Cartel Act does not provide for imprisonment. However, there are administrative sanctions that are considered to constitute criminal sanctions in the meaning of article 6 and 7 ECHR and article 14 and 15 ICCPR (see section, "Administrative and civil sanctions" above).

Anyone who wilfully violates an amicable settlement, a final and non-appealable ruling of the competition authorities or a decision of the appellate courts, is liable for a fine not exceeding CHF 100,000 (article 54 Cartel Act). Anyone who wilfully does not comply, or does not fully comply with a ruling of the competition authorities concerning the obligation to provide information, who implements a concentration that should have been notified without filing a notification, or who violates rulings relating to concentrations of undertakings, is liable to a fine not exceeding CHF 20,000 (article 55 Cartel Act). Both of these provisions mainly aim at persons who have the power to decide whether an undertaking shall commit a breach of the Cartel Act, such as board members or the management.

If the Swiss Criminal Code prohibits the same conduct, aggrieved parties may raise a civil claim for damages within the framework of the criminal procedure or separately, based on

article 41 CO. In principle, the court in charge of the criminal proceeding also rules on civil claims, except where the damage was not sufficiently substantiated in the request or the damage calculation requires substantial efforts. In the latter case, however, the criminal court should at least render a judgment regarding the general obligation to pay damages, and refer the matter to the civil courts solely for the damage specification. The judgment of a criminal court as to the guilt and to the determination of the damage, and the provisions of the criminal law concerning criminal responsibility, are generally not binding upon a civil court, though their influence is somewhat strong.

Cross-border issues

The Cartel Act applies to all concerted practices and agreements that potentially have effects on competition within Switzerland (article 2 § 2 Cartel Act; see judgment 143 II 297 of the FSC of 28 June 2016 – *Gaba*). Therefore, agreements concluded abroad, or conduct that takes place outside Switzerland but may have effects in Switzerland, fall under Swiss jurisdiction. In May 2012, the Comco imposed a fine of CHF 156m on *Bayerische Motoren Werke AG*, the ultimate parent company of the BMW group with registered offices in Munich, Germany, for illegal restrictions of parallel trade, as the contracts with its authorised distributors in the EEA were prohibiting them from selling BMW and MINI branded cars to customers outside the EEA, i.e. also to customers in Switzerland. The Comco found that these provisions had an economic effect in Switzerland and applied the Cartel Act. The FAC as well as the FSC upheld this finding (judgment B-3332/2012 of the FAC of 13 November 2015 – *BMW* and judgment 2C_63/2016 of the FSC of 24 October 2017 – *BMW*). The FSC confirmed that the effects doctrine applies under the Cartel Act and hence that its territorial scope must be interpreted broadly. With this finding, the court confirmed its practice set forth in the *Gaba* judgment. Therefore, it is important for undertakings whose activities may produce effects in Switzerland to be fully aware of the potential implications of Swiss competition law rules for their agreements and business practices (see also the legally binding judgment B-581/2012 of the FAC of 16 September 2016 – *Nikon*).

On 1 December 2014, the Cooperation Agreement with the EU entered into force, which is the first "second generation" agreement, providing for the exchange of some information even without the consent of the undertakings concerned. The aim of the Cooperation Agreement is to strengthen the collaboration between the Comco and the European Commission. By improving access to evidence, reducing administrative overlaps and ensuring due consideration of mutual interests, the Comco and the European Commission seek to combat cross-border anti-competitive practices more effectively.

The core element of the Cooperation Agreement is the possible exchange of specific, case-related information between the Comco and the European Commission. As a major contrast to the previous legal setting, under the Cooperation Agreement the exchange of information and documents between the competition authorities shall be possible even if the concerned undertaking does not consent thereto. An important statutory exception for the exchange of information and documents without the consent of the undertakings concerned applies to information previously submitted to the competition authorities under a leniency application. Moreover, as a precondition, the competition authorities must investigate the same or related conduct in order for the exchange to be admissible, and the use of any exchanged information is restricted to such same or related conduct and, additionally, limited to the enforcement of the competition laws of the EU and Switzerland.

The Cooperation Agreement must be taken into account particularly by the authorities in the preparation of dawn raids and – also by the undertakings – in the preparation and assessment of multi-jurisdictional leniency applications, i.e. whether or not to include Switzerland.

For the purposes of implementing the Cooperation Agreement, a new article 42b § 3 has been inserted in the Cartel Act, laying down general requirements for sharing information with a foreign competition authority. Information may only be transmitted based on international agreements or with the consent of the undertakings concerned. The additional requirements mirror to a large extent those contained in the Cooperation Agreement. The new article 42b § 3 Cartel Act merely sets out that the undertakings concerned are to be consulted before the transmission of information. Whether or not the exclusion of *ex ante* legal remedies against an unlawful transmission of information is compatible with the Swiss Federal Constitution and the ECHR remained untested yet and will be for the courts to decide.

The Cooperation Agreement solely allows cooperation between the Comco and the European Commission, but not with national competition authorities of the EU Member States. The European Commission can, however, provide some information, e.g. regarding the coordination of enforcement measures, to the competition authorities of the EU Member States and the EFTA Surveillance Authority. Moreover, on an informal basis, the Comco and its Secretariat cooperate with various national antitrust authorities in Europe such as the German *Bundeskartellamt* as well as with the US antitrust authorities. Absent specific future cooperation agreements, such cooperation, however, is not allowed to go beyond the exchange of non-confidential information. The Cartel Act provides in article 42a for a specific regime with regard to investigations in the air transportation industry. Such investigations are governed by the Agreement between the European Community and the Swiss Confederation on Air Transport of 21 June 1999. Accordingly, in this sector the Comco may cooperate with the European Commission on a formal legal basis.

Investigations, decisions and sanctions issued by competition authorities abroad have no binding effect on the Comco. The FSC held that, in principle, Swiss competition law must be construed independently from the competition law of the EU; it shall, however, be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules (see judgment 137 II 199 of the FSC of 11 April 2011 – *Terminierung Mobilfunk*). In practice, however, the EU competition rules and case law have always had a significant impact on the interpretation of the substantive provisions of the Cartel Act by the Comco. In its *Altimum* judgment, the FAC even went further and held that distribution agreements compliant with European competition law rules shall also be considered lawful under Swiss competition law (judgment B-5685/2012 of the FAC of 17 December 2015 – *Altimum*). The *Altimum* case, however, is currently under appeal before the FSC. In its landmark decision 143 II 297 of 28 June 2016 – *Gaba*, the FSC held that, despite the different regulatory backgrounds, the regulatory frameworks of Swiss and EU competition law shall be considered congruent.

Developments in private enforcement of antitrust laws

In Switzerland, the third-party private enforcement level is still relatively low as regards follow-on claims as well as stand-alone claims. The most relevant reason is the difficulty in gathering evidence and the high costs related thereto. In comparison, lodging a complaint before the Comco leads to an administrative proceeding basically free of charge, in which the Comco will take care of "everything". Another factor is that, according to the prevailing doctrine, consumers are not authorised to bring claims based on the Cartel Act. However,

consumers would have legal standing to bring a claim for damages under tort law. Finally, the short period of the statute of limitations for a claim for damages is an additional reason to explain this low level. Indeed, the limitation period for a civil claim for damages or reparations expires one year after the claimant is aware of both the complete damage and the identity of the injuring party, but in any case at the latest 10 years after the restriction of competition has ended (article 60 CO). The same rules apply regarding the claim for surrender of unlawfully earned profits.

The legal standing of consumers' associations as regards private enforcement actions based on the Cartel Act remains unclear. Trade or consumer organisations possess legal standing provided they are undertakings under the Cartel Act (which means that they exercise a commercial activity) and are hindered in the process of competition. However, the legal standing to protect their members' interests remains disputed. The legal doctrine tends to recognise trade or consumer organisations' active legal standing with regard to actions for injunctions to terminate a restriction of competition, but not with regard to actions for damages incurred by their members. The new CCP recognises the active standing of associations and other organisations of national and regional importance to bring actions in their own name against violations of the personality rights of their members under article 28 CC. In principle, personality rights also include economic rights and thus, at least in theory, trade or consumer organisations could claim for the prohibition of an existing or threatened violation of personality rights (for instance, prohibition of a refusal to deal). Beyond that, it is currently not possible for a representative body to bring a collective follow-on claim in Switzerland on behalf of consumers.

Concerning the gathering of evidence, effective and practical pre-trial discovery is not available in Switzerland. Furthermore, an exchange of information between the Comco and the civil courts does not take place in general. It is therefore difficult to obtain any documents before the start of the proceedings. However, in recent judgments of the FAC, (conditional) file access at least for municipalities was made less difficult (see judgments A-6315/2014, A-6320/2014 and A-6334/2014 of the FAC of 23 August 2016 – *Zugang zu Verfahrensakten*). Third parties with full legal standing in principle also have (conditional) file access. A potential claimant might therefore be inclined to initiate an administrative proceeding first, and file a request for full legal standing. Important information may, however, qualify as business secrets and remain inaccessible.

Preliminary measures, which also focus on avoiding or terminating restrictions of competition, are generally available under Swiss law, both in the investigation by the competition authorities (see judgment 130 II 149 of the FSC of 19 December 2003 – *Sellita Watch Co SA vs. ETA SA (Vorsorgliche Massnahmen)*) and in case of civil actions (article 261 to 269 CCP). Whereas preliminary measures ordered by the competition authorities focus on the protection of effective competition, preliminary measures in civil proceedings mainly aim at safeguarding an undertaking's interests. All appropriate and reversible measures for such interim execution may be ordered, e.g. the interim obligation to contract or to grant admission to a trade fair. However, interim payments are not possible and therefore, interim awards of damages are not available in Switzerland.

An example of the difficulties of private enforcement of the Cartel Act through civil proceedings in a stand-alone case can be found in a rather new decision of the FSC (see judgment 4A_449/2012 of the FSC of 23 May 2013 – *L'Etivaz*). At the request of the plaintiff (a cheese manufacturer), the FSC confirmed that the company managing a cheese-maturing cellar with regard to the production of an AOC cheese (i.e. a cheese with a

protected designation of origin label) had abused its dominant position by preventing the plaintiff from being admitted to the cheese-maturing cellar. The said company was then forced to admit the cheese manufacturer to the cheese-maturing cellar and was compelled to pay damages. However, the damages were low, as the plaintiff could not sufficiently prove the link between the abuse of the dominant position and the suffered loss of earnings.

Reform proposals

The main reform proposals in Swiss competition law relate to controversial topics on how to fight Switzerland's status as the "Island of High Prices" in Europe, as follows:

Firstly, the parliamentary initiative "*Excessive Import Prices. End Compulsory Procurement on the Domestic Market*" (14.449) of Hans Altherr of 25 September 2014 was filed and admitted. Secondly, the federal popular initiative "*Stop to the Swiss Island of High Prices – Pro Fair Import Prices (Fair-Price Initiative)*" was filed with (according to the initiative committee) about 108,000 signatures. Provided that there were indeed sufficient valid signatures, the Swiss government will submit the initiative together with its statement to the parliament for debate. Pursuant to the rules applicable to popular initiatives, it may, however, take up to more than three years until Swiss voters can indeed decide on the initiative. Both legislative attempts, the parliamentary and the popular initiative, aim to introduce new regulation with regard to abuses of undertakings with "relative market power" (a similar concept as already known in the national German competition law). According to the initiatives, subject to legitimate business reasons, undertakings shall particularly abuse their relative market power if they either refuse to contract with Swiss domestic customers willing to purchase products abroad to the corresponding foreign conditions or charge Swiss prices anyhow.

Thirdly, the motion "*For a More Effective Cassis de Dijon Principle*" (15.3631) of Hans Hess of 18 June 2015 aims to ensure that manufacturers expressly permit in their distribution agreements with Swiss domestic distribution partners, *inter alia,* to carry out installation, maintenance or guarantee work for their products, irrespective of whether these products have been purchased directly in the EEA. The parliament has approved this motion. In the following, the Secretariat of the Comco conducted a quite extensive market enquiry, in the course of which no real evidence for the existence of the problems asserted by the author of the motion has been found. Therefore, the Swiss government now requested the parliament to formally consider the motion as redundant.

Finally, a more sector-specific reform proposal concerns online travel agencies. In October 2015, the Comco prohibited several booking platforms (*inter alia*, booking.com) the use of "wide" hotel rate parity clauses in their agreement with hotels. According to these clauses, hotels were not allowed to offer lower prices or larger quantities of rooms on, *inter alia*, other booking platforms. However, due to a lack of significant empirical value, the Comco, decided not to prohibit "narrow" hotel rate parity clauses which solely prevented hotels from offering lower rates on their own websites as compared to the booking platforms. Instead, the Comco wanted to monitor the effects of such clauses on the markets. Notwithstanding the above, the motion "*Prohibit Slave-Type Contract from Online Booking Platforms against Hotels*" (16.3902) of Pirmin Bischof of 30 September 2016 aims at prohibiting any kinds of parity clauses in agreements between online booking platforms and hotels, i.e., also "narrow" hotel rate parity clauses. The Swiss parliament adopted the motion with a vast majority. It is now up to the Swiss government to prepare a legislative proposal.

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