Dominance
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Getting The Deal Through

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Lexology Getting The Deal Through is delighted to publish the fifteenth edition of *Dominance*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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Switzerland

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GENERAL FRAMEWORK

Legal framework

1 What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The Federal Act on Cartels and other Restraints of Competition of 6 October 1995 (the Cartel Act) applies to unilateral practices of market dominant undertakings. According to article 7 of the Cartel Act, market dominant undertakings act unlawfully if they abuse such position and thus hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. In addition, the Federal Price Surveillance Act of 20 December 1985, inter alia, is also relevant for market dominant undertakings.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from European Union (EU) competition law; it shall, however, be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules (Federal Supreme Court, Law and Policy on Competition (LPC) LPC 2011/3 – *Terminierungspreise im Mobilfunk*, p. 440).

This holds particularly true for article 7 of the Cartel Act, which was shaped on the basis of article 102 of the Treaty on the Functioning of the European Union (ex-article 82 of the EC Treaty). Therefore, according to the Federal Administrative Court, it is not only the responsibility of Swiss competition authorities and courts, but also of undertakings, to pay due attention to European competition law by conducting a reasonable comparative legal analysis (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom* ADSL, p. 561). However, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected, particularly regarding the sanctioning of violations of article 7 of the Cartel Act.

Definition of dominance

2 How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 4 paragraph 2 of the Cartel Act defines a dominant undertaking as 'one or more undertakings that are able, as suppliers or consumers, to behave to a significant extent independently of the other participants (competitors, suppliers or consumers) in a specific market'. Dominance is characterised by freedom of action of the concerned undertaking. Dominance could be either individual or collective.

The Cartel Act does not contain any assessment criteria. In practice, the main elements that are taken into account when assessing dominance are market shares, the existence of barriers to entry or expansion and potential competition, the market structure as well as the countervailing buyer power. These elements constitute mere indications and are not, as such, sufficient to establish a dominant position, which should be assessed in the light of all relevant circumstances relating to a particular case.

In specific circumstances, the concept of dominance could also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, for example, Comco, LPC 2005/1 – *CoopForte*, p. 160; Comco, LPC 2008/4 – *Tarifverträge Zusatzversicherung Kanton Luzern*, p. 572).

Purpose of the legislation

3 Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

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. The objective is not limited to economic aspects; general public interest considerations are taken into account as well.

However, the law grants the Competition Commission (Comco), which is the authority primarily in charge of pursuing violations of Swiss competition law (including abuses of dominant positions), solely with the power to assess economic consequences of restrictions of competition, unilateral practices and concentrations between undertakings. It is up to the Swiss Federal Council (the Swiss government) to assess the balance with general public interests. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Comco may be authorised by the Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons (article 8 Cartel Act). However, to date, this has never happened.

Sector-specific dominance rules

4 Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is sector-specific regulation of dominance but, however, in constant interplay with the Cartel Act when it comes to the assessment of a dominant position. Indeed, sector-specific regulation such as telecommunications or energy law does not preclude the application of the Cartel Act, but it should be taken into account in the latter's application (Federal Supreme Court, LPC 2011/3 – *Terminierungspreise im Mobilfunk*, p. 440). Only sector-specific provisions that aim at effectively excluding competition (but not other policy regulations) might lead to the non-applicability of the Cartel Act (Federal Supreme Court, LPC 2015/1 – *Hors-Liste Medikamente*, p. 131).

The Federal Act on Telecommunication of 30 April 1997 lays down specific ex ante obligations for dominant telecommunication providers. The latter must provide access to their facilities and their services to other providers in a transparent and non-discriminatory manner at

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cost-oriented prices. They may bundle their services, provided they also offer the services included in the bundle individually.

The Federal Act on Radio and Television of 24 March 2006 provides for special measures in the area of radio and television in cases where an undertaking active in the radio and television market has jeopardised the diversity of opinion and offerings because of an abuse of its dominant position.

The Federal Act on Electricity Supply of 23 March 2007 lays down specific regulation for historic monopoly electricity suppliers in order to ensure access to other providers.

The Federal Postal Act contains similar provisions.

Exemptions from the dominance rules

5 To whom do the dominance rules apply? Are any entities exempt?

The Cartel Act and, therefore, the provisions on dominance apply to any undertaking (private or public entities) as far as they exercise market power (article 2 paragraph 1 of the Cartel Act) and that are commercially active irrespective of their legal or organisational form. The limitation that the Cartel Act only applies to undertakings that 'exercise market power' should, however, not be overestimated. In terms of article 7 of the Cartel Act, finally, it is decisive whether an undertaking has a dominant position in a relevant market, and this term is defined in article 4, paragraph 2 of the Cartel Act (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561; with regard to the authorisation of an abusive conduct for compelling public interest reasons, see question 3).

Transition from non-dominant to dominant

6 Does the legislation only provide for the behaviour of firms that are already dominant?

With regard to abusive conduct, the Cartel Act only applies to undertakings that hold a dominant position on a relevant market. Unlike, for example, the Sherman Act, the Cartel Act does not cover the attempt to monopolise or acquire a dominant position. Indirectly, however, the merger control provisions of the Cartel Act provide for an ex ante control of concentrations that create or strengthen a dominant position liable to eliminate effective competition.

It is lawful for an undertaking to hold a dominant position. Article 7 of the Cartel Act only bans abusive conduct of dominant undertakings as exemplified in article 7, paragraph 2 of the Cartel Act.

The Cartel Act does not contain any behavioural provision specifically dealing with abuses in relation to the concept of economic dependence. However, the concept of dominance could, under specific circumstances, also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see question 2 and 'Update and trends').

Furthermore, the Federal Act on Unfair Competition of 19 December 1986 applies to certain types of conduct by non-dominant undertakings. One example is the systematic undercutting of prices, which is considered unlawful and may result, upon request, in criminal prosecution.

Finally, the Federal Price Surveillance Act, which empowers the Price Supervisor to control excessive prices, particularly in regulated markets, also applies to undertakings with market power, in other words, not only to undertakings with a dominant position on a specific market.

Collective dominance

7 Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

As mentioned in question 2, dominance is defined as a position held by 'one or more undertakings'. Therefore, collective dominance is also covered by the law. However, the Cartel Act does not provide for any specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Comco.

The first case that dealt with collective dominance was the merger between Revisuisse Price Waterhouse and STG-Coopers & Lybrand (Comco, RPW/DPC 1998/2 – *Revisuisse Price Waterhouse/STG-Coopers & Lybrand*, p. 214). In the *Mobilfunkmarkt* case (Comco, LPC 2002/1 – *Mobilfunkmarkt*, p. 97), the Comco examined the existence of collective dominance in parallel to the existence of an anticompetitive agreement. In doing so, the Comco went through a static analysis, and examined the market structure, followed by the assessment of the market conduct of the undertakings. According to the Secretariat of the Comco (with regard to the role of the Secretariat of the Comco, see question 26), the criteria for the finding of collective dominance are similar to that of collusion (horizontal anticompetitive agreements; see the final report of the Secretariat of the Comco in a consumer credit matter, LPC 2007/3 – *Konsumkredit*, p. 364).

In a case with regard to credit card acquiring (Comco, LPC 2003/1 – *Kreditkarten-Akzeptanzgeschäft*, p. 106), the Comco affirmed collective dominance of acquirers of credit cards, which abused their collective dominant position. The Comco listed the following criteria, which shall be applicable to an assessment of potential collective dominance: market concentration; market shares; market transparency and stability; entry barriers; symmetry of interests, products and costs between undertakings; countervailing buyer power; and price elasticity of demand.

Another in-depth analysis with regard to collective dominance was carried out in the pork-meat market (Comco, LPC 2004/3 – *Markt für Schlachtschweine*, p. 674). The assessment of the Comco was completed with an empirical economic analysis of price margin development in the industry, which allowed the Comco to reject the existence of collective dominance.

Also, in the case of the planned concentration between France Télécom SA and Orange Communications SA, the Comco used the above-mentioned criteria (Comco, LPC 2010/3 – *France Télécom SA/Sunrise Communications AG*, p. 499). In this case, the Comco prohibited the concentration between these two companies because in its assessment, the new company would, together with Swisscom, have assumed a collective dominant position in the mobile telecommunications market and in the absence of new competitors entering the market, the companies would have had no incentive to challenge the position of competitors by means of price reductions.

In a more recent case, the Comco has investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. The Comco finally considered that there were not enough elements to retain that these undertakings individually or jointly hold a dominant position. However, in its ruling dated 19 October 2015, the Comco prohibited the three operators of booking platforms to extensively restrict hotels in their supply policy by imposing comprehensive best price rules in the sense of illegal anticompetitive agreements (Comco, LPC 2016/1 – *Online-Buchungsplattformen für Hotels*, p. 67).

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Dominant purchasers

8 Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The dominance provisions apply also to purchasers. The assessment of dominance goes through the traditional criteria. However, under specific circumstances, the concept of economic dependence could apply to strong purchasers even though they do not hold a dominant position in the classical sense (see question 6).

Market definition and share-based dominance thresholds

9 How are relevant product and geographic markets defined? Are there market-share at which a company will be presumed to be dominant or not dominant?

Article 11 of the Merger Control Ordinance of 17 June 1996 defines the relevant product market as comprising all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. It also defines the relevant geographical market as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases. In principle, the relevant test for market definition is the substitutability of products and services and, in particular, the cross-price elasticity and small but significant and non-transitory increase in price (SSNIP) test (see Federal Supreme Court in LPC 2013/1 – *Publigroupe*, p. 114).

The Comco also examines whether a market presents the characteristics of the 'Cellophane fallacy' (ie, whether a market is erroneously defined too broadly due to the presence of already monopolistic prices; see, for instance, Secretariat of the Comco, LPC 2005/3 – *Reorganisation des Biomilchmarktes*, p. 458; Comco, LPC 2006/2 – *Emmi AG/Aargauer Zentralmolkerei AG AZM*, p. 261; Comco, LPC 2015/1 – *Valora Holding AG/LS Distribution Suisse SA*, p. 105).

Neither the law nor the case law refers to any threshold above which an undertaking must be considered to be dominant. As a rule of thumb, market shares below 30 per cent should not be sufficient for an undertaking to hold a dominant position. The 'critical' threshold, in general, is set at a market share of above 50 per cent, where an undertaking could hold a dominant position. For example, a market share of 50 per cent was deemed sufficient by the Secretariat of the Comco in a case with regard to billposting in the city of Lucerne (Secretariat of the Comco, LPC 2003/1 – *Plakatierung in der Stadt Luzern*, p. 75). Market share thresholds, however, constitute mere indications and are, standalone, never sufficient to prove dominance. In practice, the Secretariat of the Comco still maintains an in-depth analysis of the market characteristics even though the market definition reveals a market share of 100 per cent (Secretariat of the Comco, LPC 2008/2 – *Terminierungsgebühren beim SMS-Versand via Large Account*, p. 242). In particular, when barriers to entry are low and potential competition is strong, high market shares do not, per se, justify the finding of a dominant position.

The Comco has denied dominance, for example, in the case of a market share of 69 per cent, where the company had lost market shares owing to the entry of new competitors (Comco, LPC 2002/1 – *Mobilfunkmarkt*, p. 97). In another case, a market share of 50 to 70 per cent was not deemed sufficient by the Secretariat of the Comco to find dominance, inter alia, because of the strong competition from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (Secretariat of the Comco, LPC 2003/2 – *Vetrieb Veterinär-Nahtmaterial Johnson & Johnson*, p. 240).

On the other hand, public hospitals were found to be dominant with a market share of 37 to 48 per cent. In this case, according to the Comco, the absence of potential competition and the existence of particular dependency relationships between public hospitals and insurers in the private insurance field justified the finding of dominance (Comco, LPC 2008/4 – *Zusatzversicherung Kanton Luzern*, p. 544).

ABUSE OF DOMINANCE

Definition of abuse of dominance

10 How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

In general, dominant undertakings are considered to act unlawfully 'if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners' (article 7, paragraph 1 of the Cartel Act). Article 7, paragraph 2 of the Cartel Act lists examples of conduct that may be considered as abusive (see question 6).

The Cartel Act contains no per se prohibitions. The abusive character of a conduct is to be determined on a case-by-case basis, taking into account the specific market conditions. In practice, the Comco and the appellate courts examine the effects of a specific conduct on the market, particularly in cases where the conduct of a dominant undertaking falls under the categories covered by article 7, paragraph 2 of the Cartel Act. The former Competition Appeal Commission recognised that it is the anticompetitive effect of a practice that justifies its prohibition, which position is also confirmed by the Federal Supreme Court's requirement that examples of article 7, paragraph 2 of the Cartel Act should be applied in conjunction with its paragraph 1 (Federal Supreme Court, LPC 2013/1 – *Publigroupe*, p. 114).

Particularly when it comes to conduct solely covered by the umbrella clause of article 7, paragraph 1 of the Cartel Act, recent decisions show a trend towards an effects-based approach. Indeed, for example, in the Swisscom decision, the Federal Administrative Court imposed a substantial fine on Swisscom for a price squeeze in the broadband internet sector (ADSL), which falls solely under the general provision of article 7, paragraph 1 of the Cartel Act (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561).

Exploitative and exclusionary practices

11 Does the concept of abuse cover both exploitative and exclusionary practices?

Article 7 of the Cartel Act covers both exploitative and exclusionary practices. Exclusionary practices target mainly competitors, while exploitative practices aim at harming commercial partners or consumers. However, the distinction between exploitative and exclusionary practices is rather academic.

Link between dominance and abuse

12 What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In practice, the Comco requires a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal doctrine accepts that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (Comco, LPC 2006/4 – *Valet Parking*, p. 625). In the *Valet Parking* case, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of

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a dominant position, even though the behaviour had a negative effect on the off-airport parking market (ie, outside the airport).

On the other hand, the causal link between dominance and a possible abusive behaviour, in itself, is not sufficient to effectively establish an abusive conduct. The behaviour itself should comprise separate elements that qualify it as abusive. In the context of unfair (or excessive) prices where the dominance itself is the cause of the dominant undertaking's power to set monopolistic prices, this close link between dominance and price setting is not sufficient to prove that the price was abusive. In addition, it should be demonstrated that the dominant undertaking was indeed able to coerce clients to accept monopolistic prices (Federal Supreme Court, LPC 2011/3 – *Terminierungspreise im Mobilfunk*, p. 440). Yet, there is considerable legal uncertainty as to what kind of coercion the dominant undertaking must have been able to impose.

Defences

13 | What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Although the law does not provide for defences, the case law recognises the possibility to successfully invoke defence arguments such as legitimate business reasons. Ultimately, the interests of the individual undertaking have to be balanced with the interests in the 'institutional' competition on the market (Federal Supreme Court, LPC 2013/1 – *Publigroupe*, p 114). In any case, however, it is crucial that the specific conduct is proportional, namely, that it does not go beyond what is required to achieve the legitimate business reasons' goal.

The former Competition Appeal Commission has already confirmed the possibility of invoking legitimate business reasons, which might be retained if the company's conduct is justified to protect its objective commercial interests, and if the conduct under investigation is not substantially different from what would have prevailed in a competitive market (LPC 2002/4 – *Entreprises Electriques Fribourgeoises*, p. 276). The Competition Appeal Commission mentioned legitimate business reasons, including the necessity to ensure the quality of products, efficiency or technical reasons (eg, lack of capacity).

In the *TicketCorner* case (Comco, LPC 2004/3 – *TicketCorner*, p. 778), the Comco discussed efficiency gains in the administration of ticket sales, in the improvement of seller agents' training, and the prohibition of free riding. However, the exclusivity agreements between the agent seller (TicketCorner) and the event organisers were not considered necessary to achieve such efficiency gains (see also Federal Administrative Court, LPC 2016/4 – *Vertrieb von Tickets im Hallenstadion Zürich*, p. 1085).

The existence of objective justifications of a technical nature has been assessed in the decision of the Comco dated 19 December 2016 in the *Kommerzialisierung von Medikamenteninformationen* case, but finally denied.

SPECIFIC FORMS OF ABUSE

To what extent conduct is considered abusive

14 | Rebate schemes

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade by a dominant undertaking is unlawful.

Fidelity and target rebates are, under certain circumstances, considered as an abuse of dominance. In principle, quantitative rebates based on cost efficiencies are considered to be legitimate. Rebates based on quality criteria are not necessarily considered unlawful, in particular, if such rebates are justified by true benefits, and that customers are not hindered in their choice of another competitor.

Rebate and pricing schemes that discriminate against some customers may be considered also as abusive price discrimination (see, for example, Comco, LPC 2008/3 – *Publikation von Arzneimittelinformationen*, p. 385, where only bigger customers above a specific threshold benefitted from special agreements). In the *SDA* case, the Comco fined the leading Swiss news agency with an amount of about 1.9 million Swiss francs for offering certain customers exclusivity rebates, namely, discounts of about 10 to 20 per cent if these customers agreed to purchase several specific media services from SDA as a package (Comco, LPC 2014/4 – *Preispolitik und andere Verhaltensweisen der SDA*, p. 670). In general, rebates should not aim at impeding the freedom of customers to change the supplier (in particular, loyalty rebates), and quantity rebates should be economically justified, for example, owing to existing economies of scale.

In a recent decision dated 18 December 2017, the Comco decided that Swiss Post abused its dominant position on markets for letter post (commercial customers), in particular by committing price discrimination, and imposed a fine of about 22.6 million Swiss francs. The Comco considered that by offering different rebates and specific conditions to its commercial customers having similar mailing features, that Swiss Post treated some of its commercial customers better than others and thereby committed discrimination. The Comco also considered that because the conditions of a monthly additional rebate provided to customers that exceed an agreed threshold (CAPRI system), the rebate scheme was particularly difficult to understand and communicated individually to the customers concerned; this had, in the view of the Comco, the consequence that a comparison with offers from other competitors was impossible and that Swiss Post thereby foreclosed competitors.

15 | Tying and bundling

The Cartel Act considers as abusive any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services (article 7, paragraph 2(f)). The Comco has investigated tying practices on several occasions, often denying the finding of an abuse, however. The Comco considers that the tying and bundling of two products have negative effects and, therefore, are abusive if:

- the undertaking holds a dominant position on one of the markets;
- the tying and the tied products are distinct products;
- the dominant undertaking makes the acquisition of the second product conditional upon the acquisition of the first product;
- the tying or bundling have anticompetitive effects on the tied (second) market; and
- the tying is not justified for legitimate business reasons (Comco, LPC 2011/1 – *SIX/Terminals mit Dynamic Currency Conversion (DCC)*, p. 96).

In a decision dated 19 December 2016 (*Kommerzialisierung von Medikamenteninformationen*), the Comco fined Galenica AG and its branch HCI Solution AG, which offers master data for the Swiss healthcare market, in the amount of about 4.5 million Swiss francs for offering pharmaceutical companies the implementation of their medical information in its database provided that they subscribe to additional services. The Comco also reproached Galenica AG and HCI Solutions AG regarding the fact that from 2012, they inserted in their agreements provisions that were proper to obstruct the use of other databases. The Comco considered that this practice might lead to a market foreclosure vis-à-vis other suppliers of such services. This decision is currently pending before the Federal Administrative Court.

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In October 2018, the Secretariat of the Comco concluded a preliminary investigation against AMAG, the Swiss general importer of vehicles of the Volkswagen group brands. The preliminary investigation was triggered by complaints from various dealers, which asserted that AMAG was attempting to drive trading partners out of the market in order to strengthen its own position in the sale of new vehicles and the corresponding aftersales services. Regarding the markets for the distribution of new vehicles, the Secretariat came to the conclusion that AMAG does likely not hold a dominant market position. With regard to the aftersales services markets and the distribution of spare parts, the Secretariat preliminarily affirmed a dominant position of AMAG on these markets. The Secretariat noted that AMAG, through its discount systems, encouraged customers to purchase spare parts from AMAG in all product groups, which might qualify as an unlawful tying practice. Yet, the Comco refrained from opening a formal investigation since AMAG (inter alia) undertook to adapt its discount systems.

16 | Exclusive dealing

Exclusive dealing practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

On 24 November 2016, the Federal Administrative Court annulled the Comco decision to close the investigation against the ticketing and live entertainment provider TicketCorner AG and the operator of the event location Hallenstadion in Zurich (Aktiengesellschaft Hallenstadion (AGH)). The Federal Administrative Court found (likely) abuses of the dominant positions of TicketCorner and AGH. It also held that the obligation for event organisers to sell at least 50 per cent (resulting de facto in 100 per cent) of all tickets for events in the Hallenstadion via TicketCorner, or the agreement between TicketCorner and AGH in that regard respectively, constitute illegal anticompetitive agreements. In its decision, the Federal Administrative Court actually handed down the matter to the Comco because of elements to be clarified and because of the fact that the decision on a sanction falls within the competence of the Comco. However, the matter is pending before the Federal Supreme Court (Federal Administrative Court, LPC 2016/4 – *Vertrieb von Tickets im Hallenstadion*, p. 1085).

17 | Predatory pricing

The law considers as unlawful any undercutting of prices or other conditions directed against a specific competitor (article 7, paragraph 2(d) of the Cartel Act). The Comco has investigated several cases of alleged predatory pricing, denying predation, however. There is no presumption that prices below the undertaking's own total costs are predatory; the practice is covered by the undercutting provision only when the undercutting is part of a strategy to exclude competitors (Comco, LPC 2004/4 – *Cornèr Banca SA/Telekurs AG*, p. 1002). In principle, however, the Comco may infer that prices under average variable cost are directed against competitors.

In a case regarding the TV and radio market in St Gall (Secretariat of the Comco, LPC 2002/3 – *Radio- und TV-Markt St Gallen*, p. 431), the Secretariat of the Comco stated in its final report of the preliminary investigation four conditions that must be fulfilled to find an abuse of dominance in the form of predatory pricing: the undercutting must be systematic; it should be directed towards a specific, actual or potential, weak competitor; the undercutting should not allow the company to maximise its profits in the short term; and the company should be able to raise the prices again.

The Comco considers the 'recoupment' of lost profits as a condition for finding an unlawful predatory pricing strategy (see, for example, Comco, LPC 2004/4 – *Cornèr Banca SA/Telekurs AG*, p. 1002).

18 | Price or margin squeezes

Price or margin squeezes may be considered as abuses of a dominant position. The Comco defines price squeeze as a situation where a vertically integrated undertaking sharply lowers retail prices in comparison to its wholesale prices, so that comparably efficient competitors would not be able to compete and make profits in the retail market.

The leading case with regard to price squeezing concerns the Swiss telecommunications market. The Comco fined Swisscom, the incumbent Swiss telecommunications operator, in the amount of about 220 million Swiss francs for a price squeeze in the ADSL market (Comco, LPC 2010/1 – *Preispolitik Swisscom ADSL*, p. 116). The Federal Administrative Court upheld Comco's finding but reduced the fine to about 186 million Swiss francs (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561). The Comco based its analysis on the profitability of activities of the vertically integrated company and the retail margins of the Swisscom subsidiary active in the high-speed internet sector. In addition, the Comco focused its analysis on the retail margins of a reasonably efficient competitor (the imputation test). The Comco concluded that the wholesale prices applied by Swisscom did not allow its competitors to obtain sufficient margins to compete in the market for high-speed internet. The abusive and anticompetitive effect was also corroborated by Swisscom's profits in the wholesale sector and the losses incurred by its subsidiary in the retail market for ADSL services.

Recently, the Comco fined Swisscom in the amount of about 7.9 million Swiss francs for a price squeeze in the wide area network sector. Indeed, the Swiss Post issued a tender process for services with regard to the networking of its offices in 2008. Swisscom offered a price that was 30 per cent lower than its competitor's price, taking advantage of the fact that, in order to provide its facilities, it has to acquire prior facilities from Swisscom on a wholesale level. Swisscom fixed the price for the prior facilities so high that its competitors were unable to compete with their downstream services. By the same token, the Comco found that Swisscom imposed excessive prices (Comco, LPC 2016/1 – *Swisscom WAN-Anbindung*, p. 128).

19 | Refusals to deal and denied access to essential facilities

Article 7 paragraph 2(a) of the Cartel Act considers as unlawful any refusal to deal (eg, refusal to supply or to purchase goods), which is likely to foreclose competition. In the practice of the Comco, four conditions must be fulfilled to qualify a refusal to deal as abusive: first, the dominant undertaking must refuse to supply a product; second, this product has to constitute an input objectively necessary to compete in a neighbouring (upstream or downstream) market; third, the refusal has a foreclosure effect; and fourth, the refusal cannot be justified for legitimate business reasons (Comco, LPC 2011/1 – *SIX/Terminals mit Dynamic Currency Conversion (DCC)*, p. 96).

Watt/Migros was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The refusal to transport electricity was considered as an abuse of a dominant position (Comco, LPC 2001/2 – *Watt/Migros-EEF*, p. 255). The decision of the Comco confirmed the application of the Cartel Act to regulated industries; it was upheld by the former Competition Appeal Commission and in the last instance by the Federal Supreme Court.

Another leading case on refusal to deal concerned the subsidiary of Swatch AG, which manufactures raw movements for mechanical watches (Comco, LPC 2005/1 – *ETA SA Manufacture Horlogère Suisse*, p. 128). ETA notified its customers that it would phase out (ie, gradually reduce) the supply of raw movements (movement blanks) for mechanical watches, and that it would supply only already assembled

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movements in the future. The reduction and interruption of the supplies of an input was considered as an abuse of a dominant position, in particular because ETA intended to enter the market itself. The investigation was closed following commitments offered by ETA to increase the quantity supplied to its customers and to prolong the interim supply period by three years. The Comco was also investigating the decision of Swatch to cease to supply third parties with mechanical watch movements and assortments (Comco, LPC 2014/1 – *Swatch Group Lieferstopp*, p. 215). In the course of this investigation, the Comco issued interim measures to ensure the supply of third parties with movements and assortments during the investigation (LPC 2011/3 – *Swatch Group Lieferstopp*, p. 400). These interim measures were confirmed on appeal (Federal Administrative Court, LPC 2012/1 – *Swatch Group Lieferstopp*, pp. 158, 162).

In August 2018, the Secretariat of the Comco concluded a preliminary investigation against Swatch, VMH, Rolex, Richemont, Audemars Piguet and Breitling, which related to watches as well. The preliminary investigation was triggered by the fact that aftersales services for watches could not be provided by independent watchmakers, since the manufacturers refused to supply independent watchmakers with spare parts. The purpose of the preliminary investigation was to assess whether that refusal to supply qualified as an abuse of dominance. The Secretariat did not rule out the possibility that the watch manufacturers could be qualified as dominant and the aftersales services systems as abusive. However, the Secretariat was of the opinion that the aftersales services systems could likely be objectively justified at least with regard to those manufacturers that do not link watch sales to the aftersales services systems. In that regard, the Secretariat considered the aftersales service systems to be purely qualitative selective distribution systems that do not lead to significant restrictions of competition. When assessing the matter, the Secretariat also referred to the CEAHR decision of the General Court of the EU (T-712/14).

The Comco fined SIX Group 7 million Swiss francs for refusing to supply interface information to other competitors and therefore rendering their product incompatible with SIX terminals (LPC 2011/1 – *SIX/ Terminals mit Dynamic Currency Conversion (DCC)*, p. 96).

In May 2016, the Comco fined Swisscom about 72 million Swiss francs for refusing to supply some competitors with broadcasts of live sports for their platforms entirely and for having only granted limited access to a reduced range of sports content to others (Comco, LPC 2016/4 – *Sport im Pay-TV*, p. 920). The case is currently on appeal before the Federal Administrative Court.

Civil courts are likely to find a refusal to deal abuse more easily. In a judgment of 23 May 2013, the Federal Supreme Court confirmed that a company managing a cheese-maturing cellar with regard to the production of an AOC cheese (ie, a cheese with a protected designation of origin label) had abused its dominant position by preventing the plaintiff, a cheese manufacturer, from being admitted to the cheese-maturing cellar (Federal Supreme Court, LPC 2015/4 – *Etivaz*, p. 896). In addition to ordering access to the maturing cellar, the Federal Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing the cheese-maturing cellar.

The essential facility doctrine is partly recognised in practice, in that it justifies the finding of a dominant position and the duty to deal. However, the existing case law does not specify under which conditions such access must be granted and a refusal to deal may be considered as abusive without fulfilling the traditional conditions of the essential facility doctrine.

20 | Predatory product design or a failure to disclose new technology

Such practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

21 | Price discrimination

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade, in particular also through specific rebate and pricing schemes, by a dominant undertaking is unlawful (see also question 14).

22 | Exploitative prices or terms of supply

The imposition of unfair prices or other unfair conditions of trade may be considered as unlawful (article 7, paragraph 2(c) of the Cartel Act). Unfair prices are, in general, considered an exploitative practice and, therefore, as an abuse of dominance. In principle, the 'unfair' criterion of a price is to be construed in relation to the market value of the services offered and to the ability of the dominant undertaking to behave independently in the price setting; customers should lack alternative solutions, and hence the ability of the dominant company to exert a certain coercion on the customers (Federal Supreme Court, LPC 2011/3 – *Terminierungspreise im Mobilfunk*, p. 440).

The Comco imposed a record fine of 333 million Swiss francs on Swisscom, the incumbent Swiss telecommunications operator, for imposing unfair prices in the mobile call termination market (Comco, LPC 2007/2 – *Terminierung Mobilfunk*, p. 241). The decision was quashed by the Federal Administrative Court in February 2010 (Federal Administrative Court, LPC 2010/2 – *Terminierungspreise im Mobilfunk – Sanktion*, p. 242). The annulment was confirmed by the Federal Supreme Court in April 2011, which held that, owing to the regulatory framework pertaining to telecommunications, Swisscom could not exert coercion against the counterparties, and if this were the case, the counterparties (ie, competitors) would have had the possibility to file a specific complaint to the Swiss Federal Communications Commission ComCom (Federal Supreme Court, LPC 2011/3 – *Terminierungspreise im Mobilfunk – Sanktion*, p. 440). On the basis of the above-mentioned judgment of the Federal Supreme Court, the Comco decided to close the investigation it had opened on 15 October 2002 against the three competing mobile network operators Swisscom, Sunrise and Orange for an abuse of a (collective) dominant position (Comco, LPC 2011/4 – *Terminierung Mobilfunk*, p. 522).

In the case against Swisscom for a price squeeze in the wide area network sector, the Comco also fined Swisscom for imposing unfair prices with regard to its WAN connection wholesale offerings for competitors (Comco, LPC 2016/1 – *Swisscom WAN-Anbindung*, p. 128).

In March 2016, the Competition Commission opened the Supermédia investigation into Naxoo AG, the cable network operator in the city of Geneva. The preliminary investigation had revealed indications that Naxoo held a dominant position in relation to the cable network in the city of Geneva and that it had abused its position. The investigation established that Naxoo restricted or prevented third parties, such as suppliers of satellite-based services, from gaining access to the network for properties, even though access is necessary in order to transmit third parties' services. Further, in the Comco's opinion, by imposing unfair conditions of trade to the building owners when connecting the building to the cable network, Naxoo reserved itself the exclusive use of the building's internal network and building owners have thus been prevented from installing other systems on their internal network and more generally from freely disposing of the internal network. Finally, the Comco considered that Naxoo's conduct prevented customers from

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accessing other additional or competing telecommunication services. The Comco fined Naxoo in the amount of about 3.6 million Swiss francs.

23 | Abuse of administrative or government process

Such practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

24 | Mergers and acquisitions as exclusionary practices

The Cartel Act does not deal with structural abuses specifically. Article 7, paragraph 2 of the Cartel Act sets forth merely examples, and its general clause in paragraph 1 covers structural abuses if the conduct of dominant undertakings enables them to exclude rivals or exploit customers or consumers. As mentioned above (see question 9), the Cartel Act contains specific provisions on merger control, and, therefore, mergers that exceed the specific turnover thresholds are subject to ex ante control. However, notwithstanding these thresholds, a merger control notification is mandatory if one of the undertakings concerned has been held to be dominant in a market in Switzerland in a final and binding decision under the Cartel Act, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof (article 9, paragraph 4 of the Cartel Act; see, in particular, Federal Administrative Court, LPC 2016/1 – *The Swatch Group AG*, p. 473).

The concept of structural abuse is relevant in particular with regard to the acquisition of minority shareholdings and to mergers of a dominant undertaking not reaching the thresholds or not being held dominant respectively for ex ante notification.

The Comco and its Secretariat have investigated or discussed the acquisition of a minority shareholding in a few cases. In a preliminary investigation concerning Publigroupe, a group of companies active in the fields of communications, press, directories and information technology, the Secretariat of the Comco has looked into Publigroupe's minority shareholdings in newspaper publishing companies and confirmed the application of article 7 of the Cartel Act to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking. It defined a structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage'. However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse. In the specific case, the Secretariat of the Comco did not find an abusive behaviour of Publigroupe and therefore has closed the preliminary investigation without further consequences (Secretariat of the Comco, LPC 2006/3 – *Minderheitsbeteiligungen der Publigroupe SA (und ihrer Tochtergesellschaften) an Zeitungsverlagen*, p. 449).

25 | Other abuses

Other possible abuses of dominant undertakings (eg, strategic capacity construction, underinvestment in capacity, predatory advertising or excessive product differentiation) must be assessed on a case-by-case basis, may be covered by the umbrella clause of article 7, paragraph 1 of the Cartel Act and thus, according to the case law of the Federal Administrative Court, also be sanctioned (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561).

ENFORCEMENT PROCEEDINGS

Enforcement authorities

26 | Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Comco, consisting of 12 members, takes decisions, remedial actions and sanctions against undertakings abusing their dominant positions. Specific chambers of the Comco are empowered to render partial decisions on the closure of investigations, the approval of amicable settlements including other measures, in particular fines and costs, for some of the undertakings involved in an investigation while it is continued for the other undertakings. The Secretariat of the Comco is empowered to conduct investigations and, together with a member of the Comco, to issue any necessary procedural ruling. The Secretariat submits draft decisions to the Comco and implements the latter's decisions. By the end of 2017, the total headcount of the Secretariat amounted to 72 employees (60.9 full-time equivalent).

The Secretariat has broad investigative powers, in particular, it may order searches (ie, dawn raids) and seize documents and electronic data, or hear third parties as witnesses, and require the parties to an investigation to give evidence. Upon specific request for information, the undertakings under investigation are obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents, however, in due consideration of the nemo tenetur principle, namely the right against self-incrimination (see Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561).

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 Secretariat further published a note on amicable settlements in February 2018, which contains, inter alia, a draft wording for amicable settlements. Further notes exist, for example, with regard to the treatment of business secrets and the administration of deadlines in investigations.

Sanctions and remedies

27 | What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

A dominant company condemned for unlawful (abusive) conduct risks fines up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful behaviour, and is calculated also by taking into account the likely profit that resulted from the unlawful behaviour. The Cartel Act Sanctions Ordinance lays down the method of calculation of the fines in detail.

The largest fine ever issued for an abuse of a dominant position, 333 million Swiss francs imposed on Swisscom, the incumbent Swiss telecommunications operator, was cancelled by the appellate courts (see Federal Supreme Court, LPC 2011/3 – *Terminierungspreise im Mobilfunk – Sanktion*, p. 440; see question 22). Swisscom received another fine of 220 million Swiss francs in 2009 for an unlawful price squeeze in the ADSL market (Comco, LPC 2010/1 – *Preispolitik Swisscom ADSL*, p. 116). The Federal Administrative Court upheld Comco's finding on the merits, however, it reduced the fine to about 186 million Swiss francs (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561). Moreover, with decision of 21 September 2015, Comco imposed a fine on Swisscom in the *WAN-Anbindung* case of about 7.9 million Swiss francs (LPC 2016/1 – *Swisscom WAN-Anbindung*, p. 128) and with decision of 9 May 2016, the Comco imposed a fine of about 72 million Swiss francs

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on Swisscom with regard to an abusive conduct against competing TV platform operators in the live sports broadcasting markets (Comco, LPC 2016/4 – *Sport im Pay-TV*, p. 920).

Another important state-owned company, Swiss Post (the incumbent Swiss provider of postal services), recently also received a significant fine in the amount of about 22.6 million Swiss francs. In its decision dated 18 December 2017, the Comco found that Swiss Post abused its dominant position on markets for letter post (commercial customers), in particular by committing price discrimination (see question 14). The decision is currently under appeal before the Federal Administrative Court.

The fine on Publigroupe of 2.5 million Swiss francs for refusal to deal and discriminatory practices was confirmed by the appellate courts (see Federal Administrative Court, LPC 2010/2 – *Publigroupe*, p. 329 and Federal Supreme Court, LPC 2013/1 – *Publigroupe*, p. 114).

In the *Publigroupe* case, the Federal Administrative Court, referring to article 7 of the European Convention of Human Rights, distinguished between practices falling within the list of article 7, paragraph 2 of the Cartel Act and those covered by the general clause of article 7, paragraph 1 of the Cartel Act: only the former are liable to be sanctioned with a fine, because the general clause does not offer sufficient legal certainty to undertakings. However, in the later decision with regard to Swisscom's unlawful price squeeze in the ADSL market, the Federal Administrative Court changed its position and based the fine in the amount of 186 million Swiss francs solely on the general clause of article 7, paragraph 1 of the Cartel Act, basically arguing that Swisscom must have known that a price squeeze constitutes an abusive conduct (Federal Administrative Court, LPC 2015/3 – *Preispolitik Swisscom ADSL*, p. 561). The judgment of the Federal Administrative Court is currently under appeal and it remains to be seen which one of the two Federal Administrative Court's views will be shared by the Federal Supreme Court.

Besides the possibility to impose fines, the Comco has a wide range of decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify specific business practices (for instance, to grant access or to modify rebate schemes or discriminatory pricing practices).

As compared to some other jurisdictions, the Cartel Act does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking that abused its dominant position. Individuals, however, may be fined in a few other cases, particularly in the case of a violation of a binding decision of the Comco (article 54 of the Cartel Act) or if the individual itself qualifies as an undertaking in the sense of the Cartel Act.

Enforcement process

28 | Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Sanctions can be imposed by the Comco autonomously, without having to petition any court. In that regard, the Federal Administrative Court and the Federal Supreme Court come only into play where a sanction decision of the Comco is challenged by the undertaking concerned (see question 33).

Enforcement record

29 | What is the recent enforcement record in your jurisdiction?

There are usually only a few investigations opened and final decisions rendered each year with regard to abusive conduct of dominant undertakings, if any. The enforcement record is certainly lower compared to opened investigations and rendered decisions with regard to anticompetitive agreements. However, notwithstanding these numbers, very high fines have been imposed on undertakings that have been held responsible for abusive conduct (see questions 19 and 27).

In recent times, enforcement in Switzerland seems to rather focus on digital-related issues. For example, on 13 November 2018, the COMCO opened an investigation against several major Swiss financial institutions. The investigation has the purpose of clarifying whether they reached an agreement to boycott mobile payment solutions of international providers (such as Apple Pay or Google Pay) in order to protect TWINT, the Swiss mobile payment solution. A preliminary investigation against Apple, which concerns Apple Pay as well, was concluded by the Secretariat of the Comco in December 2018: Apple Pay at POS terminals can interfere with payments made using TWINT. Following the intervention of the Secretariat of the Comco, Apple committed to offer a pro-competitive technical solution.

Contractual consequences

30 | Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The contracts entered into by dominant undertakings that constitute an abuse of a dominant position may be declared null and void, in whole or in part, with retroactive effect (ex tunc; see also article 13 of the Cartel Act and the decision of the Federal Supreme Court, 12 June 2008, 134 III 438). The issue of the nullity remains, however, controversial, and there is no specific case law with regard to contracts concluded by dominant undertakings.

Private enforcement

31 | To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Civil courts are expressly empowered to apply the Cartel Act. In particular, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request before civil courts the elimination of or desistance from the hindrance, damages and satisfaction in accordance with the Swiss Code of Obligations, or the surrender of unlawfully earned profits (article 12 of the Cartel Act). Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

The Cartel Act empowers civil courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 of the Cartel Act).

The Federal Supreme Court upheld an order of a lower civil court to a cooperative society managing a cheese maturing cellar to accept a company as a member and to grant, therefore, access to the maturing cellar (Federal Supreme Court, LPC 2015/4 – *Etivaz*, p. 896).

In another case, the Cantonal Court of Vaud ordered a European sport federation to invite an athlete to one of its competitions. A recommendation issued by the sport federation, a Swiss domiciled association, not to invite athletes who could harm the events because of their past doping offences was considered as infringing rules on abuse of a dominant position (article 7 of the Cartel Act) and injuring athletes' personality rights (Cantonal Court of Vaud, 24 June 2011, published in CaS 2011, 282).

Civil courts also have the possibility to order interim measures (articles 261 to 260 of the Swiss Civil Procedure Code). Moreover, provided that there is a sufficient public interest, undertakings may also

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obtain interim measures through the Comco, or the Comco can order such measures on its own (see eg, landmark decision of the Federal Supreme Court, LPC 2004/2 – *Sellita Watch Co SA / ETA SA*, p. 640). In order to have interim measures granted, it is, inter alia, required that the alleged anticompetitive conduct causes a disadvantage that cannot be easily remedied.

With an interim decision of 12 July 2017 (Comco, LPC 2017/3 – *Eishockey im Pay-TV*, p. 410), the Comco has confirmed that, likewise, a steep hurdle must be overcome and refused to grant Swisscom, the incumbent Swiss telecommunications operator, interim measures in the Commission's investigation against UPC, a subsidiary of Liberty Global plc, on the suspicion of the abuse of a dominant position in the field of ice hockey broadcasting. Despite identified indications of anticompetitive conduct in the sense that UPC indeed could unjustifiably withhold ice hockey broadcast rights from competing TV platform providers, the Comco could not ascertain that this leads to a sustainable and irreversible change in the market structure at the level of the TV platforms and that, if the TV platforms were to be adversely affected, they would be likely to be able to win back lost customers with good offers and good services despite a possibly illegal refusal until the end of the investigation.

Damages

32 Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes, such claims for damages exist and are adjudicated by the civil courts (see also question 31). Under Swiss law, the quantum of damages generally equals the difference between the actual financial situation of the party aggrieved by the abusive conduct and the hypothetical situation in which that party would have been without the abusive conduct. Because it is often not possible to prove the quantum of damages in exact figures, courts are sometimes also satisfied with plausible assumptions (Commercial Court Aargau, LPC 2003/2 *Allgemeines Bestattungsinstitut*, p. 451). Article 42, paragraph 2 of the Swiss Code of Obligations explicitly states that courts shall estimate the quantum of damages at their discretion, in the light of the normal course of events and the steps taken by the aggrieved party, where the exact quantum of loss or damages cannot be established.

Appeals

33 To what court may authority decisions finding an abuse be appealed?

Decisions of the Comco holding undertakings responsible for unlawful abusive conduct and, to a limited extent, also the Comco's interim procedural decisions, can be challenged before the Federal Administrative Court. An appeal can be lodged on the following grounds: wrongful application of the Cartel Act; the facts established by the Comco were incomplete or wrong; or the Comco's decision was unreasonable. Hence, the appeal before the Federal Administrative Court is a 'full merits' appeal on both the findings of fact and law.

The judgments of the Federal Administrative Court may be challenged before the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims, in other words, the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, the European Convention of Human Rights 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.

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The judgments of upper cantonal civil courts rendered in civil actions may also be ultimately challenged before the Federal Supreme Court, however with the same restrictions as in cases of appeals against judgments of the Federal Administrative Court.

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

34 Are there any rules applying to the unilateral conduct of non-dominant firms?

The Cartel Act does not set forth specific rules that apply to the unilateral conduct of non-dominant firms. However, under specific circumstances, the Cartel Act may nevertheless be applicable to these undertakings, as the concept of dominance has already been applied to cases of vertical economically dependent relationships (see question 2). Moreover, such rules are also contained in the Unfair Competition Act (see question 6). Finally, important reform proposals that aim at restricting certain conduct by non-dominant firms are currently being debated (see 'Update and trends').

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UPDATE AND TRENDS

Forthcoming changes

35 Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

The most current main reform proposals in Swiss competition law relate to the controversial topic on how to fight Switzerland's status as the 'Island of High Prices' in Europe. In that regard, the federal popular initiative 'Stop to the Swiss Island of High Prices – Pro Fair Import Prices (Fair-Price Initiative)', validly filed in December 2017, is of particular importance. The initiative aims to introduce new regulation with regard to abuses of undertakings with 'relative market power' (a similar concept to that already known in national German competition law). According to the initiative, 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 under the corresponding foreign conditions or charge Swiss prices anyhow. In contrast to 'normal' abuses of a dominant position on a market pursuant to article 7 of the Cartel Act (see question 27), abuses of 'relative market power' shall, however, not lead to direct sanctions. In August 2018, the Federal Council (ie, the Swiss government) presented a preliminary counterproposal that takes up the main purpose of the initiative and initiated a consultation procedure. The initiative and the counterproposal have until June 2019 at the latest to be submitted to the Swiss parliament.

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