Chapter 21

SWITZERLAND

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I OVERVIEW

i Structure of enforcement authorities

The Swiss Competition Authorities, comprising the Competition Commission (ComCo) and its Secretariat (the Secretariat) are responsible for the public enforcement of the Swiss Cartel Act of 1995 (CartA). The 12 members of the ComCo meet on a regular basis to decide cases, while the Secretariat conducts the investigations and submits proposals to the ComCo for determination. The ComCo consists of a majority of independent experts, such as professors of law and economics, and a minority of stakeholders, including industry and trade union representatives. There are approximately 65 lawyers and economists within the Secretariat, which is divided into four, equally sized divisions: infrastructure, services, product markets and construction. The construction division was established only recently to focus more closely on one of the priorities of the competition authorities: bid rigging.

The ComCo revised its Rules of Organisation in November 2015 to form a chamber for merger control filings. This chamber, which consists of three members, decides on whether or not to open a Phase II investigation into merger cases. The final decision after a Phase II investigation remains with the ComCo as a whole.

ii Prioritisation and the enforcement agenda

Typically, the Competition Authorities investigate complaints reported by businesses or consumers and leniency applicants. However, cases that would be likely to have a substantial impact on the Swiss economy, such as market foreclosure by restrictions on parallel trade, are more likely to be prioritised for investigation. Cartels that do not substantially restrict competition are not subject to financial sanctions in Switzerland[2] and complaints by concerned parties regarding such cartels are increasingly referred to civil redress by the Competition Authorities.

The enforcement priorities of the Competition Authorities consist of fighting hard-core horizontal cartels and vertical agreements involving foreclosure of the Swiss market. Such vertical agreements are of particular interest to the ComCo, in case parallel imports from the EU into the Swiss market are potentially restricted. For example, agreements between parties within the European Economic Area (EEA) restricting passive sales outside of the EEA have

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2 For example, on 6 November 2015 the ComCo prohibited the wide parity clauses of booking platforms (Booking.com, Expedia and HRS) in relation to hotels without sanctioning the undertakings financially.

been considered illegal from a Swiss perspective, since imports into Switzerland – not being part of the EEA – were covered by such agreements. However, companies outside of the EEA may also be investigated: see a media release in December 2016 regarding a sanction against an Australian producer and a Swiss main importer of flash lights. A Swiss competitor had tried to source this product through a Polish main importer, and was unsuccessful, because the Australian producer would not supply the Polish importer, after an intervention by the Swiss main importer. The written decision in this matter is awaited.

Other decisions of the ComCo in the year under review have not yet been published. Generally, parties now frequently appeal against the publication of decisions. This is because decisions of the ComCo are comprehensive and decisions of several hundred pages are not uncommon. Therefore, there is a concern that the publication of such decisions may provide claimants with detailed facts upon which they may build a private damages case.

II CARTELS

The CartA distinguishes administrative sanctions from criminal sanctions. Criminal sanctions for individuals are very rare and only apply to those who wilfully violate an amicable settlement or a final and non-appealable decision (including rulings regarding the obligation to provide information). A corresponding fine is a maximum of 100,000 Swiss francs.[3] The nature of administrative sanctions against firms, with a maximum fine of 10 per cent of the turnover that the firm achieved in Switzerland in the preceding three financial years, is highly contentious in the literature. According to the Federal Supreme Court, administrative sanctions in the CartA have characteristics of criminal sanctions and the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) apply. However, the exact implications of this finding are unclear: the Federal Administrative Court held in a decision published last year that Switzerland, as a signatory state of the ECHR, has some discretion as to how to implement such rights.[4]

i Significant cases

Fines and leniency cases

In Switzerland many cartel investigations are started by a leniency application. In early 2014, for example, the ComCo imposed fines of 11 million Swiss francs on several airlines for entering into price-fixing agreements in relation to air freight forwarding. The reasoning of the decision has not yet been published due to appeals regarding the extent of the text to be included. According to a press release, the ComCo applied the European rules following the convention between Switzerland and the EU regarding air traffic and the CartA, in parallel. There were also proceedings in other jurisdictions.[5] The investigation was triggered by Lufthansa's worldwide leniency application. Several parties have appealed against ComCo's decision to the Swiss Administrative Court.

A leniency application may include information, which allows the ComCo to investigate further infringements (leniency plus). The maximum discount in fines for such

3 See Articles 54 and 55 CartA, which also apply to the case of implementing a concentration that should have been notified without filing a notification and related issues.

4 BVGer B-7633/2009 of 14 September 2015, c. 61.

5 The parallel decision in the EU was annulled by the General Court on 16 December 2015.

a leniency-plus application is 80 per cent. A party in a case regarding building hardware for windows decided in 2010, benefited from a reduction of 60 per cent in the original proceedings and of 100 per cent in the following investigation, which concerned building hardware for doors. This subsequent case concerned five wholesalers who agreed on minimum margins for products from a specific producer. In November 2014, the ComCo fined the firms involved a total of 185,000 Swiss francs. The ComCo decided on this relatively small sanction because the turnover figures on the relevant markets during the relevant period of time could not be exactly determined and this lump sum sanction was considered to be proportionate.

Another cartel case following a leniency application concerned a vertical restriction on parallel trade. General Electric Company (United States) and GE Healthcare GmbH (Germany) applied for leniency in relation to restrictions in distribution agreements in Germany with third parties regarding active and passive sales into Switzerland, where GE Healthcare distributed its products directly to end consumers through an affiliate. After a relatively short investigation the parties agreed to an amicable settlement in 2016, which was accepted by the ComCo in the same year. No fine was imposed because the applicants were granted a reduction of 100 per cent. This is remarkable, because a complete reduction requires that the applicant has not coerced any other undertaking into participating in the infringement of competition, nor played the leading role in such behaviour. Unfortunately, the published decision does not provide any reasoning for this aspect of the decision. It seems surprising that the producer in a common vertical relationship restricting exports of distributors had apparently no leading role; after all, this restriction of sales was beneficial to GE Healthcare's subsidiary in Switzerland. However, this case demonstrates that – apart from horizontal cartels – undertakings involved in vertical restrictions may in principle, be rewarded with partial or even full leniency.

Settlements

Under Article 29 of the CartA, the Secretariat may propose an amicable settlement on ways to eliminate the restraint to competition by the undertakings involved. The Secretariat regularly proposes such settlements, which must be approved by the ComCo. By using settlements, which include commitments of the undertakings involved regarding their future conduct, a direct and often immediate effect on the relevant market can be accomplished. Settlements can also lower the risk of an appeal and consequently avoid costly and time-consuming procedures before the Federal Administrative Court and subsequently the Federal Supreme Court. In addition, companies that accept an amicable settlement may benefit from a discount of generally up to 20 per cent of a potential fine. Thus, settlements are generally appealing to all parties. However, fewer appeals mean that for practitioners there is less judicial guidance from case law.

Where the factual or legal situation has changed significantly since an amicable settlement was reached, the terms of such settlements may be amended. In 2016, the Competition Authorities interpreted a request from Swatch regarding an obligation to supply, which had been included in an amicable settlement of 2013, as a request for an amendment. Consequently, the Secretariat investigated whether or not the situation had changed by questioning competitors and customers of Swatch. Eventually, the ComCo answered this question in the negative and therefore denied the request from Swatch.

ii Trends, developments and strategies

Comparative law approach

Since the CartA is relatively young and the Swiss market is relatively small, Swiss competition law lacks comprehensive case law in many areas. Therefore, it is evident that a comparative law approach is helpful when applying substantive competition law provisions – in particular to hard-core cartel and dominance cases. However, it is debatable whether or not foreign case law can compensate for the legal uncertainty of the CartA. The Federal Supreme Court stated in 2011, that the CartA shall be interpreted autonomously, since the CartA is not identical to EU competition law.[6] In 2012 the same Court stated that the CartA is very close to EU competition law, so that the European case law (in this case in relation to Article 102 TFEU) should be taken into account.[7] In a decision of the Federal Administrative Court from 2015 regarding the first margin squeeze case in Switzerland, the Court's view was that undertakings have to be aware of foreign competition case law. In this way the Court countered the argument of the undertaking involved in the case, that because of the unclear provisions of the CartA, it was not foreseeable that margin squeeze (or rather the applied economic test regarding margin squeeze) was foreseeably part of the CartA.[8]

It follows from this recent decision that the importance of EU case law has increased. However, it remains to be seen whether the Federal Supreme Court will accept this reasoning. The current position of the Federal Supreme Court is that EU case law has to be taken into account. However, this does not mean that Swiss courts have to follow leading cases from the EU.

Advocacy activities of the Competition Authorities

As outlined in last year's edition of *The Public Competition Enforcement Review*,[9] the Competition Authorities' view is that they have a role to play as advocates for competition, and that their role in educating the public and government departments is an important preventative measure. One aspect of the advocacy activities of the Secretariat is to give written advice to companies on specific legal questions. Such advice is subject to charges but it is not binding on the ComCo. However, in practice the Secretariat's view as expressed in such written advice carries significant weight, particularly where full details of the factual background to the legal question have been provided to the Secretariat for consideration. In 2016, the Secretariat published written advice three times.

One (anonymised) advice related to a publisher's pricing policy towards its prices to wholesalers, where the publisher differentiated its prices according to the country to which the wholesalers sold the publisher's products. A wholesaler that sold books to Switzerland had to pay a higher purchase price (on the wholesale level for such exported products) than for products sold in Germany. The Secretariat voiced serious concerns that such a pricing policy restricted parallel trade from Germany to Switzerland. It stated that this pricing policy – if accepted by the wholesaler – could be viewed as a vertical agreement, which would be subject to fines in Switzerland. It is interesting to note that this advice was requested by a wholesaler in order to support its position in current civil proceedings in Germany.

6 BGE 137 II 199, c. 4.3.1 and 4.3.2.

7 BGE 139 II 72, c.8.2.3.

8 BVGer B-7633/2009, c. 604-606.

9 See *The Public Competition Enforcement Review* (eighth edition), p. 355.

iii Outlook

In 2014 a revision project, proposing various material changes in the CartA, failed in Parliament. The consensus is that the revision project was overloaded. Only days afterwards, a Member of Parliament submitted a new proposal regarding one of the highly debated issues: that a provision similar to the German concept of 'relative market power' should be introduced into the CartA. Following this proposal, the control of behaviour of undertakings in a dominant position should be extended to such undertakings without a dominant position in the relevant market but with a certain market power in relation to certain market participants. The idea is that Swiss firms that depend on a particular supplier shall not be discriminated against compared with customers of that supplier from other countries. The government has not yet commented on this proposal.

The proponents of the concept of 'relative market power' and the prohibition on international price differentiations often refer to the German model in this regard. However, it should be noted that the German model is at odds with mainstream economic theory and international competition law standards[10] and is not, or not mainly, aimed at the Swiss problem of a general high price level. In addition, it is also likely that medium-sized companies in Switzerland and abroad (e.g., subcontractors in the mechanical industry or brand manufactures not reaching the dominance threshold) will also be regarded as 'relatively market dominant'. This would mean that the compliance cost for such companies could increase considerably but without there being a consistent theory of harm in relation to price differentiations.

Apart from other parliamentary proposals also not yet discussed in detail in Parliament, a private committee launched a people's initiative for 'fair prices' in September 2016 taking the same approach as the proposal outlined above: that dominant undertakings and undertakings having relative market power in relation to certain market participants shall be obliged to supply a Swiss buyer with services and products offered in Switzerland and abroad at the price offered abroad. In particular, that online purchases shall be possible on a non-discriminatory basis. If the private committee collects 100,000 signatures by early 2018, this initiative will be voted on by the Swiss electorate.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Restrictive agreements and significant effect

In Switzerland restrictive agreements are not prohibited *per se*. Only agreements that significantly restrict competition in a market for specific goods or services, and that are not justified on grounds of economic efficiency, are unlawful (Article 5, Section 1 CartA). A direct financial sanction only applies to hard-core cartels, which are presumed to eliminate effective competition. As stated in last year's edition of *The Public Competition Enforcement Review*,[11] the question of how the term 'significantly' should be interpreted, where the presumption to eliminate effective competition may be rebutted, has been subject to intense debate.

10 See OECD – Background note by the Secretariat on price discrimination, DAF/COMP (2016) 15, dated 13 October 2016.

11 See *The Public Competition Enforcement Review* (eighth edition), pp. 357–359.

In June 2016, the Swiss Federal Supreme Court decided in a public deliberation, on the *Gaba* case, where the application of the 'significance test' was disputed. This leading case on the prohibition of passive sales was based on the following facts: according to the ComCo, the manufacturer of Elmex toothpaste had prevented its licensee in Austria (Gebro Pharma GmbH, which was also fined) from exporting its products from Austrian territory, which consequently restricted sales to – among other countries – Switzerland. The ComCo argued that the restriction of parallel trade had a negative effect on the Swiss market because Elmex was one of the best-selling toothpastes in Switzerland. Both Gaba and Gebro appealed against this decision. The Federal Administrative Court upheld ComCo's fines, stating that a contractual ban on exports from a European territory (in this case Austria) qualifies as a vertical hard-core restriction that, under Swiss competition law, is subject to fines regardless of the actual effect of the specific restriction on competition.[12]

In 2009, the ComCo imposed a fine of 4.8 million Swiss francs on Gaba International AG for the prohibition of passive sales. In 2013, the Federal Administrative Court upheld the ComCo's decision and the Swiss Federal Supreme Court has now rejected the further appeal by Gaba. The written reasoning of this decision has not yet been published. However, according to the media release from the Court and the statements made during the public deliberation, the Court has indicated that hard-core cartels according to Article 5, Section 3 and 4 CartA, are considered significant, irrespective of any quantitative criteria, such as market shares of the participating companies or actual effects on the market.[13]

The Federal Supreme Court then, has taken a 'by-object-approach' against hard-core restrictions. So, even if the presumption of eliminating effective competition is rebutted – and consequently the negative effects of such a cartel are limited – sanctions can still be imposed. It still remains possible to argue a justification based on reasons of economic efficiency. However, since Switzerland has not adopted comprehensive block exemption regulations, and the case law regarding reasons of economic efficiency is very limited, various forms of pro-competitive cooperation between competitors (such as buying syndicates) may fall within the area of prohibition. Although some judges mentioned an exception in relation to cases of minor importance, it is not yet clear whether this exception only applies to very small undertakings.

Since the public deliberation in the *Gaba* case, this line of reasoning has already been adopted by the Federal Administrative Court in another case regarding vertical agreements. In this case, the ComCo found that Nikon had engaged in restrictions on parallel imports by means of a ban on exports in foreign distribution agreements and a ban on imports, in an earlier Swiss wholesaler agreement. It should be noted that the clauses banning exports in Nikon's foreign distribution agreements were drafted in a general way and did not specifically refer to exports to Switzerland. The ComCo considered a general ban on exports from the EEA in European distribution agreements to be passive sales restrictions affecting competition in Switzerland. The Federal Administrative Court rejected an appeal of Nikon, and confirmed the ComCo's fine. According to the Federal Administrative Court, the restrictive effect on the market of an unlawful agreement has to be taken into account when calculating the fine.[14]

Consequently, it will be more difficult for companies to argue that certain agreements do not infringe competition law: hard-core restrictions (i.e., horizontal agreements on prices,

12 BVGer B-463/2010, c. 11.1.4.

13 See press release dated 28 June 2016 regarding the decision 2C.180/2014.

14 BVGer B-581/2012, c. 7.5.

quantities and allocation of territories or customers, and vertical agreements on resale price maintenance or restrictions of passive sales) are by object, considered to significantly restrict competition, irrespective of any effects. Therefore, such agreements are unlawful and hence subject to fines, unless the undertaking may demonstrate that it is a 'minor' case or that a justification based on reasons of economic efficiency exists.

In view of these developments, companies should review their distribution and licence agreements in relation to potential restrictions of passive sales, which could affect the Swiss market. In particular, export restrictions to countries outside of the EU or EEA should be avoided, since Switzerland is not part of either the EU or EEA and such clauses might have an adverse impact on competition in Switzerland.

Dominance

In the year under review the ComCo published another decision regarding dominance against Swisscom (the incumbent national telecommunication firm). In September 2015, the ComCo sanctioned Swisscom regarding a margin-squeeze relating to a specific project, with a fine of approximately 8 million Swiss francs. Swiss Post (the national postal service company of Switzerland) had carried out a public procurement process for the provision of IT technology and services, connecting various local post offices in a wide area network. Although there were three potential service providers (including Swisscom), Swisscom's competitors depended on upstream services from Swisscom in relation to its copper network, since Swisscom held almost 100 per cent of the upstream market. Swisscom won the public procurement process because it had offered a considerably lower price than its competitors. Upon notification by a competitor, the ComCo investigated the case and found that Swisscom had followed a margin-squeeze strategy, by asking excessive prices of its competitors on the upstream market (network), and offering low prices for services on the downstream market (IT services) to Swiss Post. In addition, this behaviour was found to be discriminatory and the price offered to Swiss Post qualified as excessive pricing (because of the excessive prices for services on the upstream market). Swisscom has appealed against ComCo's decision to the Swiss Administrative Court.

Swisscom has been subject to proceedings in relation to abusive pricing policies relating to ADSL (internet connection services) on two previous occasions. In 2002, the *ADSL I* case concerned a discriminatory rebate policy, where the ComCo found that Swisscom had favoured one of its affiliated companies and at the same time disadvantaged competitors of this affiliated company on the upstream market. In the *ADSL II* case of 2009, the ComCo decided that Swisscom had engaged in another margin squeeze. The Federal Administrative Court reduced the fine on Swisscom from approximately 220 million to 186 million Swiss francs in 2015. The outcome of a further appeal is pending.[15]

ii Trends, developments and strategies

Between 2008 and 2011 the Swiss economy suffered from a significant appreciation of the Swiss franc against the euro. In 2011 the Swiss National Bank set a minimum exchange rate of 1.2 Swiss francs against €1. In January 2015 this minimum exchange rate was abandoned.

15 BVGer B-7633/2009.

Consequently, the Swiss franc has temporarily increased to parity with the euro. While the strong Swiss franc is a challenge for the export and tourism industry, Swiss distributors or producers can generally buy cheaper abroad.

In 2013 the Secretariat published a report following a comprehensive survey of the distribution of various branded foreign daily consumer products. The Secretariat came to the conclusion that most retailers had adapted their prices rapidly to the reduced import prices. However, the problem of high prices in Switzerland is still a hotly debated issue in the media and politics. Those parties in favour of stricter competition law in Switzerland may benefit from the actual currency uncertainties in connection with the Swiss franc. The people's initiative for 'fair prices' referred to earlier demonstrates the widespread discontent in Switzerland with the high prices for consumer goods compared to neighbouring markets. Therefore, it is likely that the Competition Authorities will continue to fiercely investigate restrictions of passive sales, which could further isolate the Swiss market.

iii Outlook

By introducing the by-object approach in the *Gaba* decision, the Federal Supreme Court has strengthened the ComCo's efforts in the enforcement of the prohibition on hard-core cartels, and decreased the complexity of such investigations. In relation to horizontal agreements on prices, quantities and allocation of territories or customers, and vertical agreements on resale price maintenance or restrictions of passive sales, hardly any anticompetitive effects have to be demonstrated by the Competition Authorities. Consequently, investigations should be shorter and more cases could be handled by the Secretariat in the future.

The *Gaba* decision develops Swiss competition law in the direction of EU law, but since Switzerland lacks comprehensive block exemption regulations, most importantly in relation to horizontal cooperation and licensing, the Competition Authorities could adopt a stricter approach (the so-called 'Swiss finish') resulting in legal uncertainty for companies. It is also unclear how the Competition Authorities and the courts will interpret EU competition provisions going forward. Most probably, stricter rules will be applied in the effort to avoid higher prices in Switzerland compared to the neighbouring markets.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Swiss competition law does not provide for sectoral competition law regulations and investigations as they exist in the EU. However, the Secretariat does undertake informal market analysis from time to time. Some industries, such as e-commerce and pharmaceuticals, have been under scrutiny by the Competition Authorities:

i E-commerce

In contrast to the EU, the Competition Authorities do not systematically investigate competitive issues in the e-commerce sector. However, they have been actively investigating certain cases. In 2011 the ComCo issued a decision against restrictions on online sales in selective distribution agreements. And in 2016 the ComCo prohibited wide parity clauses in agreements between Booking.com, Expedia and HRS, and their partner hotels, (i.e., price-, availability- and condition-parities) insofar as these clauses commit hotels to treat online booking platforms equally.

ii Pharmaceuticals

The Competition Authorities have repeatedly dealt with competition issues in the healthcare sector. In particular, the Secretariat has been monitoring the distribution of pharmaceuticals for some years now. In May 2015, the Secretariat assessed the suspension of deliveries by Alloga AG – the largest pre-wholesaler in Switzerland – to a wholesaler that competes with an affiliate company of Alloga AG. The suspension was due to negative public news regarding the solvency of the wholesaler. New supplies were conditional on securities being provided by the wholesaler in the sum of 20 million Swiss francs, which equals the average monthly value of supplies. The Secretariat questioned the legitimacy of Alloga's action and in particular, the amount and the duration of the required securities were viewed as critical. However, the Secretariat decided to not investigate the case in more detail and Alloga AG escaped a fine, by complying with the Secretariat's suggestions regarding the issue of possible illiquidity of its customers.

V STATE AID

Swiss competition law does not contain any rules on state aid. The only rules on state aid derive from international law, such as the Swiss-EU Free Trade Agreement of 1972, the Swiss-EU Agreement of 1999 on Air Transport and the corresponding World Trade Organization's (WTO) provisions in this field. The Federal Supreme Court, however, has repeatedly denied the self-executing character of the WTO provisions. The Swiss-EU Trade Agreement does not provide any enforcement provisions in this regard. To date, no cases have been examined relating to the Swiss-EU Air Transport Agreement.

VI MERGER REVIEW

Article 9 CartA provides for mandatory notification of a merger or, more broadly speaking, a concentration, if certain thresholds are met. There are two alternative sets of thresholds:

a Turnover thresholds: an aggregate turnover of all undertakings concerned of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs; and, additionally, individual turnover in Switzerland of each of at least two of the undertakings concerned of at least 100 million Swiss francs.

b Dominance threshold: if, in a previous investigation, the ComCo found that a specific undertaking holds a dominant position in a certain market, every concentration involving that undertaking in that market, or in a neighbouring, upstream or downstream market, is subject to the notification requirement. The Federal Administrative Court specified, in a decision in April 2014, that a neighbouring market includes:
- markets concerning products that are to some extend substitutes; or
- markets concerning products with parallel demand.[16]

Regarding ancillary restraints the ComCo's practice relies heavily on the corresponding provisions in the EU.

16 BVGer B-6180/2013, c. 2.3.

i Significant cases

The threshold to prohibit a merger is relatively high in Switzerland. In the last 20 years only the merger in the telecommunications industry between Orange and Sunrise was not approved, which would have reduced the number of competitors from three to two. In the year under review several mergers in the advertising industry have been examined in a Phase II investigation. Two mergers concerned online classified ads where the ComCo concluded that the dynamics of this market is a strong argument against a significant impact of the mergers on competition, in spite of the strong market position of the undertakings involved. In another merger notification the ComCo cleared a joint venture of the main Swiss TV-station, the main telecom company (Swisscom) and a large media company regarding a joint venture for targeted advertising. After a Phase II investigation the ComCo came to the conclusion that strong competitors exist on this market and the future of targeted advertising is uncertain.

ii Trends, developments and strategies

ComCo's new merger guidelines regarding notifications (including a standard notification form) were published in October 2014. Those guidelines are intended to facilitate the notification process for both the Competition Authorities and applicants. According to the merger guidelines, notifications may be submitted in a simplified form. For example, if the merger concerns an EU-wide market and the European Commission is notified at the same time, a full and detailed notification is generally not necessary. In such cases the Competition Authorities recommend attaching the EU filings to the Swiss notification. Furthermore, the Competition Authorities generally request a waiver from notifying firms regarding the exchange of information between the Swiss and the EU competition authorities in these circumstances.

iii Outlook

After the Swiss parliament rejected the revision project of the CartA, which proposed significant changes strengthening merger control, the ComCo repeatedly stated that mergers were cleared due to the currently high thresholds. It appears that the ComCo would prefer to intervene more rigorously; however, it is not willing to do so without a revision of the CartA. Still, the ComCo is willing to investigate merger cases in more detail – also in dynamic markets.

VII CONCLUSIONS

i Pending cases and legislation

At the time of writing, several cases are pending before the Federal Supreme Court. The written decision in the leading *Gaba* case, described above, is still awaited. The detailed reasoning anticipated in the written decision should clarify the scope of the by-object approach introduced into Swiss competition law by this case. Further guidance may also be expected, in particular in relation to vertical restrictions, such as import restrictions and resell price maintenance.

The ComCo has also made various decisions, which to date have not been published. These include a detailed decision regarding bathroom products, air freight forwarding, several

decisions against banks in relation to cartels regarding LIBOR, TIBOR and EURIBOR, and a bid-rigging case regarding road construction. The publication of the decisions in these cases will shed more light on the ComCo's current enforcement priorities.

ii Analysis

The priorities of Swiss public competition enforcement continue to focus on hard-core horizontal cartels, such as bid rigging, and vertical agreements foreclosing the Swiss market. In particular, cases involving restrictions of passive sales are investigated vigorously, regardless of whether the restriction is part of a Swiss or a foreign agreement, if the Swiss market is affected.

The commitment of the Competition Authorities to a tough enforcement policy remains unwavering, considering the legal uncertainties and the mixed signals from its appeal body on its activities and decisions. The role of European competition law is becoming increasingly important, particularly because the lack of conclusive case law has resulted in legal uncertainty in a number of areas.

Appendix 1

ABOUT THE AUTHORS

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Michael Tschudin is specialised in Swiss and European competition law, regulated markets, related compliance programmes and litigation. Having worked at the Competition Commission (2005–2006) and the court of appeal for such cases, the Swiss Federal Administrative Court (2013–2014), he is able to draw on this practical experience when advising clients. Michael Tschudin had previously worked as an attorney at Wenger & Vieli AG from 2010 to 2012 before re-joining the firm in 2015. Since completing his PhD in competition law, he has regularly published articles on related issues. He focuses particularly on economic principles and in 2014 he obtained a postgraduate diploma in 'Economics for Competition Law' from King's College, London. Michael Tschudin is ranked by *Chambers* as an associate to watch and by *Who's Who Legal: Competition* as a future leader in 2017.

FRANK SCHERRER

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Frank Scherrer is specialised in pharmaceutical and healthcare law and competition law. He has many years of experience in advising clients on competition matters and representing them in proceedings before the Competition Commission and the courts. He has written several publications, including his thesis, in competition law, mainly in the field of merger control.

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