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# Cartels

## Enforcement, Appeals & Damages Actions

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# Switzerland

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## Overview of the law and enforcement regime relating to cartels

The authorities

The Swiss Competition Authorities, comprising the Competition Commission ("ComCo") and its Secretariat ("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 76 lawyers, economists and other staff (FTE 65.3) within the Secretariat, which is divided into four equally sized divisions: infrastructure; services; product markets; and construction.

Typically, the Competition Authorities investigate complaints reported by businesses or consumers and leniency applicants. 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, and complaints by concerned parties regarding such cartels are often referred to civil redress by the Competition Authorities.

Enforcement priorities

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 cases where 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 been considered illegal from a Swiss perspective, since imports into Switzerland – not being part of the EEA – were affected by such agreements. Often, companies review such restrictions only internally from the perspective of European competition law, and strict regulations outside of the EU are not taken into account. The most recent case involving such import restrictions (in a series of similar cases) is the *Pöschl* case, which led to a fine by the ComCo in 2021 (see below section "*Overview of cartel enforcement activity during the last 12 months*").

Fines and criminal sanctions

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). Administrative fines against firms may amount to up

to 10 per cent of the turnover that the firm achieved in Switzerland in the preceding three financial years. According to the Federal Supreme Court, such administrative sanctions have the characteristics of criminal sanctions. Therefore, the guarantees of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") apply in principle but not in full.

Not all kinds of cartels are subject to fines. On the horizontal level, only hard-core cartels regarding price-fixing, volumes, allocation of customers and territories may directly result in a fine. Regarding vertical restrictions, resale price maintenance and absolute allocation of a geographical market, to the extent that passive sales by other distributors into such territories are not permitted, may be fined. Other restraints, such as vertical online sales restrictions, may be found illegal, but only fined where the undertaking involved violates the corresponding decision of the authority.

## Overview of investigative powers in Switzerland

Proceedings under the CartA generally have two stages. The Secretariat can initiate preliminary investigations on its own initiative, at the request of certain affected undertakings (e.g. competitors), or based on third-party complaints. It is at the discretion of the Secretariat to decide whether to open a preliminary investigation. If the Secretariat finds indications of a significant restriction of competition, it requests the opening of an investigation by a presidium member of the ComCo. Also, dawn raids and seizures of documents and electronic data first require an investigation to have been opened, as these coercive measures are not possible in preliminary proceedings.

In principle, the Secretariat may not decide on any procedural orders without the consent of a presidium member of the ComCo. Generally, once official investigations are opened, they are seldom closed without any consequences for the undertakings involved.

The scope of the investigative powers depends on whether or not the party involved is subject to an administrative sanction. If so, the right against self-incrimination (*nemo tenetur* principle) limits the investigative powers to a certain extent. If such sanctions do not apply, the investigative procedure is merely administrative. Such procedures are characterised by a certain duty of the involved to cooperate according to Swiss administrative law.

For example, upon specific request for information, the undertakings under investigation are obliged to provide the Secretariat with all information required for the investigation and to produce necessary documents (article 40 CartA). In case the Competition Authorities investigate a hard-core cartel – which is subject to a fine – an undertaking may refuse to cooperate in relation to a request for information, to the extent that the cooperation could result in self-incrimination. The same principle applies in relation to interviews with individuals (within the executive bodies) who speak for the undertaking.

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

The Swiss Competition Authorities may communicate with the EU authorities based on the agreement between Switzerland and the EU on cooperation and exchange of information between their respective Competition Authorities. This agreement allows them to mutually exchange specific case-related confidential information. The scope of this information exchange agreement is broader than in previous EU cooperation agreements with non-EU Member States and is therefore called a "Second Generation Agreement" in the EU. The crucial point in this new generation of agreements is that confidential information can be transmitted without the parties' consent. Nevertheless, the agreement provides for limitations on the exchange and use of information. For instance, only information already in the possession of the authority may be requested by the other authority, and information received under a leniency or settlement procedure must not be transmitted. Finally, it is noteworthy that the ComCo and Directorate-General for Competition have coordinated the timing of dawn raids regarding the same or similar competition concerns in the past. For the bilateral agreement between Switzerland and Germany in relation to the exchange of information, see below section "*Cooperation with other antitrust agencies*".

## Overview of cartel enforcement activity during the last 12 months

While the ComCo conducted around 19 investigations in the last 12 months, five new investigations concerning cartels were opened. As in other jurisdictions, enforcement activity highly depends on the number of staff within the Competition Authorities, and this number has not increased in the year under review.

Whereas in the past, detailed effects analyses had required significant resources, the effects of cartels now play a subordinate role based on the new case law of the Federal Supreme Court. These cases resulted in two main effects: firstly, investigations (but not the court proceedings) are shorter since the matter of economics is less involved when considering hard-core cartels; and secondly, the Competition Authorities seem more courageous or rather more aggressive in their investigative work. Therefore, we believe that the trend in Switzerland is clear: the level of enforcement has been raised and there is less room for pragmatic solutions.

Car distribution

In March 2023, the ComCo fined seven retailers of VW vehicles in the canton of Ticino. According to the ComCo, they formed a cartel in the sale of new vehicles to private individuals and the public sector from 2006 to 2018. Their aim was to reduce competition among the car retailers and to set the sales prices of new vehicles for private individuals and the public sector at an excessive level. The retailers coordinated all sales activities in Ticino: they entered into agreements on submissions from the public; agreed on a pricing policy for the sale of new cars to private individuals; and divided the canton of Ticino into areas of activity. The ComCo qualified the behaviour of the fined companies not as separate practices, but as the expression of a common will to participate in a global plan ("overall agreement"). As in previous practice, the ComCo initially referred to the concept of a single, continuous infringement developed under EU law to justify the construct of an overall agreement. The ComCo applies the concept of an overall agreement in a very broad way. Addressing critics of this concept, in this case the ComCo also referred in detail to the case law of the European Court of Justice on the tacit approval of an unlawful initiative. The cartel members were fined a total of around CHF 44 million. In particular, the strong position of the AMAG Group, the most important competitor and supplier of car distributors in Ticino, and the associated contractual pressure on dealers and sales partners were taken into account.

Price-fixing – Pfizer

In early February 2021, the Federal Supreme Court rendered a landmark decision regarding recommended retail prices in a case involving the pharmaceutical company Pfizer (BGE 147 II 72). The Court considered Pfizer's unilateral setting of recommended retail prices to pharmacies as an agreement between Pfizer and the pharmacies aimed at fixing retail prices, essentially because more than 50 per cent of the pharmacies involved applied the recommended retail price for Viagra, which was not subject to governmental price control. Apart from this fact, the Court also considered other elements, in particular that the recommended retail prices were digitally communicated to the pharmacies' point of sale ("POS") systems. This case has resulted in a tightening of the rules against concerted practices in relation to vertical agreements. While the Swiss practice generally follows the EU provisions in relation to vertical agreements, the Court expressly stated that it is not bound by such EU rules. In contrast to the EU practice on vertical price-fixing, in Switzerland, no pressure or other elements are required if more than 50 per cent of the retailers adhere to the recommended resale price. Although this case concerned a specific market situation and may not be fully generalised, it demonstrates that the Swiss practice in relation to resale price maintenance is stricter than the approach taken in the EU. On 13 June 2023, the Swiss Federal Administrative Court (following the Federal Supreme Court's decision) decided on the sanctions for Pfizer and Eli Lilly. The Court confirmed the ComCo's assessment of a moderate violation and the base amount of 5 per cent was therefore appropriate. Pfizer has filed an appeal against this ruling.

Pöschl

In June 2021, the ComCo imposed a fine of around CHF 270,000 on Pöschl, a German manufacturer of tobacco products (in particular snuff tobacco), for restricting parallel imports into Switzerland. Pöschl's distribution contracts contained export prohibition clauses, which prohibited Pöschl's foreign distribution partners from distributing outside their contract territory. The ComCo limited itself to the distribution partners based in Europe and left open the extent to which Swiss cartel law would apply to countries outside of Europe. Furthermore, the ComCo dealt with Pöschl's argument that reserved provisions within the meaning of article 3 para. 1 CartA would put the applicability of the CartA into question, but found that there are no indications that regulations in the area of tobacco products would not allow competition within the meaning of said provision. More importantly, the ComCo qualified the aforementioned clauses as absolute territorial protection within the meaning of article 5 para. 4 CartA, which are prohibited according to article 5 para. 1 CartA. This means that passive sales by non-resident distributors into allocated territories are directly or indirectly prohibited. Pöschl's application for leniency resulted in a 50 per cent discount.

Engadin IV

The ComCo decided various bid-rigging cases in the canton of Grisons in the last decade. A recent judgment of the Swiss Administrative Court, treating an appeal of a leniency applicant, clarified the duty to cooperate with such a leniency applicant. According to this decision, a leniency applicant disputing the legal qualification of the cartel within the scope of the self-denunciation may jeopardise their status as a fully cooperating leniency applicant. Consequently, the leniency discount was reduced in this case.

## Key issues in relation to enforcement policy

The enforcement policy of the Swiss Competition Authorities is strongly based on EU competition law. In particular, in relation to vertical restrictions, the Swiss Competition

Authorities heavily rely on the corresponding block exception rules and the guidelines of the EU. Accordingly, the ComCo has stated in its guidelines on vertical restrictions that vertical agreements, which are legal according to EU competition law generally, are legal according to Swiss law. This principle has recently been confirmed by the Federal Supreme Court in a case dealing with the wholesale market of books (decision of 21 December 2021 2C_43/2020, nr. 4.4). The ComCo wishes to avoid a *Swiss finish* – i.e. an additional review according to Swiss law of international distribution systems that are in line with EU competition law. However, the goal of avoiding a *Swiss finish* is often not met in practice, since the ComCo takes the specifics of the legal and economic framework in Switzerland into account. For example, an exclusive purchasing obligation could restrict parallel imports into Switzerland and could therefore – given the circumstances – be considered critical by the Competition Authorities. In addition, we refer to the *Pfizer* case, in which the Federal Supreme Court applied the rules against resale price maintenance more strictly than in EU practice (see above section "*Overview of cartel enforcement activity during the last 12 months*"). In the update of its guideline on vertical restrictions of 12 December 2022, the ComCo has taken into account the revision of the guideline of the EU Commission of 30 June 2022 and recent case law since the last update in 2017, such as, for example, the aforementioned *Pfizer* case. The result is that the ComCo accepts the *Swiss finish* imposed by the Federal Supreme Court and generally follows these landmark cases irrespective of developments in EU competition law. Therefore, while undertakings may benefit from some degree of guidance from EU competition law, reliable safe harbours only exist to a very limited extent in Switzerland. Consequently, the degree of legal certainty is lower than in the EU.

As of 1 January 2024, the ComCo's Guidelines regarding motor vehicles were converted into the "Motor Vehicle Ordinance" issued by the Federal Council. This ordinance is legally binding for the courts. The ordinance set forth regulations, which are generally based on EU principles.

## Key issues in relation to investigation and decision-making procedures

The ComCo announces the opening of an investigation by means of an official publication. This announcement must state the purpose of the investigation and the names of the parties involved. All parties subject to the investigation are vested with the usual administrative procedural rights, unless the CartA stipulates otherwise. In particular, they have the right to consult and comment on the case files and to suggest witness hearings, and they have the right to be heard and to participate in oral party and witness hearings. Based on the investigation, the Secretariat issues a draft decision, which is comparable to the statement of objections in the EU. The parties may comment on such draft decision.

Time bars for administrative sanctions are a specific issue worthy of discussion. The CartA merely states that an administrative sanction is not applicable if the restriction of competition has not been exercised for more than five years at the point in time when the investigation was opened (article 49 para. 3 *litera* b CartA). This leaves the question open whether there is a period of time in which the ComCo and the appellate courts have to reach a final decision. The ComCo interprets the aforementioned provision and the fact that the CartA is otherwise silent on the issue of statutory time bars to mean that no such time bars exist except in the case of said provision. Consequentially, according to the ComCo, once an investigation has been opened within the time bar of five years, there is no limitation period for the order of the ComCo or decisions of the appellate bodies (Federal Administrative Court, Federal Supreme Court) to be rendered. This view has been confirmed in a recent decision by the

Federal Supreme Court, according to which, after the opening of an investigation, only the so-called acceleration requirement ("*Beschleunigungsgebot*", *cf.* article 29 para. 1 Swiss Constitution) applies (2C_596/2019 consideration 6.3, 2 November 2022), thus there is no clear time bar. In certain specific circumstances, procedural decisions (interim decisions) may be appealed even before a final decision on the merits has been taken. This may generally be the case regarding an order to produce specific documents or compulsory interviews with individuals. Procedural rights against dawn raids are very limited. Consequently, dawn raids by the Competition Authorities have not been successfully challenged in court.

As a result of the *Menarini* decision of the European Court of Justice on 27 September 2011, the Swiss courts have held in constant practice that the guarantees of the ECHR may be met by the appeal proceeding of the Federal Administrative Court. It should be noted that the Federal Administrative Court covers a broad field of administrative law and the administrative judges generally tend to support the administration. While the Federal Administrative Court, following the guarantees of the ECHR, must examine the facts of a case point by point, it often gives leeway to the ComCo in relation to legal and economic issues.

## Leniency/amnesty regime

In Switzerland, many cartel investigations are started by a leniency application. In the first 10 years after the leniency regime came into force, the Competition Authorities received about 50 leniency applications. In general, the ComCo and the Secretariat are considered to be fair and proportionate with regard to the obligations imposed on a leniency applicant, such as the obligation to fully cooperate with the authorities during the investigation.

Pursuant to article 8 para. 1 of the Ordinance on Sanctions imposed for Unlawful Restraints of Competition ("CASO"), the ComCo grants immunity from a fine if an undertaking is the first to either: (i) provide sufficient information enabling the ComCo to open an investigation that the ComCo itself did not have at the time of the leniency filing; or (ii) submit evidence enabling the ComCo to prove a hard-core cartel, provided that no other undertaking has already been considered the first leniency applicant.

Immunity from a fine will not be granted if the undertaking: (i) coerced any other undertaking to participate in the infringement and was the ring leader; (ii) does not voluntarily submit to the ComCo all information or evidence in its possession concerning the illegal anti-competitive practice in question; (iii) does not continuously cooperate with the ComCo throughout the investigation without restrictions or delay; or (iv) does not cease its participation in the infringement voluntarily or upon being ordered to do so by the Competition Authorities.

Pursuant to the CartA, full immunity is limited to the "first in". Going in second or later in the same investigation will only allow for partial immunity. A reduction of up to 50 per cent is available at any time in the proceeding to undertakings that do not qualify for full immunity. The amount of the reduction for undertakings that do not apply first will also (but not only) depend on timing. The amount of the reduction for subsequent leniency applications depends on the importance of their contribution to the success of the proceedings; that is, in particular, the timing, the quality and the quantity of the information and evidence submitted.

A leniency application may include information that allows the ComCo to investigate further infringements (*leniency-plus*). The maximum discount in fines for such a leniency-plus application is 80 per cent (instead of up to 50 per cent if it did not apply first) in the first proceeding.

Leniency applications are also open to undertakings involved in vertical restrictions. In the *Stöckli* case decided by the ComCo in August 2019, the leniency application resulted in a reduction of 70 per cent, whereas the settlement agreement was taken into account as well. In the *Pöschl* case, the leniency applicant regarding a vertical restriction was granted a 50 per cent discount (see above section "*Overview of cartel enforcement activity during the last 12 months*"). Generally, full immunity is not possible for the manufacturer in relation to restrictions in distribution agreements, since the manufacturer generally plays a leading role in the anti-competitive agreements with its distributors.

## Administrative settlement of cases

Under article 29 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. Through settlements that 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.

The ComCo is supportive of administrative settlements and highlights in particular the cost-saving aspects and the positive effects on the reputation of undertakings that agree to such settlements. In 2020, four out of six final decisions included administrative settlements, compared to three out of four in 2021 and one out of one in 2022.

On 28 February 2018, the Secretariat published a new guidance paper on amicable settlements. The guidance clarified that the discount for such settlements depends, among other things, on the timing. Whereas a settlement in the early stage of proceedings may result in a discount of up to 20 per cent, the discount is generally reduced if the settlement is agreed to at a later stage. Where a settlement is agreed to by an undertaking after the Secretariat has issued a draft decision, the discount may amount to as little as 5 per cent. The discount for an amicable settlement is not exclusive and may be combined with other discounts, such as leniency discounts and discounts for good cooperation with the authorities. In the latter case, the combined discount for an early stage settlement of 20 per cent may be combined with a discount of another 20 per cent for good cooperation, amounting to a total discount of 40 per cent, which is not much less than the potential discount to a second leniency applicant, which may be up to 50 per cent.

Recent examples of such amicable settlements can be found in the aforementioned *Pöschl* case and the *Car Distribution* case (see above section "*Overview of cartel enforcement activity during the last 12 months*"). Pöschl agreed not to directly or indirectly restrict its non-resident distributors in passive sales to dealers and end customers in Switzerland. In the *Car Distribution* case, five of eight of the involved companies agreed to an amicable settlement.

## Third-party complaints

Anyone may file a complaint with the Secretariat (article 26 CartA). According to the official annual report of the ComCo, the Secretariat conducted 52 (informal) so-called market observations and 511 inquiries. Only very few of such matters were followed up

by the Secretariat. Certain enquiries from companies, which are targeted against another company, are referred to civil enforcement by the Secretariat. However, this cannot hide the fact that a carefully drafted third-party complaint is generally taken seriously by the Secretariat. So, a third-party complaint may be the starting point of a detailed investigation, particularly if convincing evidence is provided by the third party.

No party is *entitled* to have an investigation opened by the Competition Authorities and therefore may not appeal a refusal to do so. A third party may bring a civil court action based on competition law, although such case law has not yet been developed in great detail in Switzerland (see below section "*Developments in private enforcement of antitrust laws*").

There is the possibility for affected third parties to join the investigation procedure. If they qualify as a party, they have full legal standing and are vested with all procedural rights. However, under the Federal Supreme Court's practice, third parties do not easily qualify as a party. Particularly with regard to competitors, in addition to a close proximity to the subject matter, they are required to suffer a clear economic disadvantage. Such disadvantage requires a specific and individual affectedness and is considered given if an illegal anti-competitive agreement has disadvantageous effects on the competitor, in particular diminished turnover. The requirements for full legal standing must be clearly established by the competitor claiming to be a party.

## Administrative sanctions

The amount of the fine depends on the duration and severity of the unlawful conduct. The turnover of the undertaking is calculated by application of the rules on the calculation of turnover in merger control cases (articles 4 and 5 of the Merger Control Ordinance ("MCO")) and includes the consolidated net turnover (excluding intra-group turnover). The base amount is up to 10 per cent of the consolidated net turnover generated cumulatively on the relevant markets in Switzerland in the preceding three business years before the illegal conduct has ended, depending on the type and severity of the violation (article 3 CASO). Turnover of the undertaking abroad is not taken into account. The turnover relevant for the base amount of the fine is calculated by application of the rules of the MCO. In recent price-fixing cases, in absence of specific circumstances, the ComCo applied a percentage of between 5 and 10 per cent for the base amount. This base amount will then be increased by up to 50 per cent if the violation was implemented for up to five years. Each additional year thereafter will lead to an increase of another 10 per cent.

This interim base amount may increase by a certain percentage to reflect aggravating factors, such as repetition of an infringement, high cartel gains, ring-leading and measures to enforce cartel discipline (article 5 CASO). This is not exhaustive and other factors may also be taken into account; Swiss law provides the ComCo with wide discretion.

For calculating the fine, mitigating factors must also be taken into account and the amount of the fine may be reduced accordingly. Examples of mitigating factors are: termination of the illegal conduct before or immediately after the ComCo has taken first steps; passive role in the cartel; or desisting from taking cartel enforcement measures. In recent cases, the reduction percentages have varied from 10 to 60 per cent depending on whether the companies fully collaborated, immediately ceased their unlawful practices, or concluded an amicable settlement.

In exceptional cases, the ComCo may also impose a lump sum or symbolic fines – this has been the case in the presence of rather small turnovers.

### Right of appeal against civil liability and penalties

The decisions of the ComCo may be appealed at the Federal Administrative Court. Such appeals constitute full merits appeals on both the findings of facts and law. While administrative judges generally tend to support the administration, the Federal Administrative Court does not hesitate to annul the ComCo's decisions in full, if required. In our experience, the Federal Administrative Court's judicial review of a case is more detailed in relation to hard facts as opposed to economic evidence, where the Court often tends to show reluctance to fully review the ComCo's arguments. It is noteworthy that the appeals committee, which was competent for competition law appeals before 2007, had economists who were closely involved in the judicial review. Unfortunately, the Federal Administrative Court currently lacks economists sitting on the bench.

Since only few legal questions have been answered in Swiss competition law by the competent courts, most decisions (excluding settlement cases) are appealed. In particular, the calculation of the fine – similar to the EU – is reviewed in detail by the courts, which often results in smaller fines for the undertakings involved in cartel cases.

The judgments of the Federal Administrative Court may be challenged in the Federal Supreme Court. In proceedings before the Federal Supreme Court, judicial review is limited to legal claims, i.e. the flawed application of the CartA or other law, or a violation of fundamental rights set forth in the Swiss Federal Constitution or in international law. In the last few years, the Federal Supreme Court has greatly tightened the CartA with its interpretation of the law. In certain cases, the legal reasoning was even more enforcement-driven than the ComCo's position.

Numerous competition law cases are currently pending before the two appellate courts. Some of these cases raise fundamental questions, such as what requirements must be proven to find a single overall infringement.

### Criminal sanctions

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).

Administrative sanctions are not viewed as criminal sanctions in the strict sense. However, the guarantees of the ECHR regarding criminal charges apply in principle.

### Cooperation with other antitrust agencies

Following the agreement between Switzerland and the EU on cooperation and exchange of information between their respective Competition Authorities, which entered into force on 1 December 2014 (see above section "*Overview of investigative powers in Switzerland*"), Switzerland continued bilateral talks with Germany in relation to cooperation between their respective Competition Authorities. Germany is the most important trading partner for Switzerland. In addition, according to the ComCo, Germany constitutes an important market of reference for Switzerland, in particular, regarding price comparisons.

On 1 November 2022, Switzerland and Germany signed an agreement on cooperation between their Competition Authorities. After the Federal Assembly of Switzerland approved the agreement, it came into force on 1 September 2023. The agreement, like the agreement between Switzerland and the EU, allows the Competition Authorities to enforce

competition law in cross-border cases more efficiently, and has a similar wording to the agreement between Switzerland and the EU. It is noteworthy that the agreement contains certain specifications of a restrictive nature regarding the transfer of information from the German Federal Cartel Authority to other EU Member States (*cf*. article 12 paras 3 and 4).

### Cross-border issues

As in other jurisdictions, Swiss competition law is applicable irrespective of whether or not the infringement has taken place in Switzerland. Decisive for the application of the CartA is whether a certain behaviour may have an *effect* in Switzerland. According to recent case law of the Federal Supreme Court, it is not necessary for there to be an actual effect, or a particular intensity of the effect. It is sufficient that the behaviour may potentially have an effect on the Swiss market. This broad interpretation deviates from international standards and may lead to surprising results. For example, clauses in contracts between foreign parties that have potential effects on the Swiss markets (for example, restrictions to export) are sufficient for a sanction in Switzerland. This holds true even if such exports to Switzerland do not occur anyway – i.e. also without a restriction – and have therefore not been contemplated by the parties when drafting the agreement. In other words, actual effects no longer play a role when analysing the applicability of the CartA. This is particularly problematic in relation to hard-core cartels, since the negative effects of such cartels are presumed by the CartA and, therefore, the ComCo does not need to prove such actual effects when deciding a fine.

### Developments in private enforcement of antitrust laws

Competition law in Switzerland is (to date), to a large extent, driven by public enforcement. Private enforcement has not reached its full potential and in particular not the level the legislator originally hoped for. There are several procedural and substantive reasons for this. Compared to other jurisdictions, it has not been attractive for plaintiffs to enforce competition law claims in a civil court.

We believe that the modest development in private enforcement in Switzerland is based mainly on two elements. Firstly, companies in Switzerland consider competition law predominantly a compliance issue. The potential of competition law to protect a company's interest, in particular against dominant firms, is generally underestimated. Secondly, the amount of recent case law regarding private enforcement is relatively low.

The Federal Supreme Court reduced the requirements in relation to negative declaratory judgments in international litigation cases in 2018. The Court's new position rendered Switzerland very attractive as an alternative forum for competition law proceedings.

### Reform proposals

After the revision of the CartA in relation to the introduction of the concept of "relative market power", which entered into force on 1 January 2022, the Swiss Government drafted the next proposal for a partial revision of the CartA. This proposal comprises several essentially undisputed elements of the last reform attempt, which failed in 2014. In addition, the proposal addresses several parliamentary motions that were filed after the failure of the last revision project. The corresponding public consultation process lasted from November 2021 to 11 March 2022. Subsequently, the Swiss Government presented its findings on the outcome of the consultation process in a report from 17 March 2023. On 24 May 2023, the Swiss Government published a draft of the revised CartA and the corresponding explanatory

statement. Although Parliament are likely to amend at least parts of this new proposal, some points are already noteworthy at this stage. An important part of the upcoming revision will be the introduction of the Significant Impediment to Effective Competition Test ("SIEC Test") as the relevant standard for merger control proceedings. Today, Swiss merger control assesses transactions based on the dominance test, i.e. a transaction may only be prohibited (or subject to remedies) if it creates or strengthens a dominant position resulting in an elimination of effective competition. Other elements of the envisaged revision are regulatory time frames for the Competition Authorities and courts, party compensation in proceedings before the ComCo, and a strengthening of civil antitrust law.

In relation to cartels, one additional revision is interesting. According to the proposal, when reviewing whether a cartel has a considerable effect on competition, both by-object and by-effect tests have to be considered. According to current practice, the ComCo may essentially rely on a by-object approach when dealing with hard-core restrictions (cartels on price, volumes, territory and customers), even if it is demonstrated that effective competition has not been eliminated by the cartel in question. Therefore, the new proposal would soften the by-object approach taken by the Swiss Competition Authorities. In addition, as a result of the feedback during the consultation process, the Swiss Government is currently drafting a separate reform proposal regarding the organisation of the authorities (institutional reform) to Parliament.

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Michael Tschudin is specialised in Swiss and European competition law, regulated markets and competition law litigation. Michael assists Swiss and international companies in all questions of competition law. He represents sanctioned companies in various industries before authorities and courts and advises clients on distribution systems, licences, joint ventures and other forms of cooperation as well as merger control. Having worked at the Competition Commission (2005–2006) and the court of appeal for competition law cases, as well as the Swiss Federal Administrative Court (2013–2014), he is able to draw on this practical experience when advising clients. Since 2021, he has been a board member of the digitalswitzerland Foundation. As the only Swiss lawyer, *WWL* ranks Michael Tschudin as a "Global Elite Thought Leader – Competition – Under 45". Furthermore, *WWL* includes Michael in the rankings "Competition Future Leaders – Partners 2022" and "National Leaders Switzerland – Competition".

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