

2013 ANTITRUST YEAR IN REVIEW





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LEGISLATIVE DEVELOPMENTS

Cooperation Agreement with EU

On May 17, 2013, after two years of negotiations, the European Commission and the Swiss Federal Government signed a Cooperation Agreement in Competition Matters (the “Agreement”).¹ The Agreement is yet to be ratified and is expected to become effective in 2014, if not later.

The Agreement has been referred to by the European Commission as a “second generation” agreement. In contrast to existing cooperation arrangements between the EU and the USA (1991), Canada (1999), Japan (2003) and South Korea (2009), the Agreement with Switzerland allows the European Commission and the Swiss Competition Commission (“ComCo”) to exchange information and documents obtained in the course of their investigations.²

ComCo expects that the cooperation with the European Commission will bolster its ability to enforce the Swiss competition rules vis-à-vis international cartels. However, several competition experts have voiced concerns over a perceived lack of sufficient procedural safeguards for undertakings potentially affected by an information exchange between the authorities.

For instance, the Agreement will allow the Europe-

an Commission and ComCo to “discuss” case-related information without even notifying the affected parties in advance (Article 7(2)), and it seems possible, if not likely, that such “discussions” will include the exchange of written information. Even the exchange of documentary evidence will be relatively easy: The authority will be required to seek the consent of the undertaking from whom the evidence was obtained, but even in the absence of such consent the exchange will usually be possible anyway – and the agreement does not provide for a right to challenge the legality of an information exchange before it happens.

It remains to be seen whether these concerns will delay the ratification process and how the Agreement, once in force, will be applied by the authorities and the courts.

Revision of the Cartel Act

We have commented on the various proposals for revising the Federal Act on Cartels and Other Restraints on Competition (the “Cartel Act”)³ in previous editions of this publication.⁴ The process is currently stuck in the Federal Parliament where the two chambers have struggled to agree on the scope of the amendments

to make to the Cartel Act. The amendments under discussion include an institutional reform (introduc-

1 See the Agreement between the European Union and the Swiss Confederation concerning Cooperation on the Application of their Competition Laws of May 17, 2013, available at http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.

2 See Press Release, European Commission, “European Union and Switzerland sign Cooperation Agreement in Competition Matters” (May 17, 2013), available at http://europa.eu/rapid/press-release_IP-13-444_en.htm.

3 Kartellgesetz [KG] “Federal Act on Cartels and other Restraints of Competition” October 6, 1995 (Switz.), available at <http://www.admin.ch/ch/e/rs/c251.html>.

4 Dr. Patrick Sommer & Amr Abdelaziz, “Switzerland”, ABA Int’l Section Year in Review (2012) [hereinafter “Swiss Antitrust Review 2012”]; See also Dr. Patrick Sommer & Amr Abdelaziz, “Switzerland”, ABA Int’l Section Year in Review (2011) [hereinafter “Swiss Antitrust Review 2011”]; See also Dr. Patrick Sommer & Amr Abdelaziz, “Switzerland”, ABA Int’l Section Year in Review (2010) [hereinafter “Swiss Antitrust Review 2010”].

tion of a two-tier structure); strengthening private enforcement (by allowing consumer actions against cartels); changes to the merger control procedure (introduction of the significant impediment of effective competition (“SIEC”) test); accelerating and improving the notification procedure by which undertakings may apply for ex-ante clearance of competition restraints; a per se prohibition of hardcore horizontal and vertical restrictions (form-based approach); mandatory fine reductions to benefit undertakings with “effective” compliance programs; criminal sanctions against individuals; and a controversial legislative proposal aimed at limiting the ability of foreign companies to charge higher prices in Switzerland than in the European Economic Area.

MERGERS

ComCo has not issued any important merger control decisions in 2013.

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In 2013, ComCo continued to investigate suspected bid-rigging cartels.

On February 7, 2013, ComCo opened an investigation against three tunnel-cleaning companies and conducted dawn raids at locations in four different cantons.⁵ According to ComCo, there was evidence suggesting that the three tunnel-cleaning firms had colluded to fix prices and had coordinated in other ways in order to obtain contracts under anti-competitive conditions.

On April 16, 2013, ComCo opened an investiga-

tion against various road and underground construction companies in the canton of St. Gallen and conducted dawn raids on their premises.⁶ The affected companies are alleged to have engaged in customer and construction project allocation and other illicit coordination in tenders. ComCo expanded the investigation in October 2013 and conducted dawn raids on the premises of more undertakings in St. Gallen.⁷ A week later, ComCo expanded a similar investigation opened in October 2012 and conducted dawn raids. The latter investigation targets construction firms in the canton of Grisons.⁸

On June 18, 2013, ComCo announced a decision imposing fines against a dozen road construction companies in the canton of Zurich.⁹ The fines imposed ranged from CHF 3,000 to CHF 124,000. A leniency applicant that had filed the leniency application after the dawn raid was granted a full waiver from a fine. ComCo determined that the companies in question had engaged in bid rigging (price-fixing and customer allocation) in a total of 30 public and private tenders. In its press statement, ComCo emphasized that it will continue to fight against bid rigging and that it will continue to cooperate with the cantons and the Federal Administration in order to raise the awareness of the contracting authorities.

On May 27, 2013, ComCo found ten wholesalers of francophone books guilty of hindering parallel imports from France and imposed fines in the total amount of CHF 16.5 million.¹⁰ The wholesalers were found to have developed exclusive distribution systems which made it impossible for bookstores to procure books from alternative channels in France (even

5 See Press Release, “ComCo, WEKO eröffnet Untersuchung gegen Tunnelreinigungsfirmer” (February 7, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=47686>.

6 See Press Release, ComCo, “WEKO eröffnet Untersuchung im Bereich des Strassen- und Tiefbaus” (April 16, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=48531>.

7 See Press Release, ComCo, “WEKO dehnt Untersuchung ‘See Gaster’ im Bereich Strassen- und Tiefbau auf weitere Unternehmen aus” (October 23, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=50655>.

8 See Press Release, “ComCo, WEKO dehnt Untersuchung im Bereich Strassen-, Tief- und Hochbau im Unterengadin auf den Kanton Graubünden aus” (April 24, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=48617>.

9 See Press Release, “ComCo, WEKO büsst Strassenbauer im Kanton Zürich” (June 18, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49306>.

10 See Press Release, ComCo, “Die WEKO sanktioniert Grosshändler von französischsprachigen Büchern” (June 12, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49225>.



SWITZERLAND

passive sales were not possible), thus maintaining artificially high wholesale price levels in Switzerland from 2005 until 2011. When calculating the fines, ComCo took into account the turnovers of the parties, the gravity and duration of the breach, and the ability of each wholesaler to pay the fine.

In recent years, ComCo was under considerable public pressure to act against importers of (consumer) goods suspected of cashing in on gains related to the slide of the Euro against the Swiss Franc. This pressure seems to have eased in 2013.

On October 21, 2013, ComCo ended an investigation into the cosmetics market without finding an infringement.¹¹ ComCo argued that the vertical restraints identified (territorial protection clauses, restrictions to online sales, recommended resale prices) did not appreciably restrict competition, taking into account the low market shares of the investigated companies, the low level of market concentration and the fact that prices in Switzerland were not considerably higher than in other countries. Furthermore, the investigated companies voluntarily changed the problematic clauses and declared the recommended resale prices as non-binding and informed the dealers accordingly.

In November 2013, ComCo also ended a prelimi-

nary investigation into a possible conspiracy of 22 suppliers of international branded articles and the three retail chains Coop, Migros and Denner to cash in on exchange rate gains.¹² ComCo failed to identify sufficient evidence of horizontal or vertical agreements not to pass on exchange rate gains to consumers, or any abuse of dominance having such effect. In order to come to this conclusion, ComCo relied on questionnaires sent to the investigated companies and the answers received from them. According to ComCo's press release, most suppliers claimed to have made exchange rate-related rebates to the retailers, and the retailers claimed to have largely passed on these rebates to the consumers. The suppliers further argued that less than 50% of their costs were affected by exchange-rate movements.¹³

Finally, ComCo opened two more investigations—one against a number of Swiss-based Volkswagen concessionaires (suspected horizontal fixing of rebates and other price elements),¹⁴ another against a distributor of guitars and other stringed instruments (suspected vertical price fixing)—¹⁵ and a preliminary investigation into a possible conspiracy of several banks to manipulate currency exchange rates.¹⁶ Meanwhile, the ComCo investigation into the rigging of several reference interest rates ("LIBOR investigation")¹⁷ is still underway.

11 See Press Release, "ComCo, WEKO stellt Untersuchung Kosmetikprodukte ein" (November 28, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=51120>.

12 See Press Release, "ComCo, Sekretariat WEKO schliesst Vorabklärung zur Weitergabe von Währungsvorteilen bei Markenartikeln im Detailhandel ab" (May 12, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=51242>.

13 See Final report, "WEKO, on the preliminary investigation into exchange rate gains" (short version) (November 7, 2013), available at <http://www.weko.admin.ch>.

14 See Press Release, "ComCo, WEKO eröffnet eine Untersuchung im Automobilmarkt" (May 23, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=48943>.

15 See Press Release, "ComCo, WEKO eröffnet eine Untersuchung im Bereich Saiteninstrumente" (July 5, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49592>.

16 See Press Release, ComCo, "Sekretariat WEKO hat Vorabklärung wegen möglicher Absprachen von Währungswechselkursen eröffnet" (October 4, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=50486>.

17 See "Swiss Antitrust Review 2012", *supra* at note 4.

ABUSES OF A DOMINANT POSITION

In 2013, ComCo finalized an abuse of dominance case and tackled three new ones.

Since June 6, 2011, ComCo had been investigating a decision by the Swatch group to discontinue the supply of certain components for mechanical movements to other watch-makers.¹⁸ By a decision dated October 21, 2013, ComCo approved a final settlement with the Swatch group on this matter.¹⁹ According to the settlement, Swatch's subsidiary ETA SA Manufacture Horlogère Suisse may gradually reduce the supply of mechanical watch movement blanks and, as of January 1, 2014, will no longer be under any obligation to supply. ETA is required to treat its customers with equal measure, although a preferential treatment of small and medium-sized customers would be permitted in exceptional circumstances pursuant to a hardship clause. In contrast, ComCo refused to allow the Swatch subsidiary Nivarox-FAR SA to reduce the supply of other components for mechanical movements ("assortiments"), judging that allowing such a supply reduction would for the time being be premature due to the prevailing market conditions and various uncertainties in this area.

After conducting a preliminary investigation, ComCo opened in April 2013 a formal investigation

against Switzerland's telecommunication incumbent Swisscom and its subsidiary Cinetrade, a company that amongst other things holds long-term and comprehensive exclusive film and sports rights for pay TV, video on demand and pay-per-view.²⁰ ComCo is investigating whether Cinetrade abused a dominant position, e.g., by refusing to provide certain services to companies operating TV platforms that compete with Swisscom TV. Swisscom holds 75% of Cinetrade's shares.

On July 18, 2013, ComCo launched a second probe against Swisscom based on evidence that Swisscom may have abused a dominant position as a provider of broadband internet services for businesses.²¹ Specifically, ComCo is investigating whether Swisscom won a tender for networking the Swiss Post's offices via broadband Internet by charging excessive wholesale prices to rival telecoms service providers, thereby hindering them from effectively participating in the same tender.

Finally, the Swiss Post's own practices have come under ComCo's scrutiny. An investigation announced on July 18, 2013 aims to clarify whether the Swiss Post has abused its dominant position for certain postal services for business customers.²² The probe cen-

18 See "Swiss Antitrust Review 2011", *supra* at note 4; See also "Swiss Antitrust Review 2010", *supra* at note 4.

19 See Press Release, ComCo, "WEKO befürwortet Lieferreduktion von mechanischen Uhrwerken" (July 12, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49663>.

20 See Press Release, ComCo, "WEKO untersucht die Übertragung von Live-Sport im Pay-TV" (April 4, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=48360>.

21 See Press Release, "ComCo, WEKO eröffnet Untersuchung gegen Swisscom im Bereich Breitbandinternet" (July 19, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49705>.

22 See Press Release, "ComCo, WEKO untersucht Preissysteme der Post für Geschäftskunden" (July 18, 2013), available at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=49694>.

ters around the pricing policies of the Swiss Post and whether these policies hinder competitors from doing business and whether they discriminate or otherwise disadvantage certain customers.

COURT DECISIONS

In December 2013, the Federal Administrative Court published its long-awaited ruling in the matter “Hors-Liste Medikamente”. In that case, ComCo had fined Pfizer, Bayer and Eli Lilly for issuing recommended resale prices for Viagra, Levitra and Cialis to pharmacies. In the opinion of ComCo, these price recommendations amounted to vertical price fixing.

In three separate (but largely identical) decisions of December 3, 2013, the Federal Administrative Court overturned the decision of ComCo and lifted the fines imposed on the above-mentioned companies.²³ Surprisingly, the court’s ruling did not contain any considerations as to whether the price recommendations were pro- or anti-competitive. In the court’s view, the Cartel Act did not apply at all in this case. The court shared ComCo’s finding that there was a lack of competition in the investigated market. However, the judges ruled that this lack of competition was not

caused by the price recommendations of the pharmaceutical companies but by a combination of regulatory restrictions, including a ban on advertising the above products in public, and a “shame factor” (the fact that “consumers” of drugs for erectile dysfunction are naturally not inclined to “shop around” and compare prices in different pharmacies). ComCo has appealed the decision to the Federal Supreme Court.

Finally, the Federal Administrative Court published two notable interim decisions relating to the LIBOR investigation and the duty of “[p]arties to agreements, undertakings with market power, undertakings concerned in concentrations and affected third parties [to] provide the competition authorities with all the information required for their investigations and produce the necessary documents” pursuant to article 40 of the Cartel Act. The decisions of the Federal Administrative Court became necessary when a foreign brokerage firm²⁴ and a foreign bank²⁵ refused to duly respond to information requests of ComCo. The brokerage firm alleged that it could not cooperate with ComCo due to the UK Data Protection Act. The court accepted that a breach of the UK privacy rules could cause irreparable harm. However, ComCo’s information request was meant to preserve

23 See Press Release, Federal Administrative Court, “Viagra/Levitra/Cialis: Beschwerden von Pfizer, Bayer und Eli Lilly gutgeheissen” (December 12, 2013), available at http://www.bvger.ch/medien/medienmitteilungen/00704/index.html?download=NHZlpZeg7t,Inp6I0NTU042I2Z6in1acy-4Zn4Z2qZpnO2Yuq2Z6gpJCDdX18e2ym162epYbg2c_JjKbNoKSn6A-&lang=de.

24 “Bundesverwaltungsgericht” [Federal Administrative Court] B-4416/2013, September 4, 2013, available at <http://www.bvger.ch/publiws/download?decisionId=4f8c0cf7-c370-4f90-ae5b-b181cf89843b>.

25 “Bundesverwaltungsgericht” [Federal Administrative Court] B-4363/2013, September 2, 2013, available at <http://www.bvger.ch/publiws/download?decisionId=eeecde6b-835f-41e6-a204-0ccb583ca9a1>.

important evidence. Furthermore, the brokerage firm failed to establish that UK privacy rules really prohibited it from cooperating with ComCo and that its interest in avoiding a breach of UK privacy rules outweighed the public interest in a fast completion of the investigation. The legal justification for refusing to cooperate with ComCo was different in the second case: A Swiss subsidiary of a foreign bank received various communications and a questionnaire for the

attention of its foreign parent company but refused to forward them and to ask its parent company to provide the requested information. The Federal Administrative Court rejected the appeal of the Swiss entity, finding that ComCo's interim decision was materially directed at the foreign parent company. The Swiss appellant only served as a formal recipient and intermediary and therefore was not entitled to lodge the appeal.



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