# 2015 ANTITRUST YEAR IN REVIEW

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## 1. LEGISLATIVE DEVELOPMENTS

On 29 June 2015, the Competition Commission ("**ComCo**") published its Revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector ("**Motor Vehicle Notice**") and its explanations to the Motor Vehicle Notice.[1] The Motor Vehicle Notice came into force on 1 January 2016 and replaces the Notice of 2002. The new Motor Vehicle Notice continues to regulate, contrary to the current regulation in the EU, not only the secondary market (maintenance and repair services and sale of spare parts) but also the primary market (sale of new motor vehicles). In the EU, the primary market is no longer subject to sector–specific rules but falls within the ambit of the general rules on vertical agreements. As a result, multi–brand representations can, in principle, still not be limited in the motor vehicle sector in Switzerland, whereas this is possible in the EU if certain conditions are met.

The regulation under the Motor Vehicle Notice is similar to the situation under the 2002 Notice, but has been aligned with the approach taken in the general Notice on the Assessment of Vertical Agreements of June 2010[2]. In particular, the revised Motor Vehicle Notice contains a list of potentially serious restrictions (Articles 14 – 19). However, in accordance with the Federal Act on Cartels and Other Restraints of Competition (the "***Cartel Act***")[3] and the general Notice on the Assessment of Vertical Agreements, an agreement is, according to the wording of the Motor Vehicle Notice, only illicit if it has some actual negative effect on competition (significant restriction of competition).[4] In addition, the assessment of selective distribution systems has changed. Whereas the Notice of 2002 only allowed for selective distribution systems which were based on purely selective criteria, the new Motor Vehicle Notice allows for a selection on quantitative criteria under certain circumstances. The Motor Vehicle Notice provides for a transitional period of one year during which existing agreements must be adapted to the new regulation.

On 6 January 2016, the Secretariat of ComCo published an explanatory note on selected instruments of investigation which replaces its former explanatory note of 6 April 2011 on dawn raids.[5] As to the dawn raid procedure, the authority, *inter alia*, confirms that it will not wait for the arrival of external counsel before it proceeds with a search. Furthermore, the note elaborates on the authority's approach to communication with external legal counsel (legal privilege) in the context of dawn raids and the handling and analysis of electronic data seized. The document also contains a section on interrogations and requests for information. The Secretariat confirms its current practice that only legal and *de facto* representatives of an investigated company will be interrogated as parties to which the right to remain silent applies; any other person, including current and former employees, will be interrogated as witnesses.

[1] (In German, French and Italian): http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de.
[2] (In German, French and Italian): http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de.
[3] For an English translation of the *Cartel Act*: http://www.admin.ch/ch/e/rs/c251.html.
[4] However, see the case law of the Federal Administrative Court in Section 5 below.
[5] For an English translation: http://www.weko.admin.ch/dokumentation/01007/index.html?lang=en.

ComCo has started to rely on framework conditions when conducting settlement negotiations. According to these conditions, the content of negotiations will not be part of the file of the proceedings, negotiations are not recorded and drafts for a settlement agreement are without prejudice.

## 2. MERGERS

As in 2014, ComCo had to assess several mergers in the media sector. Once again, ComCo has neither prohibited (nor only approved under conditions or obligations) any mergers in 2015, due to the (qualified) dominance test which still applies under the Swiss merger control regime, rather than the SIEC test applied in the EU. According to Article 10 of the *Cartel Act*, a merger is only in violation of the *Cartel Act* if it creates or strengthens a dominant position which, in addition, allows for an elimination of effective competition and, at the same time, does not improve the conditions of competition in another market which outweigh the negative effects of the dominant position.

ComCo conducted an in–depth assessment (phase II investigation) of the merger of Swiss search engines local.ch (a subsidiary of Swisscom, Switzerland's telecommunication incumbent) and search.ch (a subsidiary of Tamedia, one of Switzerland's leading media group of companies) into a joint venture of Swisscom and Tamedia. In March 2015, ComCo concluded that the merger leads to a dominant position of Swisscom in the market for address directories but does not eliminate competition in the market, and thus approved the merger.[6]

Following another phase II investigation, ComCo approved in August 2015 the acquisitions of Ricardo, an operator of various online platforms, by Tamedia and of JobScout24, an online jobs portal of Ricardo, by JobCloud, another jobs portal jointly owned by Tamedia and Ricardo. ComCo concluded in both decisions that Tamedia has a dominant position in the market for jobs classifieds but that there is no indication for an elimination of competition.[7]

In the third phase II investigation of last year, ComCo held that the joint venture between Swisscom, Ringier (another leading Swiss media group) and the Swiss Broadcasting Corporation for the marketing of online, television, print and radio commercials did not eliminate effective competition in any of the relevant markets affected.[8]

Following a request for advice under Article 23(2) of the *Cartel Act*, the Secretariat of ComCo published in early 2015 a recommendation on the application of Article 9(4) of the *Cartel Act* to a concentration between a company jointly controlled by a dominant company and a third party. Article 9(4) provides that a notification of a transaction is – regardless of any turnover thresholds – mandatory if one of the undertakings involved has been held to be dominant in a final decision under the *Cartel Act* and the transaction relates to such market or a neighbouring, upstream or downstream market. The Secretariat states in its advice that a full–function joint venture does not qualify as an economically independent entity but forms part of a single economic entity consisting of the joint venture and each of the companies jointly controlling it. Therefore, according to the Secretariat, the dominant position of one of the

[6] Law and Policy on Competition (LPC), 2015/3, p. 375.

[7] Law and Policy on Competition (LPC), 2015/3, p. 470 and 507.

[8] (In German): https://www.weko.admin.ch/weko/de/home/aktuell/letzte-entscheide.html ("*Zusammenschlussvorhaben SRG / Swisscom / Ringier AG*").

mother companies triggers the notification obligation under Article 9(4).[9]

## 3. CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

In March 2015, ComCo imposed fines totalling 161,000 Swiss francs on the members of a cartel in the market for tunnel cleaning services. According to ComCo, the three participating companies had agreed on prices and surcharges between 2008 and 2013 in order to divide public tenders among themselves. The investigation was initiated by dawn raids. All three companies admitted their participation in the cartel and filed leniency applications. The first applicant escaped a fine, while the second and third applicants were granted a reduction of their fines of 50 per cent and 10 per cent, respectively, for their cooperation. Moreover, the fines were reduced by another 15 per cent due to the conclusion of amicable settlements with the authority.[10]

In a decision dated 29 June 2015, ComCo held that Musik Olar, an importer and wholesaler of stringed instruments, had agreed with its resellers on mandatory price recommendations and rebate policies. ComCo found that by fixing maximum rebates to be applied by their resellers, the company had imposed minimum resale prices which significantly impeded price competition between 2010 and 2013. The investigation concluded with an amicable settlement agreement under which Musik Olar agreed not to influence future resale prices of its distributors. The company received a fine of 65,000 Swiss francs. The fine was reduced by 50 per cent due to the company's leniency application and by another 20 per cent for entering into a settlement agreement.[11]

ComCo announced in July 2015 that it sanctioned 10 wholesalers in the sanitary industry (bathroom fixtures and fittings) with fines totalling 80 million Swiss francs for entering into various horizontal agreements on price elements and factors relevant for the determination of sale prices, such as gross prices and exchange rates. Furthermore, the commission criticised the members of the alleged cartel for agreeing to not include certain manufacturers in their catalogues. Most of the wholesalers concerned were members of a union of wholesalers of the sanitary industry, which served as a platform to conclude the illicit agreements. ComCo's reasons were still not published at the time of writing.

On 19 October 2015, ComCo closed its investigation into the online hotel booking platforms market. The investigation against Booking.com, Expedia and HRS was launched in 2012. ComCo prohibits the so–called broad price parity clause (or broad most favored nation clause) under which hotels are not allowed to offer better conditions (lower prices, amount of rooms available) through any other distribution channel. However, unlike the German competition authority, but in line with the decisions of the authorities of the UK, Italy, France, and Sweden, ComCo did not prohibit the narrow price parity clause where the prohibition to advertise lower prices is limited to the hotels' own websites. ComCo, however, explicitly left the assessment of narrow parity clauses open for the time being. There were no fines imposed since the conduct did not fall within any of the

[9] Law and Policy on Competition (LPC), 2015/1, p. 81.
[10] Decision of ComCo of 23 February 2015 regarding "Tunnelreinigung" (in German): http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.
[11] Decision of ComCo of 29 June 2015 regarding "Saiteninstrumente (Gitarren und Bässe) und Zubehör" (in German): http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

categories of agreements which are subject to direct sanctions under the *Cartel Act*.[12]

ComCo sanctioned four concession holders of the Volkswagen group of companies in October 2015 for horizontal price fixing with fines ranging from 10,000 to 320,000 Swiss francs. According to the commission's findings, the companies had agreed on a list of common rebates and delivery charges for new vehicles of Volkswagen group brands in early 2013 and communicated the coordinated rebate policy at association meetings of the Volkswagen group partners, with the objective of implementing the conditions throughout all authorized dealers in Switzerland. The fact that the price agreements had only been in force for a short period was taken into account in the calculation of the fines. One concession holder, AMAG, did not receive a fine due to its leniency application, which triggered the investigation. ComCo closed the investigation against AMAG in August 2014 following an amicable settlement. At the time of writing the reasons for the decision had not yet been published.

## 4. ABUSE OF DOMINANT POSITION

On 21 September 2015, ComCo concluded another investigation against Switzerland's telecom incumbent, Swisscom, imposing a fine of approximately 8 million Swiss francs. According to ComCo, Swisscom abused its dominant position in the market for broadband connections for business customers in the context of a public tender regarding connections of Switzerland's public postal services company, Swiss Post, to the broadband network. The tender was awarded to Swisscom after it made a significantly lower offer than its competitors. ComCo concluded that Swisscom overpriced its services on the wholesale level, on which its competitors were dependent, in order to be able to offer the procured service (margin squeeze). At the same time, ComCo found Swisscom to have abused its dominant position by charging excessive prices to Swiss Post.[13] The investigation was opened following a report filed by Swisscom's competitor Sunrise. Swisscom's appeal of the decision is currently pending before the Federal Administrative Court.

## 5. COURT DECISIONS

On 28 January 2015, the Swiss Federal Court overturned several judgements of the Federal Administrative Court of 3 December 2013,[14] in which the court had annulled ComCo's decision of 2 November 2009. ComCo had sanctioned pharmaceutical companies Pfizer, Eli Lilly, and Bayer for resale price maintenance. The companies issued price recommendations for pharmaceuticals that treat erectile dysfunction (Cialis, Levitra, and Viagra); retailers followed these price recommendations to a great extent and, thus, according to ComCo, they amounted to vertical price agreements. The Federal Administrative Court concluded in its 2013 decisions that the *Cartel Act* did not apply due to the regulatory regime for therapeutic products, which limits marketing of the products, and due to other factual limitations that do not allow for effective competition in the relevant market. Contrary to the Federal Administrative Court, the Federal Court held in its judgement that competition may be limited but is not excluded and is thus still possible within the applicable

[12] Decision of ComCo of 19 October 2015 regarding "Online-Buchungsplattformen" (in German): http://www.weko.admin.ch/aktuell/00162/index.html?lang=de.

[13] Decision of 21 September 2015 regarding "Swisscom WAN-Anbindung" (in German): http://www.weko.admin.ch/aktuell/00162/index.html?lang=de; also, the judgement of the Federal Administrative Court of 14 September 2015 in Section 5 below.

[14] In particular B-364/2010 (Pfizer), B-362/2010 (Bayer) and B-360/2010 (Eli Lilly) (in German): http://www.bvger.ch/publiws/pub/search.jsf.

regulatory framework. Hence, the Federal Court considers the *Cartel Act* to be applicable and concluded that the fact that competition in the relevant market is limited should be taken into account when assessing the alleged resale price maintenance under the substantive rules of the *Cartel Act*.[15] The case is now pending before the Federal Administrative Court for reassessment.

On 14 September 2015, the Federal Administrative Court confirmed a 2009 ComCo decision that Swisscom had abused its dominant position in the wholesale market for broadband services by improperly pricing its services, thereby hindering its competitors at the retail level (margin squeeze). The court reduced the fine from 220 to 189 million Swiss francs since it considered Swisscom to have committed the violation negligently rather than intentionally. Apart from a detailed discussion of the concept of margin (price) squeeze, the judgement contains an analysis of various procedural guarantees including the principle of *nemo tenetur* (privilege against self–incrimination). The question of whether the principle applies to undertakings and antitrust proceedings has been left open. However, the decision elaborates in detail on possible limitations to the principle and concludes that, if *nemo tenetur* were to apply, a limitation of its applicability to statements of a purely factual nature (as opposed to statements amounting to a confession) is only meaningful if limited to facts which could not have an incriminating effect at a later stage of the proceedings.[16]

In a 13 November 2015 decision, the Federal Administrative Court confirmed ComCo's 2012 decision in which the commission fined BMW for restricting imports into Switzerland.[17] According to both the court and the commission, BMW had prohibited its dealers in the EEA from selling new vehicles of the BMW and MINI brands to customers outside the EEA and thus to customers in Switzerland (export ban). The Federal Administrative Court states that absolute territorial restrictions (prohibition of passive sales) constitute a significant restriction of competition within the meaning of Article 5(1) of the *Cartel Act*, regardless of their actual effect on competition. The court thereby confirms its highly controversial concept of *per se* significant restrictions of effective competition, a concept developed by the Federal Administrative Court in its *Gaba/Gebro* judgements of December 2013. According to *Gaba/Gebro,* agreements for which the *Cartel Act* provides a rebuttable presumption that they eliminate competition (see Article 5(3) and (4) of the *Cartel Act*), such as absolute territorial restrictions, constitute *per se* significant restrictions of competition within the meaning of Article 5(1) of the *Cartel Act*. Before *Gaba/Gebro,* it was generally accepted in doctrine and case law that certain conduct is, in view of the effects–based approach of Swiss competition law in accordance with Article 96 of the *Swiss Constitution*, only prohibited under Article 5(1) of the *Cartel Act* if the authority can prove that the conduct did in fact have a negative effect on competition. Interestingly, the Federal Administrative Court confirmed this understanding of Article 5 of the *Cartel Act* in its window mountings judgements of September 2014 in the context of horizontal price agreements without making reference to its earlier *Gaba/Gebro* judgements.[18] The *BMW* judgement of 13 November 2015 confirms again

[15] Federal Court Decision (BGE) 141 II 66 (in German): http://www.bger.ch/index/juridiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-leitentscheide1954.htm.
[16] Decision B-7633/2009 (in German): http://www.bvger.ch/publiws/pub/search.jsf.
[17] Decision B-3332/2012 (in German): http://www.bvger.ch/publiws/pub/search.jsf.
[18] See our comments on the Gaba/Gebro and window mountings judgements in section 5 of our last year's contribution.

the court's position taken in *Gaba/Gebro,* at least with regard to absolute territorial restrictions.

However, the BMW decision has not been the Federal Administrative Court's last word in the debate on whether an agreement must have some actual negative effect on effective competition in order to be illicit. On 17 December 2015, only one month after the *BMW* decision, the very same court annulled a decision of ComCo regarding alleged resale price maintenance between an importer of mountaineering equipment (Altimum SA) and its retailers. In its 20 August 2012 decision, the commission concluded that the price recommendations issued by Altimum amounted to an illicit vertical agreement on resale prices between Altimum and its retailers. The Federal Administrative Court now states that price recommendations constitute vertical agreements on resale prices if either the recommended price has explicitly or tacitly been accepted by retailers (agreement) or the issuer of the recommendation exercises pressure on the retailers or incentivises adherence to the recommendation and the recommendation is followed to a great extent ("*dans une large mesure*") by retailers (concerted practice). When assessing the effects on competition, the court confirmed again that an agreement must have actual negative effects on effective competition in order to be in violation of Swiss competition law. In its assessment of those negative effects, the court concluded that the market position of the issuer of the price recommendation is relevant, but not sufficient to establish such negative effects. In addition, the degree of adherence to the recommendation and the market position of those retailers which adhere to the recommendation must be considered.

The decision is significant for two reasons. First, in the past, the commission has taken a rather strict approach to price recommendations by relying heavily on the degree of adherence. Consequently, issuers of price recommendations bore the risk of ending up in an illicit vertical agreement on prices (rather than a unilateral behaviour) without having induced or forced retailers to adhere to the recommendation. The court has now stated that mere adherence to a price recommendation by its addressees is insufficient for the recommendation to qualify as an agreement or concerted practice. Second, the court has added another chapter to the current debate over whether agreements which are considered to be particularly harmful to competition by their nature are prohibited regardless of their actual effects. In the *Altimum* decision, the court confirms again that hardcore agreements, and in particular vertical price agreements, are prohibited only if there is proof for an actual negative effect on competition. However, the Federal Administrative Court also makes reference to its contradictory position taken in the *BMW* judgement with regard to absolute territorial restrictions and holds that the Federal Court will have to decide the question in the *Gaba/Gebro* case (which also concerned absolute territorial restrictions).[19]

Both the *Altimum* and *BMW* judgements, as well as the window mountings and *Gaba/Gebro* judgements, are under appeal and currently pending before the Federal Court.

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[19] Decision B-5685/2012 (in French): www.bvger.ch/publiws/download?decisionId=94c41efe-d067-4b1a-a08b-3a7c524d7719.