

2011 ANTITRUST YEAR IN REVIEW



Argentina
Australia
Austria
Belgium
Bosnia Herzegovina
Brazil
Cambodia/Laos/
Thailand/Vietnam
Canada
Chile
China
Colombia
Denmark
Ecuador
European Union
Finland
France
Germany
Greece
Hong Kong
Hungary
Ireland
Israel
India
Italy
Japan
Kosovo
South Korea
Macedonia
Malaysia
Mexico
The Netherlands
New Zealand
Norway
Peru
Poland
Portugal
Russia
Serbia
Singapore
Spain
Sweden
Switzerland
South Africa
Taiwan
Turkey
Ukraine
United Kingdom
United States Of America
Venezuela

SWITZERLAND

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LEGISLATIVE DEVELOPMENTS

Revision of the ACart

The year 2011 was marked by the ongoing discussion on whether and how the Federal Act on Cartels and Other Restraints on Competition (the “ACart”) should be revised.¹ In a draft bill published in 2010, the Federal Government proposed changes aimed at (i) introducing a new institutional set-up by creating a Federal Competition Court, thus separating decision-making from investigating functions currently exercised by the Swiss Competition Commission (“ComCo”) and its Secretariat; (ii) accelerating and improving the notification procedure by which undertakings may apply to ComCo for ex-ante temporary clearance of competition restraints; (iii) creating a legal basis for cooperation and information exchanges between the competition authority and foreign competition authorities; (iv) defining more tightly the criteria according to which the substantive assessment in merger control proceedings is conducted; (v) lifting the requirement to file mergers which affect the EEA and Switzerland as a whole and which will therefore already be reviewed by the European Commission; (vi) introducing a more sophisticated (economic) approach to assessing vertical restraints in distribution agreements; and (vii) allowing for consumer actions against cartels.

In the same year, the Federal Parliament passed a formal resolution obliging the Federal Government to submit a draft proposal for a revised sanctions regime.² The resolution specifically calls for the introduction (i) of sanctions against individuals and (ii) an obligation on ComCo to grant fine reductions to undertakings that have enacted “effective” compliance programs.

Furthermore, the Federal Government published new amendment proposals in September 2011.³ If adopted, these amendments would (i) per se prohibit both horizontal and vertical agreements on prices, quantities and market allocation and (ii) shift the burden of proof that a specific restraint of competition is justified on grounds of economic efficiency from ComCo to the accused undertaking.

Given the large number of the amendment proposals under discussion and for other reasons including a perceived lack of consistency in the Federal Government’s legislative proposals, it is uncertain what the revision eventually will entail.

MERGERS

The number of merger filings notified to ComCo remained comparatively low in 2011. 16 transactions were cleared in phase one, and only one – a joint venture between the leading Swiss telecoms provider Swisscom and Groupe E, an electric utility in the Western part of Switzerland⁴ – made it to phase-two proceedings. The purpose of the joint venture is to install and operate a fiber optic cable network in the Canton of Fribourg. Clearance of the transaction was ultimately rejected as it did not constitute a notifiable merger. Upon review, ComCo concluded that the joint venture will not in the foreseeable future develop economic activities that are independent from the parent companies and accordingly, was not subject to merger control.⁵

CARTELS AND OTHER ANTICOMPETITIVE PRACTICES

On June 6, 2011, ComCo opened an investigation into the Swiss branch of the International Federation of

1 For an English translation of the ACart see <http://www.admin.ch/ch/e/rs/c251.html>. The draft proposal for a revised ACart is available at <http://www.weko.admin.ch/aktuell/01024/index.html?lang=de> (in German and French only).

2 The resolution was introduced by MP Rolf Schweizer in December 2007 and is therefore widely referred to as the “Schweiger Motion”. For the verbatim records of all relevant parliamentary meetings on this issue, see http://www.parlament.ch/ab/frameset/d/s/4815/334906/d_s_4815_334906_334965.htm?DisplayTextOid=334966 (no English translation available).

3 Press release, Federal Government, Konferenzielle Vernehmlassung zur Revision des Kartellgesetzes, *press release, draft amendment and explanations available in German, French and Italian* at <http://www.evd.admin.ch/aktuell/00120/index.html?lang=de&msg-id=41350>

4 Press release, ComCo, Glasfasernetz: WEKO prüft Gemeinschaftsunternehmen im Kanton Freiburg, *available in German, French and Italian* at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=37040>

5 Press release, ComCo, WEKO: Glasfaseraufbau im Kanton Freiburg bleibt unter Beobachtung, *available in German, French and Italian* at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=38881>

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the Phonographic Industry (IFPI-Switzerland) and its members.⁶ The latter are suspected of having impeded parallel imports of compact discs and other sound recording media. Further, they are alleged to have prevented certain companies from becoming members of IFPI-Switzerland and of having established discriminatory rules regarding the elaboration of the Swiss Charts. Finally, ComCo intends to look into the terms and conditions of a promotion system widely used by radio stations.

In June 2011, the Secretariat of ComCo informed the public about outcome of a notification procedure related to interchange fees on debit card transactions.⁷ Mastercard had notified the Secretariat of its intention to levy an interchange fee on payments made with the “Maestro”-card, the currently most widely used debit card in the country, and with a new debit card that is yet to be launched. While the Secretariat did not object to an interchange fee being charged for payments with the new card (as long as the new card’s market share does not rise above 15% and the fee does not exceed 20 centimes per transaction), Mastercard was warned that the introduction of an interchange fee in relation to “Maestro” could be in breach of the Swiss competition rules. Mastercard has accepted these terms which correspond to the ones agreed with Visa in 2009 in relation to the latter’s debit card “V PAY”.

On July 11, 2011, ComCo rendered its first decision in a case involving restrictions of online sales.⁸ The investigation against Electrolux and V-Zug, two major producers of domestic appliances, had been launched based on complaints that Electrolux does not allow its dealers to conduct online sales and that V-Zug allows online sales only under strict conditions. Upon review, ComCo identified the above restrictions to be unlawful. In its settlement decision, it stated that “the internet is a very important channel of distribution” and that, as a result, distributors are generally required to allow their dealers to conduct online sales.

ComCo noted that it regards restrictions to online sales as permissible under very strict conditions only and added that the fixing of resale prices or restrictions to parallel imports will never be considered as legitimate. This is the first time that ComCo investigated restrictions to online sales.

In September 2011, ComCo advised that it refused to give Swisscom and the utility companies of Basle, Berne, Lucerne St Gallen and Zurich approval for cooperation agreements they had submitted for clearance based on the notification procedure provided for in article 49a para. 3(a) of CartA.⁹ The purpose of the cooperation agreements is to install and operate a fibre optic cable network in the different cities in question. Upon review, the Secretariat of ComCo determined that it was too early to evaluate whether the agreements, once implemented, would be anti-competitive and thus illegal, but it identified problematic clauses, including clauses related to pricing and quantities, the implementation of which might restrict competition. The Secretariat’s decision might delay investments in fibre optic cable networks in Switzerland.

In November 2011, ComCo concluded an investigation targeting dozens of leading producers and distributors of perfumes and cosmetics. In its decision, ComCo determined that information exchange activities conducted in the industry association ASCOPA (“Association des fabricants, importateurs et fournisseurs de produits de cosmétique et de parfumerie”) had significantly restricted competition among the participants. However, since ComCo was unable to prove a hardcore cartel, no fines were issued.¹⁰

As the euro continued to decrease in value compared to the Swiss Franc in 2011, public pressure on ComCo remained high to monitor and, if possible, to act against companies who cash in on the gains related to the recent exchange rate development. As a reaction to that, ComCo appealed to the public to help identify undertakings that breach

6 Press release, ComCo, WEKO untersucht den Vertrieb von Musik in der Schweiz, *available in German, French and Italian at* <http://www.news.admin.ch/message/index.html?lang=de&msg-id=39490>

7 Press release, ComCo, WEKO-Sekretariat setzt Schranken für Interchange Fees bei Debitkarten von MasterCard, *available in German, French and Italian at* <http://www.news.admin.ch/message/index.html?lang=de&msg-id=39953>

8 Press release, ComCo, WEKO erklärt Behinderungen des Online-Handels für unzulässig, *available in German, French and Italian at* <http://www.news.admin.ch/message/index.html?lang=de&msg-id=40574>

9 Press release, ComCo, Glasfaser-Kooperationen: Keine Sanktionsbefreiung für harte Wettbewerbsabreden, *available in German, French and Italian at* <http://www.news.admin.ch/message/index.html?lang=de&msg-id=40966>

10 Press release, ComCo, WEKO: Parfümerie- und Kosmetikfirmen verstossen gegen Kartellgesetz, *available in German, French and Italian at* <http://www.news.admin.ch/message/index.html?lang=de&msg-id=42270>

the competition rules,¹¹ and in a press conference held on October 6, 2011, ComCo announced that it would open ten new investigations against undertakings suspected of using anti-competitive methods to cash in on exchange rate gains.¹² Until now, various investigations have been launched, including one against Jura Elektroapparate AG for restricting parallel imports of home appliances and another one against Care on Skin GmbH for restricting parallel imports and online sales of cosmetics. Further, preliminary investigations have been started in the market for balcony glazing products and a few more in the markets for electric appliances and electric bicycles.¹³ More investigations are due to be announced in the following weeks and months. It is expected that the fight against suspected vertical restrictions, particularly restrictions on parallel imports and online sales, will remain a core activity of ComCo.

In this context, in December 2011 Nikon was hit with a CHF12.5 million fine for restricting parallel imports of its imaging products.¹⁴ The investigation had been initiated based on a complaint of a trading company based in Liechtenstein and after a television show had made public Nikon's alleged practices. According to evidence gathered during a dawn raid at the premises of Nikon, Nikon allegedly instructed its Swiss and foreign dealers not to engage in parallel imports into Switzerland. The hindering of parallel trade reduced intra-brand competition and resulted in higher prices for consumers in Switzerland. Nikon has lodged an appeal against ComCo's decision which has therefore not yet entered in force.

ABUSE OF DOMINANT POSITION

On June 6, 2011, the ComCo opened an investigation against the Swatch group after the latter had announced to discontinue the supply of certain components for

mechanical movements.¹⁵ The investigation is supposed to determine whether this conduct constitutes an abuse of a dominant position. The Swatch group is aware of ComCo's competition concerns in this matter. It has therefore accepted a provisional regime for 2011 and 2012 and has expressed its willingness to accept a gradual phase-out of the supplies in question. ComCo has, on its part, temporarily suspended its investigation against ETA Manufacture Horlogère Suisse SA (a subsidiary of the Swatch group), which it had opened in September 2009 and which relates to ETA's terms of payment vis-à-vis independent watchmakers,¹⁶ as the newly opened investigation may have a substantial impact on the former.

In December 2011, ComCo closed an investigation against Ticketcorner, a ticketing system operator, and Aktiengesellschaft Hallenstadion Zürich which operates a major multi-purpose event hall (Hallenstadion). ComCo's investigation had centered around a 5-year cooperation agreement between the two undertakings whereby hosts of events in the Hallenstadion were obliged to process 50% of their ticket sales via Ticket Corner. ComCo determined that the Aktiengesellschaft Hallenstadion Zürich had market power but fell short of being dominant and that therefore the provisions of the cooperation agreement did not satisfy the provisions applicable to dominant undertakings. Further, based on an investigation of the relevant market, ComCo concluded that the clause obliging event hosts to process 50% of their ticket sales via Ticketcorner did not significantly restrict competition, inter alia, since the requirement affected less than 10% of the overall ticketing market and since event hosts consider other factors to be more relevant when it comes to selecting an event location.

COURT DECISIONS

In April 2011, the Federal Supreme Court issued a long-awaited decision regarding Swisscom's behaviour in the mobile termination market.¹⁷ Thereby, the Federal Supreme Court confirmed the Federal Administrative Court's

11 Q&A, ComCo, Unvollständige Weitergabe von Wechselkursvorteilen, available in German, French and Italian at <http://www.weko.admin.ch>; see also the form of notification regarding cases of incomplete exchange rate pass-through made available to the public by ComCo, available in German, French and Italian at <http://www.weko.admin.ch>

12 Press release, ComCo, Pressegespräch WEKO 6. Oktober 2011, available in German, French and Italian at <http://www.weko.admin.ch>

13 Press release, ComCo, Sekretariat WEKO eröffnet weitere Verfahren zur Nichtweitergabe von Währungsvorteilen, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=41932>

14 Press release, ComCo, WEKO büsst Nikon wegen Behinderung von Parallelimporten, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=42698>

15 Press release, ComCo, WEKO eröffnet Untersuchung gegen die Swatch Group, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=39502>

16 Press release, ComCo, WEKO eröffnet Untersuchung gegen ETA Manufacture Horlogère Suisse SA, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=29027>

17 BGE 137 II 199 et seq., available in German at <http://www.bger.ch>

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finding¹⁸ that Swisscom's conduct was not abusive and that Swisscom could therefore not be fined. In addition, however, it annulled the Federal Administrative Court's finding that Swisscom held a dominant position, arguing that such an isolated finding was not justified by any interest deserving protection. And unlike the Federal Administrative Court, the Federal Supreme Court did not rule on Swisscom's procedural objections relating to the conformity of the Swiss cartel investigation procedure with the Article 6 of the European Convention on Human Rights. In February 2007, ComCo had fined Swisscom CHF333 million (approximately US\$383) for abuse of a dominant position in the mobile termination market. ComCo had opined that Swisscom imposed unfair mobile termination rates upon its competitors, a finding which was later overruled on the grounds that the Telecommunications Act provided for an *ex post* regulation procedure which in the opinion of the Federal Administrative Court and the Federal Supreme Court made it impossible for Swisscom to impose its mobile termination rates. The Federal Supreme Court's decision is final and binding.

Due to this outcome, in December 2011 ComCo decided to end proceedings against the same parties concerning the same subject-matter (but relating to a different time period).¹⁹

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¹⁸ Press Release, Federal Administrative Court, B-2050/2007: Urteil des BVGer in Sachen Swisscom (Schweiz) AG gegen WEKO betreffend Terminierungspreise im Mobilfunk, available in German, French and Italian at <http://www.bundesverwaltungsgericht.ch/index/press/press-mitteilungen.htm>

¹⁹ Press release, ComCo, Mobilfunkterminierung: WEKO stellt Verfahren ein, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=42791>