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# Antitrust 20<sup>Year</sup> 10 in Review



 GARRIGUES



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# Switzerland

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## Legislative and Administrative Developments

### *Revision of the ACart*

On June 30, 2010, the Federal Government published a draft proposal for wide-reaching amendments of the Federal Act on Cartels and Other Restraints on Competition (the "ACart").<sup>1</sup> One of the proposed changes is to provide a new institutional set-up involving a competition authority and a federal competition court as two distinct and fully independent bodies, thus separating executive from decision-making functions. This proposal is to be viewed in the context of growing concerns over whether the current organizational structure of the Swiss Competition Commission ("ComCo") complies with the constitutional right to an independent tribunal. Other proposed amendments aim to (i) accelerate and improve the notification procedure by which undertakings may apply to ComCo for ex-ante temporary clearance of competition restraints; (ii) create a legal basis for cooperation and information exchanges between the competition authority and foreign competition authorities; (iii) define more tightly the criteria according to which the substantive assessment in merger control proceedings is conducted; (iv) lift 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; (v) introduce a more sophisticated (economic) approach to assessing vertical restraints in distribution agreements; and (vi) allow for consumer actions against cartels.

Based on the outcome of a public consultation which ended on November 19, 2010, the Federal Government has yet to decide whether to pursue the proposed reforms or not.

### *Introduction of sanctions against individuals?*

On September 21, 2010, the Federal Parliament passed a formal resolution obliging the Federal Government to submit a draft proposal for a revised sanctions regime regarding competition law infringements.<sup>2</sup> The aim of this initiative is to encourage compliance with competition laws by offering undertakings that implement effective compliance programs a statutory right to reduced fines if their officers or employees infringe competition rules in defiance of such programs. In addition, the resolution calls for the introduction of sanctions that would be imposed on the officers or employees in question.

It is likely that the draft proposal for a revised sanctions regime will be integrated into the draft proposal for an amendment of the ACart (see above) or that the two will at least be dealt with jointly.

### *Revision of Verticals Notice*

On June 30, 2010, ComCo published a revised version of its Notice on Vertical Agreements,<sup>3</sup> which maintains ComCo's practice in line with the (revised) EU Vertical Block Exemption Regulation and codifies ComCo's own decisions in three recent leading cases. The Notice does not lay down binding rules but can provide undertakings with a fair degree of regulatory guidance with respect to vertical agreements. It came into effect on August 1, 2010 for all vertical agreements that entered in force on or after that date. For earlier vertical agreements, the new Notice will apply as from August 1, 2011.

## Mergers

On April 22, 2010, ComCo announced that it prohibited the planned merger between Sunrise and Orange, two

<sup>1</sup> The contribution for Switzerland was written by Dr. Patrick Sommer, Stefan Brunnschweiler and Amr Abdelaziz of CMS von Erlach Henrici Ltd.

<sup>2</sup> 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).

<sup>3</sup> 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/framset/d/s/4815/334906/d\\_s\\_4815\\_334906\\_334965.htm?DisplayTextOid=334966](http://www.parlament.ch/ab/framset/d/s/4815/334906/d_s_4815_334906_334965.htm?DisplayTextOid=334966) (no English translation available).

<sup>3</sup> Notice on Vertical Agreements of June 28, 2010, available in German, French and Italian at <http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de>

network operators active in the Swiss market. The merger would have created a company with a market share of around 40% as a new potential competitor to telecommunications incumbent Swisscom, whose market share is approximately 60%. ComCo prohibited the merger arguing that (i) the remaining two operators would have held a collectively dominant position; (ii) the incentives for fierce competition between them would have been weak due to the high barriers for new market entries; and (iii) effective conditions or remedies subject to which the deal could have been approved could not be identified.<sup>4</sup>

On September 17, 2010, Sunrise was sold to CVC Capital Partners, a private equity firm. The deal was cleared a month later without conditions.<sup>5</sup>

## Cartels and other Anticompetitive Practices

Against the background of a strong Swiss Franc and a weak euro, ComCo has seen a rise in complaints against companies that allegedly hinder or prevent parallel imports into Switzerland. On March 24, 2010, ComCo opened a formal investigation against Nikon and conducted a dawn raid of the company's premises.<sup>6</sup> On May 19, 2010, the same thing happened to Roger Guenat, a distributor of alpine sports products.<sup>7</sup> On October 25, 2010, ComCo opened an investigation against BMW for allegedly preventing Swiss customers from purchasing cars in Germany.<sup>8</sup> In June 2010, ComCo closed an investigation in connection with the alleged prevention of parallel imports of beers of Anheuser-Busch Inbev und Grupo Modelo to Switzerland. The respective accusations turned out to be unfounded.<sup>9</sup> As ComCo has continued to receive complaints about allegedly unlawful practices aimed at shielding the Swiss market from parallel imports, more investigations may be launched in the coming months.

On May 10, 2010, ComCo issued a decision in a case involving Flamco and Pneumatex, two European manufacturers of

components for plumbing, cooling and heating systems.<sup>10</sup> ComCo's investigation revealed that these two undertakings had coordinated price increases for a number of products in Switzerland. Flamco was fined CHF169,000 (approximately US\$169,000), while Pneumatex was granted a full waiver from a fine (which would have amounted to CHF5.2 million (approximately US\$5.2 million) after it had applied for leniency. Both Flamco and Pneumatex cooperated with ComCo during the investigation and agreed to an amicable settlement which formed the basis of ComCo's above-mentioned decision. An EU investigation relating to the same matter is still pending.

In connection with an investigation of the perfumes and cosmetics market, in May 2010 the Secretariat of ComCo submitted a proposed decision to ComCo and to the producers and distributors of perfumes and cosmetics targeted by the investigation.<sup>11</sup> Meanwhile, the Secretariat decided to review its proposal based on the comments received from the parties. The actual decision is expected in 2011 based on a second decision proposal of the Secretariat. The investigation centers on allegedly unlawful activities engaged in by the industry association ASCOPA including the fixing of prices, quantities and market shares in the relevant market. The first decision proposal of the Secretariat called for individual fines of up to CHF25.5 million (approximately US\$25.5 million) and for total fines of more than CHF100 million (approximately US\$100 million).

In June 2010, ComCo opened an investigation against a cantonal section of the Swiss Real Estate Professionals' Union.<sup>12</sup> The section had provided its members with fee recommendations. The purpose of the investigation is to determine whether these fee recommendations amounted to an unlawful horizontal price-fixing agreement.

On September 15, 2010, ComCo launched an investigation against Electrolux and V-Zug, two major producers of domestic appliances.<sup>13</sup> The investigation was triggered by complaints that Electrolux does not allow its dealers to conduct online sales and

4 Press release, ComCo, "WEKO untersagt Zusammenschluss von Orange und Sunrise", available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=32758>

5 Press release, ComCo, "WEKO genehmigt Kauf von Sunrise durch CVC", available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=35628>

6 Press release, ComCo, WEKO eröffnet Untersuchung gegen Nikon, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=32402>

7 Press release, ComCo, WEKO eröffnet Untersuchung gegen Roger Guenat S.A., available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=33193>

8 Press release, ComCo, WEKO eröffnet Untersuchung gegen BMW., available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=35867>

9 Press release, ComCo, WEKO stellt Untersuchung im Bereich Import von Bier ein, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=34020>

10 Press release, ComCo, WEKO bösst Hersteller von Komponenten für Heiz-, Kühl- und Sanitäranlagen, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=33258>

11 Press release, ComCo, Sekretariat beantragt Bussen für Firmen der Parfümerie- und Kosmetikbranche, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=33291>

12 Press release, ComCo, WEKO eröffnet Untersuchung gegen den Immobilienhändler-Verband USPI-Neuchâtel, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=33583>

13 Press release, ComCo, WEKO untersucht Behinderung von Online-Shops, available in German, French and Italian at <http://www.news.admin.ch/message/index.html?lang=de&msg-id=35158>

that V-Zug allows online sales only under certain conditions. This is the first ComCo investigation into restrictions of online sales and the resulting decision is expected to become a leading case in this area.

On October 18, 2010, ComCo issued a decision against five producers of mountings for windows and window-doors and fined four of them for price-fixing practices. The investigation had been triggered by Roto Frank AG, a participant in the alleged cartel who blew the whistle and therefore was granted full fine immunity. Another participant, SFS unimarket AG, benefited from a fine reduction of 60% for providing ComCo with information on additional anti-competitive practices which led to a further investigation into the market for door mountings. An EU investigation relating to the same matter is still pending.

### Abuses of a Dominant Position

On February 8, 2010, ComCo announced that it had opened an investigation against Ticketcorner, a ticketing system operator, and Aktiengesellschaft Hallenstadion Zürich, which operates a major multi-purpose event hall. Based on a five-year cooperation agreement between these two companies, hosts of events in the Hallenstadion are obliged to process 50% of their ticket sales via Ticket Corner. The purpose of ComCo's investigation is to determine, on the one hand, whether this arrangement entails an undue restriction on other ticketing companies willing to compete in the ticketing business and, on the other hand, whether the Aktiengesellschaft Hallenstadion Zürich is abusing a dominant position vis-à-vis event hosts by obliging them to process 50% of their ticket sales via Ticketcorner.

On December 14, 2010, ComCo fined SIX Multipay CHF 7 million (approximately US\$7 million) for abuse of a dominant position. SIX Multipay is the leading company in the market for cashless payment transfers in Switzerland and is the dominant provider of acceptance contracts for VISA and MasterCard and Maestro. The abuse consisted in SIX Multipay offering a new multi-currency payment option in 2005 which could only be used with card terminals of its own affiliate (SIX Card Solutions), as SIX Multipay initially refused to make available essential interface information to other card terminal producers.

### Court Decisions

On March 10, 2010, the Federal Administrative Court announced a partial annulment of a ComCo decision of February 2007 in which Swisscom was fined CHF333 million (approximately US\$333 million) for abuse of a dominant position in the mobile termination market.<sup>14</sup> The court found that, due to the existence of a special procedure in the Telecommunications Act, Swisscom was unable to impose unfair mobile termination rates upon its competitors. This procedure which made possible ex-post regulation of Swisscom's mobile termination rates, when demanded by a competing operator. Accordingly, the fine against Swisscom was annulled. However, the Federal Administrative Court upheld ComCo's decision on all other issues and, in particular, confirmed that Swisscom has a dominant position in the mobile termination market and that the applicable substantive and procedural rules are valid and comply with Swisscom's right to a fair trial. The case is currently pending before the Federal Supreme Court.

On April 30, 2010, the Federal Administrative Court announced that it fully upheld a ComCo decision of March 2007 regarding media advertising company Publigroupe.<sup>15</sup> The court confirmed that Publigroupe had abused its dominant position in the market for the placement and sale of space in print media in Switzerland by preventing independent placement agents from entering and competing in the market. Also, Publigroupe's commissioning guidelines, based on which certain agents were granted commissions and others were not, were found to be discriminatory. Publigroupe has appealed against this decision which is now pending before the Federal Supreme Court.

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<sup>14</sup> 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>

<sup>15</sup> Press Release, Federal Administrative Court, B-2977/2007: Urteil des Bundesverwaltungsgerichts in Sachen Publigroupe SA und Mitbeteiligte gegen Wettbewerbskommission, available in German, French and Italian at <http://www.bundesverwaltungsgericht.ch/index/press/press-mitteilungen.htm>