DOMINANCE

Switzerland

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Getting The Deal Through

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Dominance

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Quick reference guide enabling side-by-side comparison of local insights, including into the general legal framework and sector-specific rules, the definition of collective dominance, and relevance of dominant purchasers; abuse of dominance and related defences; specific forms of abuse, enforcement, sanctions, remedies and appeals; and current trends.

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Table of contents

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Switzerland

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GENERAL FRAMEWORK

Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), applies to unilateral practices of market dominant undertakings. According to article 7 of the Cartel Act, market-dominant undertakings act unlawfully if they abuse such position and thus hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. With effect from 1 January 2022, these rules also apply to undertakings with relative market power. In addition, the Swiss Federal Price Surveillance Act of 20 December 1985, as amended (no official English version available), inter alia, is also relevant for market dominant undertakings.

In general, the Cartel Act is autonomous Swiss law and, as such, to be construed independently from European Union (EU) competition law. However, EU competition law shall be used as an interpretative aid in case the legislator intended an alignment by setting corresponding rules.

This holds particularly true for article 7 of the Cartel Act with regard to dominant undertakings, as these regulations were shaped on the basis of article 102 of the Treaty on the Functioning of the European Union (ex-article 82 of the EC Treaty). Therefore, according to the Swiss Federal Administrative Court, it is not only the responsibility of Swiss competition authorities and courts, but also of undertakings, to pay due attention to EU competition law by conducting a reasonable comparative legal analysis. However, this does not mean that the (often subtle) differences between these two jurisdictions should be neglected, particularly regarding the abuse of a dominant position.

Law stated - 20 January 2022

Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

Article 4, paragraph 2 of the Cartel Act defines a dominant undertaking as 'one or more undertakings that are able, as suppliers or consumers, to behave to a significant extent independently of the other participants (competitors, suppliers or consumers) in a specific market'. Dominance is characterised by freedom of action of the concerned undertaking. Dominance could be either individual or collective.

The Cartel Act does not contain any assessment criteria. In practice, the main elements that are taken into account when assessing dominance are market shares, the existence of barriers to entry or expansion and potential competition, the market structure as well as the countervailing buyer power. These elements constitute mere indications and are not, as such, sufficient to establish a dominant position, which should be assessed in the light of all relevant circumstances relating to a particular case.

In specific circumstances, the concept of dominance could also cover vertical economically dependent relationships between a supplier and its buyers, respectively between a buyer and its suppliers (see, eg, Swiss Competition Commission, LPC 2005/1 – CoopForte , p. 160).

Law stated - 20 January 2022

Purpose of legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The purpose of the Cartel Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy. The objective is not limited to economic aspects; general public interest considerations might be taken into account as well.

However, the law grants the Swiss Competition Commission, which is together with its Secretariat the authority primarily in charge of pursuing violations of Swiss competition law (including abuses of a dominant position or relative market power), solely with the power to assess economic consequences of restrictions of competition, unilateral practices and concentrations between undertakings. It is up to the Swiss Federal Council (the Swiss government) to assess the balance with general public interests. Upon request by the undertakings, agreements and unilateral behaviour by dominant undertakings that have been declared unlawful by the Swiss Competition Commission may be authorised by the Swiss Federal Council if, in exceptional cases, they are necessary for compelling public interest reasons (article 8 of the Cartel Act). To date, this has never happened.

Law stated - 20 January 2022

Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

There is sector-specific regulation of dominance but, however, in constant interplay with the Cartel Act when it comes to the assessment of a dominant position. Indeed, sector-specific regulation such as telecommunications or energy law does not preclude the application of the Cartel Act, but it should be taken into account in the latter's application (Swiss Federal Supreme Court, LPC 2011/3 – Terminierungspreise im Mobilfunk – Sanktion , p. 440). Only sector-specific provisions that aim at effectively excluding competition (but not other policy regulations) might lead to the non-applicability of the Cartel Act (Swiss Federal Supreme Court, LPC 2015/1 – Hors-Liste Medikamente , p. 131).

The Swiss Federal Act on Telecommunication of 30 April 1997, as amended, lays down specific ex ante obligations for dominant telecommunication providers. The latter must provide access to their facilities and their services to other providers in a transparent and non-discriminatory manner at cost-oriented prices. They may bundle their services, provided they also offer the services included in the bundle individually.

The Swiss Federal Act on Radio and Television of 24 March 2006, as amended, provides for special measures in the area of radio and television in cases where an undertaking active in the radio and television market has jeopardised the diversity of opinion and offerings because of an abuse of its dominant position.

The Swiss Federal Act on Electricity Supply of 23 March 2007, as amended (no official English version available) lays down specific regulation for historic monopoly electricity suppliers in order to ensure access to other providers.

The Swiss Federal Postal Act of 17 December 2010, as amended (no official English version available), contains similar provisions.

Law stated - 20 January 2022

Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

The Cartel Act and, therefore, the provisions on dominance apply among others to any undertaking (private or public entities) that exercises market power (article 2, paragraph 1 of the Cartel Act) and is commercially active irrespective of their legal or organisational form. The limitation that the Cartel Act only applies to undertakings that 'exercise market power' should, however, not be overestimated. In terms of article 7 of the Cartel Act, finally, it is decisive whether an undertaking has a dominant position in a relevant market. The term 'dominant position' is defined in article 4, paragraph 2 of the Cartel Act. Upon request, in exceptional cases, abusive conduct may be authorised by the Swiss Federal Council for compelling public interest reasons. However, to date, this has never happened.

Law stated - 20 January 2022

Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

Regarding abusive conduct, the Cartel Act only applies to undertakings that hold a dominant position on a relevant market or that have relative market power. Unlike, for example, the Sherman Act, the Cartel Act does not cover the attempt to monopolise or acquire a dominant position. Indirectly, however, the merger control provisions of the Cartel Act provide for an ex ante control of concentrations that create or strengthen a dominant position liable to eliminate effective competition.

It is lawful for an undertaking to hold a dominant position or a position with relative market power. Article 7 of the Cartel Act only bans abusive conduct of such positions as exemplified in article 7, paragraph 2 of the Cartel Act.

Furthermore, the Swiss Federal Act on Unfair Competition of 19 December 1986, as amended (no official English version available), applies to certain types of conduct by non-dominant undertakings. One example is the systematic undercutting of prices, which is considered unlawful and may result in claims for damages and, upon request, in criminal prosecution.

Finally, the Swiss Federal Price Surveillance Act (no official English version available), which empowers the Price Supervisor to control excessive prices, particularly in regulated markets, also applies to undertakings with market power, in other words, not only to undertakings with a dominant position on a specific market.

Law stated - 20 January 2022

Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Dominance is defined as a position held by 'one or more undertakings'. Therefore, collective dominance is also covered by the law. However, the Cartel Act does not provide for any specific definition of collective dominance, whose characteristics are developed by the decision-making practice of the Swiss Competition Commission and the courts.

The first case that dealt with collective dominance was the merger between Revisuisse Price Waterhouse and STG-Coopers & Lybrand (LPC 1998/2 – Revisuisse Price Waterhouse/STG-Coopers & Lybrand , p. 214). In the Mobilfunkmarkt case (LPC 2002/1 – Mobilfunkmarkt , p. 97), the Swiss Competition Commission examined the existence of collective dominance in parallel to the existence of an anticompetitive agreement. In doing so, it went through a static analysis and examined the market structure, followed by the assessment of the market conduct of the

undertakings. According to the Secretariat of the Swiss Competition Commission, the criteria for the finding of collective dominance are similar to that of collusion (horizontal anticompetitive agreements; see the final report of the Secretariat of the Swiss Competition Commission in a consumer credit matter, LPC 2007/3 – Konsumkredit , p. 364).

In a case regarding credit card acquiring (LPC 2003/1 – Kreditkarten-Akzeptanzgeschäft , p. 106), the Swiss Competition Commission affirmed collective dominance of acquirers of credit cards, which abused their collective dominant position. The Commission listed the following criteria, which shall be applicable to an assessment of potential collective dominance: market concentration; market shares; market transparency and stability; entry barriers; symmetry of interests, products and costs between undertakings; countervailing buyer power; and price elasticity of demand.

Another in-depth analysis with regard to collective dominance was carried out in the pork-meat market (LPC 2004/3 – Markt für Schlachtschweine , p. 674). The assessment was completed with an empirical economic analysis of the price margin development in the industry, which allowed the Swiss Competition Commission to reject the existence of collective dominance.

Also, in the case of the planned concentration between France Télécom SA and Orange Communications SA, the Swiss Competition Commission used the above-mentioned criteria (LPC 2010/3 – France Télécom SA/Sunrise Communications AG , p. 499). In this case, the Swiss Competition Commission prohibited the concentration between these two undertakings because in its assessment, the new company would, together with Swisscom, have assumed a collective dominant position in the mobile telecommunications market and in the absence of new competitors entering the market, the undertakings would have had no incentive to challenge the position of competitors by means of price reductions.

In October 2020, the Swiss Competition Commission granted unconditional clearance to the acquisition of Sunrise Communications Group Ltd by Liberty Global that created the second largest telecommunications provider in Switzerland. The clearance decision followed an in-depth examination of the initially contemplated reverse transaction in 2019 in which the Commission in particular assessed and eventually excluded a collective dominant position of Sunrise and Swisscom in certain markets.

Law stated - 20 January 2022

Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The dominance provisions apply also to purchasers. The assessment of dominance goes through the traditional criteria. Already under the regulation in force until the end of 2021, under specific circumstances, the concept of economic dependence could have been applied to strong purchasers even though they do not hold a dominant position in the classical sense. With effect from 1 January 2022, however, the Swiss dominance rules do not only apply to dominant undertakings but also to those with 'mere' relative market power that could also be purchasers.

Law stated - 20 January 2022

Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

Article 11 of the Swiss Merger Control Ordinance of 17 June 1996, as amended, defines the relevant product market

as comprising all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. It also defines the relevant geographical market as the area in which on the one hand consumers purchase and on the other suppliers sell the goods or services that constitute the relevant product market. This provision also serves as the basis for defining the relevant market in dominance cases. In principle, the relevant test for market definition is the substitutability of products and services and, in particular, the cross-price elasticity and small but significant and non-transitory increase in price (SSNIP) test (see Swiss Federal Supreme Court in LPC 2013/1 – Publigroupe , p. 114).

The Swiss Competition Commission also examines whether a market presents the characteristics of the 'Cellophane fallacy' (ie, whether a market is erroneously defined too broadly due to the presence of already monopolistic prices; see, for instance, LPC 2015/1 – V alora Holding AG/LS Distribution Suisse S A, p. 105).

The law does not refer to any threshold above which an undertaking must be considered to be dominant. As a rule of thumb, market shares below 30 per cent should, in principle, not be sufficient for an undertaking to hold a dominant position. The 'critical' threshold, in general, is set at a market share of above 50 per cent, where an undertaking could hold a dominant position. According to recent case law by the Swiss Federal Administrative Court, market shares of 50 per cent shall even give rise to a presumption for the existence of a dominant position. According to the court, such presumption may only be rebutted by facts proving the opposite (Swiss Federal Administrative Court, case B-831/2011 – Zugang zur Dienstleistung der dynamischen Währungsumrechnung [SIX/dynamic currency conversion, DCC], n. 442). It remains to be seen, however, whether this view of the Swiss Federal Administrative Court will hold up before the Swiss Federal Supreme Court in the currently pending appeal. In our view, market share thresholds constitute mere indications and are, standalone, never sufficient to prove dominance. In practice, the Secretariat of the Swiss Competition Commission maintains an in-depth analysis of the market characteristics even though the market definition reveals a market share of 100 per cent (LPC 2008/2 – Terminierungsgebühren beim SMS-Versand via Large Account , p. 242). In particular, when barriers to entry are low and potential competition is strong, high market shares do not, per se, justify the finding of a dominant position.

The Swiss Competition Commission has denied dominance, for example, in the case of a market share of 69 per cent, where the company had lost market shares owing to the entry of new competitors (LPC 2002/1 – Mobilfunkmarkt , p. 97). In another case, a market share of 50 to 70 per cent was not deemed sufficient by the Secretariat of the Swiss Competition Commission to find dominance, inter alia , because of the strong competition from the two other (actual) competitors. The market test had shown that the larger company was unable to raise its prices and thus to ignore competition on the market (LPC 2003/2 – Vetrieb Veterinär-Nahtmaterial Johnson & Johnson , p. 240).

On the other hand, public hospitals were found to be dominant with a market share of 37 to 48 per cent. In this case, according to the Swiss Competition Commission, the absence of potential competition and the existence of particular dependency relationships between public hospitals and insurers in the private insurance field justified the finding of dominance (LPC 2008/4 – Zusatzversicherung Kanton Luzern , p. 544).

Law stated - 20 January 2022

ABUSE OF DOMINANCE

Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

In general, dominant undertakings are considered to act unlawfully 'if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners' (article 7, paragraph 1 of the Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (the Cartel Act)). Article 7, paragraph 2 of the Cartel Act lists examples of conduct that may be considered as abusive.

The Cartel Act contains in our view no per se prohibitions. The abusive character of a conduct is to be determined on a case-by-case basis, taking into account the specific market conditions. In practice, the Swiss Competition Commission and the appellate courts examine the effects of a specific conduct on the market, particularly in cases where the conduct of a dominant undertaking falls under the categories covered by article 7, paragraph 2 of the Cartel Act. The former Competition Appeal Commission recognised that it is the anticompetitive effect of a practice that justifies its prohibition. This position is also confirmed by the Swiss Federal Supreme Court's requirement that the examples listed in article 7, paragraph 2 of the Cartel Act should be applied in conjunction with its paragraph 1 (LPC 2013/1 – Publigroupe , p. 114 and case 2C_985/2015 – Preispolitik Swisscom ADSL , n. 8.3.3). However, the recent case law by the Swiss Federal Administrative Court according to which article 7 of the Cartel Act is to be deemed an absolute offence (Gefährdungstatbestand) not requiring any effect on competition (Swiss Federal Administrative Court, case B-831/2011 – Zugang zur Dienstleistung der dynamischen Währungsumrechnung [SIX/dynamic currency conversion, DCC], n. 1209) takes the opposite stance. It remains to be seen how the Swiss Federal Supreme Court will assess this matter in the appeal, which is still pending.

Law stated - 20 January 2022

Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Article 7 of the Cartel Act covers both exploitative and exclusionary practices. Exclusionary practices target mainly competitors, while exploitative practices aim at harming commercial partners or consumers. However, the distinction between exploitative and exclusionary practices is rather academic.

Law stated - 20 January 2022

Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

In practice, the Swiss competition authorities require a link between dominance and abuse. However, the causal link is not understood as limiting the finding of an abuse to the market in which the undertaking is found dominant. The practice and legal doctrine accept that unilateral conduct of dominant undertakings may have an impact (or negative effect) in adjacent markets (LPC 2006/4 – Valet Parking , p. 625). In the Valet Parking case, the refusal of Zurich Airport to grant authorisation for parking within the airport to competitors was considered as an abuse of a dominant position, even though the behaviour had a negative effect on the off-airport parking market (ie, outside the airport). Furthermore, according to the most recent case law by the Swiss Federal Administrative Court, no causal nexus between dominance and abuse is required for a conduct to be inadmissible (case B-831/2011 – Zugang zur Dienstleistung der dynamischen Währungsumrechnung [SIX/dynamic currency conversion, DCC] , n. 824 et seqq .). It remains to be seen, however, whether this view of the Swiss Federal Administrative Court will hold up before the Swiss Federal Supreme Court in the currently pending appeal.

On the other hand, the causal link between dominance and a possible abusive behaviour, in itself, is in our view not sufficient to effectively establish an abusive conduct. The conduct itself should comprise separate elements that qualify it as abusive. In the context of unfair (or excessive) prices where the dominance itself is the cause of the dominant undertaking's power to set monopolistic prices, this close link between dominance and price setting is not sufficient to prove that the price was abusive. In addition, according to the Swiss Federal Supreme Court, it should be demonstrated that the dominant undertaking was indeed able to coerce clients to accept monopolistic prices (LPC 2011/3 – Terminierungspreise im Mobilfunk – Sanktion , p. 440). Yet, there is considerable legal uncertainty as to what

kind of coercion the dominant undertaking must have been able to impose. This is particularly true in light of the most recent case law by the Swiss Federal Administrative Court in the SIX/DCC matter (see above).

Law stated - 20 January 2022

Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

Although the law does not provide for defences, the case law recognises the possibility to successfully invoke defence arguments such as legitimate business reasons. Ultimately, according to the Swiss Federal Supreme Court, the interests of the individual undertaking have to be balanced with the interests in the 'institutional' competition on the market (LPC 2013/1 – Publigroupe , p. 114). In any case, however, it is crucial that the specific conduct is proportional, namely, that it does not go beyond what is required to achieve the legitimate business reasons' aim.

The former Swiss Competition Appeal Commission has already confirmed the possibility of invoking legitimate business reasons, including the necessity to ensure the quality of products, efficiency or technical reasons (eg, lack of capacity),which might be retained if the undertaking's conduct is justified to protect its objective commercial interests, and if the conduct under investigation is not substantially different from what would have prevailed in a competitive market (LPC 2002/4 – Entreprises Electriques Fribourgeoises , p. 276).

In the TicketCorner case (LPC 2004/3 – TicketCorner , p. 778), the Swiss Competition Commission discussed efficiency gains in the administration of ticket sales, in the improvement of seller agents' training, and the prohibition of free riding. However, the exclusivity agreements between the agent seller (TicketCorner) and the event organisers were not considered necessary to achieve such efficiency gains (see also the respective decision of the Swiss Federal Administrative Court, LPC 2016/4 – Vertrieb von Tickets im Hallenstadion Zürich , p. 1085).

The existence of objective justifications of a technical nature has been assessed by the Swiss Competition Commission, but finally denied (LPC 2020/3a – Kommerzialisierung von Medikamenteninformationen, p. 1144).

Law stated - 20 January 2022

SPECIFIC FORMS OF ABUSE

Types of conduct

Rebate schemes

Under the Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (the Cartel Act), the discrimination between trading partners in relation to prices or other conditions of trade by a dominant undertaking is unlawful.

Fidelity and target rebates are, under certain circumstances, considered as an abuse of dominance. In principle, quantitative rebates based on cost efficiencies are considered to be legitimate. Rebates based on quality criteria are not necessarily considered unlawful, in particular, if such rebates are justified by true benefits, and that customers are not hindered in their choice of another competitor.

According to the Swiss Competition Commission, rebate and pricing schemes that discriminate against some customers may be considered also as abusive price discrimination (see, eg, LPC 2008/3 – Publikation von Arzneimittelinformationen , p. 385, where only bigger customers above a specific threshold benefitted from special agreements). In the SDA case, the Swiss Competition Commission fined the leading Swiss news agency with an amount of about 1.9 million Swiss francs for offering certain customers exclusivity rebates, namely, discounts of about

10 to 20 per cent if these customers agreed to purchase several specific media services from SDA as a package (LPC 2014/4 – Preispolitik und andere Verhaltensweisen der SDA , p. 670). In general, rebates should not aim at impeding the freedom of customers to change the supplier (in particular, loyalty rebates), and quantity rebates should be economically justified, for example, owing to existing economies of scale.

In a decision dated 18 December 2017, the Swiss Competition Commission decided that Swiss Post abused its dominant position on markets for letter post (commercial customers), in particular by committing price discrimination, and imposed a fine of about 22.6 million Swiss francs (LPC 2020/2 – Geschäftskunden Preissysteme für adressierte Briefsendungen , p. 433). It considered that by offering different rebates and specific conditions to its commercial customers having similar mailing features, Swiss Post treated some of its commercial customers better than others in a discriminatory manner. The Commission also considered that because the conditions of a monthly additional rebate provided to customers that exceed an agreed threshold (CAPRI system), the rebate scheme was particularly difficult to understand and communicated individually to the customers concerned. According to the Swiss Competition Commission, this conduct made it impossible for customers to compare the different product offerings of Swiss Post and its competitors, resulting in a foreclosure of the latter.

Law stated - 20 January 2022

Tying and bundling

The Cartel Act considers as abusive any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services (article 7, paragraph 2(f) of the Cartel Act). The Swiss Competition Commission has investigated tying practices on several occasions. However, it eventually often denied the finding of an abuse. The Swiss Competition Commission considers that the tying and bundling of two products have negative effects and, therefore, are abusive if:

- the undertaking holds a dominant position on one of the markets;
- the tying and the tied products are distinct products;
- the dominant undertaking makes the acquisition of the second product conditional upon the acquisition of the first product;
- the tying or bundling have anticompetitive effects on the tied (second) market; and
- the tying is not justified for legitimate business reasons (LPC 2011/1 – SIX/Terminals mit Dynamic Currency Conversion (DCC), p. 96; the Swiss Federal Administrative Court in principle followed the decision of the Swiss Competition Commission in this regard; see case B-831/2011 – Zugang zur Dienstleistung der dynamischen Währungsumrechnung [SIX/dynamic currency conversion, DCC], n. 1421).

In a decision dated 19 December 2016, the Swiss Competition Commission fined Galenica AG and its branch HCI Solution AG, which offers master data for the Swiss healthcare market, in the amount of about 4.5 million Swiss francs for offering pharmaceutical companies the implementation of their medical information in its database provided that they subscribe to additional services (LPC 2020/3a – Kommerzialisierung von Medikamenteninformationen , p. 1144). The Commission also reproached Galenica AG and HCI Solutions AG regarding the fact that from 2012, they inserted in their agreements provisions that were liable to obstruct the use of other databases. It considered that this practice might lead to a market foreclosure vis-à-vis other suppliers of such services. This matter is currently pending before the Swiss Federal Administrative Court.

Law stated - 20 January 2022

Exclusive dealing

Exclusive dealing practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

On 24 November 2016, the Swiss Federal Administrative Court annulled the decision of the Swiss Competition Commission to close the investigation against the ticketing and live entertainment provider TicketCorner AG and the operator of the event location Hallenstadion in Zurich (Aktiengesellschaft Hallenstadion (AGH)). The Swiss Federal Administrative Court found (likely) abuses of the dominant positions of TicketCorner and AGH. It also held that the obligation for event organisers to sell at least 50 per cent (resulting de facto in 100 per cent) of all tickets for events in the Hallenstadion via TicketCorner, or the agreement between TicketCorner and AGH in that regard respectively, constitute illegal anticompetitive agreements. In its decision, the Swiss Federal Administrative Court actually handed down the matter to the Swiss Competition Commission because of elements to be clarified and because of the fact that the decision on a sanction falls within the competence of the latter. (LPC 2016/4 – V ertrieb von Tickets im Hallenstadion , p. 1085). However, the matter is pending before the Swiss Federal Supreme Court.

Law stated - 20 January 2022

Predatory pricing

The law considers as unlawful any undercutting of prices or other conditions directed against a specific competitor (article 7, paragraph 2(d) of the Cartel Act). The Swiss Competition Commission has investigated several cases of alleged predatory pricing, denying predation, however. There is no presumption that prices below the undertaking's own total costs are predatory; the practice is covered by the undercutting provision only when the undercutting is part of a strategy to exclude competitors (LPC 2004/4 – Cornèr Banca SA/Telekurs AG , p. 1002). In principle, however, the Swiss Competition Commission may infer that prices under average variable cost are directed against competitors.

In a case regarding the TV and radio market in St Gall, the Secretariat of the Swiss Competition Commission stated in its final report of the preliminary investigation four conditions that must be fulfilled to find an abuse of dominance in the form of predatory pricing (LPC 2002/3 – Radio- und TV-Markt St Gallen , p. 431): first, the undercutting must be systematic; second, it should be directed towards a specific, actual or potential, weak competitor; third, the undercutting should not allow the company to maximise its profits in the short term; and fourth, the company should be able to raise the prices again.

In contrast to the practice of the European Commission, the Swiss Competition Commission considered the 'recoupment' of lost profits as a necessary condition for finding an unlawful predatory pricing strategy (see, eg, LPC 2004/4 – Cornèr Banca SA/Telekurs AG , p. 1002).

Law stated - 20 January 2022

Price or margin squeezes

Price or margin squeezes may be considered as abuses of a dominant position. The Swiss Competition Commission defines price squeeze as a situation where a vertically integrated undertaking lowers retail prices in comparison to its wholesale prices, so that comparably efficient competitors would not be able to compete and make profits in the retail market.

The leading case with regard to price squeezing concerns the Swiss telecommunications market. The Swiss Competition Commission fined Swisscom, the incumbent Swiss telecommunications operator, in the amount of about 220 million Swiss francs for a price squeeze in the ADSL market (LPC 2010/1 – Preispolitik Swisscom ADSL , p. 116).

The Swiss Federal Administrative Court upheld the Swiss Competition Commission's finding, but reduced the fine to about 186 million Swiss francs (LPC 2015/3 – Preispolitik Swisscom ADSL , p. 561). The Swiss Federal Supreme Court upheld the finding of the Swiss Federal Administrative Court's stance in full (case 2C_985/2015 – Preispolitik Swisscom ADSL). In the reasoning of its decision, the Swiss Federal Supreme Court set out that there must be three structural conditions satisfied for a price squeezing conduct to be possible: first, the undertaking being alleged of such a conduct has to be vertically integrated; second, it must provide an input on which competing undertakings in the downstream market depend on in order to provide their competing services; and third, it must have a dominant position. The relevant anticompetitive conduct is the margin squeeze itself or, in other words, the insufficient price range of those who compete with the dominant undertaking downstream or at the retail level, respectively. According to the Swiss Federal Supreme Court, the question of whether there is an insufficient profit margin on the part of the dominant undertaking's competitors must be determined by means of a cost-price comparison of the dominant undertaking itself. Thereby, the 'as efficient competitor' test has to be applied.

In another matter concerning the Swiss telecommunications market, the Swiss Competition Commission fined Swisscom about 7.9 million Swiss francs for a price squeeze in the wide area network sector. Indeed, Swiss Post issued a tender process for services with regard to the networking of its offices in 2008. Swisscom offered a price that was 30 per cent lower than its competitor's price, taking advantage of the fact that, in order to provide its facilities, it has to acquire prior facilities from Swisscom on a wholesale level. Swisscom set the price for the prior facilities so high that its competitors were unable to compete with their downstream services. By the same token, the Commission found that Swisscom imposed excessive prices (LPC 2016/1 – Swisscom WAN-Anbindung , p. 128). In August 2020, The Swiss Competition Commission opened another investigation against Swisscom analogous and, hence, potentially abusive conduct.

Law stated - 20 January 2022

Refusals to deal and denied access to essential facilities

Article 7, paragraph 2(a) of the Cartel Act considers as unlawful any refusal to deal (eg, refusal to supply or to purchase goods), which is likely to foreclose competition. In the practice of the Swiss Competition Commission, four conditions must be fulfilled to qualify a refusal to deal as abusive: first, the dominant undertaking must refuse to supply a product; second, this product has to constitute an input objectively necessary to compete in a neighbouring (upstream or downstream) market; third, the refusal has a foreclosure effect; and fourth, the refusal cannot be justified for legitimate business reasons (LPC 2011/1 – SIX/Terminals mit Dynamic Currency Conversion (DCC) , p. 96). However, in a recent decision, the Swiss Federal Administrative Court took a different stance with regard to a number of these conditions concerning the same matter, thereby significantly lowering the thresholds for intervention (case B-831/2011 – Zugang zur Dienstleistung der dynamischen Währungsumrechnung [SIX/dynamic currency conversion, DCC] , n. 775 et seqq). It will now be on the Swiss Supreme Court to assess the matter, which will likely bring more legal certainty in this regard.

The matter Watt/Migros was one of the first leading cases finding an abusive refusal to deal. An electricity distribution network that was a local monopoly refused to carry electricity acquired by Migros from Watt, a competing undertaking. The Swiss Competition Commission considered this refusal as an abuse of a dominant position (LPC 2001/2 – Watt/Migros-EEF , p. 255). This decision confirmed the application of the Cartel Act to regulated network industries; it was upheld by the former Swiss Competition Appeal Commission and in the last instance by the Swiss Federal Supreme Court. Comparable to this situation is a case concluded in June 2020 by the Swiss Competition Commission by means of amicable settlements, according to which the Commission opened the gas market via the Cartel Act by ordering an initially refused transit of natural gas via the networks of certain providers to end customers by third parties.

Another leading case of the Swiss Competition Commission on refusal to deal concerned a subsidiary of the Swatch Group, which manufactures raw movements for mechanical watches (LPC 2005/1 – ETA SA Manufacture Horlogère Suisse , p. 128). ETA notified its customers that it would phase out (ie, gradually reduce) the supply of raw movements

(movement blanks) for mechanical watches, and supply only already assembled movements in the future. The reduction and interruption of the supplies of an input was considered as an abuse of a dominant position, in particular because ETA intended to enter the downstream market itself. The investigation was closed following commitments offered by ETA to increase the quantity supplied to its customers and to prolong the interim supply period by three years. The Swiss Competition Commission was also investigating the decision of Swatch to cease to supply third parties with mechanical Swiss made watch movements and assortments (LPC 2014/1 – Swatch Group Lieferstopp , p. 215). In the course of this investigation, the Swiss Competition Commission issued interim measures to ensure the supply of third parties with movements and assortments during the investigation (LPC 2011/3 – Swatch Group Lieferstopp , p. 400). These interim measures were confirmed on appeal (LPC 2012/1 – Swatch Group Lieferstopp , pp. 158, 162). In July 2020, the Swiss Competition Commission decided, however, not to impose new supply obligations and restrictions, respectively, on the Swatch Group, even though its subsidiary ETA is considered to remain dominant in the market for mechanical Swiss made watch movements.

Civil courts are likely to find a refusal to deal abuse more easily. In a judgment of 23 May 2013, the Swiss Federal Supreme Court confirmed that a company managing a cheese-maturing cellar with regard to the production of an AOC cheese (ie, a cheese with a protected designation of origin label) had abused its dominant position by preventing the plaintiff, a cheese manufacturer, from being admitted to the cheese-maturing cellar (LPC 2015/4 – Etivaz , p. 896). In addition to ordering access to the maturing cellar, the Swiss Federal Supreme Court upheld a duty to accept the plaintiff as a member of a cooperative society managing the cheese-maturing cellar.

The essential facility doctrine is partly recognised in practice in that it justifies the finding of a dominant position and the duty to deal. However, the existing case law does not specify under which conditions such access must be granted and a refusal to deal may be considered as abusive without fulfilling the traditional conditions of the essential facility doctrine.

Law stated - 20 January 2022

Predatory product design or a failure to disclose new technology

Such practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

In December 2020, the Swiss Competition Commission opened a proceeding against Swisscom, the incumbent telecommunications operator in Switzerland, to investigate whether it excludes competitors from the market when building the fibre-optic network. In areas in which Swisscom is expanding such network alone, it changed the network construction setup and no longer provides competitors with direct access to the network infrastructure. The theory of harm of the Swiss Competition Commission is that such conduct presumably restricts the innovation and business opportunities of Swisscom's competitors and that consumer may be restricted in their choice of providers and product diversity. In order to safeguard competition for the duration of the investigation, the Commission issued interim measures that prohibit Swisscom from denying competitors access to end-to-end lines during the expansion of the fibre-optic network.

Law stated - 20 January 2022

Price discrimination

Under the Cartel Act, the discrimination between trading partners in relation to prices or other conditions of trade, in particular also through specific rebate and pricing schemes, by a dominant undertaking is unlawful. With regard to article 7, paragraph 2(g) of the Cartel Act that has been newly introduced into the Cartel Act together with the introduction of the concept of relative market power and that is aimed at combatting international intra-group price discrimination, see 'Unilateral conduct'.

Law stated - 20 January 2022

Exploitative prices or terms of supply

The imposition of unfair prices or other unfair conditions of trade may be considered as unlawful (article 7, paragraph 2(c) of the Cartel Act). Unfair prices are, in general, considered an exploitative practice and, therefore, as an abuse of dominance. According to the Swiss Federal Supreme Court, the 'unfair' criterion of a price, in principle, is to be construed in relation to the market value of the services offered and to the ability of the dominant undertaking to behave independently in the price setting; customers should lack alternative solutions, and hence the ability of the dominant company to exert a certain coercion on the customers (LPC 2011/3 – Terminierungspreise im Mobilfunk , p. 440).

The Swiss Competition Commission imposed a record fine of 333 million Swiss francs on Swisscom, the incumbent Swiss telecommunications operator, for imposing unfair prices in the mobile call termination market (LPC 2007/2 – Terminierung Mobilfunk – Sanktion , p. 241). The decision was quashed by the Swiss Federal Administrative Court in February 2010 (LPC 2010/2 – Terminierungspreise im Mobilfunk – Sanktion , p. 242). The annulment was confirmed by the Swiss Federal Supreme Court in April 2011, which held that, owing to the regulatory framework pertaining to telecommunications, Swisscom could not exert coercion against the counterparties, and if this were the case, the counterparties (ie, competitors) would have had the possibility to file a specific complaint to the Swiss Federal Communications Commission ComCom (LPC 2011/3 – Terminierungspreise im Mobilfunk – Sanktion , p. 440). Consequently, the Swiss Competition Commission decided to close the investigation it had opened on 15 October 2002 against the three competing mobile network operators Swisscom, Sunrise UPC (formerly Sunrise) and Salt (formerly Orange) for an abuse of a (collective) dominant position (LPC 2011/4 – Terminierung Mobilfunk , p. 522).

Law stated - 20 January 2022

Abuse of administrative or government process

Such practices may be covered by the general clause of article 7, paragraph 1 of the Cartel Act.

Law stated - 20 January 2022

Mergers and acquisitions as exclusionary practices

The Cartel Act does not deal with structural abuses specifically. Article 7, paragraph 2 of the Cartel Act sets forth merely examples, and its general clause in paragraph 1 covers structural abuses if the conduct of dominant undertakings enables them to exclude rivals or exploit customers or consumers. The Cartel Act contains specific provisions on merger control, and, therefore, mergers that exceed the specific turnover thresholds are subject to ex ante control. However, notwithstanding these thresholds, a merger control notification is mandatory if one of the undertakings concerned has been held to be dominant in a market in Switzerland in the binding part of a final and binding decision under the Cartel Act, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof (article 9, paragraph 4 of the Cartel Act; see, in particular, Swiss Federal Administrative Court, LPC 2016/1 – The Swatch Group AG , p. 473).

The concept of structural abuse is relevant in particular with regard to the acquisition of minority shareholdings and to mergers of a dominant undertaking not reaching the thresholds or not being held dominant respectively for ex ante notification.

The Swiss competition authorities have investigated or discussed the acquisition of a minority shareholding in a few

cases. In a preliminary investigation concerning Publigroupe, a group of companies active in the fields of communications, press, directories and information technology, the Secretariat of the Swiss Competition Commission has looked into Publigroupe's minority shareholdings in newspaper publishing companies and confirmed the application of article 7 of the Cartel Act to structural abuses, in particular to the acquisition of minority shareholding by a dominant undertaking. It defined a structural abuse as the 'use by a dominant undertaking of the modification of the market structure to its advantage'. However, the acquisition of minority shareholdings should become a systematic strategy to be considered as an abuse. In the specific case, no abusive behaviour of Publigroupe could be established and the preliminary investigation has therefore been closed without further consequences (LPC 2006/3 – Minderheitsbeteiligungen der Publigroupe SA (und ihrer Tochtergesellschaften) an Zeitungsverlagen , p. 449).

Law stated - 20 January 2022

Other abuses

Other possible abuses of dominant undertakings (eg, strategic capacity construction, underinvestment in capacity, predatory advertising or excessive product differentiation) must be assessed on a case-by-case basis, may be covered by the general clause of article 7, paragraph 1 of the Cartel Act and thus, according to the case law of the Swiss appellate courts, also be fined.

Law stated - 20 January 2022

ENFORCEMENT PROCEEDINGS

Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

The Swiss Competition Commission, consisting of 11 to 15 members (currently 12), takes decisions, remedial actions and sanctions against undertakings abusing their dominant positions. It is also competent to take decisions and remedial actions against undertakings abusing their relative market power. The specific chambers of the Swiss Competition Commission are empowered to render partial decisions on the closure of investigations, the approval of amicable settlements including other measures, in particular fines and costs, for some of the undertakings involved in an investigation while it is continued for the other undertakings. The Secretariat of the Swiss Competition Commission is empowered to conduct investigations and, together with a presiding member of the Commission, to issue any necessary procedural ruling. The Secretariat submits draft decisions to the Swiss Competition Commission and implements the latter's decisions. It has around 75 employees (around 65 full-time equivalents), including a significant number of economists.

The Secretariat of the Swiss Competition Commission has broad investigative powers, in particular, together with a presiding member of the Commission, it may order searches (ie, dawn raids) and seize documents and electronic data, or hear third parties as witnesses, and require the parties to an investigation to give evidence. Upon specific request for information, the undertakings under investigation are obliged to provide the competition authorities with all the information required for their investigations and produce the necessary documents, however, in due consideration of the nemo tenetur principle, namely the right against self-incrimination.

The Secretariat of the Swiss Competition Commission 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 Secretariat further published a note on amicable settlements in February 2018, which contains, inter alia, a draft wording for amicable settlements. Further notes exist, for example, with regard to the

treatment of business secrets, the decision-making process of the Swiss Competition Commission and the administration of deadlines in investigations.

Law stated - 20 January 2022

Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

A dominant undertaking condemned for unlawful (abusive) conduct risks fines up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount of the fine is dependent on the duration and severity of the unlawful conduct, and is calculated also by taking into account the likely profit that resulted from the unlawful conduct. The Swiss Cartel Act Sanctions Ordinance lays down the method of calculation of the fines in detail. Contrary to market-dominant undertakings, companies with 'mere' relative market power are not subject to direct fines in case of an abuse of their position.

The largest fine ever issued for an abuse of a dominant position, 333 million Swiss francs imposed on Swisscom, the incumbent Swiss telecommunications operator, was annulled by the appellate courts (see Swiss Federal Supreme Court, LPC 2011/3 – Terminierungspreise im Mobilfunk – Sanktion , p. 440). The Swiss Competition Commission imposed on Swisscom another high fine of 220 million Swiss francs in 2009 for an unlawful price squeeze in the ADSL market (LPC 2010/1 – Preispolitik Swisscom ADSL, p. 116). The Swiss Federal Administrative Court upheld Swiss Competition Commission's finding on the merits, but reduced the fine to about 186 million Swiss francs (LPC 2015/3 – Preispolitik Swisscom ADSL , p. 561), which was recently confirmed by the Swiss Federal Supreme Court (case 2C_985/2015 – Preispolitik Swisscom ADSL).

The Swiss Post, the incumbent, state-owned provider of postal services in Switzerland, recently also received a significant fine in the amount of about 22.6 million Swiss francs. In its decision dated 18 December 2017, the Swiss Competition Commission found that Swiss Post abused its dominant position on markets for letter post (commercial customers), in particular by committing price discrimination. The decision is currently under appeal before the Swiss Federal Administrative Court.

Besides the possibility to impose fines, the Swiss Competition Commission has a wide range of decision-making and remedial powers. It can issue injunctions to terminate a conduct or to change and modify specific business practices (for instance, to grant access or to modify rebate schemes or discriminatory pricing practices).

In contrast to certain other jurisdictions, the Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (the Cartel Act) does not provide for sanctions that may be imposed on individuals acting on behalf of an undertaking that abused its dominant position. However, individuals, may be fined in a few other cases, particularly in the case of a violation of a binding decision of the Swiss Competition Commission (article 54 of the Cartel Act) or if the individual itself qualifies as an undertaking in the sense of the Cartel Act.

Law stated - 20 January 2022

Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

Sanctions can be imposed by the Swiss Competition Commission autonomously, without having to petition any court. In that regard, the Swiss appellate courts come only into play where a sanction decision of the Swiss Competition

Commission is challenged.

Law stated - 20 January 2022

Enforcement record

What is the recent enforcement record in your jurisdiction?

There are usually only a few investigations opened and final decisions rendered each year with regard to abusive conduct of dominant undertakings, if any. The enforcement record is certainly lower compared to opened investigations and rendered decisions with regard to anticompetitive agreements. However, notwithstanding these numbers, very high fines have been imposed on undertakings that have been held responsible for abusive conduct.

In recent times, enforcement in Switzerland seems to rather focus on digital-related issues. For example, on 13 November 2018, the Swiss Competition Commission opened an investigation against several major Swiss financial institutions. The investigation has the purpose of clarifying whether they reached an agreement to boycott mobile payment solutions of international providers (such as Apple Pay or Samsung Pay) to protect TWINT, a Swiss mobile payment solution. A preliminary investigation against Apple, which concerns Apple Pay as well, was concluded by the Secretariat of the Swiss Competition Commission in December 2018 for reasons of expediency: Apple Pay at POS terminals can interfere with payments made using TWINT. Following the intervention of the Secretariat, Apple committed to offer a pro-competitive technical solution. In December 2020, the Swiss Competition Commission opened a proceeding against Swisscom, the incumbent telecommunications operator in Switzerland, to investigate whether it excludes competitors from the market and restrict consumers in their choice of providers and product diversity when building the fibre-optic network. In order to safeguard competition for the duration of the investigation, the Commission issued interim measures that prohibit Swisscom from denying competitors access to end-to-end lines during the expansion of the fibre-optic network.

With regard to the newly introduced concept of relative market power, it is currently unclear whether to expect a lot of proceedings brought forward. In a newspaper article, the Swiss Competition Commission has already announced that it intends to issue landmark cases relatively quickly after entry into force of the new regulations. Subsequently, it wants to refer the complainants to the civil courts. Hence, according to the intention of the Swiss Competition Commission, the prohibition of the abuse of a position of relative market power shall mainly be enforced by civil courts.

Law stated - 20 January 2022

Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

The contracts entered into by dominant undertakings that constitute an abuse of a dominant position may be declared null and void, in whole or in part, with retroactive effect (ex tunc ; see also article 13 of the Cartel Act and the decision of the Swiss Federal Supreme Court, 12 June 2008, 134 III 438). The issue of the nullity remains, however, controversial, and there is no specific case law with regard to contracts concluded by dominant undertakings.

Law stated - 20 January 2022

Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Civil courts are expressly empowered to apply the Cartel Act. In particular, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request before civil courts the elimination of or desistance from the hindrance, damages and satisfaction in accordance with the Swiss Code of Obligations , or the surrender of unlawfully earned profits (article 12 of the Cartel Act). Hindrances of competition include, in particular, the refusal to deal and discriminatory measures.

The Cartel Act empowers civil courts (at the plaintiff's request) to rule that any contracts are null and void in whole or in part, or that the person responsible for hindering competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (article 13 of the Cartel Act).

The Swiss Federal Supreme Court upheld an order of a lower civil court to a cooperative society managing a cheese maturing cellar to accept a company as a member and to grant, therefore, access to the maturing cellar (LPC 2015/4 – Etivaz, p. 896).

In another case, the Cantonal Court of Vaud ordered a European sport federation to invite an athlete to one of its competitions. A recommendation issued by the sport federation, a Swiss-domiciled association, not to invite athletes who could harm the events because of their past doping offences was considered as infringing rules on abuse of a dominant position (article 7 of the Cartel Act) and injuring athletes' personality rights (Cantonal Court of Vaud, 24 June 2011, published in CaS 2011, 282).

Civil courts also have the possibility to order interim measures (articles 261 to 260 of the Swiss Civil Procedure Code). Moreover, provided that there is a sufficient public interest, the Swiss Competition Commission can order interim measures on its own (see, eg, landmark decision of the Swiss Federal Supreme Court, LPC 2004/2 – Sellita Watch Co SA / ETA SA , p. 640). In order to have interim measures granted, it is, inter alia, required that the alleged anticompetitive conduct causes a disadvantage that cannot be easily remedied.

With an interim decision of 12 July 2017 (LPC 2017/3 – Eishockey im Pay-TV , p. 410), the Swiss Competition Commission refused to grant Swisscom interim measures in the investigation of the Commission against UPC, a subsidiary of Liberty Global plc, on the suspicion of the abuse of a dominant position in the field of ice hockey broadcasting. Thereby, the Swiss Competition Commission confirmed a strict approach regarding interim measures. Despite clear indications for the abuse of a dominant position by UPC, it denied the claim for interim measures since, according to the Swiss Competition Commission, the conditions for a disadvantage that cannot be easily remedied were not satisfied. Even though it refused to grant the interim measures, the Swiss Competition Commission imposed a fine of about 30 million Swiss francs on UPC with regard to its abusive conduct against competing TV platform operators in the ice hockey broadcasting markets in its decision on the merits in October 2020. In December 2020, the Swiss Competition Commission issued interim measures that prohibit Swisscom from denying competitors access to end-to-end lines during the expansion of the fibre-optic network in order to safeguard competition for the duration of the investigation.

Law stated - 20 January 2022

Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes, such claims for damages exist and are adjudicated by the civil courts. Under Swiss law, the quantum of damages generally equals the difference between the actual financial situation of the party aggrieved by the abusive conduct and the hypothetical situation in which that party would have been without the abusive conduct. Because it is often not possible to prove the quantum of damages in exact figures, courts in principle have the possibility to estimate damages based on plausible assumptions (Commercial Court of the Canton of Aargau, LPC 2003/2 – Allgemeines Bestattungsinstitut , p. 451). Article 42, paragraph 2 of the Swiss Code of Obligations explicitly states that courts shall estimate the quantum of damages at their discretion, in the light of the normal course of events and the steps taken by the aggrieved party, where the exact quantum of loss or damages cannot be established. However, any information substantiating and facilitating such estimation must be brought forward by the party claiming damages, which in practice creates high hurdles in the burden of proof.

Law stated - 20 January 2022

Appeals

To what court may authority decisions finding an abuse be appealed?

Decisions of the Swiss Competition Commission holding undertakings responsible for unlawful abusive conduct and, to a limited extent, also its interim procedural decisions, can be challenged before the Swiss Federal Administrative Court. An appeal can be lodged on the following grounds: wrongful application of the Cartel Act; the facts established by the Swiss Competition Commission were incomplete or wrong; or the Commission's decision was unreasonable. Hence, the appeal before the Swiss Federal Administrative Court is a 'full merits' appeal on both the findings of fact and law.

The judgments of the Swiss Federal Administrative Court may be challenged before the Swiss Federal Supreme Court. In proceedings before the Swiss Federal Supreme Court, judicial review is limited to legal claims, in other words, the flawed application of the Cartel Act or a violation of fundamental rights set forth in the Swiss Federal Constitution, the European Convention of Human Rights or other international treaties. The claim that a decision was unreasonable is fully excluded and claims with regard to the finding of facts are basically limited to cases of arbitrariness.

The judgments of upper cantonal civil courts rendered in civil actions may also be ultimately challenged before the Swiss Federal Supreme Court. However, the same restrictions as in cases of appeals against judgments of the Swiss Federal Administrative Court apply.

Law stated - 20 January 2022

UNILATERAL CONDUCT

Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

With effect from 1 January 2022, the concept of relative market power has been introduced in the Swiss Federal Act on Cartels and other Restraints of Competition of 6 October 1995, as amended (the Cartel Act). Thus, companies with relative market power are also subject to a control of abusive behaviour.

According to the new article 4, paragraph 2-bis of the Cartel Act, an undertaking is deemed to have relative market power if 'other undertakings are dependent on it for the supply of or demand for a good or service in such a way that there are no sufficient and reasonable possibilities of switching to other undertakings' . Whether a company has relative market power cannot be answered in general terms. It requires a case-by-case assessment for each company (buyers and suppliers) and each product or service adding to the complexity of such assessment.

With the new rules, companies with 'mere' relative market power will, inter alia, be prohibited from refusing business and supply relationships, discriminating on prices or imposing unreasonable conditions unless such conduct is objectively justified (legitimate business reasons). In addition, the catalogue of examples of abusive conduct under article 7, paragraph 2 of the Cartel Act was extended. According to this amendment (article 7, paragraph 2(g) of the Cartel Act), companies with relative market power or that are market-dominant may not restrict buyers from 'purchasing goods or services offered in Switzerland and abroad at the market prices and the conditions customary in the industry abroad'. This provision is aimed at combating international intra-group price discrimination. Notably, such unilateral conduct has so far not been subject to any competition law scrutiny. For example, a Swiss reseller shall have the right vis-à-vis a manufacturer with relative market power to buy a specific product locally in Germany at local prices, which are presumably lower than the Swiss prices, in order to resell such product in Switzerland.

Contrary to market-dominant undertakings, companies with 'mere' relative market power are not subject to direct fines in case of an abuse of their position. However, they may face lengthy and expensive proceedings, injunctive reliefs, claims for actual delivery and damages, as well as the invalidity of the relevant contractual clauses.

The concept of relative market power is new in Switzerland. Hence, legal uncertainty exists on how the Swiss competition authorities will apply these new rules. As both the German and Austrian competition laws already contain similar provisions, they will presumably serve as an interpretative aid.

The Price Surveillance Act of 20 December 1985, as amended, contains additional rules for undertakings with market power. Based on these rules, undertakings with market power are subject to the oversight of the price supervisor who may intervene in case of abusive prices.

Law stated - 20 January 2022

UPDATE AND TRENDS

Forthcoming changes

Are changes expected to the legislation or other measures that will have an impact on this area in the near future? Are there shifts of emphasis in the enforcement practice?

In addition to the concrete implementation of the new rules on relative market power, the adoption of a new preliminary draft for the partial revision of the Cartel Act is currently at the centre of Swiss competition law. The Federal Council has approved a consultation on this preliminary draft and is thus making a new attempt to revise the Cartel Act. The consultation will last until 11 March 2022. The draft revision does not primarily focus on issues of market dominance or relative market power. However, among other things, civil antitrust law is to be strengthened, and regulatory deadlines and party compensation are to be introduced within the framework of administrative law proceedings before the Swiss Competition Commission and its Secretariat. These will also have an impact on dominance proceedings and relative market power. However, it remains to be seen whether the revision of the Cartel Act will actually be successful as earlier attempts failed.

Law stated - 20 January 2022

Jurisdictions

Australia	Gilbert + Tobin
Austria	Schima Mayer Starlinger
Belgium	Cleary Gottlieb Steen & Hamilton LLP
Brazil	Mattos Filho Veiga Filho Marrey Jr e Quiroga Advogados
Bulgaria	Wolf Theiss
Canada	Baker McKenzie
China	DeHeng Law Offices
Denmark	Bruun & Hjejle
Ecuador	Robalino
European Union	Cleary Gottlieb Steen & Hamilton LLP
France	UGGC Avocats
Germany	Cleary Gottlieb Steen & Hamilton LLP
Greece	Nikolinakos & Partners Law Firm
Hong Kong	Eversheds Sutherland (International) LLP
India	Shardul Amarchand Mangaldas & Co
Indonesia	ABNR
Ireland	Matheson
Italy	Rucellai & Raffaelli
Japan	Anderson Mōri & Tomotsune
Morocco	UGGC Avocats
Nigeria	Streamsowers & Köhn
Norway	Advokatfirmaet Thommessen AS
Poland	Linklaters LLP
Portugal	Gómez-Acebo & Pombo Abogados
Saudi Arabia	Al Tamimi & Company

Slovenia	Odvetniska druzba Zdolsek
South Korea	Yoon & Yang LLC
Spain	.
Switzerland	CORE Attorneys Ltd
Turkey	ELIG Gurkaynak Attorneys-at-Law
United Kingdom	Cleary Gottlieb Steen & Hamilton LLP
USA	Cleary Gottlieb Steen & Hamilton LLP