Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2021 – Switzerland

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2021: Less case law, more legislation

While the year 2021 was a rather unspectacular year regarding relevant new case law, the legislative made sure it provided for quite noteworthy developments in competition law nonetheless.

The Swiss Competition Commission ("**ComCo**") and especially the courts produced relatively few leading decisions in 2021, with still a lot of major cases pending at the Federal Administrative Court ("**FAC**") as well as the Federal Supreme Court ("**FSC**"). However, there were a handful of landmark cases – such as the Pfizer Case – and remarkable developments, which will be highlighted below.

On the other hand, not only did the Swiss Parliament approve the so-called Fair Price Initiative in 2021, which came into force in January 2022, but the legislator has also made a new attempt at a fairly comprehensive revision of the Cartel Act ("**CartA**").

Unlawful Agreements / Cartels

At the beginning of the year, the FSC ruled on the landmark **Pfizer**-Case regarding recommended retail prices as well as clarifying the elements of a concerted practice (2C_149/2018)[1]. The judgement received a lot of attention in the public eye and within the relevant professional circles, especially because it ultimately results in a rare deviation of Swiss practice on recommended retail prices from that established in the European Union.

The FSC made clear that the concept of "concerted practice" does not require an exchange of intentions, but only a minimum amount of communication and that even unilateral conduct of an undertaking with regard to information may be deemed sufficient if competitors can be expected to adapt their market behaviour accordingly as a result.

Based on the high level of adherence to Pfizer's price recommendations, the court concluded that Pfizer and its distributors had entered into an unlawful price fixing agreement pursuant to Article 5(4) CartA. According to the court, pressure or further elements are not necessarily required in addition to adherence.

In July, ComCo imposed a fine of around CHF 7.7 million on **Ford Credit** Switzerland GmbH ("Ford Credit") for unlawful coordination of leasing conditions. In particular, Ford Credit was found to have exchanged information with other financing companies on price elements such as interest rates and residual value tables for car leasing. The decision marks the end of the "automobile leasing" investigation, which has been going on for many years and in which ComCo had reached amicable settlements with all remaining eight financing companies apart from Ford Credit in 2019. Ford Credit has appealed the decision to the FAC[2].

Finally, it is worth mentioning that ComCo clarified its approach towards so-called **Arbeitsgemeinschaften ("ARGE"),** which are consortiums – mainly used in the construction sector – where multiple undertakings intend to work together on a project and often will place a common bid in a public tender procedure. In a report published in 2021, ComCo made clear that the main criteria to evaluate if such an ARGE is in line with Competition Law is whether or not it reduces the amount of bids. This means that if both undertakings had placed – in absence of the ARGE – an offer by themselves, such ARGE would possibly constitute an infringement of Competition Law.

Abuse of Dominance

With regard to abuses of dominance, 2021 was rather calm, as we did not see any landmark decisions in this field – leaving aside the decisions regarding interim measures mentioned below.

Noteworthy is, however, FAC's decision in the "**Wan-Anbindung**" case (B-8386/2015)[3]. In this ruling, the FAC, for the most part, confirmed ComCo's decision to impose a sanction on Swisscom. However, it reduced the sanction by approx. CHF 500,000 to CHF 7.4 million. This case concerned a tender issued by Swiss Post in 2008 for a so-called "Wide Area Network" (WAN) for its postal sites. Swisscom was awarded the contract. According to the FAC, Swisscom forced unreasonable prices on both, the Swiss Post and Sunrise, which acted as a competitor to Swisscom in the tender, and applied a margin squeeze against Sunrise. Swisscom appealed the decision, which is now pending before the FSC.

Merger Control

As far as can be seen, there was no Phase II merger in Switzerland in 2021. Nevertheless, the following interesting developments took place in the area of merger control.

ComCo is increasingly checking transactions that actually have little to no connection to Switzerland. The advice on the merger project "Enel X/VW" concerned the acquisition of joint control by VW and Enel X over a joint venture in the field of the construction and operation of charging infrastructures for battery electric vehicles. Although the joint venture will operate exclusively in Italy and will only set up charging points there, in ComCo's view, the transaction was subject to a merger notification obligation. ComCo justified this approach with the fact that customers from Switzerland would potentially also be interested in using the infrastructure in Italy, and regarding the relevant geographic market, ComCo had not ruled out an EEA plus Switzerland-wide market in this area of activity.

The authors are aware of other, so far unpublished cases in which ComCo assumes the possibility of intervention in transactions with a marginal foreign component. It remains to be seen whether this trend will continue.

Furthermore, the FSC has indirectly confirmed the recent developments regarding the notification obligation for concentrations involving dominant companies. Under Article 9(4) CartA, a proposed concentration triggers a mandatory pre-merger notification obligation irrespective of the statutory turnover thresholds if (i) one of the undertakings concerned has been held to be dominant on a market in Switzerland in a final and non-appealable decision in proceedings under the Cartel Act; and (ii) the concentration concerns either that market or an adjacent, upstream or a downstream market.

As discussed in last year's edition, the FAC confirmed in Tamedia/Adextra, that in purely administrative merger proceedings, the proximity requirement of Article 9(4) CartA (i.e. markets that are adjacent, upstream or downstream) must be interpreted broadly. According to the FAC, the notification obligation under Article 9(4) CartA does not require that the transaction concerns a market directly adjacent, upstream or downstream of the dominated market. Rather, the notification obligation under Article 9(4) CartA is triggered if it cannot be ruled out from the outset that the dominant position might have competitive effects on any market affected by the proposed concentration.

The FAC's ruling was appealed to the FSC. In September 2021, the FSC dismissed the appeal. However, its reasoning did not elaborate on the question of when a market is to be seen as (directly) adjacent. Nevertheless, the FAC ruling described above has become legally binding.

Finally, ComCo has given guidance on how the thresholds in Article 9(1) CartA triggering a duty to notify have to be calculated if an undertaking is involved which reports its turnovers in a foreign currency and has a financial year that does not match the calendar year.

Procedural Aspects and Sanctions

2021 was the year of interim measures in Switzerland. ComCo issued interim measures in two major proceedings against important market players.

In February, following a complaint by SIX, ComCo opened an investigation against **MasterCard[4]** for possible obstruction of the so-called National Cash Scheme ("NCS") of SIX. This is a national set of rules for cash withdrawals. ComCo is investigating whether MasterCard abused its allegedly dominant position by refusing to allow the NCS system to be placed next to the MasterCard system on the new Debit MasterCard (so-called "co-badging"). As part of the investigation, ComCo issued various interim measures against MasterCard, which are intended to create the possibility for the card-issuing banks to technically prepare the debit cards for a possible later activation of the NCS.

In a second case, ComCo issued interim measures against **Swisscom** shortly before Christmas 2020, which were confirmed by the FAC at the end of September 2021. The so-called "network construction strategy" case concerns the expansion of the fibre-optic infrastructure by Swisscom in Switzerland.

According to ComCo, when expanding its network, Swisscom changed the construction method in such a way that competitors do not have direct access to the network infrastructure. The main focus was on the change to a single-fibre model with point-to-multipoint topology compared to the previous four-fibre model with point-to-point topology, with which, according to ComCo, so-called layer 1 access was guaranteed. ComCo, therefore, considered it credible that Swisscom was abusing a dominant position and issued interim measures against Swisscom. In concrete terms, Swisscom was prohibited from continuing the fibre roll-out without guaranteeing so-called layer 1 access.

Swisscom appealed ComCo's measures to the FAC. In its ruling of 30 September 2021 (B-161/2021), the FAC confirmed the measures against Swisscom and stated for now. It has to be assumed that Swisscom's new network construction strategy constituted abusive conduct by a dominant company in the form of a restriction of technological development. Swisscom has appealed the ruling to the FSC, which, in December, decided not to grant suspensive effect on the appeal.

In other news, the FSC also specified the right of employees and bodies of an accused undertaking to refuse to testify in antitrust proceedings against the undertaking. This has been a controversial topic in Swiss antitrust law for years. The FSC has now provided clarity in this regard (2C_383/2020). *Former* executive bodies of a company affected by cartel proceedings are in principle to be questioned in the capacity of a witness. The FSC only regards *current* formal and de facto organs of the undertaking as representatives of the undertaking, i.e. only these are granted the right to refuse testimony. *Former* organs of undertakings under investigation can be questioned as witnesses without restriction.

Civil litigation

Already in 2019, ComCo tried to promote civil antitrust law by means of reduced fines for companies that pay damages to cartel victims. ComCo reduced the fines of such companies taking into account 50% of the settlement payments made.

However, ComCo's efforts have had little effect so far. Even in 2021, civil antitrust law in Switzerland remained a marginal phenomenon at best. Thus, there has been no significant public proceeding in 2021.

Meanwhile, the Swiss Federal Council has also recognized the problem and wants to promote civil antitrust law in the upcoming revision of the Cartel Act (see below).

Legislation

2021 marked a year with a fair amount of developments in Competition Law Legislation.

First, in March, Swiss Parliament revised the Cartel Act based on the so-called **Fair Price Initiative** and *inter alia* adopted the concept of "relative market power". The new rules regarding relative market power extend all prohibitions previously applicable only to dominant undertakings (Article 7 CartA) to companies with "relative market power". A company is considered to have

"relative market power" if other companies depend on it with respect to the supply of or demand for a product or service in such a way that there is no sufficient and reasonable possibility to switch to other companies. In contrast to the traditional determination of market dominance, it is irrelevant whether the allegedly relative dominant company can behave independently of other market participants to a significant extent. Whether a company has relative market power must therefore always be determined in relation to a specific bilateral business relationship.

Furthermore, the new legislation introduces a Geo-Blocking ban in Article 3a of the Act against Unfair Competition ("**UCA**"). Under the new law, it will be deemed unfair competition if an online retailer demands higher prices from Swiss customers, restricts their access to an online portal or redirects them to a Swiss website with higher prices. However, it is important to mention that Article 3a para. 2 UCA contains various exemptions (e.g. for financial services, public transport, audio-visual content or gambling). The regulation does not establish an obligation for companies to deliver their products/services to Switzerland. Goods that may be available at a lower price must eventually be picked up abroad. The changes to the UCA as well as the CartA entered into force on 1 January 2022.

Second, in November, the Federal Council published further proposed amendments to the CartA for consultation. Although the Federal Council and Parliament are likely to amend at least parts of this new proposal after the consultation process, some points are already noteworthy. An important part of the upcoming revision will be the introduction of the Significant Impediment to Effective Competition-Test (SIEC-Test) as the relevant standard for merger control proceedings. Today, Swiss merger control still assesses transactions based on the dominance test, i.e. a transaction may only be prohibited (or subject to remedies) if it creates or strengthens a dominant position liable to eliminate effective competition. Other elements of the envisaged revision are regulatory time frames for competition authorities and courts, party compensation in proceedings before ComCo, and a strengthening of civil antitrust law. However, the legislative process is only in its early stages, and it is not expected that any of these reforms will come into force before 2023/24.

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[1] Lenz & Staehelin represents Pfizer in this case.

[2] Lenz & Staehelin represents Ford Credit in this case.

[3] Lenz & Staehelin represents Swisscom in this case.

[4] Lenz & Staehelin represents MasterCard in this case.

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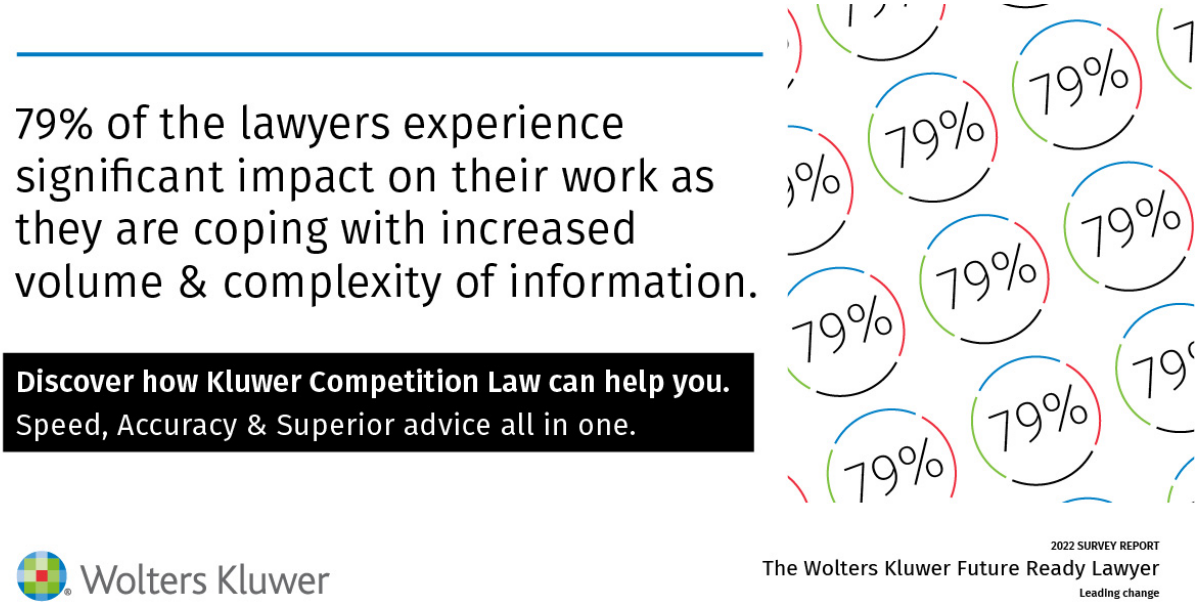

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