Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2020: Switzerland

Marcel Meinhardt, Sandro Travaglini (Lenz & Staehelin) · Monday, January 18th, 2021

2020: Business as usual (more or less)

While over the past year COVID has had a major impact on our lives in many areas, it left Swiss competition law practice refreshingly unimpressed. In late March 2020, in the middle of the first lockdown, the Swiss Competition Commission ("**ComCo**") issued a clear message: Swiss competition law continues to apply also during the global pandemic.

Subsequently, ComCo made some minor organizational adjustments (swift handling of requests for advice on measures in connection with COVID; electronic submission of merger notifications; letters are usually sent without a signature; contact with ComCo via Skype), but otherwise ran its operations as usual and even conducted dawn raids at several companies in summer 2020.

The COVID-related published practice of ComCo is also rather sparse. Among others, ComCo ruled that the decision of the Swiss Football League to continue the championships of the highest Swiss leagues did not constitute abusive conduct of the association. In addition, ComCo had to assess the compatibility of proposed state aid under the Agreement between the Swiss Confederation and the European Community on Air Transport in two cases, eventually finding the proposed state aid to be in compliance with the Agreement in the case of two Lufthansa subsidiary airlines (SWISS and Edelweiss), but not in the case of aviation-related operations (SR Technics).

Unlawful Agreements / Cartels

With regard to unlawful agreements/cartels, 2020 was rather calm as we did not see any landmark decisions in this area. Generally, there was a tendency towards the termination of proceedings by means of amicable settlements. Also, ComCo maintained a focus on bid-rigging, sanctioning an agreement in the area of optical networks, and opening a new investigation into possible agreements in the construction sector. Besides this, ComCo conducted investigations against several trading companies due to possible agreements in relation to debt collection and reached further partial decisions and amicable settlements with various banks and brokerage houses concerning alleged manipulation of reference interest rates in trading with interest rate derivatives.

Abuse of Dominance

In contrast, 2020 saw a number of high-profile cases related to the abuse of dominance, with a focus on the media and telecommunications sector.

Two new proceedings were directed against state-owned telecommunications industry leader Swisscom. ComCo opened an investigation against Swisscom for an alleged margin squeeze pertaining to the use of Swisscom's infrastructure in tenders for projects to network company locations. This new investigation is a sequel to an investigation that has already been concluded with a sanction against Swisscom (WAN-Anbindung) and which is currently subject to an appeal pending before the Federal Administrative Court ("**FAC**"). The decisions in both of these cases are expected to clarify important issues relating to margin squeeze. In addition, ComCo opened proceedings against Swisscom and imposed provisional measures on the grounds of possible abuse of dominance through the stand-alone expansion of the fiber-optic infrastructure.

ComCo also fined Swisscom's competitor UPC for unlawful refusal to deal with regard to the exclusive live broadcast of Swiss ice hockey games on pay-TV. This decision is in line with ComCo's previous practice, which is based on an extremely narrow market definition in the area of pay-TV and for this reason is also subject to a complaint pending before the FAC in an analog case (Sports in Pay-TV).

Furthermore, ComCo released Swatch subsidiary ETA from its supply obligation and restrictions on mechanical Swiss-made watch movements. With this, ComCo put a provisional end to the multi-year process initiated by ETA in 2013. This process was a novelty to Swiss competition law and aimed at allowing ETA as a dominant undertaking to gradually withdraw from its supply obligations, thus giving it more freedom in the choice of its commercial partners. The gradual reduction of ETA's supply obligation enabled competitors to expand their capacities and customers to adjust their sources of supply, leading to profound changes in the Swiss watch industry. Although ETA is now no longer subject to supply obligations, it remains dominant and thus under ComCo's general supervision with regard to the abuse of market power.

ComCo also announced that it was fully opening up the natural gas market in central Switzerland. This was reached within the framework of an amicable settlement with two pipeline network operators, which ComCo qualified as market-dominant under the Essential Facility Doctrine and which ComCo also sanctioned for unlawful refusal to deal (although with a reduced amount). As a result, end consumers in the network may now freely choose their gas supplier. ComCo expects this decision to have a signal effect, thus opening up the gas market throughout Switzerland in pre-emption of an ongoing and less far-reaching revision of the Gas Supply Act.

Finally, the Federal Supreme Court partially upheld the appeal against the FAC's decision in AG Hallenstadion/Ticketcorner. The Federal Supreme Court held that it was not established that the agreement between the ticketing provider Ticketcorner and the concert venue AG Hallenstadion, according to which at least 50 percent of the tickets for rock and pop concerts at the Hallenstadion shall be distributed via Ticketcorner, constituted an abuse of dominance by Ticketcorner. By contrast, AG Hallenstadion was held to have abused its dominant position by linking the rental of its venue for pop and rock concerts to the 50 percent requirement and thus imposing the ticketing-clause on its clients. The Court further held that the ticketing cooperation clause between AG Hallenstadion and Ticketcorner was an unlawful agreement, albeit one that did not trigger fines.

Merger Control

In merger control, the focus was on the telecommunications sector as well. The public takeover of Sunrise (Switzerland's number 2 in mobile) by Liberty Global and its subsidiary UPC (number 2 in TV and broadband) created a converged challenger in Switzerland to industry leader Swisscom. This multi-billion transaction was in principle the reverse of last year's takeover attempt by Sunrise of UPC, which failed due to shareholder opposition. Since ComCo had already examined last year's transaction in depth, it refrained from conducting another in-depth examination for this year's reverse transaction and instead approved the proposed merger already in Phase I. In this context, ComCo also stated that for reasons of procedural economy, an in-depth examination may exceptionally be waived in cases where there are indications of the creation or strengthening of a dominant position, but where it is obvious that there is no risk of effective competition being eliminated. This could be the case, in particular if the same or similar facts have only recently been examined in detail by ComCo and classified as unobjectionable, and no significant changes have occurred in the meantime.

ComCo and the FAC have also specified and extended the notification obligation for concentrations involving dominant companies. Under Article 9(4) of the Swiss Cartel Act ("**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.

In response to a consultation request, the Secretariat of ComCo stated, that in order to determine whether there is an obligation to notify a concentration pursuant to Article 9(4) of the CartA, the facts at the time of signing are relevant. The decision regarding dominance must therefore be final and non-appealable at this time in order to trigger a mandatory pre-merger notification. By contrast, a final and non-appealable decision on dominance issued between signing and closing does not trigger an obligation to notify a concentration under Swiss competition law. Although this advice issued by the Secretariat of ComCo is not legally binding, the Secretariat of ComCo would be expected to maintain this legal position in an actual proceeding.

In Tamedia/Adextra, the FAC confirmed that in purely administrative merger proceedings, the proximity requirement of Article 9(4) of the CartA must be interpreted broadly. According to the FAC, the notification obligation under Article 9(4) of the 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) of the 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. This decision extends the reporting obligation under Article 9(4) of the CartA and, in its further considerations, also raises the question of whether and how undertakings once found to be dominant could realistically ever be released from the notification obligation such a finding entails. This underlines the far-reaching implications that a final and non-appealable finding of market dominance in proceedings under the CartA may have.

Procedural Aspects and Sanctions

In two new decisions, the FAC has 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, as ComCo only regards current executive bodies of the undertaking as representatives of the undertaking and parties to the investigation, and only grants them the right to refuse to testify. In Contrast, ComCo obliges former executive bodies and employees without an executive function to testify against the undertaking. This view was now reconfirmed by the FAC in continuation of its previous practice (B-7017/2018; B-6863/2018). However, both decisions have been appealed to the Federal Supreme Court, which will have the final say in the matter.

As regards competition law sanctions, the FAC has ruled that such sanctions must be economically sustainable in order to meet the proportionality requirement (B-823/2016). This means that sanctions may neither cause the bankruptcy of the fined undertaking (market exit) nor significantly impair its competitiveness. The undertaking's financial plight must be taken into account as an extraordinary circumstance that reduces the penalty. In assessing the economic viability of a sanction ComCo has, according to the FAC, to consider the undertaking's provisions formed for the sanction, its capitalization, and its liquidity (including unused credit volume or potential credit limit reductions).

Civil litigation

In last year's annual report, ComCo extensively discussed a decision from the preceding year in which it had for the first time reduced antitrust fines due to damages compensation paid to cartel victims. The cartel under consideration involved twelve construction companies that regularly allocated road construction projects among themselves and jointly determined the level of their offer prices. After having issued its request for a decision (which is similar to the statement of objections in the European Union), ComCo's Secretariat offered the parties the opportunity to settle with the cartel victims. The Secretariat promised to request ComCo to reduce the antitrust fines due to such private damages settlements. As a result, nine of the twelve companies entered into settlement agreements with the government, in which they undertook to pay the cartel victims approximately CHF 6 million in damages compensation. In its decision, ComCo followed the Secretariat's request and reduced the fines of the respective nine companies by approximately CHF 3 million, taking into account 50% of the settlement payments made. This new practice, which is likely to be maintained in future cases, is a consequence of the difficulties victims experience when claiming antitrust damages against cartels in Switzerland. Although ComCo's novel approach attempts to foster such civil damages claims, it also raises significant concerns, in particular as it may reduce the willingness of companies to apply for leniency.

Besides this, the Federal Supreme Court has ruled with regard to the choice of jurisdiction, that a jurisdiction clause contained in a letter of intent may also extend to antitrust-based civil action seeking the conclusion of a contract that was not concluded in the course of the contract negotiations (4A_433/2019).

Legislation

In terms of new legislation, the Federal Council has mandated the Federal Department of Economic Affairs, Education and Research in February 2020 to prepare a consultation draft on the revision of the Cartel Act. 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. The fundamental difference between the current dominance test applied in Switzerland and the SIEC test to be introduced lies in the threshold for intervention. With the SIEC test, mergers may be prohibited or be subject to conditions and obligations if they lead to a significant impediment to competition. Under the current test, this is only possible if effective competition is eliminated. Other elements of the envisaged revision are regulatory deadlines for the competition authorities and courts, party compensation also for proceedings before ComCo, and a strengthening of civil antitrust law. However, the legislative process is only at its beginning and it is not expected that any of these reforms will come into force before 2022.

Last year also brought the introduction of the so-called e-marker. The e-marker is an electronic declaration to ComCo that the undertaking will file a leniency application. Unlike other forms of markers, such as submission by email or fax, the e-marker is entirely paperless as it can be submitted to ComCo via the form on ComCo's website.

Furthermore, the Swiss Parliament started its debate on the Fair Price Initiative and an indirect counter-proposal by the government, both of which aim to tighten the Cartel Act. Among other new provisions, the concept of relative market power shall be introduced to combat foreclosure of the Swiss market and price discrimination against Swiss corporate customers. Although differences between the two chambers of Parliament remain, on 2 December 2020 both agreed that the concept of relative market power should apply not only to companies outside Switzerland that supply goods and services to Swiss purchasers but also as a general concept to all sorts of abusive conduct, *i.e.* also to conduct of domestic companies and purchasers.

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 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. As the parliament has not yet reached an agreement on all aspects, it is expected that it is dealing again with this matter in the coming spring session.

---

informed decisions, more quickly from every preferred location. Are you, as a competition lawyer, ready for the future?

Learn how **Kluwer Competition Law** can support you.

This entry was posted on Monday, January 18th, 2021 at 10:00 am and is filed under Competition Law 2020, Switzerland
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.