

Kluwer Competition Law Blog

Main Developments in Competition Law and Policy 2022 – Switzerland

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2022: The Year of Series of Judgments

The year 2022 was an eventful year from a Swiss Competition jurisdictional perspective. Case law on unlawful competition agreements/cartels was at the forefront of the discussion on Swiss competition law. In the following, we take a closer look at the series of judgments of the Swiss Federal Supreme Court (“**FSC**“) and the Swiss Federal Administrative Court (“**FAC**“) on this topic. We further address several important cases for Swiss practice on abuses of dominance and briefly discuss merger control, procedural aspects, and private enforcement. During the last year, the Swiss Competition Commission (“**ComCo**“) also revised its Notice on the Treatment of Vertical Agreements (“**Vertical Notice**“). It entered into force on January 1, 2023. Finally, Switzerland and Germany signed the administrative agreement on cooperation between their competition authorities (“**Agreement**“) on November 1, 2022. It is expected to enter into force, not before the second half of 2023.

Unlawful Agreements / Cartels

Within a series of judgments on the distribution of **French-language books** in Switzerland, the FSC looked into exclusivity clauses and their qualification as absolute territorial protection. In doing so, the FSC once again emphasized the proximity of Swiss competition law to European regulations. The following takeaways are worth mentioning:

- A contractual commitment of a manufacturer or a distributor towards its Swiss distributor “*not to sell*” its works and “*not to let them be sold*” in Switzerland shall ensure absolute territorial protection. Therefore, the FSC confirmed that clauses like “*the publisher will use its best efforts to prevent the circumvention of such exclusive right from neighboring or non-adjacent countries*” or “*the publisher consequently undertakes not to sell or cause to be sold its works on Swiss territory*” aim at foreclosing the Swiss territory.
- The FSC left open whether the EU rules on genuine agencies also apply in Switzerland. However, it confirmed that a clause according to which “*the supplier undertakes not to open direct accounts in Paris for Swiss customers, except for sold-out titles, without the prior consent of the publisher*” qualifies as an impermissible passive sales ban, even in the case of an agency.
- By contrast, the FSC assessed to following clauses to be lawful: (i) “*the publisher undertakes to*

ensure, as far as possible, that this exclusivity is respected by the distributor's customers and, in particular, by booksellers or bookstore chains with points of sale outside Switzerland“; (ii) The publisher entrusts its publishing service partners with the exclusive distribution of their works in Switzerland to “guarantee the exclusivity of the distribution” for Switzerland or “to ensure the respect of this agreement by the wholesalers and other agents“; (iii) A manufacturer entrusted the “exclusive” distribution of its products to another company while explicitly undertaking to the latter “not to open direct accounts for Swiss customers without [its] prior consent“.[8]

Within another series of judgments, the FAC confirmed illegal price agreements in the **air cargo** sector. The **Air Transport Agreement between Switzerland and the EU** provides for Swiss jurisdiction only for “*routes between Switzerland and third countries*“. However, the FAC did not consider the ComCo competent to assess the freight transports that were first transported by land to an EU country and then by air to a third country. Consequently, it quashed three decisions of ComCo. For all other airlines, the FAC held that the exchange of information on fuel surcharges and commission surcharges was anti-competitive. This exchange took place within an association that systematically collected information, and disseminated it among its members which the FAC qualified as a single and continuous infringement. In five cases, the FAC reduced the respective sanctions as it considered the conduct to be less serious than what the ComCo had originally assessed. Moreover, it lifted a future ban on the airlines on exchanging relevant information, as ComCo could not demonstrate a concrete risk of repetition in the future.

In December, the FAC also issued its long-awaited decision on information sharing between competitors in the **Ascopa** case. The case had been pending for 10 years. [1]

The FAC decided, in line with the case law of recent years, that ComCo does not have to prove concrete effects of such behaviour on the market. Therefore, the FAC classified the exchange of information between competitors on gross price lists, sales and investments as anti-competitive. However, also the FAC held that such an exchange of information did not qualify as a price agreement and, hence, it confirmed that the behaviour did not trigger fines.

In response to a consultation request of an **international purchasing cooperation**, the Secretariat of ComCo (“**Secretariat**“) took the position that if dealers together hold less than 15% of the relevant purchasing market and did not compete on the downstream markets, such purchasing cooperation was unlikely to raise competitive concerns. It was rather necessary to set up countervailing buyer power against producers and could foster downstream competition. As the exchange of information between the members of the purchasing cooperation was limited to information ancillary to the purchasing cooperation the Secretariat also viewed this to be lawful. On the other hand, purchase quantity reductions and delistings would qualify as restrictions by object or effect and would require an in-depth analysis.

Abuse of Dominance

In the SIX Group and SIX Payment Services (today Worldline) case, the FSC confirmed the sanction of around seven million Swiss francs for illegal **tying**. The **service** bundled concerned dynamic currency conversion (DCC), a function that gives the holders of foreign credit or debit cards the option to choose at the merchant’s terminal whether to pay in local currency or in their foreign, home currency. The Swiss acquirer offered the DCC function to its merchants, who in

turn, needed a “DCC-enabled” payment card **terminal**, i.e. a terminal that supported the DCC function. For this, Worldline only allowed card terminals of its sister company and did not grant access to third-party terminals.

The FSC confirmed that tying can take place in several steps and that a third party can offer the tied good. Tying, in the view of the court, is a by-object offence. Hence, it does not require proof of a specific type of damage or distortion of competition, since it restricts the merchants’ freedom of choice and eliminates the competition on the market. The mere proof of the **risk** thereof is sufficient. The FSC also confirmed that restructuring within the group does not affect liability. The FAC confirmed that the group parent company of the entity behaving in an anti-competitive manner at the time of disposal of the sanction can be sanctioned even if it was group external during the relevant period. This prevents a group from escaping antitrust liability through restructuring. In this context, the FSC explicitly left open whether the group is defined according to the control- or the management principle.

The FAC upheld Comco’s decision imposing a sanction against Vifor Pharma (former Galenica) and its subsidiary for the abuse of a dominant position on the **market for digital drug-related information** but reduced the fine from CHF 4.5 million to around CHF 3.8 Million. Vifor Pharma had entered into contracts with software companies that included exclusive supply clauses, rights of first refusal and the tying of access to drug information to other services. This practice prevented other information providers from entering into contracts with such software companies. While the FAC acknowledged that Vifor Pharma together with its subsidiary had abused its position on drug information, this was not its “*overall strategy*“. An appeal against this decision is pending.

The FAC confirmed Comco’s sanction of CHF 71.8 million against Swisscom for abuse of a dominant position on the **market for pay TV broadcasting of soccer and ice hockey games** of the Swiss major leagues (Sports in Pay-TV). Core offerings with Swiss soccer and ice hockey broadcasts are part of the objectively necessary content of a TV platform. Therefore, full access to such content was objectively necessary for every TV platform to compete in Switzerland. Since Swisscom had successfully acquired such rights on an exclusive basis, the FAC qualified Swisscom to be dominant in the national markets for such sports broadcasting. As such, Swisscom was obligated to grant access to such exclusive rights to competing TV platforms. The appeal against this decision is pending.

With regard to the new provisions on the economic dependency between contracting parties (concept of “**relative market power**“), ComCo opened an investigation in 2022 against an internationally active pharmaceutical company. ComCo is **investigating the allegation** that Swiss wholesalers are hindered from purchasing various goods offered in Switzerland and abroad at cheaper, foreign conditions. Such behaviour is unlawful for companies with relative market power vis-à-vis the Swiss wholesaler.

Merger Control

In 2022, the focus of Swiss merger control was on **foreign-to-foreign mergers**. The Secretariat **confirmed** its strict interpretation of the fundamental notification obligation for foreign-to-foreign transactions. Exceptions to the general principle of effects in Switzerland specified in ComCo’s Notice on the Notification and Assessment under Merger Control, apply restrictively.

For violating Swiss merger filing obligations, ComCo **sanctioned** Swissgenetics Genossenschaft in the amount of CHF 50,000 plus a procedural fee in the amount of almost CHF 14,000. In 2020, the Swiss-based Swissgenetics Genossenschaft acquired New Generation Genetics Inc., which is based in the USA. Both are active in bull selection and collection of bull semen. The Secretariat became aware of this acquisition only after its completion picking up a media release on Swissgenetics' website. Since in 1999, the ComCo had established an order, according to which Swissgenetics' legal predecessor held a dominant position in the Swiss market for the exercise of the then-existing exclusive rights for the artificial insemination of cattle, the Secretariat asked Swissgenetics to comment on the question of whether the acquisition of New Generation Genetics Inc. was subject to notification. Subsequently, Swissgenetics submitted a post-closing notification to the Secretariat. ComCo classified this merger as unproblematic but sanctioned Swissgenetics for violation of the notification obligation.

Procedural Issues and Interim Measures

In 2022, the FSC decided on orders of ComCo forcing companies to a certain future behaviour under threat of punishment (**behavioural measures**). The FSC **confirmed** that ComCo may order such behavioural measures even if such a company has discontinued the infringing behaviour. However, there needs to be a risk of repeating for the measures to be lawful. In the meantime, the FAC **applied this case law** to further judgements.

In two cases, ComCo imposed **interim measures** in potential abuse cases. One concerned the expansion of the fibre-optic infrastructure. In this case, the FSC **confirmed the interim measures** of the ComCo preventing Swisscom from continuing the roll-out of the fibre-optic network without guaranteeing so-called Layer 1 access during the ongoing investigation of the ComCo. By contrast, in the second case of interim measures concerning Mastercard, ComCo withdrew its measures after the FCA had reinstated the suspensive effect of Mastercard's appeal. ComCo had ordered Mastercard to grant access to its ATM cards for a competing ATM scheme.

Private Enforcement

As in last year's edition, civil antitrust law in Switzerland again remained a marginal issue at best in 2022. ComCo assessed several requests for access to ComCo's files as well as files of proceedings, for a potential claimant in a civil damage proceeding. [2]

In a still pending antitrust appeals proceeding, ComCo granted the potential claimant access to its files albeit with redacted business secrets. Even though access was also granted to the underlying evidence, the leniency and immunity applications were largely excluded as otherwise the institution of the leniency application itself could have been affected. As in previous cases, the Federal Law on Information Transparency in the Administration proved to be a viable basis for potential claimants to access ComCo's investigation files.

Legislation

On December 14, 2022, ComCo published its [revised Vertical Notice](#) including revised explanatory notes. The revised Vertical Notice entered into force on January 1, 2023. Existing contracts must be adapted to the new rules within a transition period of one year. With the revised Vertical Notice, the ComCo intends to create congruence in principle with the EU Commission's Vertical Block Exemption Regulation, which applies in the EU since June 1, 2022. Although the Vertical Notice is largely based on the legal situation in the EU, it deliberately provides for stricter rules on key issues, particularly price recommendations, export bans and restrictions on passive sales. Contracts with an impact on Switzerland must therefore continue to be examined for compliance with the "Swiss Finish" in antitrust distribution practice.

Switzerland and Germany signed the [Agreement on November 1, 2022](#), which is expected to enter into force in the second half of 2023 at the earliest, after approval of the Swiss Federal Assembly. It will enable future cooperation between the ComCo and the German Federal Cartel Office. Among other things, they will be able to take coordinated enforcement actions and exchange information obtained in an investigation. Under certain conditions, either authority may transmit the information it already possesses to the other for use as evidence. Information may also be exchanged in merger proceedings.

[1] Cf. FAC B-141/2012, dated December 12, 2022.

[2] Cf. DPC/RPW 01/2022 p 77 et seqq.

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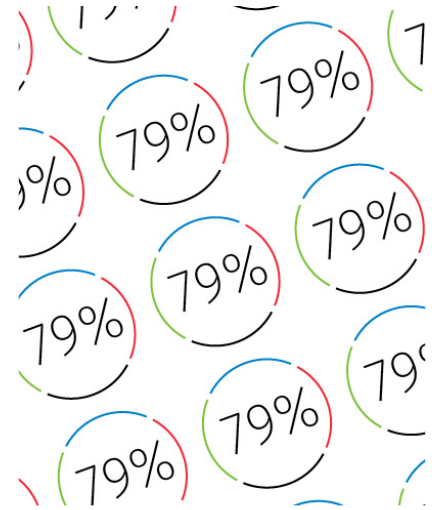
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