

Developments in Swiss Competition Law in 2006¹

As announced in our report last year, the first direct administrative sanctions fell in 2006 in relation to abuses of dominant position. They were followed this year by another decision imposing a CHF 333 mio administrative fine on Swisscom Mobile for abuse of dominant position in the terminating calls for mobile telephony services market. In light of the appeal made by Swisscom Mobile, we will surely come back on that last decision next year. Searches in the premises of undertakings were also inaugurated in 2006 within the framework of the Agreement between the Swiss Confederation and the European Commission on Air Traffic dated June 21, 1999 as a result from a request by the EU in its investigations in the air freight sector. Nevertheless, the most interesting developments in 2006 are perhaps in the field of mergers with a couple of Swiss peculiarities.

1. Legislative evolution and jurisprudence

Draft Communication² on the Assessment of Vertical Agreements:

On September 5, 2006, the Secretariat of the ComCo³ circulated for comments a draft Communication on the Assessment of Vertical Agreements⁴. Largely based on the EC 2790/1999 Regulation on the application of article 81(3) of the Treaty to Categories of Vertical Agreements and Concerted Practices, this draft Communication tries to re-frame the EC Regulation in a way that fits with the Swiss legal framework which, contrary to the EC Competition law, is based on the prohibition of abuses resulting from restrictive practices instead of a direct prohibition of restrictive practices. The outcome was largely criticised for its lack of clarity, for its legalistic approach as compared to the EC Regulation and for the fact that it did not recognize the pro-competitive effects of inter-brand competition. A new version is awaited for the end of the first quarter 2007.

Despite requests from the industry, the ComCo renounced in 2006 to issue a specific communication in relation to insurance business. Instead it plans to publish by the end of the first quarter 2007, a summary of its practice regarding cooperation and other agreements between insurances.

¹ The present article covers the activities of the Swiss Competition Authorities in 2006. It is the outcome of the choice made by the author.

² For an explanation about the communications issued by ComCo, see Developments in Swiss Competition Law 2005, ERIC 2006/1.

³ Swiss competition authorities are:

- the Competition Commission which takes all decisions on investigations, sanctions and mergers (hereafter the "ComCo");
- the Secretariat of the ComCo which prepares all decisions for the ComCo and carries out the investigations;
- the Appeal Commission for competition matters, a Federal Court competent to decide upon all appeals from decisions by the ComCo (hereafter the "ReCo").

⁴ http://www.weko.admin.ch/publikationen/00213/F-Entwurf_Vernehmlassung_Bekanntmachung_Vertikalen_050906.pdf?lang=fr

Legislation:

The European Union is not alone working on the Cassis de Dijon principle⁵. The Swiss Federal Council proposed in 2006 a radical innovation consisting in modifying the Swiss Act on Technical Restraints to Trade, to unilaterally introduce a “Cassis de Dijon” principle opening the Swiss market to EC or EEA compatible products. According to the proposed draft amendment, products complying with EC/EEA technical regulations or with a Member State technical regulations, would be eligible for distribution on the Swiss market without additional administrative requirements. Exceptions are possible only where ordered by the Federal Council or in relation to chemical products. Given the high level of regulatory harmonization already prevailing between Switzerland and the EC, the most noticeable effects of the proposal are likely to be in the food and near-food markets. The main purpose of such modification is to fight the high level of prices in Switzerland.

A similar motivation is at the inception of a modification to the Swiss Act on the Interior Market dated October 6, 1995. The purpose of the Swiss Law on the Interior Market is to allow economic agents to sell their products and provide services everywhere in Switzerland, without discrimination and additional administrative requirements, once approved in one Canton. The modification which entered into force on July 1st, 2006 broadens the scope of powers delegated to the ComCo, as an appeal board against all cantonal decisions restricting the access to markets for regulatory reasons, and as a referral agency disposing of powers to compel other administrative authorities to collaborate and provide information.

Procedural Developments

The introduction of direct administrative sanctions in the Swiss Cartel Act, meant a strong departure from the consensual approach held in the previous Swiss cartel acts of 1962, 1985 and 1994. One and not insignificant “consensual” provision survived though: article 29 of the Swiss Cartel Act which authorises the Secretariat to enter into amicable settlements with the parties involved, with a view to remove the restraint. Was that provision going to become dead letter, or was instead the very new and partly alien to the Swiss legal system introduction of “plea bargains” within the framework of the leniency program, going to stimulate interest for that provision? It is probably too early to say and no conclusion can be drawn for the time being. Interestingly enough however, the ReCo held in a decision regarding the *Sammelrevers*, i.e. the price fixing arrangement between publishers, distributors and retailers of books in the German language, that the introduction of direct sanctions had changed the way article 29 should be applied: After an investigation is opened in the meaning of article 27 LCart, there should be no room left for amicable settlements according to the ReCo⁶. We find this statement quite arguable, particularly considering the possibility to overturn the presumptions set forth in article 5 para 3 and 4 LCart and to justify restraints under article 5 para 2 LCart. Decisions on such issues are not easy and do not fall into a simple binary logic ipso facto excluding settlements. Was that statement from the ReCo an intended response to an earlier statement by the ComCo President under which amicable settlements could be considered within the framework of investigations only, but not during preliminary

⁵ The EU decided on February 14, 2007, to introduce measures to improve the free flow of goods within the EU. Concentrating to a large extent on enforcement measures, one significant change proposed is the shifting of the burden of evidence from the enterprise to the local authorities to demonstrate why a product approved in one Member State cannot be offered in another Member State.

(<http://www.europa.eu/rapid/pressReleasesAction.do?reference=IP/07/181&format=HTML&aged=0&language=FR&guiLanguage=fr>)

⁶ DPC 2006/3 p. 548

investigations or notifications under article 49a LCart⁷? The answer is: probably not. Affaire à suivre.

On a totally different subject, the ComCo got an opportunity to confirm what constituted interested third parties in the meaning of article 40 LCart. According to article 40 LCart, “interested third parties are required to provide the competition authorities with all relevant information and to produce all necessary documents”. IMS Health, the third party in that case, refused to voluntarily provide the requested information on the parties’ market shares, thereby forcing the ComCo to impose the requested collaboration by way of a decision. IMS Health was thus forced to provide that information because interested third parties in the meaning of article 40 LCart, are any third party active on the same market or having a business relationship with one of the parties involved in the proceedings⁸.

2. Dominant Positions

The ComCo dealt in 2006 with an obligation to trade shares at the Swiss Stock Exchange imposed by Swiss Exchange (hereafter “SWX”). The general terms and conditions of SWX require that participants to the stock exchange, during trading periods, enter all orders on the order books of SWX. To justify this obligation, SWX argued that the obligation increased transparency, facilitated the verification of its duty of care, enhanced the liquidity of quoted stocks and was actually creating beneficial scale effects. The ComCo found that there were other ways to reach the same purposes, perhaps less restrictive to competition, as indicated a.o. by the contents of the EC MiFID Directive⁹. It believed that, in the absence of regulatory framework to ensure that these objectives are fulfilled, ordering SWX to renounce to this obligation was not appropriate. As a result, the ComCo decided not to proceed with a full investigation and to keep an eye on this matter in collaboration with the Swiss Banking Commission¹⁰.

3. Horizontal Agreements

When is price fixing, price fixing?

Sometimes, minor decisions may be of interest. When closing a preliminary enquiry regarding tariffs set forth by the association of undertakings active in the tank construction and maintenance business, the ComCo confirmed that the said tariffs were not illegal in the meaning of article 5 LCart. First, the high discrepancy between the tariffs and the actual market prices convinced the ComCo that the presumption of elimination of competition could be overturned. Despite the fact that price is an essential parameter of competition, the ComCo considered that these tariffs were not significantly restricting competition. Competition on the market remained high as a result of a falling demand - partly because of the replacement of oil tanks with more ecological solutions - leading undertakings to offer very high discounts on prices. In its final decision, the ComCo nevertheless recommended that the professional association eliminates the said tariffs.

⁷ DPC 2006/3 p. 601, 605. Under article 49a para 4 LCart, parties to an agreement may notify it before it enters into force, in order to obtain clearance or avoid direct sanctions if found illegal.

⁸ DPC 2006/3 p. 510

⁹ Directive 2004/39/EC of the European Parliament and of the Council of April 21, 2004, on markets in financial instruments amending the Council Directives 85/61/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and the Council repealing Council Directive 93/22/EEC, OJ L 145/1, 30.4.2004.

¹⁰ The Swiss Banking Commission is the Federal regulatory agency in charge of the control and surveillance of financial institutions and banks. It issues ordinances and communications on prudential and compliance issues.

Credit and Debit Cards

In 2002, the EC Competition Commission exempted the Multilateral Interchange Fee set up by Visa International¹¹. This year in Switzerland, the ComCo took two similar decisions, one regarding the Multilateral Interchange Fee for credit cards (Visa and Mastercard), and another one concerning the Domestic Interchange Fee in relation to debit cards (Maestro)¹².

In the first decision on credit cards, the ComCo found that the MIF constituted a horizontal agreement at the level of the acquirers and the users which did not suppress efficient competition but significantly restricted it. In addition, the ComCo found that issuers and acquirers (mainly Telekurs in Switzerland) together held a collective dominant position. Basically, the ComCo concluded that the MIF was not so much the issue as opposed to the system. Indeed, the MIF only served to the optimisation of the multilateral system. The regular increases in the domestic MIF did not find justifications because the market could develop without such increases. The only effect of such increases was to raise the revenue of the issuers and restrict access to the market for new acquirers. Ultimately, the parties found an agreement by which the issuers undertook a.o. to objectivise the domestic MIF by reference to the costs related to the network only and to lift the non-discrimination rule imposed on merchants which prevented competition. Last but not least, the MIF had to be reduced to 1.3-1.35% within the next 3 years¹³. The solution found between the issuers and ComCo may have been prompted by the very soon entry into force of the administrative sanctions.

The second decision came as a result of the possibility to notify an agreement under article 49a paragraph 4 LCart to obtain clearance and avoid direct sanctions, before the notified agreement enters into force. The ComCo decided that it would open investigations only if the parties maintained the Domestic Multilateral Interchange Fee. The ComCo found that the debit card market was different from the credit card market and the two means of payment were not substitutes. According to the ComCo this DMIF qualified as a horizontal agreement between issuers. It did not suppress competition in the meaning of article 5 para 3 LCart because issuers remained free to make consumers pay different contributions and because some competition existed with other debit cards. It concluded that the restriction on efficient competition was significant in the meaning of article 5 para 1 LCart and left open possible justifications. The ComCo also found that the numerous links between the issuers and the acquirer (Telekurs) led to a collective dominant position on the access to the Maestro debit card payment traffic market. However it did not answer the question whether the mere fact of impacting the full of the DMIF on merchants constituted an abuse of such collective dominant position and concluded instead that it allowed to impose unfair general terms on merchants.

¹¹ OJ L 318/17, 22.11.2002 (Case No COMP/29.373 – Visa international – Multilateral Interchange Fee). Visa's opinion that the MIF was not a price for services between the issuers and acquirers but an adjustment to a cost imbalance between the costs associated with issuing and acquiring and the revenues received from cardholders and merchants, prevailed. Consequently, the Commission found that the agreement was not illicit by object and that the MIF was actually necessary for the system to reach the planned externalities and therefore justified in the meaning of article 81 (3) of the Rome Treaty.

¹² DPC 2006/1 p. 66, DPC 2006/4 p. 601.

¹³ As opposed to 0.7% in the EC decision referred to in fn 4 above.

4. Vertical Agreements

See above 1.

5. Merger Control

Notification requirements in relation to undertakings in a dominant position

The Swiss Cartel Act is often said to be based or to mimic EC Competition Law. Swiss merger control provisions however contain a couple of significant departures therefrom. A first departure, left open in a Swiss Supreme Court decision of 2004, was confirmed this year by the ReCo in an appeal against the authorised merger of Swisscom AG with Cinetrade AG: the merger approval process in Switzerland does not require a decision when the merger is not opposed and therefore may not lead to an appeal¹⁴.

Another significant departure in relation to mergers lays in article 9 para 4 LCart. Under article 9 para 4 LCart, “notification is mandatory when, as a consequence of a procedure initiated pursuant to the Swiss Cartel Act, a legally enforceable decision establishes that a participating undertaking holds a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream”. As a result, certain undertakings like Swisscom and its various subsidiaries were systematically forced to notify sometimes insignificant mergers¹⁵. In the Swisscom Eurospot AG/Core Communications Corporation merger for instance, the ComCo held that the merger had to be notified even if the acquired company is not active in Switzerland¹⁶. According to the ComCo there is always a presumption, in the presence of a dominant position in a neighbouring market, that the Swiss market may be affected.

The practice of the ComCo in relation to occasional statements of dominant position made by the ComCo was seriously and justifiably criticised by the ReCo¹⁷. The ReCo reviewed all decisions which did not conclude on an abuse and stated that the ComCo made dominant position statements in a limited number of cases only and in a totally inconsistent manner. Because the stated difference of treatment could not be explained by any rational motive or policy, the ReCo upheld the appeal and invited the ComCo to adopt a coherent policy in that respect. On this occasion, it also confirmed that the ComCo could not open an investigation against a party just for the sake of stating a dominant position.

In practice, article 9 para 4 LCart raises a number of questions about what constitutes a neighbouring market, product-wise and geographically, and about the assessment of the concentration given the already stated existence of a dominant position. At the request of Emmi, a dairy factory found in a dominant position, the ComCo chose to confirm a fine-knit approach. After reviewing all cases where neighbouring markets had been recognized, it rather chose a case by case approach to define the neighbouring product or service markets and confirmed that foreign mergers had to be notified without consideration for their actual impact or the absence thereof, on the Swiss market¹⁸.

¹⁴ DPC 2006/2 p. 296. For the Supreme Court decision, ATF 131 II p. 497.

¹⁵ See for instance in 2006 only, the decisions Swisscom Fixnet AG/Cybernet (Schweiz) AG, DPC 2006/2 p. 248, Swisscom Fixnet AG/Betty Holding AG DPC 2006/3, p. 470, or the Emmi AG / Aargauer Zentralmolkerei AG DPC 2006/2 p. 261, where the ComCo stated at the end of its decision, that in spite of the justification for the merger it led to the creation of a dominant position in the milk, cream and butter markets.

¹⁶ DPC 2006/2 p. 291

¹⁷ DPC 2006/4 p. 698

¹⁸ DPC 2006/4 p. 622

In terms of assessment, the ComCo held in another decision that the small size of the market share of the acquired company did not in itself make the merger insignificant¹⁹. Given the dominant position of the acquiring company, even very small additions of market shares may have significant effect. Therefore, the ComCo analysed other circumstances such as the unbundling of the last mile, the influence of innovation, the SME segment of the market, to assess more concretely the possible effects of the merger.

Ancillary Restraints

In the Denner/Pick Pay merger decision, the ComCo confirmed that restrictive covenants directly linked to and indispensable to the merger will be assessed within the merger control procedure²⁰. The ComCo accepted a 3 year non-compete obligation imposed on the seller, to preserve the goodwill of the acquired undertaking and the know-how transferred. The ComCo did not however verify the substance of the know-how or the actual risks in relation to the goodwill.

In a later decision, the ComCo attempted to clarify some of the issues left open after a Swiss Supreme Court decision particularly ambiguous and hard to reconcile with the text of the Swiss Antitrust Act. The Swiss Supreme Court in relation to a non-compete clause contained in a shareholders agreement held in 1988 that the obligation was unilateral and therefore did not constitute an agreement affecting competition in the meaning of article 4 para 1 LCart²¹. The ComCo instead confirmed that such non-compete provisions were to be held as agreements affecting competition²². Based on the EC practice, it considered such ancillary restraints to be acceptable for a duration of three years when motivated by the protection of know-how and for a duration of two years when motivated by the protection of the goodwill. The ComCo held that exceptionally, non-compete covenants could be agreed for a five year duration when facing a concrete risk that customers may leave the company within the next three years following the merger. Consequently, it approved a five year non-compete obligation imposed on members of the management, in light of the fact that the acquired undertaking was largely dependent upon one single customer.

Failing Company Defence

Emmi AG, the largest dairy producer in Switzerland notified its merger with another important dairy producer in Switzerland, calling upon the Failing Company Defence principle²³. The ComCo considered that, in the absence of merger, the acquired company would disappear, leading its market to be taken over by the acquiring company. Therefore in the absence of alternative solution less detrimental to competition, the ComCo accepted the argument and approved the merger.

Conditions Imposed on Merging Enterprises

In answer to the notification by a group of enterprises active in the production and transportation of electricity of a common undertaking for the transmission of electricity over a high voltage integrated network (Swissgrid), the ComCo imposed a number of obligations to

¹⁹ DPC 2006/2 p. 248

²⁰ DPC 2006/1 p. 131 In a change from previous decisions, the ComCo decided to include the hard discounter in the relevant market which is defined as the market food retail business. This move may not be without consequence on the decision notified by Migros to take over all of the Denner business. Currently, Migros is the largest food retailer in Switzerland with approx. 35% of the market, and Denner the third with approx. 10% of the market.

²¹ ATF 124 III 495

²² DPC 2006/4 p. 682

²³ DPC 2006/2 p. 261

the notified merger and the participating enterprises. These included the obligation (i) to provide non-discriminatory access to the Swissgrid high voltage network, (ii) to produce invoices for services rendered by Swissgrid to its shareholders and participants, (iii) to publish its tariffs, (iv) to produce invoices by the shareholders for the usage of the network they contributed to Swissgrid, (v) that Swissgrid refrain from producing and trading in power, running or owning a distribution network, unless this is not for its own use or only aimed at securing its network, (vi) that Swissgrid refrain from taking any stake in a company active in the fields listed in v above, (vii) that members of the board and management of Swissgrid refrain from acting as organs of any enterprise with commercial activities listed in v above²⁴. The notifying undertakings appealed from that decision arguing that, in the absence of legislation liberalising the market, the ComCo could not, through conditions, edict general and abstract rules upon the behaviour of the participating entities. On appeal, ReCo approved the creation of Swissgrid, without condition²⁵. It held that the ComCo could not simply impose the conditions it deemed suited. When stating that a merger creates or strengthens a dominant position, the ComCo must enter into a “dialogue” with the parties and seek their proposals to remedy the situation. It is only if the parties’ proposals are not sufficient to remedy the situation that the ComCo may impose conditions. As far as the usage of the network is concerned, the ComCo cannot through conditions impose general and abstract behavioural rules. The merger control is structural in principle. Only specific behavioural conditions, as opposed to general and abstract behavioural measures, can be ordered.

Assessment of mergers

In the above referred Swissgrid decision, the ReCo made recommendations as to the assessment of mergers and the burden of evidence. It held that positive effects of a merger could not be questioned on the basis of future hypotheticals only. In the absence of concrete indicia the ComCo must consider that the entity resulting from the merger will behave in accordance with the law²⁶.

6. Sanctions

As mentioned in the introduction, the ComCo made in 2006 its first decision based on article 49a LCart, against an undertaking in a dominant position, Unique Airport²⁷. Earlier in the year, Unique had already been subject to a sanction for failure to comply with an interim relief decision of the ComCo²⁸. Perhaps the most striking feature of that decision is the reference to principles of criminal law with a view to back-up the legal foundations of the sanction. However, no direct application of general provisions of the Swiss Criminal Code was stated, except perhaps the *lex mitior* principle²⁹. In the second decision however, the

²⁴ DPC 2005/2 p. 347 The purpose of Swissgrid was to create the said high voltage network with a view to cooperate with the European Union. The idea was for each shareholder to contribute its network in use first and in property after some time. The full function entity created was not intended to produce or sell power but to transport it only.

²⁵ DPC 2006/2 p. 310 It considered first that ComCo failed in its assessment of the relevant market. The ReCo found that currently, there was no high power transmission market because the separation between power plants and transportation did not exist. The contracts are not negotiated with users but between power plants and retailers. The service consisting in transporting electricity over high voltage network is actually integrated into the retail offer. On that retail market, there is currently no competition. Therefore the creation of Swissgrid could not be held as creating a dominant position on a power transmission market.

²⁶ DPC 2006/2 p. 310

²⁷ DPC 2006/4 p. 625

²⁸ DPC 2006/1 p. 141

²⁹ Because the infringement took place before and after the entry into force of the amendment to the Swiss Cartel Act dated June 20, 2003, introducing direct sanctions against certain restraints to competition, the ComCo

administrative nature of the sanctions was confirmed with a reference for due process purposes only, to the provisions of the Act on Criminal Administrative Law.

The first decision against Unique was an opportunity for the ComCo to confirm that the sanctions set forth in article 50 LCart, were also applicable against undertakings failing to comply with interim relief decisions. The interim relief decision ordered Unique to make an offer “comparable” to the terminated services. Was the offer subsequently made by Unique comparable or not? Not a straightforward issue at first sight. In the ComCo’s view, a comparable offer is one which has approximately the same cost and whose ups- and downsides are balanced. An offer allowing the survival of the terminated undertakings only is not sufficient.

Last but not least, both decisions applied without surprise the calculation principles set forth in the Sanction Ordinance dated March 12, 2004.

Geneva, March 17, 2007

held that the severity of the two versions of article 50 LCart should be compared, in application of the *lex mitior* principle. Actually, the ComCo did not make such analysis considering that the duration of the infringement under the previous article 50 LCart was too negligible to raise the sanction determined in application of the new article 50 LCart.