The Public Competition Enforcement Review

Editor

Shaun Goodman

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For further information please email
Adam.Sargent@lbresearch.com

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Editor
Shaun Goodman

Law Business Research Ltd

PUBLISHER
Gideon Roberton

MARKETING MANAGER
Adam Sargent

EDITORIAL ASSISTANT
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*Alessandro Celli, Boris Wenger and Laurent von Niederhäusern**

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

In Switzerland, public competition enforcement is a federal matter. The main enforcing authority is the Swiss Competition Commission ('Comco'). The Comco is supported by its Secretariat ('the Secretariat') which conducts investigations and prepares the Comco's decisions in administrative procedure.

Both public and private competition enforcement are based on the 1996 Federal Act on Cartels and Other Restraints of Competition ('ACart'). Several amendments to the ACart were enacted in 2003 in order to provide the Comco with efficient new enforcement instruments, including direct administrative sanctions (i.e., fines), dawn raids and seizures as well as a leniency programme. Furthermore, an *ex ante* notification procedure similar to the former EC individual exemption procedure was introduced. This procedure protects the notifying parties from potential direct sanctions. It does not, however, exempt the conduct notified from being investigated and prohibited by the Comco.

The ACart and in particular the 2003 amendments have recently been evaluated by a panel of experts, resulting in the 2009 Evaluation Report to the Swiss government. The Report recommends 14 amendments to the ACart. Based on this report, the government will decide in spring 2009 whether or not to suggest any amendments to the Swiss parliament.

The Comco has repeatedly emphasised its intention to tackle Switzerland's high prices which are well above the European average. The rather strict provisions of the Comco's 2007 Guidelines on Vertical Agreements ('GVA') may be seen as a means to attain this goal, and it is rather surprising that 2008 has not seen the Comco taking a single

* Alessandro Celli is a partner, Boris Wenger is a senior associate, and Laurent von Niederhäusern is an associate at Froriep Renggli.

decision on vertical restraints. Another goal which the Comco has been pursuing on an ongoing basis is full compatibility between Swiss and EC substantive competition law. Furthermore, the Comco strongly advocates the conclusion of cooperation agreements with the EU and other important trade partners allowing the exchange of confidential information between competition authorities.

The chronic insufficiency of the Comco's financial and human resources remains a major concern. When closing a preliminary investigation in 2007, the Secretariat expressly stated that it had to abandon further investigations on a suspected abuse of a dominant position for lack of human resources. Accordingly, one of the suggestions put forward in the 2009 Evaluation Report is to raise the Comco's budget.

ii Cartels

Swiss competition law distinguishes between horizontal agreements on prices, quantity and the allocation of territories (hard-core cartels) according to Article 5(3) ACart and non-justifiable horizontal agreements significantly impairing effective competition according to Article 5(1) and (2) ACart.

Hard-core cartels are presumed to eliminate effective competition. They are unlawful and subject to direct sanctions according to Article 49a(1) ACart if this presumption cannot be rebutted or, in case it is successfully rebutted, if the agreement still significantly impairs effective competition and cannot be justified on grounds of economic efficiency. Horizontal agreements other than hard-core cartels are unlawful, but not subject to direct sanctions, if the agreement significantly impairs effective competition and cannot be justified on grounds of economic efficiency.

As to its structure, the assessment of cartels under Swiss competition law may differ from the assessment under EC competition law. As to the results of the assessment of cartels under Swiss and EC law, however, there are no significant differences.

iii Antitrust: restrictive agreements and dominance

As to vertical agreements, Swiss competition law distinguishes between agreements regarding retail price maintenance agreements or passive sales restrictions according to Article 5(4) ACart and non-justifiable vertical agreements significantly impairing effective competition according to Article 5(1) and (2) ACart.

The former category of vertical agreements are presumed to eliminate effective competition and are assessed the same as hard-core cartels (see above). If unlawful, they are subject to direct sanctions. The latter category, however, is not subject to direct sanctions and is assessed the same as non-justifiable horizontal agreements significantly impairing effective competition (see above).

The Comco explained its practice on vertical agreements in its 2007 GVA. Nevertheless, some uncertainty remains as only a few decisions have been taken in this area in the last couple of years. Generally, the GVA results in a slightly stricter practice than in the EU with regard to vertical restraints, in particular regarding retail price maintenance and market share thresholds.

Finally, exclusionary, exploitative and discriminatory conduct of enterprises having a dominant position in the relevant market are deemed abusive according to Article 7(1) ACart. Such abuses are unlawful and subject to direct sanctions.

iv Merger Control

Swiss competition law provides for rules on merger control. According to these rules, the Comco may prohibit a concentration or impose remedies if it creates or strengthens a dominant position liable to eliminate effective competition according to article 10(2) ACart.

Compared to EU and other merger controls, the Swiss jurisdictional filing thresholds are relatively high. In addition, decisions taken by the Swiss Federal Supreme Court in 2007 (*Swissgrid; Berner Zeitung/20 Minuten*) made it clear that the intervention threshold of the Swiss substantive test according to Article 10(2) ACart is significantly higher than the intervention thresholds of both the Swiss dominance test according to Article 7(1) ACart and of the SIEC test in EU merger control. Consequently, cases where the Comco imposes remedies or altogether prohibits a merger are rare.

One of the priority suggestions of the 2007 Evaluation Report is to harmonise Swiss merger control with EU practice by introducing the SIEC test. It also recommends to lower jurisdictional filing thresholds.

In the case of jurisdictional filings taking place both in the EU and in Switzerland, the Comco usually asks the merging parties to coordinate the filing dates in the two jurisdictions. This allows the Comco to await and adopt the decision of the European Commission. However, the Comco recently cleared a merger between the copper refiners Cumerio and Norddeutsche Affinerie before the European Commission had closed its Phase II review on the same merger, under the condition that the parties would await EU clearance to close the transaction in Switzerland and apply any remedies imposed in the EU to Switzerland, as far as relevant.

Furthermore, the Comco took a couple of high-profile decisions in 2007 and 2008 which ought to be mentioned.

Firstly, the Comco assessed two mergers on the Swiss retail market, with Migros taking over its competitor Denner and Coop purchasing Carrefour's sales areas. Although concluding that both mergers would strengthen the collective dominance of Migros and Coop, the Comco chose to approve the mergers subject to far-reaching conditions on both retailers for a duration of six to seven years. Inter alia, Migros (which sells its own brands only) must not interfere with Denner's operative independence and must allow it to keep separate channels of distribution. Denner retail shops which sell mostly branded goods must be maintained in order to ensure that consumers and suppliers of branded goods still have an option other than Coop. Coop was obligated to sell Carrefour retail shops in regions where the concentration would result in Coop/Carrefour's dominant position. Additionally, both Migros and Coop were forbidden to enter into exclusivity arrangements with product suppliers and to acquire any other competitor in the retail market.

Secondly, the Comco assessed a merger on the Swiss financial markets between SWX (Swiss Exchange) Group, SWX, SIS Swiss Financial Services Group and Telekurs. The Comco examined the vertical implications of the merger on the markets for listing, trading, clearing and settlement in depth, fearing a foreclosure effect as the companies would be in a position to privilege affiliate companies in the upstream or downstream markets and to discriminate commercial partners. The merger was cleared under the condition that SWX and SIS would sign the European Code of Conduct for Clearing and Settlement (CoC), making sure that the two companies would allow competitors

to use their infrastructures. The signatories to the CoC committed to guarantee non-discriminatory access to their services, price transparency, service unbundling, etc.

v Procedural issues

The administrative procedure applying to Swiss public competition enforcement significantly differs from the procedure followed by the European Commission and has experienced some important developments in recent years.

Following dawn raids carried out by the Comco upon suspicion of horizontal price agreements, various shipping companies called the Swiss Federal Supreme Court to prevent the unsealing of seized documents, claiming that the work products of their in-house counsels were privileged. In its decision, the Supreme Court left open whether or not the work products of in-house counsels are privileged. It stated, however, that even if the work products of in-house counsels were protected by the legal privilege (which is contested by the Comco), this would not prevent their unsealing. Generally, legal privilege can only be invoked for information which is in custody of counsel, be it an in-house or external counsel. In any case, documents which are in the custody of other persons are not privileged, even if they were drafted by counsel. Moreover, only legal correspondence of counsel regarding the competition proceedings concerned is privileged.

Another important development concerns the *ex ante* notification procedure introduced in 2003 (see Section I(*i*) *supra*). The law provides that an undertaking considering to engage in potentially unlawful conduct may notify this conduct to the Comco. If the Comco does not open a preliminary or an in-depth investigation within five months following notification, the undertaking enjoys immunity from direct sanctions for the notified conduct.

Following a notification filed by four banks on the planned introduction of a Domestic Interchange Fee (DMIF) on debit card transactions in 2004, significant shortcomings of the *ex ante* notification procedure came to light. The Secretariat opened a preliminary investigation after two months following notification which lifted the notifying parties' immunity from direct sanctions. In 2006, the Secretariat concluded in an informal final report that the planned DMIF was a horizontal agreement on pricing likely to be unlawful, but refused to open an in-depth investigation and decide formally on the matter as long as the DMIF was not introduced yet. The four banks, at risk of being subjected to direct sanctions if they introduced the DMIF, appealed against the authority's refusal to open an in-depth investigation and to decide formally on the matter. In December 2008, the Swiss Federal Supreme Court dismissed the appeal, stating that the purpose of the notification procedure is to reduce legal uncertainty with regard to possible direct sanctions, but does not entitle the notifying parties to obtaining a formal decision on the legality of a future conduct.

The utility of the *ex ante* notification procedure has been considerably weakened by this decision. In case the Secretariat opens a preliminary investigation within five months following notification and, after a period of up to a couple of years, closes this preliminary investigation by an informal and inconclusive final report, all benefits of the notification (immunity from direct sanctions, legal certainty) are lost. In addition, the procedure delays market launch and is costly. It is obvious that, under such circumstances, the *ex ante* notification procedure results in over-deterrence and is usually not a valid

option for enterprises. This is why the 2009 Evaluation Report suggests amending the notification procedure to the effect that the objection period of five months is shortened and that immunity is lifted only when an in-depth investigation, which must be closed by a formal decision, is opened within this objection period.

In the Comco's 2007 *Publigroupe* and 2008 *Documed* decisions (see Section III (*i*), *infra*), the Comco resolved an open issue with regard to direct sanctions according to Article 49a(1) ACart. The Comco stated that binding formal settlements closing an in-depth investigation according to Article 29 ACart may be combined with direct sanctions. In such cases, the range of the fine is defined in the settlement negotiated between the parties and the Secretariat and the final amount is left for the Comco to decide.

In the same two decisions, the Comco confirmed that subjective elements are taken into account when deciding on a direct sanction, although evidence of fault is not formally requested by law. An undertaking will be subjected to direct sanctions only if its conduct constitutes a violation of the due diligence reasonably expected under the circumstances and is therefore deemed intentional or at least negligent. In the cases at hand, the fact that the undertakings did not change their conduct after the Comco had started its investigation was considered an aggravating element.

On procedural matters, the 2009 Evaluation Report puts forward several suggestions to enhance the effectiveness of the ACart. Inter alia, the report suggests to introduce direct sanctions against officers and employees of enterprises engaging in unlawful conduct. Such sanctions would be limited to cases of hard-core cartels and linked with a leniency programme for individuals. Regarding the structure of the enforcing authorities, the report proposes to merge the Comco and its Secretariat into one single authority or at least to increase the Comco's independence by shaping it as an authority with a smaller number of completely independent experts with full-time positions. The report also underlines the necessity for the Swiss government to enter into formal cooperation agreements providing for an exchange of confidential information between the Comco and other competition authorities. Currently, any information exchange is either informal, if it is of general, non-confidential nature only, or based on a waiver of the parties concerned.

II CARTELS

i Significant cases

In 2005, the Comco opened an in-depth investigation regarding a hard-core cartel between 18 construction enterprises offering road asphalt works in the Italian-speaking part of Switzerland. The investigation unveiled that in a written agreement concluded in 1998, the companies had agreed on a sophisticated system to divide up all public orders as well as all private orders with a value exceeding 20,000 Swiss francs. The companies' representatives met weekly to decide on the allocation of the work orders based on fixed contingents reflecting past market shares. In the case of tenders, the future winner and his 'lowest' bid were agreed upon in advance. Due to a rotation system, each cartel member regularly received an amount of orders corresponding to its capacity. The Comco concluded that the rotation system and the price agreements constituted a hard-core cartel presumed to eliminate efficient competition. Since this presumption

could not be rebutted, the hard-core cartel was deemed unlawful. The parties gave up their weekly sessions around March 2005, just in time to avoid the newly introduced direct sanctions. The Comco noted that prices for road construction works in the area concerned dropped by more than 30 per cent after the cartel was dismantled.

In another case, alerted by seemingly very high prices compared to foreign countries, the Comco investigated an alleged horizontal agreement on the private tendering of cement and concrete for the NEAT, a big-scale project of new railroad tunnels across the Alps. In the absence of any written evidence pointing to agreements between the bidders, the Comco carried out an in-depth investigation based solely on indirect evidence. In this context, the Comco stated that unusual offers and behaviour of the bidders may indicate anti-competitive agreements, but that a mere suspicion would not suffice to incriminate the bidders.

In its search for evidence, the Comco compared the prices offered for cements within single subprojects of NEAT, for different subprojects and then for the same kinds of cements abroad, especially in Germany. The Comco noted significant price differences, but discovered a number of economic reasons for the disparities such as different transport prices due to favourable locations or limited production capacity, higher costs due to the legal requirements of transporting all cement by train even to remote mountain regions and the costs of development and production of specific kinds of cements. The low number of bidders, which may have been interpreted as an indication of geographical market allocation, was explained by high costs of railroad transport and by the limited production capacity of most Swiss cement producers. Thus, the Comco could not find sufficient evidence of the existence of a cartel between the bidders.

In an investigation regarding the Lucerne health services market, the Comco examined whether the accumulation of countervailing power, which was to be used to negotiate with a dominant or monopolistic opposite market side, could constitute grounds of economic efficiency justifying a horizontal agreement according to Article 5(2) ACart. In the case at hand, Swiss health insurers joined forces in their negotiations with public, dominant hospitals in the Canton of Lucerne regarding the costs of insurers' care.

The Comco deemed the horizontal agreement between the health insurers to be justified on grounds of economic efficiency. The insurers were allowed to build two negotiating groups, each representing a maximum 60 per cent market share. The decision was made dependent on the groups not engaging in any anti-competitive conduct on the market, considering the danger of insurers establishing joint practices on other areas of activities. Besides, the decision applied only to the actual situation where the hospitals' dominant position made countervailing power necessary. Finally, the Comco limited the scope of its decision to the tightly regulated area of health insurance, where insurers are forced to negotiate with all public hospitals.

With this decision, the Comco explored new territory by giving formal advice to legal subjects based on hypothetical facts. Most Cantons have a situation similar to the one in Lucerne and the Comco chose to issue this decision in consideration of the important need for legal certainty for health insurers all over Switzerland. However, the Comco expressly advised other Swiss health insurers to use the *ex ante* notification procedure according to Article 49a (3)(a) ACart prior to relying on this decision.

ii Trends, developments and strategies

Swiss associations of liberal professions often issue fee recommendations in the form of lists of indicative prices or calculation aids. The Comco qualifies such recommendations as unlawful price agreements and does not accept the reasons put forward by the associations – price transparency, help to newly arrived professionals, protection of customers – as grounds of economic efficiency justifying the recommendations.

Following a preliminary investigation regarding attorneys' fees, the Comco recently recommended an alternative to the professional associations wishing to increase transparency and to protect customers against abusive pricing without engaging in anti-competitive conduct. The Comco suggested entrusting a third party, such as a fiduciary, a university or a consumer association, with a survey of the minimum, maximum and average prices for the different services offered by the liberal profession. This data is then published in a booklet addressed to consumers and professionals along with the statement that the prices are not mandatory to the members of the association.

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Significant cases

Following a complaint by Agusta SpA, an Italian helicopter manufacturer, about irregularities in the procedure that led to the purchase of 20 helicopters by the Swiss Army, the Comco investigated whether Armasuisse's conduct qualified as an unlawful abuse of a dominant position. Armasuisse, the entity which organises the purchase of all equipment of the Swiss Army, was qualified by the Comco as an undertaking subject to the ACart because it exercises market power, notwithstanding the fact that it is legally obliged to consider political or military interests of the Swiss government.

Since the Comco defined a worldwide market for the sale of helicopters, there could be no dominant position of Armasuisse. Even so, the Comco seized the opportunity to issue a recommendation to the Swiss government according to Article 45(2) ACart, asking the government to increase legal protection for companies involved in procurement procedures led by Armasuisse.

In another case, the Comco investigated whether Documed, a company specialised in the publication of information on pharmaceuticals, engaged in an unlawful abuse of a dominant position. Documed's main product is a compendium of all drugs available in Switzerland. This compendium is important for the pharmaceutical companies as they are obliged by law to publish comprehensive information on the drugs they offer in a publication featuring all the drugs available on the Swiss market. As Documed is the only competitor releasing such a wide-ranging publication, the pharmaceutical companies are virtually forced to turn to Documed for the publication of their medical information. Hence, the Comco concluded that Documed had a dominant position.

Documed's price policy entailed different prices for the same publications and equal prices for publications of different values. Since these practices were discriminatory and not justified by legitimate business reasons, they were deemed to be unlawful by the Comco according to Article 7(1)(b) ACart.

The Comco further examined if Documed had abused its dominant position by imposing exaggeratedly high prices to its customers. The Comco was unable to use the

'relative method' of comparing them with prices for similar services abroad as sufficient data was not available. Therefore, the Comco turned to applying the 'absolute method' of calculating reasonable costs and profits of the company. This calculation, however, did not uncover a practice of excessive pricing.

On the market for advertisement placement in written media, the Comco investigated Publigroupe's practice of paying commissions only to companies which were mainly active in the advertisement business and reached certain sales per year. Considering Publigroupe's dominant position, the Comco qualified this policy as discriminatory and denied the existence of legitimate business reasons which could have justified this conduct according to Article 7(1) ACart. Although Publigroupe committed to abandon the illegal practices in a binding settlement with the Comco, the Comco imposed direct sanctions in the amount of 2.5 million Swiss francs on Publigroupe (see Section I(*v*), *supra*).

On the telecommunications market, the Comco has conducted several investigations against Swisscom for abuse of dominant position in recent years, some of which are still ongoing. Swisscom as the successor of the formerly state-owned monopolist PTT is a priority target to competition investigations because it owns facilities essential to other companies providing telephone and internet services.

In 2007, the Comco ruled that Swisscom had abused its dominant position on the Swiss mobile phone market by imposing excessive termination charges to other providers. The Comco qualified the charges as excessive after examining prices abroad and analysing Swisscom's costs. Considering the profit Swisscom had made by overcharging consumers, the Comco imposed a fine in the amount of 333 million Swiss francs, the highest ever imposed by the Comco. This decision concerned Swisscom's conduct before 31 May 2005 and has been appealed before the Swiss Administrative Federal Court. Another investigation on the same subject but concerning the period after 31 May 2005 is still pending.

With regard to the wholesale market for broadband internet access, the Comco acted as an expert for the Federal Communication Commission (ComCom). In its expert report, the Comco concluded that Swisscom enjoys a dominant position on this market. Pursuant to Swiss telecommunication legislation, the fact that Swisscom enjoys a dominant position will allow the ComCom to force the company to lower its prices to make them consistent with actual costs.

In a separate investigation, this time on the market for ADSL (a form of broadband) internet connections, the Secretariat has come to the conclusion that Swisscom had abused its dominant position by setting excessive prices on the access to its network, which resulted in a margin squeeze for its competitors. The Comco still has to confirm the Secretariat's conclusions under consideration of Swisscom's arguments and to decide on possible direct sanctions. In another investigation regarding the ADSL market, the Comco had already concluded that Swisscom had abused its dominant position by granting discounts to its subsidiary Bluewin and denying them to other providers. The Comco dropped this investigation in May 2007 after Swisscom accepted to grant equal discounts to other providers.

After final judgment was rendered in 2007 on the prohibition by the Comco of the price cartel according to Article 5(3) ACart regarding German books, the associations of book retailers asked the Swiss Federal Council to issue an exceptional authorisation on

grounds of compelling public interests according to Article 8 ACart. Such authorisation is an exceptional measure based on political grounds, aiming to correct possible negative effects of the competition legislation in the case of overwhelming public interests. In only the second decision of this kind, the Swiss Federal Council admitted that the diversity of books and bookstores was in the public interest, but denied the authorisation because the evidence put forward by the Comco clearly showed that the price cartel was not necessary to reach this goal.

ii Trends, developments and strategies

The 2007 Guidance on Vertical Agreements (GVA) leans widely on Commission Regulation (EC) No. 2790/1999, the Comco's stated intention being the harmonisation with EU practice on vertical agreements. In reality, however, the principles of the GVA result in a slightly stricter approach towards vertical agreements than in the EU.

The 2009 Evaluation Report criticises the relatively strict treatment of vertical agreements in Switzerland and the formal regulation based on assumptions of illegality as contrary to the international trend of assessing vertical restraints using an economic, effects-based approach.

The most important suggestion of the 2009 Evaluation Report concerns the assumptions of unlawfulness against vertical agreements on retail price maintenance or passive sales restrictions in Article 5(4) ACart. These agreements are presumed to eliminate effective competition according to Article 5(4) ACart and therefore to be unlawful. Section 10(2) GVA states that the assumption cannot be rebutted by evidence of interbrand competition only. In the case of resale price maintenance, Section 11(2) further states that making price recommendations public, indicating expressly that they are not binding on the distributors and avoiding any pressure on the distributors regarding pricing will help rebutting the assumption. Significantly lower prices abroad and the fact that most distributors actually follow the recommendation, however, are elements pointing to unlawful retail price maintenance.

The 2009 Evaluation Report suggests to give up these assumptions of unlawfulness, but wants to keep the possibility of direct sanctions against vertical agreements on retail price maintenance or passive sales restrictions. The report further considers that, should the assumptions of unlawfulness be kept, at least evidence of interbrand competition should suffice to rebut the assumption. Most experts and practitioners seem to agree with these suggestions.

iii Outlook

In March 2008, the Comco opened an investigation regarding the book market in the French-speaking part of Switzerland. French books are supplied to Swiss book stores almost exclusively by French book importers, which are affiliated to the French publishing houses. The Comco intends to examine if the prices in Switzerland are excessively high compared to France. If this is the case, and the higher prices are not justified by legitimate business reasons, the Comco may conclude that this pricing is excessive and constitutes an abuse of a collectively dominant position according to Article 7(1) ACart.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

Swiss competition law does not provide for sectoral investigations as in the EU. It only provides for a rather informal observation of specific markets by the Comco according to Article 45(1) ACart, a tool which has been rarely used by the Comco.

However, some industries and sectors have stood under close scrutiny by the Comco for many years. For example in the telecommunication sector, suspicions of the Comco and complaints of competitors about abusive conduct of a dominant position by the incumbent Swisscom have led to several investigations (see Section III (*i*), *supra*). Other markets watched closely by the Comco include the markets for banking and payment services, the markets for health services as well as the energy and retail markets.

V STATE AID

As the regulation of the European Economic Area (EEA) does not apply to Switzerland, state aid in Switzerland is only subject to World Trade Organization rules. Furthermore, the Federal Act on the Internal Market ensures that the Swiss market is not impeded by domestic barriers to trade.

VI CONCLUSIONS

i Pending cases and legislation

At this point, it is difficult to assess which of the suggestions put forward by the 2009 Evaluation Report may find their way into the ACart. However, three key suggestions seem to be capable of winning a majority: First, the treatment of vertical agreements according to Article 5(4) ACart and the GVA is too strict and needs to be harmonised with the corresponding EU law. Secondly, the substantive tests of Swiss and EU merger control must be harmonised. Thirdly, the *ex ante* notification procedure according to Article 49a (3)(a) ACart does not fulfil its purpose and needs to be amended in order to provide legal certainty.

The Swiss parliament is currently discussing the unilateral introduction of the *Cassis-de-Dijon* principle in Switzerland by means of an amendment to the Federal Act on Technical Trade Barriers. Under this principle, all goods which are lawfully introduced in the EU market would be allowed to be imported into Switzerland without any restrictions or duties. While the principle's introduction, which has been strongly advocated by the Comco, seems to be widely accepted, the parliament is discussing mainly the range of exemptions to this principle, in particular in the area of food products.

Another new law concerns the territorial exhaustion of patents. Current Swiss law provides for international exhaustion of copyright and trademarks but not of patents, which are still subject to national exhaustion. Although Article 3(2) ACart states that any restriction to the import of patented goods is subject to competition law, national exhaustion constitutes an important barrier to parallel imports of patented goods since most importers are reluctant to rely on competition law when facing litigation with the manufacturers

of the patented goods. In December 2008, the Swiss parliament decided to introduce the principle of international exhaustion into the Patent Act. However, the international exhaustion of patents will be limited to the territory of the European Economic Area unless the patent is of minor significance for the functionality of the patented goods, in which case the law provides for global exhaustion. International exhaustion will not apply to goods with administered prices, such as pharmaceutical products. This amendment is expected to enter into force in the second semester of 2009.

ii Analysis

The last few years have seen a consolidation of Swiss public competition enforcement after the first modern competition law entered into force in 1996 and some important amendments were enacted in 2003. Generally, based on Swiss and EU case law as well as the Comco's guidelines and notices, a level of legal certainty has been achieved which allows the enterprises to ensure their compliance with Swiss competition law.

Parts of the Comco's practice, in particular on vertical agreements, may be relatively strict and some tools initially designed to provide legal certainty such as the *ex ante* notification procedure may be flawed. These deficiencies, however, are likely to be addressed by a set of amendments which is expected to be proposed to the Swiss parliament in 2009.

All in all, it seems that, depending on their financial and human resources, the Comco and its Secretariat will be able to continue consolidating public competition enforcement in Switzerland and to increasingly coordinate their tasks with foreign competition authorities.

ALESSANDRO L CELLI
Froriep Renggli

Dr Alessandro Celli is a partner at Froriep Renggli in Zurich, the head of the firm's competition group and co-head of the IP & technology group. He practises Swiss competition law and is particularly experienced in all aspects of IP and technology related national and international transactions (joint ventures, licence agreements, patent pooling, research collaborations, distribution, sale and purchase of technology businesses and marks or brands). He also advises on business restructuring and is a member of the board of various Swiss operative companies. He has published extensively in these fields. Alessandro Celli's other fields of practice include sports law and entertainment law.

Alessandro Celli graduated from the University of Zurich in 1987 and obtained his Doctor in Law degree (Dr iur) in 1993. He was admitted to the Swiss bar in 1990 and joined Froriep Renggli in 1991, becoming a partner in 1998. He is a member of the following professional associations: Zurich Bar Association, Swiss Bar Association, Inter-Pacific Bar Association (IPBA), American Bar Association (ABA), Swiss Association of Competition Law, Association Suisse pour la Protection de la Propriété Intellectuelle (AIPPI) and International Trademark Association (INTA). Alessandro Celli is a former lecturer at the University of Fribourg and currently member of the board of the Zurich law society.

BORIS WENGER
Froriep Renggli

Boris Wenger is a senior associate at Froriep Renggli in Zurich. His practice focuses on Swiss and EC competition law. He regularly advises clients on competition law compliance and business strategies with competition law implications. He represents clients in investigations, merger control proceedings and other proceedings before the Swiss Competition Commission, in appeals against competition law decisions and in civil competition law litigation. Boris Wenger practices in other areas of administrative and regulatory law such as public procurement, transport and customs law, etc. He is also active in the areas of corporate and commercial law as well as M&A transactions.

Boris Wenger graduated from the University of Basle in 1996 and was admitted to the Swiss bar in 2001. In 2002, he graduated as a Master of the Science of Law (JSM) from Stanford Law School (USA). He joined Froriep Renggli as an associate in 2005. Boris is a member of the Zurich and the Swiss Bar Associations, the Swiss Association of Competition Law, and the International Association of Young Lawyers (AIJA).

LAURENT VON NIEDERHÄUSERN
Froriep Renggli

Laurent von Niederhäusern is an associate at Froriep Renggli in Zurich and a member of the firm's competition and IP & technology groups. Laurent's practice focuses on intellectual property law, competition law, contract law and corporate law. He is also active in the area of employment law.

Laurent von Niederhäusern studied at the University of Zurich and at the faculty of law at Trinity College, Dublin, Ireland. In 2003, he obtained his Swiss law degree from the University of Zurich. He was admitted to the Swiss bar in 2007 and joined Froriep

Renggli as an associate in 2008. Laurent is a member of the Swiss Bar Association and of the Zurich Bar Association.

FRORIEP RENGGLI
Bellerivestrasse 201
CH-8034 Zurich
Switzerland
Tel: +41 44 386 60 00
Fax: +41 44 383 60 50
zurich@froriep.ch
www.froriep.com