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Christian Bovet | Adrien Alberini*

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I. Introduction

1. The Competition Commission's[1] decisions on the distribution in Switzerland of *francophone books*[2] did not satisfy nine of the parties to the investigation; they all appealed to the Federal Administrative Tribunal, which handed down its judgments at the end of October 2019.[3] Numerous lessons may be drawn from these judgments. In particular:
   - *European competition law* remains a great source of inspiration for Swiss authorities. For instance, the court pointed out that the differences between the regimes governing agreements are "in great part only apparent."[4]
   - In competition law, a *group* constitutes one sole undertaking.[5] Among other things, this implies that legal entities belonging to the same group may not enter into agreements from a competition law standpoint (so-called "group privilege").[6]
   - In case of an absolute territorial protection, both direct and indirect exclusions of *passive sales* are contrary to Federal Law on Cartels and other Competition Restraints,[7] Article 5(4).[8]
   - The presence in the law of a presumption does not imply that the burden of proof lies with the parties to an anticompetitive agreement. On the contrary, the authority must determine, in cooperation with the parties, whether effective competition subsists in spite of such agreement.[9]
   - The fact that the service rendered by distributors to small and medium bookstores was characterized as invaluable by the latter[10] was not considered as sufficient for the Tribunal to constitute a legitimate business reason under LCart/KG, Article 5.[11]
   - Only the regular rules of administrative procedure apply after the (special) phase where parties may *comment on the draft decision* prepared by the Secretariat and due to be eventually presented to the Commission.[12]
   - The communication of summarized information, deemed as *business secrets,* only at the time of the notification of Comco's decision violates the parties' right to be heard. However, the harm caused this way may still be repaired on appeal before the Federal Administrative Tribunal.[13]
   - Although absolute proof should be the standard in ordinary administrative procedure, one should admit that lighter requirements may be accepted in some situations, the evidence level being then the one of "preponderant likelihood" *("vraisemblance prépondé-*

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1 Hereinafter "Comco". In this chronicle, this abbreviation refers both to the Commission and to its Secretariat.

2 See *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2014/4, p. 435 § 7.

3 Federal Administrative Tribunal, cases B-3938/2013 *Dargaud,* B-3954/2013 *Glénat,* B-3962/2013 *Diffulivre,* B-3975/2013 *Flammarion,* B-4012/2013 *Interforum,* B-4011/2013 *Albert le Grand,* B-4014/2013 *Servidis,* B-4019/2013 *Transat* and B-4669/2013 *Editions des 5 frontières,* judgments of 30 October 2019.

4 E.g. case B-3938/2013 *Dargaud* (note 3), § 5.3. Also *idem,* § 7.2, 9.4.3.

5 E.g. case B-3975/2013 *Flammarion* (note 3), § 3.1.

6 E.g. case B-3938/2013 *Dargaud* (note 3), § 6.1 *et seq*. On the exclusion of the qualification of the contractual relationships as constitutive of an agency agreement in case B-4019/2013 *Transat* (note 3), see § 8.1 *et seq*. of said judgment.

7 LCart/KG ; RS/SR 251.

8 E.g. case B-3954/2013 *Glénat* (note 3), § 6.3. Also case B-3938/2013 *Dargaud* (note 3), § 7.3.

9 E.g. case B-4669/2013 *Editions des 5 frontières* (note 3), § 12.3.

10 E.g. case B-4014/2013 *Servidis* (note 3), § 11.5 (in particular, *idem,* § 11.5.3).

11 E.g. case B-3938/2013 *Dargaud* (note 3), § 17. See also *idem,* § 15.

12 *Idem,* in particular § 4.1.1. On the respect in that case of European Convention on Human Rights (ECHR; RS/SR 0.101), Article 6, see case B-4014/2013 *Servidis* (note 3), § 4.1.2 *in fine* and 4.2.2.

13 E.g. case B-3938/2013 *Dargaud* (note 3), in particular § 4.3.2.

rante"; "überwiegende Wahrscheinlichkeit"; "verosimiglianza prepoderante").[14]

II. Agreements

2. In the wake of its decision a couple of years ago relating to the coordination of submissions in the construction sector in the Münstertal,[15] Comco handed down several new decisions on similar issues.[16] These recent cases stemmed notably out of leniency applications in the Münstertal investigation; thus, they show the effectiveness of the bonus plus programme in generating a "domino effect" aimed at disclosing and shutting down several interrelated cartels in a specific sector and defined geographical area. In addition, these cases are interesting on a number of counts:
   - Even though the rule is well known, it may be useful to recall that, while the coordination of submissions in procurement processes is strictly prohibited, undertakings may exchange confidential information, provided that such exchange is necessary in the context of a consortium or a subcontracting relationship.[17] In this connection, the setting up of a consortium over a long period of time aiming to implement a general strategy of coordination of offers cannot be justified.[18]
   - Cooperation agreements (allegedly governing supply and transportation) cannot be used in order to limit excessive production capacities at the level of an industrial sector. An agreement entered into for a period of ten years and comprising several non-compete provisions could not be justified on the basis of efficiency grounds.[19]
   - When undertakings participated over a lengthy period of time in various similar agreements for the purpose of coordinating their submissions, the scheme qualifies as a whole agreement *(Gesamtabrede).* In this connection, the fact that the cooperation may have been interrupted for certain periods or the fact that not all undertakings have participated in every submission is not relevant.[20]
   - The exchange of confidential information which may be relevant in terms of price setting is considered, from a qualitative perspective, as a medium-core to a hard-core restriction of competition. Therefore, one should only pay limited attention in such circumstances to the quantitative impact of the behaviour under scrutiny.[21]
   - When filing a leniency application, it is of utmost importance to clearly indicate the material and territorial scope of the behaviour which is disclosed to the competition authority. Indeed, the benefits of the leniency application do not extend to practices which are close from a material or territorial perspec-

[14] E.g. case B-4669/2013 *Editions des 5 frontières* (note 3), § 11.3.1. Also case B-3975/2013 *Flammarion* (note 3), § 9.3.1 and case B-3938/2013 *Dargaud* (note 3), § 6.4.

[15] On this case, see *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2018/1, p. 73 § 8. With respect to recent cartels and agreements in the context of procurement processes, see also *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2019/1, p. 73 § 4, 5 and 6, and *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2018/1, p. 73 § 9.

[16] DPC/RPW 2019/2, p. 322 *Hoch- und Tiefbauleistungen Engadin I; Hoch- und Tiefbauleistungen Engadin II* not yet published but currently available on Comco's website at *<https://www.weko.admin.ch/weko/fr/home/actualites/dernieres-decisions.html>;* DPC/RPW 2018/4, p. 756 *Hoch- und Tiefbauleistungen Engadin III;* DPC/RPW 2018/4, p. 801 *Hoch- und Tiefbauleistungen Engadin IV;* DPC/RPW 2019/2, p. 302 *Hoch- und Tiefbauleistungen Engadin V;* DPC/RPW 2018/4, p. 820 *Hoch- und Tiefbauleistungen Engadin VII;* DPC/RPW 2018/4, p. 841 *Hoch- und Tiefbauleistungen Engadin Q;* DPC/RPW 2018/4, p. 736 *Hoch- und Tiefbauleistungen Engadin U; Bauleistungen Graubünden* not yet published but currently available on Comco's website at *<https://www.weko.admin.ch/weko/fr/home/actualites/dernieres-decisions.html>*.

[17] DPC/RPW 2018/4, *Hoch- und Tiefbauleistungen Engadin U* (note 16), § 132.

[18] DPC/RPW 2019/2, *Hoch- und Tiefbauleistungen Engadin I* (note 16), § 662.

[19] *Idem,* § 695 *et seq.* (containing some useful developments on the EU Regulation 1218/2010 on specialisation agreements).

[20] *Idem,* § 594. The concept of *Gesamtabrede* has been challenged and discussed in greater detail in *Bauleistungen Graubünden* (note 16), § 420 *et seq*.

[21] *Bauleistungen Graubünden* (note 16), § 522 *et seq*.

tive, but beyond the scope of the application in question.[22]

- After filing a leniency application, the assistance of the leniency applicant to the competition authority must be uninterrupted.[23]
- The role of the cartel leader, which implies an increase in the amount of the fine, should not be accepted too lightly.[24]
- The submission of pro-forma offers by an undertaking (which has no intent of participating in the cartel and benefiting from it) leads nevertheless to the qualification of this undertaking as a party to the unlawful agreement.[25]
- Unlawful practices which do not generate any turnover lead nevertheless to sanctions. While the determination of the fine has been subject to various approaches over the past, in the present case Comco decided that the basic amount of the fine could be calculated based on the volume of the submission affected by the cartel.[26]
- The allocation of fines when undertakings have been restructured is based on the principle of business continuity, which has to be assessed on a case-by-case basis taking into account various criteria.[27]
- Compensation made by the participants in the cartel to victims leads to a reduction of the sanction, provided this is done before Comco has issued its decision. In *Bauleistungen Graubünden,* nine undertakings reached a settlement agreement with Canton Graubünden according to which an amount of 6 million Swiss francs would be paid to the Canton and several municipalities as compensation.[28]

3. In *Badezimmer,*[29] Comco dismantled a very large cartel in the bathroom equipment sector and imposed fines on several undertakings amounting in total to over 80 million Swiss francs. While undertakings at various levels of the production and distribution chain (manufacturers, distributors and installers) seemed to be involved, Comco focused on the players at the wholesale level. The competition authority found out that competitors at the wholesale level held regular meetings for almost fifteen years aiming at ensuring that appropriate margins would be protected at each level of the distribution chain.[30] More specifically, Comco held and clarified that agreements on gross prices, rebates, margin, exchange rates and transportation costs are unlawful.[31] In addition, Comco condemned the fact that wholesalers had included in their catalogues only the products of manufacturers which would be supplying them on an exclusive basis, thus preventing the emergence of new competitors.[32] By way of conclusion and even though this was expected, this decision makes clear that agreements on price components fall under the presumption of LCart/KG, Article 5(3).
4. In the *KTB* case,[33] a cartel existed among certain construction companies in the Bern area. Among other things, Comco considered that evidence showed that an agreement existed between plants and the association on the prices to be paid to the former by the latter's members for the purchase of gravel and concrete. These prices were rather favourable to members of the association; in return, they undertook to purchase sand, gravel and ready-mixed concrete in the agreed area solely from KTB plants. Similarly, KTB plants agreed not to supply non-members at more favourable prices and conditions. In addition, private individuals and non-members were to pay a surcharge.[34] The authority rightly rejected the argument that in substance only final prices were subject to LCart/KG, Article 5(3)(a); in line with EU practice, it pointed out that, for instance, *price compo-*

22 DPC/RPW 2018/4, *Hoch- und Tiefbauleistungen Engadin U* (note 16), § 161 *et seq.* (in particular § 172 *et seq.*).
23 *Idem,* § 178 *et seq.* (in particular § 189).
24 *Idem,* § 155 *et seq*.
25 DPC/RPW 2018/4, *Hoch- und Tiefbauleistungen Engadin III* (note 16), § 96 *et seq*.
26 *Idem,* § 159 *et seq*.
27 DPC/RPW 2019/2, *Hoch- und Tiefbauleistungen Engadin I* (note 16), § 745 *et seq.* (in particular § 753).
28 *Bauleistungen Graubünden* (note 16), § 595 *et seq*.
29 DPC/RPW 2019/3a and 3b, p. 606 *Badezimmer*.
30 *Idem,* § 282 *et seq*.
31 *Idem,* § 2292 *et seq*.
32 *Idem,* § 2309 *et seq*.
33 Comco, case 22-0477, decision of 10 December 2018, available on the authority's website at: <*https://www.weko.admin.ch/weko/fr/home/actualites/dernieres-decisions.html*>.
34 *Idem,* § 638.

nents also fall within the scope of this provision.[35] Comco also concluded that there was a *collective dominant position*[36] and that it was deemed abusive under LCart/KG, Article 7(2)(e) (limitation of limitation of production, supply or technical development).[37] Therefore, it ordered several measures so as to end and remedy this unlawful situation.[38]

5. The enforcement of the anticartel regulation is not limited to the kind of large cartels mentioned above; Comco also takes down smaller unlawful practices at a local level, as the case against driving instructors in the German-speaking part of Canton Wallis shows.[39] Interestingly, the case started with a citizen inquiry to the Federal Price Supervisor according to which a number of residents were wondering about the high level of prices in the area compared to other regions. Further to several investigatory measures and in the absence of a clear answer as to the existence of an agreement, Comco eventually dawn-raided the premises of the association of driving instructors and found the evidence it was looking for.[40] While Comco's assessment on the merits is not surprising, it is worth pointing out that the driving instructors tried to justify their coordinated behaviour on the fact that it was necessary to ensure a sufficient level of services and, ultimately, of traffic safety; an argument which was rejected by Comco on the grounds that it was not of an economic nature.[41]
6. While Comco considered almost twenty years ago that the price recommendations schemes of the association of engineers and architects (SIA) were compliant with competition law, the authority decided to tackle once again this topic.[42] Further to Comco's first assessment, the SIA quickly decided to modify certain components of the schemes under scrutiny so that Comco could close its investigation. In particular, Comco and the SIA agreed on the method to be observed for collecting and processing the data underlying the price recommendations schemes, the elements of which can certainly be used as a checklist in similar circumstances.[43]
7. In *AMAG Vertriebsnetz,* Comco assessed many aspects of the AMAG dual distribution network; Comco's report, which addresses a wide range of issues relating to the distribution of motorcars, will be useful for lawyers and professionals operating in this sector.[44] In essence, several independent authorized dealers complained that AMAG Import discriminated against them in various ways as compared to dealers belonging to the AMAG Group (so-called AMAG Retail dealers) in order to drive them progressively out of the market and implement a fully and exclusively vertically integrated structure.[45] Adopting a practical approach, Comco decided to close its preliminary investigation provided AMAG complied with a series of measures, including the duty to inform transparently all dealers of changes within the network, the obligation to authorize in the network pure service providers, the obligation to tolerate multibranding and, more importantly, the obligation for AMAG to further separate its import and retail activities (notably through the prohibition of cross-subsidies allowing AMAG Retail dealers to offer overcompetitive price discounts and of the use of commercial information provided by independent vendors for the benefit of AMAG Retail dealers).[46]
8. As almost every year,[47] a ruling handed down by a civil court recalls that a motorcar dealer claiming that the termination of its agreement by the importer infringes on LCart/KG, Article 7, has to demonstrate that the conditions of a classical abuse of a dominant position or of economic dependency are met.[48] This latter instance in particular shall not be accepted at face value and the claimant has to bring evidence relating to the

35 *Idem,* § 848–850.
36 *Idem,* § 905.
37 *Idem*, in particular § 908 (three cumulative conditions).
38 *Idem,* § 920.
39 DPC/RPW 2019/2, p. 513 *Fahrlehrertarife Oberwallis*.
40 *Idem,* § 3 *et seq*.
41 *Idem,* § 43 *et seq*.
42 DPC/RPW 2019/2, p. 284 *SIA-Honorarordnungen*.
43 *Idem*, § 93.
44 DPC/RPW 2019/2, p. 251 *AMAG Vertriebsnetz*.
45 *Idem,* § 5 *et seq.* (in particular § 171 for a recap of the various measures under scrutiny).
46 *Idem,* § 250 *et seq*.
47 *Bovet C./Alberini A.*, "Recent developments in Swiss competition law", RSDA/SZW 2019/1, p. 73 § 13.
48 DPC/RPW 2019/3b, p. 1101 *Urteil des Handelsgerichts des Kantons Zürich vom 11. Juli 2019 in Sachen A. AG gegen B. AG betreffend vorsorgliche Massnahmen*.

absence of alternative options enabling it to continue its business activities.[49]

9. Comco entered into a settlement with Stöckli Skis in a clear vertical restraint situation (prohibition to undersell, restrictions on internet sales and even price communications, prohibition of cross-deliveries).[50] Stöckli's full cooperation and the measures defined in the settlement agreement justified a 50% reduction of the envisaged sanction.[51] According to the authority, an *objective lack of diligence or default of organization* is generally given when the existence of anticompetitive behaviour is established; this is typically the case when an undertaking persists such behaviour although it knows or should have known that the activity in question is potentially unlawful.[52]

III. Dominant positions

10. The Federal Tribunal fully confirmed the Federal Administrative Tribunal's judgment and, therefore, the 186 million Swiss Francs fine in the Swisscom *margin squeeze* case.[53] The court recalled the usefulness of European competition law in this field,[54] including in the definition of the three cumulative conditions to be fulfilled in such a situation (vertical integration, indispensability of the relevant service[55] and existence of a dominant position).[56] Thus, an abusive behaviour is established typically when the price requested by the dominant firm for said service is higher than the one it bills to its subscribers (i.e. final consumers) or when the margin left to an efficient competitor – i.e. the difference between the price of the relevant service and the price billed to the end-users – does not allow it to cover the costs specific to the products it is offering to its own subscribers.[57] The investigation should also determine whether (objective) legitimate business reasons may be established.[58] The court confirmed that all conditions leading to an abusive margin squeeze were fulfilled in this case[59] and that considering this type of abusive behaviour to be covered by the general clause of LCart/KG, Article 7(1), was conform to ECHR, Article 7.[60]

11. Eight years later, the Federal Administrative Tribunal confirmed Comco's decision in the *SIX/Access to Dynamic Currency Conversion Services (DCC)* matter.[61] No doubt that the ruling, which is over 500 pages long, will become the reference on refusal to supply issues;[62] the court indicated in its press release that it had to deal with around sixty legal issues, twenty of which had never been addressed in previous cases.[63] At the outset, one may briefly recall that SIX Multipay AG granted access, i.e. communicated the information enabling interoperability, to the so-called Dynamic Currency Conversion function to its sister company SIX Card Solutions AG, a credit and debit card terminals manufacturer, while refusing access to the same to other terminals manufacturers; the latter argued that the DCC function was necessary to compete against SIX Card Solutions. On the first key issue relating to the relationship between intellectual property and competition law, the court confirmed that these fields are complementary and, since immaterial property is comparable to material property, conduct involving intellectual property rights must be assessed un-

49 *Idem,* § 7.3.3.

50 Comco, case 22-0488, decision of 19 August 2019, § 6. This decision is available on the authority's website at: *<https://www.weko.admin.ch/weko/fr/home/actualites/dernieres-decisions.html>*.

51 *Idem,* § 99.

52 *Idem,* § 78.

53 Federal Tribunal, case 2C_985/2015, judgment of 9 December 2019. See *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2017/1, p. 102 § 9.

54 *Idem,* § 4.3 and 8.3.6.

55 More precisely, in German: *"Vorleistung"*.

56 Federal Tribunal, case 2C_985/2015 (note 53), § 5.2.

57 *Idem,* § 5.5.1 and 5.5.2.

58 *Idem,* § 5.9.

59 *Idem,* in particular § 6.3.6.

60 *Idem,* § 8.1–8.3.6.

61 Federal Administrative Tribunal, case B-831/2011, judgment of 18 December 2018. On Comco's decision, see *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2011/2, p. 206 § 10.

62 With respect to the other type of abusive practices, *i.e.* exploitation practices, it can be referred in particular to the Mobile termination rates *(Mobilfunkterminierung)* decision of the Swiss Federal Tribunal addressed in *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2012/2, p. 150 § 12.

63 See the press release issued on 21 May 2019 by the Federal Administrative Tribunal, available at *<https://www.bvger.ch/bvger/fr/home/medias/medienmitteilungen-2019/sanktion-gegen-six-group-bestaetigt.html>*.

der the material provisions of LCart/KG, namely Articles 5, 7 and 9 *et seq*.[64] In this regard, it is worth underlining that the Tribunal devoted more than 30 pages to the assessment of interface information from a competition law perspective, thereby demonstrating that a court is capable of addressing such technical issues by taking into consideration both IP and competition law parameters.[65] In the case at stake, the court concluded that the interface information of the SIX Group was not protected by copyright.[66] Regarding the refusal to supply within the meaning of LCart/KG, Article 7(2)(a), the court listed eleven criteria relevant to addressing the refusal to provide interface information and then assessed the refusal in question in light of every single one of them, providing at the same time fundamental thoughts in relation to these criteria.[67] One may in particular recommend the reading of the sections relating to the indispensability of the contentious input,[68] to the question whether the refusal prevents the development of a new product[69] and, in particular, to the level of restriction of effective competition which has to be reached.[70] In this latter respect, the court considered that an impediment to effective competition (and not the suppression of effective competition) is sufficient in the absence of access to interface information[71] and that the undertaking suffering from such lack of access does not have to be fully driven out of the market as a result thereof.[72] As a last note, even though there would be much more to say about this captivating ruling, the court held that the conduct at stake also breached LCart/KG, Article 7(2)(f) (tying and bundling),[73] and left open the question of a violation of LCart/KG, Article 7(2)(e) (limitation of production, markets and technical development)[74] and Article 7(2)(b) (discrimination of business partners), hence confirming that a specific practice may be in breach of several provisions of LCart/KG at the same time.[75]

12. *TWINT/Apple* shows that Comco may intervene in a pragmatic manner in order to promptly prevent conduct in high-tech markets that may have a negative and irreversible impact in the long run due to the particular features of such markets.[76] TWINT complained that Apple was abusing its dominant position through the following scheme: in essence, when iPhone users were trying to pay via TWINT under certain circumstances, the payment process was interrupted and the TWINT app replaced by Apple Pay. Comco reacted swiftly and, after conducting preliminary investigations, provided the parties with a draft decision ordering protective measures. This led Apple to offer commitments in the form of a technical solution which was acceptable from a competition law perspective.[77] The report issued by Comco is worth reading as it describes the functioning of mobile payment apps and the features of this sector in Switzerland; in this respect, it will come as no surprise that "Switzerland is still an iPhone country."[78] After considering these elements but given the commitments offered by Apple, Comco logically left open the question as to whether the relevant market is limited to the access for developers of mobile payment apps to the iOS platform or is broader and comprises in particular the Android platform, it being noted that the answer to that question would have consequences for contractual relationships in the app sector going well beyond a specific case.[79] Furthermore, Comco addressed the possible abuse based on LCart/KG, Article 7(2)(e) and considered that the behaviour under scrutiny might drive TWINT out of the market and negatively impact technological development in the sector in question, without be-

64 Case B-831/2011 (note 61), § 81 *et seq*.
65 *Idem,* § 528 *et seq*.
66 *Idem,* § 632.
67 *Idem,* § 800.
68 *Idem,* § 972 *et seq*.
69 *Idem,* § 1032 *et seq*.
70 *Idem,* § 1055 *et seq*.
71 *Idem,* § 1148 *et seq*.
72 *Idem,* § 1174 *et seq*.
73 *Idem,* § 1251 *et seq*.
74 *Idem,* § 1422 *et seq*.
75 *Idem,* § 1424 *et seq*.
76 DPC/RPW 2019/3a, p. 574 *TWINT/Apple,* § 216 *et seq*. (in particular § 217). With respect to the TWINT merger case, see *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2019/1, p. 73 § 20.
77 DPC/RPW 2019/3a, *TWINT/Apple* (note 76), § 1 *et seq*.
78 *Idem,* § 136 *et seq* (in particular § 152).
79 *Idem,* § 172.

ing justified by any legitimate reason raised by Apple.[80]

13. Comco published on its website in December 2018 a decision it rendered in October 2017[81] against the Swiss Post regarding a then new price system including a double *rebate mechanism,* i.e. a basic rebate completed by an additional monthly rebate calculated on the basis of a projected annual turnover; some complexity was added by the fact that the general turnover comprised amounts billed in respect of services covered by the Post's legal monopoly (i.e. letters under 50 grams).[82] The authority accepted only to a limited extent the application of LCart/KG, Article 3(1), to this case[83] and established that one could split the product market between mail items weighing less than and those weighing more than 50 grams.[84] Since it holds a dominant position in both markets,[85] the Post's behaviour was characterized as discriminatory under LCart/KG, Article 7(2)(b). Indeed, the four cumulative conditions set forth by the practice were all fulfilled in this case.[86] Beyond these aspects, Comco dealt with a sensitive issue, namely the impact of the determination of this dominant position integrating a regulated market falling within the scope of LCart/KG, Article 3(1), on the *notification duty* provided for by *LCart/KG, Article 9(4)*.[87] The authority concluded that this duty was not affected and therefore also applied to the market portion covered by the Post's legal monopoly.[88]

IV. Merger control

14. The qualification as a merger within the meaning of merger control continues to raise questions on which Comco has to give advice. In case a joint venture company contemplates the acquisition of a target company, only the joint venture together with the target should qualify, as a matter of principle, as participating undertakings. By contrast, the parent companies of the joint venture should be considered as participating undertakings when the joint venture was formed only for the purpose of acquiring the target, when it is not yet in operation, when it is not of full-function nature, or when it can be demonstrated that the parent companies are actually involved in the acquisition of the target.[89]

15. Obviously, steps taken by certain companies in the media sector trigger reactions from competitors in this dynamic environment which is constantly changing as a result of the digital revolution. Interestingly, Comco faced at the same time two transactions (AZ Medien/NZZ and Tamedia/Basler Zeitung) which had to be assessed in light of each other from the perspective of collective dominance:[90]
    - In *AZ Medien/NZZ,* these two companies formed a full joint venture meant to take over all of their activities in the field of regional newspapers.[91] Insisting on the competitive and changing landscape characterizing this field, AZ Medien and NZZ justified their cooperation by the need to reach synergies and economies of scale.[92] While the list of markets concerned by the transaction is long, in reality only a few markets were affected.[93] With respect more specifically to the NZZ newspaper, Comco rejected the preliminary reasoning according to which the transaction would have no impact on this newspaper because its readers would not be switching to newspapers belonging to AZ Medien. In this regard, Comco recalled in particular that, even though it may be true that the NZZ is a premium product and the various newspapers of the parties are differentiated products, all the newspapers in

80 *Idem,* § 181 *et seq*.
81 Comco, case 32-0235, decision of 30 October 2017, available at <*https://www.weko.admin.ch/weko/fr/home/actualites/dernieres-decisions.html* >.
82 As summarized in *idem,* § 1.
83 *Idem,* § 594 *et seq.* (in particular, § 609 and 631).
84 *Idem,* § 654 *et seq.* (in particular, § 722).
85 *Idem,* § 813.
86 See especially *idem,* § 844–851, where the four conditions are well presented.
87 *Idem,* § 814 *et seq*.
88 *Idem*, § 830.
89 DPC/RPW 2019/3a, p. 603 *Beratung zur Meldepflicht nach Art. 9 Abs. 1 Bst b KG.*
90 See in particular DPC/RPW 2018/4, p. 866 *AZ Medien/NZZ*, § 211.
91 *Idem,* § 1 *et seq*.
92 *Idem,* § 15 *et seq*.
93 *Idem,* § 132 *et seq*.

question belong to the same relevant market and, therefore, competition between these newspapers will be reduced as a consequence of the transaction.[94] That being clarified, Comco seemed particularly concerned by issues raised by collective dominance on the printed newspaper markets in the Basel area (as well as Sunday newspapers in the German-speaking part of Switzerland)[95] given the high level of concentration in this sector.[96] The authority held that the formation of the new joint venture was likely to lead to an alignment with Tamedia/Basler Zeitung.[97] However, it concluded that the presence of Ringier and its star paper the Blick was sufficient to prevent the risk of elimination of effective competition, considering the high threshold defined by the Swiss Federal Tribunal to meet this test.[98]

– In *Tamedia/Basler Zeitung,* Comco's decision begins with an impressive list of printed papers and websites owned by Tamedia, as well as other operational activities carried out by this group.[99] The decision goes on with a long list of the relevant markets in the media sector and indicates that many markets are affected by the transaction.[100] On the merits and like in the *AZ Medien/NZZ* case addressed in the preceding Section, Comco seemed particularly concerned by issues raised by collective dominance on the printed newspaper markets considering the very concentrated nature of this sector.[101] The authority held that the acquisition of the Basler Zeitung by Tamedia was likely to lead to the alignment of the Basler Zeitung with AZ/NZZ, thus reinforcing the collective dominance of Tamedia and AZ/NZZ.[102] However, it concluded here too that the presence of Ringier and its star paper the Blick was sufficient to prevent the risk of elimination of effective competition.[103]

All in all, these two cases confirm that merger control is not an efficient tool to prevent concentration in the Swiss media sector; moreover, and leaving aside competition and economic considerations, the diversity of opinion and content in the newspaper sector continues to decline.

16. The requests for an opinion in the *Swisscom Directories/Websheep* and *Ringier/Bärtschi Media* cases both illustrate, like other cases in the past, the broad interpretation made by Comco with respect to the concepts of upstream,[104] downstream and related markets within the meaning of LCart/KG, Article 9(4), when it comes to markets in the Internet or data sector.[105]

V. Procedure

16. The publication of a report drafted by Comco's Secretariat and concluding that the investigation should be closed at this early stage offered the Federal Administrative Tribunal an opportunity to deal with several legal issues.[106] In particular, a *preliminary investigation* may be qualified as an informal procedure, which is brought to an end through a report, as opposed to a formal decision.[107] While the investigation is governed by the general principle of fairness,[108] the Federal Law on Administrative Procedure[109] is not applicable (e.g. no access to the file).[110] Therefore, the question of whether such a report may nevertheless be considered as a "decision" subject to publication under LCart/KG, Article 48, was crucial. Using the classical methods of interpretation, the court concluded that the word *"décisions"/"Ent-*

94 *Idem,* § 134 *et seq*.
95 *Idem,* § 257 *et seq*.
96 *Idem,* § 153 *et seq*. (in particular § 159 *et seq*.).
97 *Idem,* § 210 *et seq*.
98 *Idem,* § 213 *et seq*.
99 DPC/RPW 2018/4, p. 937 *Tamedia/Basler Zeitung,* § 4.
100 *Idem,* § 117.
101 *Idem,* § 185 *et seq*. (in particular § 188 *et seq*.).
102 *Idem,* § 229.
103 *Idem,* § 325 *et seq*.
104 See for instance *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2017/1, p. 102 § 14.
105 DPC/RPW 2019/1, p. 82 *Beratungsanfrage betreffend Meldepflicht eines Zusammenschlussvorhabens;* DPC/RPW 2018/4, p. 716 *Beratung Meldepflicht gemäss Art. 9 Abs. 4 KG.*
106 Federal Administrative Tribunal, case B-5117/2016, judgment of 30 January 2019.
107 *Idem,* § 3.1 and 3.2, as well as 3.5.
108 *Idem,* § 3.3.
109 RS/SR 172.021 ; PA/VwVG.
110 Federal Administrative Tribunal, case B-5117/2018 (note 106), § 3.3 and 3.4.

scheide"/"decisioni" used in this rule should receive a broad meaning in Switzerland's three official languages.[111] Among other things, this was consistent with the objectives of legal certainty, administration's transparency and public information.[112]

18. *Parties' and witnesses' rights* in a competition law procedure are not similar.[113] That's why Credit Suisse appealed against a Comco decision qualifying as a witness one of its former employees and current CEO of a 50% joint venture it had set up with American Express (Swisscard). The Federal Administrative Tribunal accepted to hear the case on the merits, considering that the bank was sufficiently affected by the decision and that the latter might cause it an irreparable harm.[114] While the sanction procedure has consistently been characterized as an administrative one,[115] the court pointed out, on the one hand, that the law granted special means to Comco to establish the factual background of a case and obtain evidence[116] and, on the other hand, that the fine eventually imposed by the authority is deemed criminal in nature *("strafrechtlich")* or, at least, may be assimilated to a criminal sanction *("strafrechtsähnlich")*.[117] Consequently, an undertaking that may be subject to such a fine may legitimately claim the protection granted in criminal proceedings under ECHR, Article 6, and the Federal Constitution, Article 32,[118] in particular the prohibition of self-incrimination.[119] However, the Tribunal emphasized that the European Court of Human Rights had not excluded any duty for a party to provide information under the threat of a pecuniary sanction, but only "improper compulsion" (i.e. abusive or disproportionate constraints).[120] Having stated that in substance any person who is not a party to the proceeding should be considered as a witness,[121] the Federal Administrative Tribunal qualified Credit Suisse's former employee as such,[122] the relevant time to this characterization being in this case the date of the questioning.[123] After carefully analysing Credit Suisse's rights in the joint venture, the court also refuted the argument that the witness should in fact be considered indirectly as a corporate body of the bank and therefore be questioned as the representative of a party rather than a witness.[124] However, it maintained its jurisprudence that such a witness should testify only on "purely factual points",[125] which would not have a direct negative bearing on the sanctioning process of the bank.[126]

19. Parties seem sometimes to ignore basic rules governing the protection of *business secrets*[127] in published decisions. First, it should be recalled that the publication of a decision by Comco is deemed to be a real act under PA/VwVG, Article 25*a*.[128] Second, to be qualified as a business secret a piece of information has to fulfil three conditions: (i) it should not be publicly known nor available; the owner of the information (ii) should wish to keep it secret and (iii) should have a legitimate interest in preserving this characteristic.[129] Finally, the burden of establishing the fulfilment of these conditions rests essentially on the party claiming that information should be withdrawn from or at least redacted in the published decision.[130]

111 *Idem,* § 5.4 *et seq*.
112 *Idem,* § 5.7.4.
113 Federal Administrative Tribunal, case B-6482/2018, judgment of 8 November 2019, in particular § 4.
114 *Idem,* § 2.1 and 2.2.
115 *Idem,* § 3.1.
116 *Idem,* § 3.1.
117 *Idem*, § 3.2.
118 Cst./BV ; RS/SR 101.
119 Federal Administrative Tribunal, case B-6482/2018 (note 113), § 3.2.1.
120 *Idem,* § 3.2.2.
121 *Idem,* § 4.1.2.
122 *Idem,* § 4.3.4.
123 *Idem,* § 4.3.3.
124 *Idem,* § 4.4.
125 *Idem,* § 5.1 : *"[…] solange es sich um Angaben rein tatsächlicher Art handelt".*
126 *Ibidem: "[…] welche sich für die Beschwerdeführerin im Hinblick auf eine allfällige Sanktionierung nicht direkt belastend auswirken können".*
127 See also *infra* note 136.
128 DPC/RPW 2019/1, p. 142 *VPVW Stammtische/Projekt Repo 2013 – Geschäftsgeheimnisse,* § 13. Also Federal Administrative Tribunal, case B-5117/2018 (note 106), § 1.1.
129 *Idem,* § 31.
130 *Idem,* § 33–38. An appeal against Comco's decision was rejected by the Federal Administrative Tribunal, case B-5114/2016, judgment of 3 May 2018, DPC/RPW 2019/1, p. 206 *Urteil vom 3. Mai 2018 – Verfügung der Wettbewerbskommission vom 20. Juni 2016 betreffend Publikation,* where the court also emphasized the broad discretionary power the authority holds in determining

20. The Federal Administrative Tribunal had the opportunity to supplement its jurisprudence and Comco's practice on *access to personal data by third parties*.[131] One of the central issues was to determine the impact of a pending proceeding in the light of the provisions of the Federal Law on Data Protection.[132] While admitting that a pending appeal before the Federal Tribunal did not exclude *per se* the application of the LPD/DSG,[133] the court stated that the transmission of a decision sanctioning cartel members to another authority could be considered as indispensable under LPD/DSG, Article 19(1)(a), only if the decision was in force.[134] The application of LPD/DSG, Articles 8 and 19(1)(d), was also set aside.[135]
21. A distinction should be made between the right to participate in the procedure before Comco according to LCart/KG, Article 43(1), and the right to be a party either before the competition authority or in appeal before the Federal Administrative Tribunal and the Federal Tribunal.[136] The fact that an undertaking first held the former status does not prevent it from claiming the latter in case of an appeal filed by the party sanctioned by Comco.[137] Indeed, the interest of a participant may evolve and, for instance, become more significant in the appeal procedure; similarly, the object of the appeal may be partly different from that of Comco's decision.[138] In the present case, the participant's request, filed two months after he was informed of the filing of an appeal before the Federal Administrative Tribunal, was deemed valid, and not late as argued by the appellant.[139] The participant having established the fulfilment of the two conditions for being a party – i.e. to be concerned more than anyone by the decision and to hold a legitimate interest in the cancellation, modification or confirmation of the decision –, his rights as a party were confirmed by the court.[140]
22. A party to an anticompetitive agreement who was sanctioned by Comco *may not appeal* the authority's decision approving an amicable settlement with another party to said agreement.[141] Indeed, under this settlement the second undertaking was exempted from any sanction because it had denounced the cartel and was taking on commitments that would be effective in the future; it was not hurting the competition situation of the appellant who, therefore, failed to establish a valid interest to object to Comco's decision.[142]
23. The Federal Tribunal quashed a Federal Administrative Tribunal's judgment denying an individual *right to appeal* to an undertaking participating in a concentration.[143] Rules providing for a collec-

whether and how a decision should be published (§ 7.2.3). On these various issues, see also Federal Administrative Tribunal, case B-5117/2018 (note 106), § 7.

131 See *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2019/1, p. 73, 79–80 § 22.

132 LPD/DSG; RS/SR 235.1.

133 DPC/RPW 2019/2, p. 552 *Bekanntgabe der WEKO von Personendaten aus Verfahrensakten gegenüber Nicht-Verfahrensbeteiligten nach Abschluss einer Untersuchung* (Federal Administrative Tribunal, case A-592/2018, judgment of 23 October 2018), § 7 (in particular, § 7.1.5).

134 *Idem,* § 9 (in particular, § 9.5).

135 *Idem,* § 10–11. See also Federal Administrative Tribunal, case A-5988/2018, judgment of 24 October 2019 (Graubünden); DPC/RPW 2019/2, p. 560 (Federal Administrative Tribunal, case A-590/2018, judgment of 23 October 2018 [excerpt]) and p. 562 (Federal Administrative Tribunal, case A-604/2018, judgment of 23 October 2018 [excerpt]); as well as DPC 2018/4, p. 723 (Comco, decision of 17 September 2018).

136 Federal Administrative Tribunal, case B-2798/2018, judgment of 29 July 2019, § 4.1.2. See also Federal Tribunal, case 2C_433/2017, judgment of 1 May 2019 *Swisscom vs. Sunrise,* where the court refers mainly to ATF/BGE 142 II 268 *Nikon* and, among other things, reminds the parties that the protection of business secrets does not concern elements relating to the anticompetitive behaviour of a cartel's participant or an undertaking holding a dominant position (Federal Tribunal, case 2C_433/2017, § 2.2, and ATF/BGE 142 II 268, § 5.2.4).

137 Federal Administrative Tribunal, case B-2798/2018 (note 136), § 4.1.3.

138 *Ibidem*.

139 *Idem,* § 4.2 and 4.3.

140 *Idem,* § 5.

141 DPC/RPW 2019/3b, p. 1074 *Urteil vom 8. Mai 2019 in Sachen VPVW (Genehmigungsverfügung)* = ATF/BGE 145 II 259 (Federal Tribunal, case 2C_524/2018, judgment of 8 May 2019). On the merits of the case, see DPC/RPW 2019/1, p. 84 *VPVW Stammtische/Projekt Repo 2013,* where Comco stated (§ 313) that Swiss competition law should be characterized as a prohibition with legal exceptions *("Verbotsprinzip mit Legalausnahme")* rather than a regime condemning abusiveness as a principle *("Missbrauchsprinzip")*.

142 *Idem,* in particular, § 2.5.3.

143 DPC/RPW 2019/3b, p. 1079 (Federal Tribunal, case 2C_509/2018, judgment of 24 June 2019, *Ticket Corner Holding*).

tive filing with Comco – designed for the simplification of the notification process – should not have an impact from a procedural standpoint.[144] Similarly, nothing in the file showed that this appeal was without any factual interest, since it had not been established that the participating undertakings had renounced the operation; arguments based on LCart/KG, Article 34,[145] and a compulsory joinder of parties *("consorité nécessaire"/"notwendige Streitgenossenschaft")*[146] were therefore rejected.

24. Supported by the jurisprudence of the Federal Administrative Tribunal, parties may now claim some flexibility in the drafting and reading of their *conclusions*. Indeed, an appellant had requested the court to reduce the fine imposed on it by Comco "in an adequate measure according to the court's appreciation".[147] More precise indications were, however, given in the remaining conclusions.[148] Although the standard is that proper conclusions are those precise enough[149] to be copied in a judgment if the claimant/appellant is successful, one should exceptionally admit conclusions expressed in general terms, provided that the claimant's/appellant's requests may be sufficiently identified on the basis of the arguments this party presented and, if applicable, the contested decision.[150]

25. The Obwalden and Bern Courts handed down several judgments dealing with *civil procedure* issues applied to competition in the motor vehicle business sector. The former interpreted a jurisdiction clause contained in a "service agreement" as encompassing also competition law disputes and therefore declared itself incompetent *ratione loci* to decide on the request for conservatory measures filed by the claimant.[151] The latter first rejected a similar request on the merits; in substance, the existence of a dominant position was not established in the summary procedure, and claims pertaining to vertical restraints were unsubstantiated.[152] Because of the rules governing judgments in force, a new request for conservatory measures was not even examined by the court.[153]

144 *Idem,* § 3.

145 *Idem,* § 4.

146 *Idem,* § 5.

147 Federal Administrative Tribunal, case B-3096/2018, judgment of 12 February 2019, § B: *"die de[n] Beschwerdeführerin[nen] auferlegte Sanktion nach Ermessen des Gerichts auf ein angemessenes Mass zu reduzieren".*

148 *Ibidem*.

149 Typically, because the relevant amount is expressed in a precise figure.

150 Federal Administrative Tribunal, case B-3096/2018 (note 147), § 5.1 and 5.2 (in particular, § 5.2.1 and 5.2.2).

151 DPC/RPW 2019/1, p. 214 *Entscheid des Obergerichtspräsidiums des Kantons Obwalden vom 2. Mai 2018 in Sachen A. gegen B. – Gesuch um vorsorgliche Massnahmen* (in particular, § 1.4.4.3: broad interpretation of jurisdiction clauses) and DPC/RPW 2019/1, p. 221 *Entscheid des Obergerichts des Kantons Obwalden vom 19. Dezember 2018 in Sachen A. AG gegen B. AG – Missbrauch marktbeherrschender Stellung*. See also DPC/RPW 2019/1, p. 244 *Partnerschaftsvertrag; Kartellrecht; Zwischenentscheid über die Zuständigkeit zum Erlass von vorsorglichen Massnahmen* (Federal Tribunal, case 4A_340/2018, judgment of 10 September 2018 [absence of irreparable harm]).

152 DPC/RPW 2019/1, p. 228 *Entscheid des Handelsgerichts des Obergerichts des Kantons Bern vom 26. März 2018 in Sachen A. AG gegen B. AG – Kartellrecht (vorsorgliche Massnahmen)*. For more details, see also *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2019/1, p. 73 § 13.

153 DPC/RPW 2019/1, p. 239 *Entscheid des Handelsgerichts des Obergerichts des Kantons Bern vom 14. Dezember 2018 in Sachen A. AG gegen B. AG – Kartellrecht (vorsorgliche Massnahmen)*.