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## Recent developments in Swiss competition law

Adrien Alberini | Christian Bovet\*

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### I. Introduction

1. The amendment to the Federal Law on Cartels and Other Competition Restraints<sup>1</sup> proposed by Olivier Français and successively approved by the Parliament's two Chambers<sup>2</sup> might lead to some uncertainty in the application of competition law in Switzerland. In substance, the idea is to correct the effects of the Federal Tribunal's jurisprudence which considers as significant under LCart/KG, Article 5(1), any agreement falling within the scope of LCart/KG, Articles 5(3) and (4). The lawmaker wishes to oblige the Competition Commission<sup>3</sup> to base this diagnosis not only on the *qualitative* criteria set forth by these provisions but also on *quantitative* criteria. The latter may be quite difficult to define and to express in the law and, if the proposal were to succeed, might cause some problems in their application both by the administrative and judicial authorities and by the undertakings.
2. In 2022 the Federal Tribunal rendered three judgments on the distribution of *French-language books* in Switzerland.<sup>4</sup> Like the Federal

Administrative Tribunal previously,<sup>5</sup> the Court stated that Swiss competition law was close to European regulations and that competition authorities could therefore consider the practice and the jurisprudence of their European counterparts.<sup>6</sup> The exclusion of agreements entered into within a group or an agency system was also reaffirmed.<sup>7</sup> While retaining an absolute territorial protection in the *Dargaud* and *Flammarion* cases,<sup>8</sup> the Court quashed the Federal Administrative Tribunal's judgment in the *Albert le Grand* case.<sup>9</sup> In addition, in the *Dargaud* case the Federal Tribunal admitted that out of 36 agreements left after the Federal Administrative Tribunal's judgments, only 24 could be retained as containing an unlawful territorial exclusivity clause;<sup>10</sup> the appreciation of the 12 others was left open, since the previous jurisdiction's analysis was insufficient and too much time had elapsed.<sup>11</sup>

3. In connection with the focus of this volume of RSDA/SZW, one should note that Comco has indicated on several occasions that it paid and would continue to pay particular attention to the *competitive process in the digital economy*, it being specified that one of the main challenges is the variety of issues arising out practices relating to new and fast evolving technologies.<sup>12</sup> Several cases summarized in the present chronicle are good examples thereof.

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<sup>1</sup> LCart/KG; RS/SR 251.

<sup>2</sup> Motion 18.4282 available on the Parliament's website at <<https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaefte?AffairId=20184282>> ("La révision de la loi sur les cartels doit prendre en compte des critères tant qualitatifs que quantitatifs pour juger de l'illicéité d'un accord" / "Die Kartellgesetzrevision muss sowohl qualitative als auch quantitative Kriterien berücksichtigen, um die Unzulässigkeit einer Wettbewerbsabrede zu beurteilen").

<sup>3</sup> Hereinafter "Comco". In this chronicle, this abbreviation refers both to the Commission and to its Secretariat.

<sup>4</sup> Federal Tribunal, case 2C\_43/2020 (*Dargaud*), judgment of 21 December 2021; Federal Tribunal, case 2C\_44/2020 (*Flammarion*), judgment of 3 March 2022; Federal Tribunal, case 2C\_37/2020 (*Albert le Grand*), judgment of 14 June 2022.

<sup>5</sup> See Bovet C./Alberini A., Recent developments in Swiss competition law, RSDA/SZW 2020/1, p. 73 § 1.

<sup>6</sup> For instance, judgment *Flammarion* (n. 4), § 4.4. See also the following judgments of the Federal Administrative Tribunal: case B-1410/2022 (*Flammarion*), judgment of 14 April 2022; case B-2784/2022 (*Albert le Grand*), judgment of 4 August 2022; and case B-294/2022 (*Dargaud*), judgment of 31 August 2022.

<sup>7</sup> Judgment *Flammarion* (n. 4), § 6 and judgment *Dargaud* (n. 4), § 7.3.

<sup>8</sup> Judgment *Flammarion* (n. 4), § 9.7 and judgment *Dargaud* (n. 4), § 9.4 (interesting developments on internet distribution in § 9.3).

<sup>9</sup> Judgment *Albert le Grand* (n. 4), § 8.4.7 to 8.5.

<sup>10</sup> Judgment *Dargaud* (n. 4), § 11.3.

<sup>11</sup> Judgment *Dargaud* (n. 4), § 11.4. See also *idem*, § 7.7.

<sup>12</sup> See for instance the foreword of Comco's President in DPC/RPW 2022/1, p. 21.

## II. Agreements

4. In December 2022, the Federal Administrative Tribunal handed down a 355-page judgment in the *ASCOPA* case.<sup>13</sup> One may recall that Comco had rendered its decision on October 31, 2011, at the end of a stormy procedure: while the draft decision imposed heavy fines on the undertakings involved, in the end no penalty was imposed because the information exchange between competitors under scrutiny had been considered finally as falling “only” under LCart/KG, Article 5(1).<sup>14</sup> At that time, some legal uncertainty was surrounding the issues relating to the *exchange of information between competitors* raised by this case. Today, based on the developments over the past ten years, the conclusions reached by Comco seem obvious and it comes as no surprise that they have been confirmed by the Federal Administrative Tribunal. Particularly, this court held that, in light of the principles established by the Federal Tribunal in key cases relating to unlawful agreements, both qualitative and quantitative elements have to be considered to apply LCart/KG, Article 5(1), and no concrete impact on the market must be demonstrated.<sup>15</sup> From a qualitative perspective, the exchange of information between competitors relating to gross price lists and turnover, as well as investments for advertising purposes, (easily) qualified in the present case as an impediment to effective competition.<sup>16</sup> From a quantitative perspective, neither external competition from companies outside the association nor internal competition between the members of the association was sufficient.<sup>17</sup> More generally, this saga raises some fundamental questions, including the purpose of such a long procedure and lengthy decision, without a sanction being imposed...
5. Comco’s decision of December 2013 in the *air freight sector* has finally been published.<sup>18</sup> In

short, Comco tackled exchanges between several undertakings providing air freight services with respect to various price components of their services during the 2000–2006 period. Comco started by recalling that the airline industry had been fully regulated long before the liberalization process that started in the 1990s and lasted over the past 30 years. As of today, this sector remains heavily regulated notably through international agreements, some of which take precedence over Swiss competition law.<sup>19</sup> Specifically, Comco had to interpret the EU Air Transport Agreement to determine that it had jurisdiction in the case in question and, with respect to unlawful agreements, that Article 8 of this Agreement and Article 5 LCart/KG would apply.<sup>20</sup> Comco further considered that certain exchanges between the undertakings under scrutiny were outside the scope of its investigation notably because the applicable international agreements would allow coordination of tariffs or merely because they would not fall under Comco’s jurisdiction.<sup>21</sup> On the merits, it is interesting to read Comco applying directly the EU Air Transport Agreement and, in so doing, taking into consideration EU case law.<sup>22</sup> Eventually, part of the exchanges were found to qualify as horizontal agreement infringing competition law either under the Air Transport Agreement or LCart/KG.<sup>23</sup>

6. Almost all the decisions rendered by Comco in the *air freight sector* have been upheld by the Federal Administrative Tribunal.<sup>24</sup> This Court confirmed notably Comco’s jurisdiction in the case at hand based on the EU Air Transport

<sup>19</sup> *Idem*, § 931 *et seq.*

<sup>20</sup> *Idem*, § 961 *et seq.*

<sup>21</sup> *Idem*, § 1117 *et seq.*

<sup>22</sup> *Idem*, § 1150 *et seq.*

<sup>23</sup> *Idem*, § 1277 *et seq.*

<sup>24</sup> Federal Administrative Tribunal, cases B-710/2014, B-747/2014, B-761/2014, B-786/2014, B-787/2014, judgments of 16 November 2022. In one specific case, the appeal filed by an undertaking was admitted since the agreement under scrutiny was already subject to a procedure in the EU, it being specified that the Administrative Federal Tribunal had to interpret the notion of “airline route” to determine whether the Swiss and EU procedures had been targeting the same conduct (Federal Administrative Tribunal, case B-785/2014, judgment of 16 November 2022).

<sup>13</sup> Federal Administrative Tribunal, case B-141/2012, judgment of 12 December 2022.

<sup>14</sup> *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2012/2, p. 150 § 2.

<sup>15</sup> See judgment of 12 December 2022 (n. 13), § 6.1 *et seq.*

<sup>16</sup> *Idem*, § 6.4.

<sup>17</sup> *Idem*, § 6.5.

<sup>18</sup> DPC/RPW 2022/1, p. 84 *Abreden im Bereich Luftfracht*.

Agreement.<sup>25</sup> Also, Comco did not err in considering that the provisions applying to unlawful agreements in the EU Air Transport Agreement prevail over the corresponding rules in Swiss competition law and, if both regulations were to provide for the same prohibitions, that a sanction based on LCart/KG could be imposed.<sup>26</sup> On the merits, the judgment of the Federal Administrative Tribunal merits attention as it reviews, both from an EU and Swiss competition law perspective, key concepts such as “global agreements” (*Gesamtabrede*), information exchange and concerted practices.<sup>27</sup> Eventually, Comco’s decision was criticized on one particular count: the competition authority could not validly hold in its conclusions (*dispositif; Dispositiv*) that the parties are prohibited from agreeing on price and price components, unless such behaviour is allowed under the applicable air transport agreement, since such risk was theoretical and not supported by specific elements in the file.<sup>28</sup>

7. In [*Brandschutzsystem*]-Elemente, Comco’s Secretariat faced the task of assessing a *price calculation tool* (essentially in the form of Excel sheets) made available by a producer of fire protection systems to its five distributors. While the use of the calculation tool had led to some coordination among the concerned undertakings, the tool allowed each user to insert markups and markdowns. Eventually, Comco’s Secretariat reached the conclusion that no suspicious coordination had taken place and therefore closed its preliminary investigation.<sup>29</sup>
8. Like almost every year, Comco’s Secretariat has been asked by a professional association to assess a project at the heart of which lies an *exchange of information*. One of these latest requests stemmed from the association for electrical appliances for Swiss households and industry. In short, this association was planning to elaborate statistics about sales by producers and importers on a wide range of products, based on the argument that such information would allow for more competition between and price pres-

sure against these upstream market participants. It came as no surprise that the authority held this project as problematic from a competition law standpoint, as it might lead to the exchange of sensitive information about sales quantities, turnovers and sales channels between members of the association.<sup>30</sup>

9. By contrast, Comco’s Secretariat took a positive stance towards the project set up by the association for *handling damages arising out of earthquakes*, the purpose of which is essentially to set up an organization for cooperation between cantons and insurance companies in this field and, more particularly, to assess and calculate damages arising from such natural disasters. Each insurance company would not have direct access to information of other specific insurance companies regarding buildings, assessment of damages and indemnification payments, such information being accessible only by the association itself. Furthermore, the same principle and reasoning would apply to claim settlements. As a last note, Comco’s Secretariat recommended to amend the articles of association to allow without undue restrictions new insurance companies willing to join.<sup>31</sup>
10. In addition to the projects mentioned in the preceding paragraphs of this contribution, the exchange of information may be an important topic in the context of *digital applications (in the financial sector)*. Post Finance disclosed to Comco’s Secretariat its project called Valuu Platform and, more specifically, the collaboration between this new business line and its retail banking activities. The issue at stake was that the retail banking department would use Valuu to advise clients on mortgages and, in doing so, Post Finance advisors would have access to offers made by competitors through Valuu. Comco’s Secretariat recommended several adjustments to Valuu in the form of technical and organizational measures which would significantly restrict the access of Post Finance advisors to sensitive business information. Furthermore, Comco’s Secretariat could not exclude all competition

<sup>25</sup> See judgments of 16 November 2022 (n. 24), § 4.

<sup>26</sup> *Idem*, § 5.

<sup>27</sup> *Idem*, § 8.4 and 10.

<sup>28</sup> *Idem*, § 15.

<sup>29</sup> DPC/RPW 2022/3, p. 573 [*Brandschutzsystem*]-Elemente.

<sup>30</sup> DPC/RPW 2022/1, p. 74 *Beratung Statistik Verkauf Elektroapparate*.

<sup>31</sup> DPC/RPW 2021/4, p. 829 *Verein Betriebsgesellschaft Schadenorganisation Erdbeben (BSO)*.

concerns since aggregated data relating to the price of homogenous financial products would be exchanged through the platform. However, such risk was regarded as limited considering the high aggregation level of the data at stake, the limited frequency of data exchanges and the structure of the market. As a last note, Comco's Secretariat recommended the implementation of a specific internal training programme in relation to the technical and organizational measures which would be set up in relation to the rolling out of Valuu.<sup>32</sup>

11. While the assessment made by Comco's Secretariat in *Internationale Einkaufskooperation*, upon request of several dealers, is of limited use to practitioners given the high number of confidential data which have been blacklined, one can at least deduce from it that the authority keeps assessing this kind of cooperation in line with the principles established in the dedicated section on *purchase agreements* in the EU Guidelines on horizontal cooperation agreements. Particularly, the cooperation in the case at hand was unlikely to raise competition concerns since the dealers had together shares of less than 15% on the relevant purchasing markets, the dealers were not competitors on the downstream markets, the collaboration was necessary to set up countervailing buyer power against powerful international producers, the collaboration would strengthen downstream competition in Switzerland (the dealers would pass cost reductions on to consumers), and the exchange of information between the participating undertakings was limited to information ancillary to the subject-matter of the collaboration.<sup>33</sup>
12. In the field of *vertical restraints*, Comco has once again updated its Notice on Vertical Agreements as well as the Explanatory Note relating thereto<sup>34</sup>

considering the quite significant case law elaborated over recent years in Switzerland. Also, Comco intended to stay in line with the revised EU Block Exemption Regulation and the Guidelines on Vertical Restraints which have been amended by the EU Commission in 2022. The most significant changes relate to the following topics:

- First, several provisions have been adopted or clarified with respect to online activities. For instance, the concept of active sales has been detailed in relation to such activities.<sup>35</sup> A new definition and new provisions have been adopted for online intermediary services.<sup>36</sup> Also, the restriction of use of the internet to sell contractual products qualifies, subject to certain exceptions, as a significant impediment to effective competition from a qualitative perspective.<sup>37</sup>
  - More flexibility is offered to undertakings in relation to the organization of their distribution networks. Typically, useful clarifications have been made in relation to the organization of selective distribution networks.<sup>38</sup>
  - The latest principles governing price recommendations adopted by the Federal Tribunal have been incorporated in the Explanatory Note relating to the Notice on Vertical Agreements.<sup>39</sup>
13. *Vertriebssystem von Yamaha-Produkten*<sup>40</sup> is interesting on two counts. First, the agreements between the general importer of Yamaha products and its dealers and services providers contained a *wide range of vertical restraints* potentially infringing competition law. The Secretariat's report is thus a good reminder of the rules applicable to these various restraints. Second, this case shows that the Authority is not always willing to carry out a full investigation and impose fines on

<sup>32</sup> DPC/RPW 2022/3, p. 585 *Plattform Valuu der PostFinance AG*.

<sup>33</sup> DPCR PW 2022/2, p. 306 *Internationale Einkaufskooperation*, particularly § 113 *et seq.*

<sup>34</sup> With respect to the previous full revision of these documents, see *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2018/1, p. 73 § 5. Regarding the more specific amendment relating to sales through general online platforms, see *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2019/1, p. 73 § 8.

<sup>35</sup> Notice on Vertical Agreements, § 2.

<sup>36</sup> Notice on Vertical Agreements, § 9, as well as 10(4) and 15(j).

<sup>37</sup> Notice on Vertical Agreements, § 15(e).

<sup>38</sup> Notice on Vertical Agreements, § 15(c), as well as 15(b)(ii) and 15(d)(ii).

<sup>39</sup> Explanatory Note, § 8 *et seq.*

<sup>40</sup> Comco, case 22-0502, decision of 10 May 2022 (*Vertriebssystem von Yamaha-Produkten*), available on the authority's website at <<https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html>>.

undertakings. Comco's Secretariat may prefer, even when quite strong elements may support breaches of competition law, to negotiate with the undertakings under scrutiny the amendment of their distribution agreements in order to prevent future anticompetitive conduct.<sup>41</sup> That being said, the following provisions have been specifically addressed:<sup>42</sup>

- The authority raised a number of issues relating to price recommendations which might therefore qualify as resale price maintenance.
- Forcing dealers to source products exclusively from the general importer should in principle qualify as absolute territorial protection. Furthermore, minimum purchase requirements may indirectly lead to the same outcome and should therefore be amended into special offers. Lastly, this conclusion could also be reached with respect to the limitation of the manufacturer guarantee exclusively to products supplied by the general importer.
- The contractual provision according to which all dealers would be prevented from selling to certain defined categories of consumers may qualify as a horizontal allocation of markets.
- The disclaimer of warranty when spare parts originating from third-party suppliers were used amounts to a non-compete obligation. Since such disclaimers had been set contractually for a period of less than five years, they did not raise competition law concerns. By contrast, the contractual obligation according to which dealers and service providers had to use only original spare parts would impede competition significantly from a qualitative perspective, but insufficient information was available as to any such impediment from a quantitative perspective.

14. “[...] Poeschl refused to supply Gawith due to previous shipments found in Swiss market. It is small anyway and I do not intend to start a war with them, just not worth it [...]”<sup>43</sup> This email, received by the informant (most likely a dealer based in Switzerland) from its supplier (a mem-

ber of the Pöschl distribution network based in Germany), shows that, sooner or later, the *prohibition of parallel imports* is discovered, communicated to Comco and established quite easily. In the case at hand, it appeared that Pöschl Tobacco Switzerland AG had requested from its mother company in Germany to prevent sales of Gawith products by distributors based in the EU to Swiss customers. More specifically, the distribution agreements in question contained strict export prohibition (with no distinction between active and passive sales).<sup>44</sup> Interestingly, Pöschl Deutschland filed for leniency, but Comco waived the sanction only by 50% considering that this undertaking had a leading role in restricting competition.<sup>45</sup> Hence, this case recalls once again that Comco is not willing to show any flexibility when it comes to the insulation of the Swiss market.

15. With respect more specifically to *distribution in the motorcar sector*, the Federal Tribunal addressed a (strange) case in which a multibrand wholesaler of spare parts complained about the lack of access – from authorized dealers – to original parts of a specific car manufacturer and concluded that it had a right to source parts directly from the manufacturer. The cantonal court had admitted the request made by the wholesaler based on Section 16(g) of the Notice on Vertical Restraints in the Motorcar Sector, according to which the restriction imposed by spare parts manufacturers on authorized dealers to sell these parts to independent undertakings significantly impedes competition from a qualitative perspective. On the contrary, the Federal Tribunal considered that the manufacturer and the wholesaler were not parties together to an agreement preventing the sale of parts by the former to the latter and, therefore, that no unlawful agreement had taken place between them in the case at hand (quite obviously, one would be tempted to say).<sup>46</sup>

<sup>41</sup> *Idem*, § 273.

<sup>42</sup> *Idem*, § 272.

<sup>43</sup> DPC/RPW 2021/4, p. 837 *Pöschl Tabakprodukte*, § 2.

<sup>44</sup> *Idem*, § 7.

<sup>45</sup> *Idem*, § 100 *et seq.*

<sup>46</sup> Federal Tribunal, case 4A\_229/2021, judgment of 18 January 2022 (also in DPC/RPW 2022/1, p. 298).

### III. Dominant positions

16. The Federal Administrative Tribunal confirmed Comco's sanction of over 70 million francs on Swisscom and two of its subsidiaries for abuse of a dominant position on the market for *pay live TV broadcasting of soccer and ice hockey games* of the Swiss major leagues.<sup>47</sup> In essence, the Court validated that the full access to such content was objectively necessary for every TV platform to compete on the merits. One should note particularly that the Federal Administrative Tribunal dealt (in a decision running to more than 200 pages) with the numerous interesting topics previously tackled by Comco in this matter.
17. In *Galenica* (now Vifor Pharma),<sup>48</sup> the Federal Administrative Tribunal largely upheld Comco's decision imposing a fine on this dominant undertaking on the market for *digital drug-related information* for entering into agreements with software companies comprising a combination of exclusive supply provisions and rights of first refusal (thus preventing other information providers from entering into agreements with such software companies) and for unlawfully bundling the access to drug-related information with other services.<sup>49</sup> It should be particularly noted that a discussion took place once again about the finding of a dominant position in the conclusions of the decision. It seems that Comco was interested in such finding so as to be able to rely thereon in relation to LCart/KG, Article 9(4), considering otherwise the high notification thresholds applicable in Swiss merger control. Referring notably to the judgments of the Federal Tribunal in *Terminierung Mobilfunk* and *Publigroupe*, the Federal Administrative Tribunal rejected Comco's argument and modified its decision on that specific point, which eventually led to a reduction of the sanction.<sup>50</sup>
18. *TV/Radiovermarktung* relates to the *distribution of TV and radio advertising time* in Switzerland by an undertaking alleged to be abusing its dominant position through various exclusionary practices; competitors were thus prevented from selling similar advertising time and complained that their loss over the past years amounted to several millions.<sup>51</sup> After dealing quite extensively with the critical issue of market definition, Comco's Secretariat defined (while leaving this definition ultimately open) the two relevant markets narrowly as the market for distribution of TV advertising time in Switzerland on private TV channels, and as the market for the distribution of radio advertising time in Switzerland.<sup>52</sup> With respect to the practices under scrutiny, the authority held that several aspects raised competition law concerns, including the bundling of rebates for TV with advertising volumes in other media (LCart/KG, Article 7[2][f]) and the granting of rebates depending on the condition that most of the radio advertising volume would be booked with the dominant undertaking (LCart/KG, Article 7[2][e]).<sup>53</sup> Eventually, this undertaking committed to take a range of measures to prevent exclusionary effects, which led Comco's Secretariat to close its preliminary investigation.<sup>54</sup>
19. In the telecommunication sector, one will certainly remember Comco's highly debated intervention last year preventing (through interim measures) Swisscom from moving ahead with the construction of its optical fibre network in peripheral areas with no *Layer 1 access*,<sup>55</sup> as well as the Federal Administrative Tribunal's lengthy decision confirming Comco's position.<sup>56</sup> This situation led Swiss Fibre Net AG to seek Comco's Secretariat assessment of a project aimed at setting up an FTTH infrastructure. Specifically, this undertaking wanted to ensure that its model would allow for sufficient wholesale Layer 1 access in terms of competition law. The authority

<sup>47</sup> Federal Administrative Tribunal, case B-4003/2016, judgment of 10 May 2022. With respect to Comco's decision, see *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2017/1, p. 102 § 8.

<sup>48</sup> Federal Administrative Tribunal, case B-2597/2017, judgment of 19 January 2022.

<sup>49</sup> See *Alberini A./Bovet C.*, Recent developments in Swiss competition law, RSDA/SZW 2021/1, p. 86 § 11.

<sup>50</sup> Judgment of 19 January 2022 (n. 48), § 10.

<sup>51</sup> DPC/RPW 2021/4, p. 807 *TV/Radiovermarktung*.

<sup>52</sup> *Idem*, § 49 *et seq.*

<sup>53</sup> *Idem*, § 90 *et seq.*

<sup>54</sup> *Idem*, § 154 *et seq.*

<sup>55</sup> See *Alberini A./Bovet C.*, Recent developments in Swiss competition law, RSDA/SZW 2022/1, p. 89 § 14.

<sup>56</sup> *Idem*, § 15.

confirmed this since, based on the information available relating to the model selected by Swiss Fibre Net AG, all internet service providers in the relevant area would have a Layer 1 access to the optical fibre network infrastructure of this operator.<sup>57</sup>

20. Further to Comco's *opening of the market for natural gas* a couple of years ago,<sup>58</sup> a city providing gas requested Comco's Secretariat approval of its project aimed at implementing Comco's decision based on a so-called "*Beistellung*" model. However, the authority considered that this model was actually preventing the opening of the gas market since it made it practically impossible for distributors to source gas from alternative suppliers at cheaper prices, thus maintaining the old market structure under which the city would supply gas to end consumers with the same level of margins. By way of conclusion, Comco's Secretariat indicated that it was still unclear when the Gas Supply Act would be adopted and warned against temporary schemes which would inhibit any opening of the market.<sup>59</sup>
21. Comco was requested by the Communications Commission to provide an expert opinion in the *interconnection* procedure based on the Telecommunication Act, Article 11a(2),<sup>60</sup> between Init7 (Schweiz) AG and Swisscom. This case relates once again to the complex issues of access to IP interconnection and the position of Swisscom on the market, which have been already addressed in the past.<sup>61</sup> Comco considered that Swisscom had entered with Deutsche Telekom into two customary contractual relationships (peering and transit) which, taken together however, were unusual. This situation provided Swisscom with a central disciplining position vis-à-vis its counterparties, which led Comco to conclude that Swisscom holds a dominant position in the market for access to IP interconnec-

tions to end customers of Swisscom with respect to autonomous systems operators which cannot enter into a peering relationship with Deutsche Telekom.<sup>62</sup>

#### IV. Merger control

22. The question as to whether *foreign transactions* are subject to Swiss merger control comes up on a regular basis.<sup>63</sup> Comco had thus once again the opportunity to recall the principle of effects in Switzerland set out in LCart/KG, Article 2(2), as further specified in the Notice on the Notification and Assessment under Merger Control, Section 4. More specifically, the exceptions provided for therein apply restrictively and, in the present case, even though the delivery of products was operated through sub-companies, the parties to the concentration were considered as having customers in Switzerland. Furthermore, Comco recalled that the turnover realized by an undertaking must be determined based on the location of the customers, i.e. the location where the product is delivered (*Leistungsort*), which was Switzerland. On the other hand, Comco confirmed that the transportation and logistics activities of the parties to the merger were not in a relationship with the activities of the Swiss post which would trigger the application of LCart/KG, Article 9(4).<sup>64</sup>
23. For once, Comco considered that an acquisition by Swisscom would not be subject to mandatory notification based on LCart/KG, Article 9(4). The transaction related to a target company operating exclusively in the field of software provisioning, an activity which could not be considered as being in an upstream, downstream or neighbouring relationship with Swisscom landline phone services within the meaning of the aforesaid provision.<sup>65</sup>

<sup>57</sup> Comco, case 54-0643, assessment of 25 October 2022 (*Rangierbares Glasfasernetz*), available on the authority's website at <<https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html>>.

<sup>58</sup> See Alberini/Bovet (n. 49), p. 86 § 9.

<sup>59</sup> DPC/RPW 2022/3, p. 580 *Beistellungsmodell beim Gasverkauf durch Dritte an Endkundinnen und Endkunden eines Gasnetzbetreibers*.

<sup>60</sup> LTC/FMG; RS/SR 784.10.

<sup>61</sup> See Bovet/Alberini, RSDA/SZW 2018 (n. 34), p. 73 § 12.

<sup>62</sup> DPC/RPW 2022/2, p. 545 *Gutachten: Interconnect Peering*.

<sup>63</sup> See Alberini/Bovet (n. 55), p. 89 § 18.

<sup>64</sup> DPC/RPW 2022/1, p. 77 *Beratung Meldepflicht Bächle Logistics GmbH / Hugger Holding GmbH / Logistic Center Villingen GmbH*.

<sup>65</sup> DPC/RPW 2022/1, p. 82 *Beratung Meldepflicht Unternehmenszusammenschluss Swisscom AG / Innovative Web AG etc.*

24. In addition to showing once again the diversity and narrow definition of relevant markets in the media sector (particularly with respect to advertising activities), a decision by Comco in the field of merger control merits some attention as it recalls the principles governing *collective dominance*. Comco assessed notably risks stemming from symmetries from various perspectives, namely technology, costs, business activities, interests and capacities, reaching the conclusion that the parties to the merger (called AB) would be more symmetrical with a specific competitor (called G). However, the authority held that the distinctive features of the competitors had played a minor role in the past, so that one might expect G to keep competing against the new consolidated entity AB.<sup>66</sup>
25. The *publication of decisions* may also be an issue under merger control. Since Comco and one of the parties to the merger referred to in the decision above<sup>67</sup> could not agree on a large range of pieces of information qualifying as business secrets, the authority was prompted to issue a decision in relation thereto. Particularly, Comco recalled that parties cannot merely blackline sections of the decision but, upon request, they must explain the reason for which the information concerned must be protected. It should be pointed out that, considering the circumstances and the work needed to issue the decision on business secrets, Comco charged over CHF 20,000 to the undertaking seeking the decision.<sup>68</sup>

## V. Procedure

26. The Federal Tribunal<sup>69</sup> did not follow the path the Federal Administrative Tribunal tried to open in 2021 regarding unannounced inspections (“*dawn*

*raids*”).<sup>70</sup> Moreover, our highest court rightly decided to join the appeal filed against this first judgment with a parallel appeal procedure pertaining to the positive judgment<sup>71</sup> rendered by the Federal Criminal Tribunal<sup>72</sup> further to the request presented by Comco with respect to the unsealing of data seized by the competition authority.<sup>73</sup> The close relationship between the two proceedings is particularly relevant since, strictly speaking, there are no disputable coercive measures as long as data are sealed and consequently no decision about the unsealing has been taken;<sup>74</sup> this situation excludes any procedural interest to contest coercive measures.<sup>75</sup> It also excludes contradictory decisions by the Federal Criminal Tribunal and the Federal Administrative Tribunal.<sup>76</sup> Therefore, as a rule, an appeal against an inspection before the latter is not admissible. On the other hand, the Federal Tribunal reserved the right of the parties to properly exercise – especially in a more detailed and argued manner – their right to state their possible objections in the triage stage of the unsealing procedure.<sup>77</sup> From a substantive law standpoint, the Federal Tribunal still examined the conditions of the inspection in connection with the legality of the way in which the (sealed) data had been obtained and recalled that a dawn raid violates the principle of proportionality because it is unnecessary, given that the authority already holds all the relevant information.<sup>78</sup>

27. *Publication of reports* drafted by the Comco’s Secretariat and *business secrets* are recurrent

<sup>66</sup> DPC/RPW 2022/2, p. 328 *Zusammenschlussvorhaben AB* (in particular § 566 *et seq.*).

<sup>67</sup> See DPC/RPW 2022/2, p. 328 (n. 66).

<sup>68</sup> DPC/RPW 2022/2, p. 509 *Publikation der Stellungnahme der WEKO – Zusammenschlussvorhaben [A]/[B]*.

<sup>69</sup> Federal Tribunal, cases 2C\_295 and 2C\_307/2021, judgment of 1 December 2021 (also in DPC/RPW 2022/1, p. 286 *Hausdurchsuchung und Beschlagnahme*).

<sup>70</sup> Federal Administrative Tribunal, case B-4839/2020, judgment of 4 March 2021 (also in DPC/RPW 2022/1, p. 272 *Hausdurchsuchung und Beschlagnahme*), summarized in *Alberini/Bovet* (n. 55), p. 89 § 23.

<sup>71</sup> Federal Criminal Tribunal, case BE.2020.16, judgment of 24 February 2021.

<sup>72</sup> According to Federal Law on Criminal Administrative Law (DPA/VStrR; RS/SR 313.0), Article 50(3), the Lower Appeals Chamber (*Cour des plaintes/Beschwerdekammer*) of the Federal Criminal Tribunal is competent to hear this type of request.

<sup>73</sup> Judgment of 1 December 2021 (n. 69), § 2.1, esp. § 2.1.2 and 2.1.5.

<sup>74</sup> *Idem*, § 3.3.5.

<sup>75</sup> *Idem*, § 3.4.1.

<sup>76</sup> *Idem*, § 3.4.1.

<sup>77</sup> *Idem*, § 4.2.3 to 4.2.6.

<sup>78</sup> *Idem*, § 4.1.5.1.

subjects of litigation between the authority and parties.<sup>79</sup> In its judgment of 16 April 2021, the Federal Administrative Tribunal first reiterated that such publication is deemed to constitute a real act<sup>80</sup> under Federal Law on Administrative Procedure,<sup>81</sup> Article 25a,<sup>82</sup> and that the opening and the closing of a preliminary investigation by the Secretariat, as well as the determination to open a full investigation, were not decisions within the meaning of PA/VwVG, Article 5.<sup>83</sup> While recognizing that the competition authority holds some margin of appreciation in qualifying data as business secrets, the Court emphasized that there is no place for any balance of interest process once this qualification has been reached.<sup>84</sup> In this case, information pertaining to turnover was characterized as business secrets;<sup>85</sup> on the other hand, the claim relating to general terms contained in a few section titles was rightly rejected.<sup>86</sup> Arguments relating to data protection were also carefully examined: data which do not fall under the special provisions of LCart/KG dealing with business secrets<sup>87</sup> are subject to the general rules of data protection law imposing a balance of interest

process.<sup>88</sup> The impact of publicity then plays a central role, including in terms of administrative transparency and deterrence.<sup>89</sup> The relatively long period elapsed between the drafting of the report and its publication due to the length of the judicial procedure does not constitute an obstacle to these purposes.<sup>90</sup>

28. The jurisprudence relating to *access to documents by third parties*<sup>91</sup> – especially authorities and public entities whose interests were harmed by anticompetitive behaviours in public procurement contracts – is now rather well established.<sup>92</sup> Comco implemented these principles in several procedures.<sup>93</sup> While in these situations the Federal Law on Information Transparency in the Administration is usually invoked as a secondary legal ground,<sup>94</sup> it may constitute the main, if not the only motivation in other circumstances. In the latter case, the special provisions of LCart/KG, Articles 25(2) and 26(3), lead to a restrictive application of the general law.<sup>95</sup>
29. What is the relevant *degree of evidence* required in competition law? This is one of the questions the Federal Administrative Tribunal tried to answer in its judgment pertaining to the so-called Volkswagen “Projekt Repo 2013”.<sup>96</sup> As pointed out by

<sup>79</sup> *Bovet/Alberini* (n. 5), p. 73 § 16 and 19.

<sup>80</sup> *Acte matériel/Realakt*.

<sup>81</sup> PA/VwVG; RS/SR 172.021.

<sup>82</sup> Federal Administrative Tribunal, case B-4139/2015 (*Publikation des Schlussberichts*), judgment of 16 April 2021, § 1.1 (also in DPC/RPW 2021/4, p. 1055). Based on procedural grounds, the Federal Tribunal refused to hear the case (Federal Tribunal, case 2C\_451/2021, judgment of 9 June 2021; also in DPC/RPW 2021/4, p. 1090). See Comco’s decisions pertaining to anonymization, business secrets and publication in DPC/RPW 2021/4, p. 926 and DPC/RPW 2021/4, p. 936. See also Federal Administrative Tribunal, case B-2548/2019 (*Publikation der Stellungnahme der WEKO*), judgment of 21 September 2020 (also in DPC/RPW 2021/4, p. 1067), confirmed by the Federal Tribunal, case 2C\_874/2020, judgment of 19 October 2021 (also in DPC/RPW 2021/4, p. 1082 *Publikation einer Stellungnahme*), pertaining to a concentration accepted without any corrective measure. For another case of application in merger control, see DPC/RPW 2022/2, p. 509 *Publikation der Stellungnahme der WEKO – Zusammenschlussvorhaben [A]/[B]* (n. 68).

<sup>83</sup> Judgment of 16 April 2021 (n. 82), § 3.5.

<sup>84</sup> *Idem*, § 5.2.

<sup>85</sup> *Idem*, § 5.5.2.

<sup>86</sup> *Idem*, § 5.5.1.

<sup>87</sup> LCart/KG, Article 25(4).

<sup>88</sup> Judgment of 16 April 2021 (n. 82), § 6.5.

<sup>89</sup> *Idem*, § 6.5.2.

<sup>90</sup> *Idem*, § 6.6.

<sup>91</sup> Regarding the parties’ right to access to the file (*in casu* partially and temporarily limited) and their right to appeal (*in casu* refused on procedural grounds), see Federal Administrative Tribunal, case B-4139/2021, judgment of 25 October 2022.

<sup>92</sup> See *Bovet/Alberini* (n. 5), p. 73 § 20, and *Bovet/Alberini*, RSDA/SZW 2019 (n. 34), p. 73 § 22.

<sup>93</sup> DPC/RPW 2022/2, p. 472 *Herausgabe von Verfahrensakten an Dritte bezüglich der noch nicht rechtskräftigen Sanktionsverfügung See-Gaster*; DPC/RPW 2022/2, p. 495 *Wiedererwägung der Verfügung auf Herausgabe von Verfahrensakten an Dritte bezüglich der noch nicht rechtskräftigen Sanktionsverfügung Hoch- und Tiefbauleistungen See-Gaster*, and DPC/RPW 2022/2, p. 504 *Herausgabe von Verfahrensakten an Dritte bezüglich der noch nicht rechtskräftigen Sanktionsverfügung Hoch- und Tiefbauleistungen Engadin I*.

<sup>94</sup> For instance, DPC/RPW 2022/2, p. 472 (n. 93), § 42.

<sup>95</sup> DPC/RPW 2022/2, p. 458 *Zugang zu amtlichen Dokumenten eines landwirtschaftlichen Dossiers*, in particular § 39 and 40.

<sup>96</sup> Federal Administrative Tribunal, case B-7920/2015, judgment of 16 August 2022 (also in DPC/RPW 2022/3, p. 676).

the Court, fully persuasive evidence (*Überzeugungsbeweis*) should be the rule,<sup>97</sup> and likelihood (*Wahrscheinlichkeitsbeweis*) the exception.<sup>98</sup> The latter should in particular apply to economic issues, for which there is always a certain level of uncertainty.<sup>99</sup> In a case where the authority has to determine whether an agreement falls within the scope of LCart/KG, Article 5(3), the burden of proof rests with Comco,<sup>100</sup> which has to establish separately the participation of each of the undertakings in the cartel.<sup>101</sup> After a careful and step-by-step reexamination of the facts and the

law, the Court concluded that one could indeed establish that the appellant had entered into an anticompetitive agreement through its general behaviour in this case.<sup>102</sup> Comco's sanction was confirmed as a consequence of an unlawful price-fixing agreement.<sup>103</sup> On the other hand, administrative measures ordered by the competition authority were cancelled because they were deemed to be disproportionate: the infringement occurred during a limited period of time and the risk of reiteration was very weak.<sup>104</sup>

<sup>97</sup> *Idem*, § 6.3.1.

<sup>98</sup> *Idem*, § 6.3.2.

<sup>99</sup> *Ibidem*.

<sup>100</sup> *Idem*, § 6.3.4.

<sup>101</sup> *Idem*, § 6.4.

<sup>102</sup> *Idem*, § 8.10.

<sup>103</sup> *Idem*, § 11.

<sup>104</sup> *Idem*, § 12.3.