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# Recent developments in Swiss competition law

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**Table of contents**



## I. Introduction

1. An in-depth *reform* of the Federal Law on Cartels and Other Competition Restraints[1] should not be expected any time soon. On 17 September 2014, the National Council confirmed its decision of non-consideration, which, in accordance with Swiss parliamentary procedure, led to the closing of a long legislative process that started during the winter 2006/2007 with the mission entrusted to an expert group by the head of the Federal Department of Economic Affairs.[2] It is unlikely that this time-consuming process will reopen soon. On the other hand, one might observe political moves on limited issues, typically because of the – unfortunately, usual – discussions relating to the limited effects of the so-called "strong Swiss franc" on retail prices in Switzerland.[3]

2. The *Agreement between the European Union (EU) and the Swiss Confederation Concerning the Cooperation on the Application of their Competition Laws* was duly adopted by the Swiss Parliament,[4] together with an amendment of the LCart/KG:[5] new LCart/KG, Article 42*b*(2), provides for several conditions to the transmission of data to foreign competition on the basis of an international agreement, without the consent of the parties to the procedure. Two conditions deserve special attention: first, the behaviour under investigation in the recipient state must also be unlawful under Swiss law;[6] although practically this rule might not be a problem eventually, it still raises some legal issues, namely because it adds a condition – not negotiated between the parties – to an international agreement.[7] Second, confidential data should not be disclosed to the foreign competition authority in the context of an amicable settlement or when assisting in the discovery and elimination of the restraint of competition; this condition is fully consistent with Article 7(6) of the Agreement, pursuant to which: "The competition authorities of the Parties shall not discuss or transmit to each other information obtained under the Parties' leniency or settlement procedures, unless the undertaking which provided the information has given its express consent in writing."[8] If one follows the interpretation given by the Federal Councillor in charge of the Department of Economic Affairs,[9] one should exclude any jurisdictional control of the application of the Agreement and of the conditions of LCart/KG, Article 42*b*(2). This is partly supported by the text of LCart/KG, Article 42*b*(3), under which the notification to the undertakings concerned by the exchange of information should allow them "to state [their] views before transmitting the data to the foreign competition authority"; contrary to the provisions of Swiss financial regulations, in LCart/KG, Article 42*b,* there is no explicit reference to the rendering of a proper administrative decision and the possibility to file an appeal against it.[10] Should the Courts follow this interpretation, the application of this Agreement

1 LCart/KG (RS/SR 251).

2 The authors presented this reform over the years in this chronicle (see for instance *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2012/2, p. 150 § 1). For the documentation (which now belongs to legal history!), see the website of the Swiss Federal Competition Commission (Comco) at *<http://www.weko.admin.ch/dokumentation/00216/index.html?lang=fr>*.

3 In particular, Comité de PME pour des prix équitables à l'importation / KMU-Komitee für faire Importpreise *(<http://www.faire-importpreise.ch/index_fr.html>)*.

4 RS/SR 0.251.268.1. Published in the EU in OJ 2014 L 347, p. 3 (Council decision of 21 October 2014 published in OJ 2014 L 347, p. 1). The Agreement entered into force on 1 December 2014 (RO/AS 2014 3711). For a general presentation of this Agreement, see our previous chronicle, *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2014/4, p. 435–436, § 2.

5 RO/AS 2014 3713.

6 LCart/KG, Article 42*b*(2)(a).

7 However, see Article 13 of the Agreement (note 4), which offers an original solution to this possible conflict ("Nothing in this Agreement shall be construed to prejudice the formulation or enforcement of the competition laws of either Party").

8 See the definitions of "leniency" and "settlement procedure" in, respectively, Articles 2(7) and (8) of the Agreement (note 4).

9 BO/AB 2014 E/S 450 (*item* 13.044).

10 For instance, Federal Law on Stock Exchanges and Securities Trading (LBVM/BEHG, RS/SR 954.1), Article 38(5).

will certainly be facilitated – and the rights of the parties weakened.[11]

3. Since the Agreement restricts the retransmission of data by the EU Commission to competition authorities of Member States and vice versa,[12] Comco might have to use again the strategy – or should one say "stratagem"? – of *letters rogatory* based on the Hague Convention of 18 March 1970 on the taking of evidence abroad in civil or commercial matters.[13] In substance, Comco successfully argued before the French competent authority, in the LIBOR/TIBOR/EURIBOR case,[14] that it should be considered as a "judicial authority" under the Convention. Among other things, it relied on the fact that there was no appeal before a civil or commercial court against Comco's decisions – which is not surprising under Swiss administrative law and procedure. The responses to a 2008 questionnaire,[15] on which the authority also partly based its arguments, are not as univocal as stated in Comco's request. In particular, the analogy made in relation to social security matters is not so obvious since, first, in the relevant excerpt of the summary drafted by the Permanent Bureau of the Hague Conference on Private International Law stated that: "Switzerland noted that, while its Federal Tribunal has ruled that social security proceedings are civil in character, the laws of some Cantons hold the opposite."[16] Second, the Federal Tribunal's judgment referred to in the responses by the Swiss authorities to the Permanent Bureau[17] dates back to 28 April 1966,[18] i.e. four years before the adoption of the Hague Convention. It relates to the notification of a decision on social security individual rights;[19] it is in this precise context that the Court admitted a broad interpretation of "civil matters", considering that such a personal claim by an insured person against a social security public organization should be included in the material scope of the 1954 Hague Convention on Civil Procedure.[20] Last but not least, Switzerland's responses to the Permanent Bureau clearly presented the regime governing competition law in our country;[21] an application of these principles should have excluded Comco's request for letters rogatory.

## II. Agreements

4. The level of evidence was one of the central elements of the three judgments rendered by the Federal Administrative Tribunal in connection with a cartel of producers of *mountings for windows*.[22] In 2012 the EU Commission fined nine producers a total

11 However, Federal Councillor *Schneider-Ammann* (BO/AB 2014 E/S 450): *"Ich will aber auch noch unmissverständlich klarmachen, dass die betroffenen Unternehmen auch ohne Beschwerderecht bei der Informationsübermittlung ihre Interessen wahren können."*

12 Article 10 of the Agreement (note 4).

13 RS/SR 0.274.132.

14 DPC/RPW 2014/2, p. 450.

15 This document is available on the website of the Hague Conference on Private International Law at <*http://www.hcch.net/index_en.php?act=conventions.publications&dtid=33&cid=82*>.

16 Idem, p. 28.

17 This document is available on the website of the Hague Conference on Private International Law at <*http://www.hcch.net/upload/wop/2008switzerland20.pdf*>. See p. 23: *"Dans un arrêt ATFA 1966 67–73, le Tribunal fédéral des assurances a indiqué qu'il convenait d'accorder l'entraide en matière d'assurances sociales de la même manière qu'en matière civile. Quelques AC (8) se sont néanmoins prononcées par la négative."*

18 ATFA/EVGE 1966, p. 67. See also the legal opinion issued on 26 February 2013 by the Federal Directorate of Public International Law, "Zustellung amtlicher Dokumente an eigene Staatsbürger im Ausland", JAAC/VPB 2014.10, p. 186, in particular p. 188–190.

19 *Idem,* § 3.

20 RS/SR 0.274.12.

21 Summary (note 15), p. 29: "**Anti-trust and Competition.** Thirteen States […] advised that they consider such proceedings fall within the Convention's scope, while five States […] advised that they do not. Four States [including Switzerland] advised that such proceedings may sometimes fall within the Convention's scope, but it would depend upon the particular facts of the case" (citations omitted). Switzerland's response on this issue is particularly explicit and refers in substance to the classical theory of distinction between public law and private law (note 17, p. 23): *"Concurrence et législation antitrust[:] Notamment dans ce domaine, il est nécessaire d'analyser à fond si la nature de la prétention est civile, si les parties qui s'opposent agissent sur un pied d'égalité ou si l'une d'entre elle fait usage de prérogatives de puissance publique à l'égard de l'autre. Selon les circonstances du cas d'espèce, ce domaine peut être considéré comme relevant du champ d'application couvert par l'expression ‹en matière civile et commerciale› ou non."*

22 Judgments of 23 September 2014, cases B-8399/2010 *Siegenia-Aubi,* B-8404/2010 *SFS unimarket* and B-8430/2010 *Paul Koch*.

amount of 86 million euros.[23] In 2010 the Swiss competition authority had sanctioned four companies in the same sector; a fifth one was granted full immunity under Comco's leniency regime. Three of them appealed against the Swiss decision. After rightly pointing out that instructions from a mother company to its subsidiaries led to the latter's lack of independence from a competition law standpoint,[24] the Court offered a detailed study of the principles governing the gathering and the assessment of evidence in competition law proceedings. It admitted all the appeals.[25] Interestingly, it stated in this context that the self-reporting undertaking enjoyed the same rights as all other parties in the procedure; in particular, the requirements regarding the level of proof were identical and the inquisitorial principle applied fully.[26] The application of the full-proof *("Vollbeweis")*[27] standard and hesitations on the cause-and-effect relationship between agreements entered into at the European level and their impact on the Swiss market were eventually favourable to the appellants.[28] The Court's conclusions were also supported by Comco's failure to properly analyse some relevant market data.[29] Appeals filed by the Federal Department of Economic Affairs against two of these judgments are pending before the Federal Tribunal.

5. The *Meldesystem Baumeisterverbände* case[30] confirms the competition authority's strict approach towards *exchange of information* among competitors. Cantonal associations of entrepreneurs set up a system whereby the members had to disclose public procurement procedures in which they were participating.[31] According to Comco, such a system increases transparency regarding the number and the identity of participants in public procurement procedures, which is likely to affect significantly effective competition.[32] In response to the undertakings' arguments, Comco stated that it was difficult to see why the system as it was set up was necessary for statistical purposes. In particular – Comco pointed out – data concerning submissions do not have to be shared among competitors while submission procedures are ongoing; such data could be shared afterwards.[33]

6. While e-commerce is expanding worldwide and in Switzerland, the *Jura* case[34] recalls that *restrictions of online sales* can qualify as unlawful agreements under competition law. More specifically, Comco dealt with the allegation that Jura refused to provide repair services covered by its guarantee for coffee machines that were sold online. Through investigatory measures, Comco clarified that the refusal was limited to sales by undertakings which were not part of Jura's distribution network; in line with the EU Court of Justice, Comco considered that such refusal does not breach competition law.[35]

23 See for instance, EU Commission's press release of 28 March 2012, "Antitrust: Commission fines nine producers of window mountings €86 million for price fixing cartel", available on the website of the Commission at <*http://europa.eu/rapid/press-release_IP-12-313_en.htm*>. Appeals are pending before the EU General Court (see for instance, OJ 2012 C 227, p. 30 [case T-252/12 *Gretsch-Unitas*]).

24 In particular, *Siegenia* judgment (note 22), § 2.7.

25 *Idem,* § 4.

26 *Idem,* § 4.4.35. In the *SFS unimarket* judgment (note 22), § 4, the Federal Administrative Tribunal expressly stated that a self-reporting undertaking was also fully entitled to file an appeal against Comco's decision; this action was not inconsistent with the fact of first self-reporting behavior in breach of competition law.

27 In this connection, the following considerations are especially important (*Siegenia* judgment [note 22], § 6.1.3): *"Folglich hat die Vorinstanz* de lege lata *in jedem Einzelfall nachzuweisen, dass der Wettbewerb durch die fragliche Abrede erheblich beeinträchtigt wird. Zum heutigen Zeitpunkt besteht im schweizerischen Kartellrecht somit keine per se-Erheblichkeit, weshalb die Auswirkungen von Absprachen auf dem Markt durch die Vorinstanz zu untersuchen sind."* See also the *Paul Koch* judgment (note 22), § 5.3.2, referring to the Federal Administrative Tribunal's 2013 *Gaba* judgment: *"Sowohl im ordentlichen Verwaltungsverfahrensrecht als auch im Kartellrecht gilt grundsätzlich das Beweismass des Vollbeweises, mithin der Gewissheit (vgl. Urteil des Bundesverwaltungsgerichts B-506/2010 vom 19. Dezember 2013,* Gaba*, E. 5)."*

28 In particular, *Siegenia* judgment (note 22), § 5.3.1.1.38, 5.3.1.2.28, 5.4.23.

29 For instance, *idem,* § 6.3.18 et seq. (keyword: *"Beweislücke"* [e.g. *idem,* § 6.3.39]).

30 DPC/RPW 2014/2, p. 371 *Meldesystem Baumeisterverbände*.

31 *Idem,* § 1.

32 *Idem,* § 51 et seq.

33 *Idem,* § 66 et seq.

34 DPC/RPW 2014/2, p. 407 *Jura*.

35 *Idem,* § 27 et seq., in particular § 86.

## III. Dominant positions

7. The so-called "phasing-out" of the *Swatch Group* as a provider of watch components to competitors was eventually the object of an amicable settlement.[36] Beyond the specificities of this market, the content of some of the commitments are worth a careful reading. For instance, the four stages of this phasing-out – starting with a gradual reduction of deliveries of 10% per two-year periods (i.e. 75% in 2014 and 2015; 65% in 2016 and 2017; and 55% in 2018 and 2019) to end by an abrupt 0% as from January 2020[37] – constitute a rather strong message to the industry. Similarly, Comco's control and approval of agreements that would depart from the settlement with the Swatch Group might be quite burdensome and affect the flexibility of some market actors.[38]

8. In its landmark *Mobilfunkterminierung* decision a few years ago, the Federal Tribunal set strict requirements to show that *excessive prices or trade conditions* are imposed within the meaning of LCart/KG, Article 7(2)(c); in particular, such prices or conditions are not deemed to be imposed merely because they come from an undertaking holding a dominant position.[39] In *ETA Preiserhöhungen,*[40] Comco was faced with price increases by the Swatch Group's subsidiary ETA (as well as unilateral changes in its supply terms and conditions). ETA produces mechanical movements, which are distributed to both members of the Group and third parties. First, it appeared that ETA did not discriminate third parties against companies of the Swatch Group. Second, and more importantly, it did not appear that Swatch's competitors suffered from a competitive disadvantage resulting from the price increase; in this connection, Comco underlined that LCart/KG, Article 7(2)(c), does not confer the right to be supplied at a certain price.[41] This case confirms that the imposition of excessive prices may only be established under exceptional circumstances.

9. In *Netzwerkgeräte Cisco Systems,*[42] Comco assessed whether Cisco Systems Inc. abused a dominant position in the *provision of technical support services* for Ethernet switches and router. In particular, the question arose as to whether Cisco unlawfully tied software updates of its system with additional support services provided by either Cisco itself or its commercial partners. While leaving open the question of Cisco's dominant position, Comco stated that several elements supported such a position in the markets for support services for Ethernet switches and router and in the markets for updates for these devices;[43] it is worth pointing out that Comco rejected Cisco's argument that the primary market for devices and the secondary market for services should qualify as a system market.[44] Comco concluded that unlawful tying could possibly be supported by several elements, including the fact that during the guarantee period of the devices, bug fixes and maintenance releases could be made available to customers, even if said customers were not provided with technical support services. In addition, Cisco's customers may have been incentivized to purchase updates from Cisco. Finally, Cisco did not adequately inform its customers that updates and services could be obtained from third parties. All this may have prevented third party providers from competing against Cisco.[45] In the end, Comco did not fully assess the case as Cisco made several commitments, the implementation of which will be monitored by Comco.[46]

10. The *Eignerstrategie Energie Wasser Bern (ewb)* case[47] shows the delicate *interaction between competition law and economic regulation*.[48] At the heart of this case lies the acquisition by ewb – which enjoys a legal monopoly in several fields, such as the provision of energy and water – of participations in several privately held companies operating in downstream or neighbouring markets. Thanks to its legal monopoly,

36 DPC/RPW 2014/1, p. 215 *Swatch Group Lieferstopp*. For more details about this case, see *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2012/2, p. 157, § 13.

37 *Swatch Group Lieferstopp* decision (note 36), p. 285, Commitment 3.

38 *Idem,* Commitment 4.

39 See our 2012 chronicle (note 36), § 12.

40 DPC/RPW 2014/2, p. 396 *ETA Preiserhöhungen*.

41 *Idem,* § 76 et seq.

42 DPC/RPW 2014/2, p. 353 *Netzwerkgeräte Cisco Systems*.

43 *Idem,* § 53 et seq.

44 § 96 et seq.

45 *Idem,* § 110 et seq.

46 *Idem,* § 160 et seq.

47 DPC/RPW 2014/1, p. 79 *Eignerstrategie Energie Wasser Bern (ewb)*.

48 In this respect, see for instance our 2012 chronicle (note 36), § 15 (*Switch/Switchplus* case) and § 16 (*Gebäudeversicherung Bern [GVB]* case).

ewb was alleged to have promoted its subsidiaries to the detriment of competition in markets not covered by the legal monopoly. Obviously, ewb holds a dominant position in the markets covered by its legal monopoly; by contrast, the downstream and neighbouring markets are characterized by competition.[49] After carefully assessing ewb's behaviour, the Secretariat stated that there were no sufficient elements in support of (i) the transmission of useful information from the activities covered by the legal monopoly to the activities subject to competition,[50] (ii) the existence of cross-subsidies between said activities,[51] (iii) the refusal to supply third parties as a consequence of the new activities acquired by ewb,[52] and (iv) the creation of technical barriers or the implementation of tying strategies which would have prevented competitors from effectively competing in markets not covered by the legal monopoly.[53] Moreover, it should be noted that an interesting section of the decision is dedicated to the concept of undertaking in the presence of a group of companies; this section deals notably with the criteria under which political bodies qualify as mother companies (and thus as undertakings within the meaning of competition law) of publicly held companies.[54]

11. *Complex cooperation agreements* are of growing importance in infrastructure markets, and their assessment under competition law is often difficult; in this respect, one may recall the partnerships between local public utilities and Swisscom for the construction and operation of the FTTH network in the main Swiss cities and the uncertainty surrounding Comco's position regarding some of the key provisions governing these partnerships.[55] The *Verbändevereinbarung Erdgas Schweiz* decision relates to the *natural gas sector* and is based on a request for ruling pursuant to LCart/KG, Article 49*a*(3)(a), filed by VSG, an association of companies operating the natural gas network.[56] In short, VSG asked Comco to clear the cornerstones of a cooperation agreement entered into with two entities representing the interests of industrial natural gas purchasers. First, Comco clarified that competition law applies to network access conditions, the transport of natural gas, as well as the high and low pressure pipes. More specifically, as per the regulation applicable to such pipes, the operator has to accept transport for third parties under essentially the same conditions as those set out in LCart/KG, Article 7.[57] Unsurprisingly, Comco then stated that operators of the natural gas network – at the level of both transport and distribution – enjoy a natural monopoly position, as no parts of the network overlap.[58] With respect to the cornerstones of the cooperation agreement at stake, Comco's position can be summarized as follows:

– The first-come-first-served principle, which applies to network access and would be combined with an auction scheme should a bottleneck situation occur, does not necessarily raise competition law issues.[59]
– The *Netzstabilitätspönalen* (*i.e.* penalties imposed on third parties should they exceed a certain threshold in relation to the use of the regional network) would lead to discrimination against third parties relative to the contracting parties; therefore, the parties agreed to revise their agreement and to apply these penalties to each user of the network under the same conditions.[60]
– The increase in price charged to third parties – should they exceed the maximum transport capacity agreed upon in their agreements with the network operators (it being specified that the increase would apply retroactively to the entire duration of each agreement concerned) – raises the same concerns as the *Netzstabilitätspönalen;* the parties revised the agreement accordingly.
– The definition of criteria for access to the network raises significant concerns from a competition law perspective, although sound legitimate business reasons could justify such limitations. More fundamentally, Comco recognized that a regulatory framework governing access to the network is missing in the natural gas sector.

49 *Idem,* § 40 et seq., in particular § 61.
50 *Idem,* § 101 et seq.
51 *Idem,* § 85 et seq.
52 *Idem,* § 83 et seq.
53 *Idem,* § 83 et seq.
54 *Idem*, § 22 et seq., in particular 26 et seq.
55 In this respect, see our 2012 chronicle (note 36), § 11, and *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2013/2, p. 163 § 13.
56 DPC/RPW 2014/1, p. 110 *Verbändevereinbarung Erdgas Schweiz*.
57 *Idem,* § 15 et seq.
58 *Idem,* § 93 et seq.
59 *Idem,* § 119 et seq.
60 *Idem,* § 126 et seq.

> That said, such framework can be set neither by the main players through private regulation nor by Comco (whose authority is limited to *ex post* interventions).[61]

As a last note, this case shows once again the limits of the request for ruling pursuant to LCart/KG, Article 49*a*(3)(a). On several occasions, Comco indicated that it was difficult to anticipate the effects of the provisions set out in the agreement notified by the parties, and that those effects would have to be assessed on a case-by-case basis.[62] It should be noted that the parties asked Comco to draft the final report in a way that would (at least) significantly reduce their risk of being fined.[63]

12. In the context of the broad discussion relating to the *high costs of health services in Switzerland,* santésuisse (i.e. the organization representing the interests of insurers) adopted several measures aiming at reducing the costs generated by marketing telephone calls.[64] The main measures were the following: (i) ending the practice of telephone calls by insurers or third parties (e.g. call centers) aimed at acquiring new customers, and no longer financing related costs through the mandatory health insurance, (ii) capping the amount paid to brokers and providers of comparison services, and (iii) introducing regulation of quality requirements applicable to brokers.[65] Following up on a request for ruling pursuant to LCart/KG, Article 49*a*(3)(a), Comco discussed whether the aforementioned measures qualified as a buyer cartel or a buying group. In that respect, Comco referred to the EU Commission Guidelines on horizontal agreements. Considering that the measures were unilaterally setting the price paid to counterparties and amounted in part to a boycott of certain services provided by said counterparties – and that the counterparties did not hold any market power, the measures qualified as a buyer cartel.[66] Indirectly, the measures also led to the internalization of efforts by insurers to acquire new customers in the field of supplementary insurances, such internalization being detrimental to smaller insurers. Furthermore, the transparency in relation to premiums would decrease causing the search costs of customers to rise. As a general result, the level of competition for premiums would decrease and customers would tend to stay with their current insurer.[67] Eventually, santésuisse decided to put an end to the measures notified to Comco.[68]

## IV. Merger control

13. In *Aurelius/Publicitas,*[69] the question came up again whether *LCart/KG, Article 9(4),* continues to apply when circumstances have changed since a dominant position was established in a previous decision. In line with recent case law, Comco recalled that the obligation set out in LCart/KG, Article 9(4), ends only if the loss of the dominant position is recognized in a formal decision.[70] Additionally, the *Aurelius/Publicitas* case is interesting from the perspective of the *creation or strengthening of a dominant position test*. Comco recalled that the combination of market shares is not the only situation leading to the creation or strengthening of a dominant position; economies of scope may also have a similar outcome. In the case at hand, Aurelius was taking over the activities relating to media sales of Publigroupe; the software solutions developed by Aurelius, combined with the multichannel advertising services provided by Publigroupe, could potentially reinforce the transferred activities. However, Comco concluded that this risk was low, based on the fact that Aurelius' software solutions did not belong to the company's key products and that Publigroupe already had its own software solutions.[71]

14. In *Debrunner Koenig holding AG/BST holding AG,*[72] Comco held that the acquisition by an undertaking having a 20–30% market share (market leader) of another undertaking with a 10–20% market share (second operator in the market) does not raise competition issues when the market is fragmented (twenty other competitors operate on the relevant

61 *Idem,* § 153 et seq.
62 See for instance § 226.
63 *Idem,* § 229.
64 DPC/RPW 2014/1, p. 153 *Vereinbarung santésuisse betreffend Kundenwerbung*.
65 *Idem,* § 1 et seq.
66 *Idem,* § 88 et seq., in particular 122 et seq.
67 *Idem,* § 136 et seq.
68 *Idem,* § 173 et seq.
69 DPC/RPW 2014/2, p. 421 *Aurelius/Publicitas*.
70 *Idem,* § 25 et seq.
71 *Idem,* § 51 et seq.
72 DPC/RPW 2014/1, p. 307 *Debrunner Koenig holding AG/BST holding AG*.

market), competitors are able to improve their production facilities within a short period of time, some competitors are part of larger international groups, the market is characterized by low barriers to entry, the products are homogeneous and standardized, and relevant technologies are made available to all market participants by third parties.[73] It should be further noted that Comco did not clear a five-year non-compete obligation and recalled that such restriction can exceed three years only in very particular circumstances.[74]

15. In addition to some developments on natural monopoly[75] and economies of scope,[76] one can draw from the *Thomas Kirschner/Valora Mediaservices AG* decision that Comco took into account *efficiencies*. Valora was vertically integrated, i.e. had operations both at wholesale and the retail level in the press sector. Through the sale of the press activities at the wholesale level to an independent third party (Thomas Kirschner), Valora maintains only its press activities at the retail level and, therefore, is no longer vertically integrated. Comco held that such a spin-off is positive from a competition law standpoint.[77]

16. From the perspective of the *definition of the relevant market,* the following developments call for attention:

– Among the 34 markets addressed in the *Swisscom (Schweiz) AG/Publigroupe SA* decision, Comco defined several markets in relation to contact data (market for contact data, market for users of contact data and related services and market for advertising in connection with contact data and related services).[78]
– Comco left open the question whether e-books belong to the same market as physical books; also, the question was left open whether e-readers should be put in a market separate from e-books or rather whether e-readers and e-books form jointly a system market.[79] Along the same lines, Comco did not answer the question whether online sales of electronics devices are substitutable for sales of these devices in brick and mortar shops.[80]
– Comco considers that its definition of the relevant market in the *Publigroupe* decision of 2007 is still valid: online media are not substitutable for printed media and therefore the provision of advertising spaces in one of these media does not compete with the provision of advertising spaces in the other media.[81]

## V. Procedure

17. Important economic interests are often at stake in competition law and proceedings are usually rather long. Some parties try to mitigate the effects of this situation through *conservatory measures*. The conditions are strict, and both Comco and the Federal Administrative Tribunal impose a higher standard of proof when the measures aim at imposing a particular behaviour to one of the parties *("gestaltende Massnahmen")*.[82] Likelihood remains the test for evidence, but the degree is higher than for measures aiming at maintaining an existing situation or preserving elements of proof *("sichernde Massnahmen")*.

18. According to Federal Law on Administrative Procedure,[83] Article 46(1), an appeal against *interim orders,* other than those dealing with jurisdiction or recusal issues, is permitted only (a) if they may cause irreparable harm or (b) if granting the appeal would immediately bring about a final decision and thereby obviate significant expenditure in time or money in prolonged evidentiary proceedings. If this is not the case, interim orders may be contested by appeal at the same time as an appeal against the final ruling, provided these orders have an effect on the content of such ruling. Considering that the conditions of PA/VwG, Article 46(1), were not fulfilled, the Federal Administrative Tribunal declared inadmissible an appeal against Comco's decision to grant the quality of

73 *Idem,* § 33 et seq.
74 *Idem,* § 44 et seq.
75 DPC/RPW 2014/2, p. 430 *Thomas Kirschner/Valora Mediaservices AG*, § 54 et seq.
76 *Idem,* § 59 et seq.
77 *Idem,* § 62.
78 DPC/RPW 2014/3, p. 515 *Swisscom (Schweiz) AG/Publigroupe SA,* § 37 et seq. (to be noted that Comco referred to some previous cases).
79 DPC/RPW 2014/3, p. 545 *Droege International Group AG/Verlagsgruppe Weltbild GmbH i.l*, § 9.
80 *Idem,* § 14.
81 *Aurelius/Publicitas* decision (note 69), § 34 et seq.
82 Judgment of 9 July 2014, case B-4637/2013 *upc cablecom,* § 3. Published in DPC/RPW 2014/2, p. 452. Comco's decision is published in DPC/RPW 2014/2, p. 387 *Sport im Pay-TV – vorsorgliche Massnahmen*.
83 PA/VwG (RS/SR 172.021).

parties to three providers in the *CT Cinetrade* case.[84] The Court relied on legal authors who consider that an appeal in such a case should be accepted only in exceptional circumstances,[85] not realized here. Among other things, it rejected the arguments that Comco's decision would open the way to 250 cable operators to join the procedure.[86]

19. An undertaking that Comco found to have breached a mandatory notification within the meaning of LCart/KG, Article 51(1), filed an appeal with the Federal Administrative Tribunal in order to prevent Comco from *publishing its decision* before all the appeal options were exhausted.[87] The Court qualified the appeal as a request for conservatory measures according to PA/VwVG, Article 56.[88] On the merits, it considered that the appellant did not show to a sufficient extent (in particular from the perspective of the presumption of innocence) that it would be harmed in a way which would be difficult to remedy.[89]

20. Beyond the protection of specific business secrets,[90] the *Nikon* judgment might be the source of additional contestations by parties with respect to the *publication of Comco's decisions*.[91] The Federal Administrative Tribunal reminded the parties that this action does not constitute a decision but as such belongs to the category of so-called "material acts" *("Realakte"; "actes matériels")* pursuant to PA/VwVG, Article 25*a;*[92] on the other hand, if the authority and a party do not agree on some aspects relating to the content or the form of the publication, an appeal maybe filed in accordance with PA/VwVG, Article 25*a*(2).[93] While clearly affirming the legal basis for the publicity of Comco's activities,[94] the Court emphasized that the publication of decisions pertaining to competition law sanctions could not as a rule pursue any special preventive goal.[95] Should this be the case, then, in analogy to the regime applicable in civil and criminal law, this element should be an integral part of the sanctioning process and clearly appear in the statement of reasons;[96] in addition, the decision should then not be published before it is final – which would be in contradiction with the purposes of LCart/KG, Article 48.[97]

21. Undertakings subject to *inspections* in the EU should be aware of the broad geographical scope that such kind of measure may take. In its *Nexans* judgment, the Court of Justice pointed out that, during its inspection, the Commission was not "required to limit its investigations to documents relating to the projects which had an effect on the common market. Taking account of Commission's suspicions concerning an infringement, which probably had a global reach, involving client attribution, even documents linked to projects located outside the common market were likely to provide relevant information on the suspected infringement."[98] These considerations also have an impact on Swiss companies, not only on those doing business in the EU.

84 Judgment of 2 October 2014, case B-1635/2014. On the failure of an association to establish its quality of party, see judgment of 1 July 2014, case B-3985/2013, published in DPC/RPW 2014/2, p. 461 *Buchungsplattformen für Hotels*.

85 *CT Cinetrade* judgment (note 84), § 1.5.

86 *Idem,* § 1.5.1. In the same case, Comco admitted that an individual it had first mentioned as a party was not an undertaking under competition law and should therefore be excluded from the personal field of application of the LCart/KG. See DPC/RPW 2014/2, p. 391 *Sport im Pay-TV – teilweise Verfahrenseinstellung*.

87 DPC/RPW 2014/2, p. 469 *Zwischenverfügung vom 12. Dezember 2013 in der Beschwerdesache […] gegen WEKO – Verfügung vom 23. September 2013 im Untersuchungsverfahren […] betreffend Vollzug eines meldepflichtigen Zusammenschlusses gemäss Art. 51 KG*.

88 *Idem,* § 3.

89 *Idem,* § 4.

90 In this respect, see also the recent judgments of the EU General Court in the *Evonik Degussa GmbH* (T-341/12) and *Akzo Nobel* (T-345/12) cases, of 28 January 2015. Among other things, the Court pointed out the publication of decisions by the EU Commission should not be confused with the granting of access to specific documents or other data (§ 93). In addition, the publication of information transmitted by a party in a leniency procedure was prohibited only if three cumulative (and ordinary) conditions were fulfilled (*Evonik* judgment, § 94): (i) the information is known only to a limited number of persons; (ii) the disclosure of this information would cause serious harm to the person who has provided it or to third parties; and (iii) the interests liable to be harmed by disclosure must, objectively, be worthy of protection.

91 Judgment of 15 October 2014, case B-3588/2012.

92 *Idem,* § 1.1.

93 *Ibidem.*

94 *Idem,* § 5.1.

95 *Idem,* § 5.3.

96 It might even have an impact on the amount of the sanction.

97 *Nikon* judgment (note 91), § 5.3.

98 Case C-37/13 *Nexans,* of 25 June 2014, § 40.