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Recent developments in Swiss competition law

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I. Introduction

1. The Competition Commission[1] adopted new organizational rules ("OrgReg").[2] It would go beyond the scope of this chronicle to comment each and every provision. On the other hand, it is worth mentioning that the 2015 rules take into account the evolution of the tasks and functions attributed to the authority over the past 20 years; in fact, it is quite amazing that this text did not need any adaptation for such a long period. As an illustration, OrgReg, Article 2, lists the laws and treaties upon which Comco bases its interventions either through proper decisions or administrative acts, including expert advice to other authorities. OrgReg, Article 6(2), provides for an interesting system aimed at warranting that the majority of members attending a Comco meeting are so-called "independent experts": should this not be the case, then members representing economic lobbies will be excluded by drawing lots until the required majority is reached. The existence of two chambers dealing respectively with partial rulings and merger-control decisions should in principle accelerate the treatment of cases: in particular, the former is competent for closing investigations against a party (typically through an amicable settlement), while the procedure continues against others;[3] the latter decides on the opening of an in-depth investigation ("Phase II").[4]

2. It comes as no surprise that the Swiss Federal Tribunal quashed the decision of the Federal Administrative Tribunal in the *Hors-Liste* case.[5] The highest Court recalled first that LCart/KG, Article 3(1), defines the *material scope* of this Act in relation to other Acts in the field of economic law. Very importantly: circumstances of a specific case cannot be taken into account for the application of this provision.[6] Regarding Therapeutic Products Act, Article 32(2)(a), and related provisions that had been considered by the Federal Administrative Tribunal as provisions excluding the application of LCart/KG, after carrying out a full analysis of said provisions the Federal Tribunal concluded that they do not constitute competition rules *("Wettbewerbsnormen")* but rules protecting public health that apply in parallel to LCart/KG.[7] With respect more specifically to the first element on which the Federal Administrative Tribunal based its ruling, namely the fact that drugs used for the treatment of erectile dysfunction are subject to a ban on advertising, the Federal Tribunal stated that such a ban does not exclude all types of advertising (for instance, price lists and catalogues are allowed).[8] With respect to the second element – the shame factor, i.e. the fact that patients are embarrassed about erectile dysfunction and thus tend to purchase their medication always from the same drug stores, a practice which eventually limits competition at the retail level – the Federal Tribunal pointed out that it is irrelevant in relation to the application of LCart/KG, Article 3(1). Indeed, the shame factor is not a legal provision excluding the application of competition law.[9] Thus, the case is back with the Federal Administrative Tribunal which will eventually have to tackle the difficult question of price recommendations…

3. The *material scope* of LCart/KG was also at the heart of an unfortunately not very clear (and relatively old though only recently published) opinion rendered by Comco at the request of a civil court of the

1 Hereinafter "Comco". In this chronicle, this abbreviation refers both to the Commission and its Secretariat.
2 RS/SR 251.1.
3 OrgReg, Article 19.
4 OrgReg, Article 20.
5 DPC/RPW 2015/1, p. 131 *Urteil des Bundesgerichts vom 28. Januar 2015 – Sanktionsverfügung: Hors-Liste Medikamente (Publikumspreisempfehlung betreffend Cialis, Levitra und Viagra)*. On the decision of the Federal Administrative Tribunal, see *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2014/4, p. 435 § 3.
6 *Hors-Liste* judgment (note 5), § 2.2.
7 *Idem,* § 3.3.
8 *Idem,* § 4.2.3.
9 *Idem,* § 4.2.1.

Canton of Bern.[10] In essence, the question raised by the court was whether Emmentaler Switzerland, a trade association representing the interests of various undertakings whose business relates to the Emmental cheese, was allowed to limit and coordinate the quantities of this type of cheese produced and distributed by its members. Comco held that Federal Act on Agriculture, Article 8(1), invoked by Emmentaler Switzerland and stating that "[p]roducers' organisations or the corresponding branches are responsible for promoting quality and sales, as well as for ensuring that production and supply are adapted to the demands of the market," is not as such a sufficient legal basis in order for LCart/KG, Article 3(1), to apply. Such application requires in addition to take into account the particular circumstances of a specific case.[11] In this respect, Comco seemed then to hold that, since the relevant market encompasses similar types of cheese[12] and the share of the Emmentaler AOC is around 39% of this market, the limitation and coordination of quantities does not qualify as an unlawful agreement and, consequently, does not fall within the material scope of LCart/KG.[13] On a related note, Comco left open the question whether the prohibition imposed on members of Emmentaler Switzerland to produce similar cheeses is necessary to ensure the implementation of the aforementioned limitation and coordination of the production of Emmentaler. In the affirmative, this prohibition would also fall outside the material scope of LCart/KG.[14] Finally, one should note that the opinion contains some interesting developments on the application of LCart/KG, Article 3(2), to registered designations of origin ("AOCs").[15]

II. Agreements

4. The Federal Administrative Tribunal fully confirmed Comco's decision[16] in the *BMW* case.[17] Many lessons may be drawn from this judgment.[18] The following are of particular interest in the limited format of this chronicle: after a detailed discussion of the legal sources, the Court – basing its arguments on the effects theory expressly stated in LCart/KG, Article 2(2) – retained a broad application of the geographical scope of the law *("weit gefasster örtlicher Anwendungsbereich")*.[19] This case also provided this jurisdiction with the opportunity to try to reconcile and/or distinguish its recent prior jurisprudence in the field of vertical restraints, especially in view of the debate that took place after the judgments rendered in connection with a cartel of producers of mountings for windows.[20] Finally, it is worth mentioning that in its judgment the Federal Administrative Tribunal expressly validated Comco's practice stating that a vertical restraint pertaining to territory definitely has a qualitative negative market impact and that this restriction is deemed to significantly affect the relevant market(s).[21] The parties "however" keep the possibility to establish that this restriction is justified on economic efficiency grounds; therefore, there is no *per se* unlawfulness and this practice is constitutionally acceptable.[22]

10 DPC/RPW 2015/3, p. 731 *Gutachten für das Regionalgericht Bern-Mittelland in Sachen Käser […] gegen den Verein Emmentaler Switzerland (ES)* (which dates back to April 22, 2013). It should be noted that the opinion also deals with the question whether a trade association can qualify as an undertaking within the meaning of LCart/KG, Article 2(1bis). Comco made it clear that the absence of operation by a trade association on a market is not relevant. Such an association qualifies as an undertaking if its decisions influence the economic activity of its members. *Idem,* § 14 *et seq.*

11 *Idem,* § 26 *et seq.* The approach taken by Comco does not seem to be in line with the *Hors-Liste* judgment referred to above (one should however keep in mind that the Comco's opinion in *Emmentaler Switzerland* is older than the *Hors-Liste* judgment of the Federal Tribunal).

12 In this respect, see *Bovet/Alberini* (note 5), § 12, on the *Etivaz* case in which the Vaud Cantonal Tribunal and Federal Tribunal defined relevant markets in the cheese sector in a much more narrow way.

13 *Emmentaler Switzerland* opinion (note 10), § 54 *et seq.* and 77.

14 *Idem,* § 58 *et seq.* and 77.

15 *Idem,* § 71 *et seq.*

16 *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2013/2, p. 158 § 9.

17 Judgment of November 13, 2015 (case B-3332/2012), available on the internet website of the Federal Administrative Tribunal at <*http://www.bvger.ch/publiws/?lang=fr*>.

18 See also below note 67.

19 *BMW* judgment (note 17), § 2.3.

20 In this respect, *Bovet C./Alberini A.,* "Recent developments in Swiss competition law", RSDA/SZW 2015/1, p. 42 § 4. See for instance *BMW* judgment (note 17), § 3.11.3 and 4.2.

21 *BMW* judgment (note 17), § 9.1.

22 *Idem,* § 9.1.4.

5. The saga of cases in the *credit and debit cards sector* goes on.[23] The most recent case relates to domestic multilateral interchange fees (DMIF) in credit card systems[24], Comco's investigation ending once again with a settlement agreement entered into with key players in the credit card sector. In this connection, one should recall that an initial amicable settlement had been reached by Comco in 2005.[25] It should further be pointed out that issues relating to fees in credit card systems have recently been addressed in the EU at the regulatory level.[26] Against this background, the purpose of the new investigation initiated by the Comco was to assess whether the goals pursued through the 2005 settlement have been reached and whether the solutions agreed at the time should be maintained or not in light of developments over the past decade.[27] At the outset, Comco confirmed that credit cards and debit cards belong to separate relevant markets and, more specifically, confirmed the existence of relevant markets for (i) the acquisition of Visa and MasterCard credit cards and (ii) the issuance of Visa and MasterCard credit cards.[28] Comco further confirmed that the DMIF qualifies as a horizontal agreement falling under the presumption of elimination of effective competition and, the presumption being able to be rebutted, as a restriction of competition from a qualitative perspective within the meaning of LCart/KG, Article 5(1).[29]

The interesting part of the decision is in the Section relating to a possible *justification based on efficiency grounds*.[30] In this context, Comco first raised the question whether the optimization of the credit card system could suffice to justify an agreement (i.e. the DMIF) according to LCart/KG, Article 5(2), or whether a higher standard should be required for the application of this provision, namely that the DMIF does not only optimize the credit card system but is a necessary part thereof. Without giving an explicit answer, Comco stated that in any event the optimization should not only be in the interest of the parties to the agreement but should produce efficiency gains and thus benefit the economy more generally.[31] In the case at hand, Comco relied on economic literature and referred in particular to the new Tourist Test developed by Rochet and Tirole and a Swiss study based on this test (so-called *Jäger-Studie*) in order to conclude that, provided that the rate of the DMIF is set at 0.44%, the credit card system should allow for savings, as compared to cash payments; such savings amount to the production of efficiency gains and are thus legitimate. Thus, the 0.44% rate was at the heart of the settlement agreement entered into by Comco and the parties under investigation.[32]

6. After monitoring the *motor vehicle market* and consulting with experts for several years, Comco finally released its much-awaited revised Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector, along with a revised Explanatory Note.[33] As expected and unlike the choice made in the EU, the revised Notice maintains sector-specific rules for both primary and secondary markets and does not introduce fundamental changes. Essentially, the rules applicable to the distribution of motor vehicles have been restructured in order to be better aligned with the existing Notice of Vertical Agreements. In this connection, one should note in particular a catalogue of serious restrictions from a qualitative perspective.[34] This catalogue provides useful clarifications regarding practices relating to the provision of a guarantee and restrictions relating to spare parts, repair and maintenance services. On a more specific note, one may regret the fact that the revised Notice fails to provide clear guidance about whether there is a duty to contract for car manufacturers or importers with repair and maintenance service providers where the latter meet the qualitative criteria set by the car manufacturers or importers. In light of the Explanatory Note, it seems that service providers meeting those criteria would in principle still be entitled to join the network as authorized members.[35]

23 See notably *Bovet/Alberini* (note 16), § 7.
24 DPC/RPW 2015/2, p. 1965 *Kreditkarten Domestische Interchange Fees II (KKDMIF II)*.
25 *Idem,* § 7 *et seq.*
26 *Idem,* § 34 *et seq.*
27 *Idem,* § 15.
28 *Idem,* § 86 *et seq.*
29 *Idem,* § 71 *et seq.*
30 *Idem,* § 119 *et seq.*
31 *Idem,* § 127 *et seq.*
32 *Idem,* § 141 *et seq.*
33 These documents are available on Comco's website at *<http://www.weko.admin.ch/dokumentation/01007/index.html?lang=fr>*. The revised Notice entered into force on January 1, 2016.
34 Revised Notice, § 14 *et seq.*
35 Revised Explanatory Note, § 22 *et seq.*

7. In connection with the preceding point, it should be recalled that the *duty to contract* for car manufacturers or importers with repair and maintenance service providers in the motor car sector has been a hotly debated topic in Swiss competition law for now more than a decade. In December 2014, the Commercial Court of the Canton of Zurich contributed significantly to this issue when it dismissed the request for interim measures filed by a service provider whose contract had been ordinarily terminated by Jaguar Land Rover AG.[36] The Court held first that LCart/KG, Article 5, applies only to agreements and, therefore, a unilateral refusal to deal cannot be addressed on the basis of this provision.[37] Also, the Court pointed out that the Notice on the Assessment of Vertical Agreements in the Motor Vehicle Sector does not provide for a duty to contract in the field of aftermarket services; such duty is only set out in the Explanatory Note to said Notice, it being specified – as the Court pointed out – that the Explanatory Note does not contain any explanation as to the rationale for such duty. In addition, Comco has not rendered any decision on this issue yet.[38] The Court went on to say that the request was ill-founded also from the perspective of relative dominance. The Court indicated in particular that the ZHAW study on dependency relationships in the motor car sector of March 18, 2014, which has been submitted by the plaintiff in support of its request, could not serve as evidence in a specific case and, in addition, the objectivity and the relevancy of this study could be questioned.[39] Last, in relation to the definition of the relevant market, it is interesting to note that the Zurich Court rejected the concept whereby a brand (however strong as it may be) could constitute a relevant antitrust market.[40]

8. The Tribunal of Commerce in Zurich had to deal with a second and very similar request filed by a service provider whose contract had been ordinarily terminated by the car manufacturer.[41] Even though the request was dismissed, the developments on a possible abuse of a dominant position deserve consideration. In the assessment of the *refusal to reintegrate the service provider in the network* as refusal to deal, the Court rejected the car manufacturer's argument that the service provider would not be driven out the market because it could source original spare parts or tools from competitors; indeed, competitors are not subject to any duty to supply such articles.[42] While the argument was of little interest in the case at stake, since the Court addressed it from the perspective of classical dominance and the car manufacturer had only a 2.5% market share, this holding may have potentially significant consequences should a behavior be assessed as a possible abuse of relative dominance. Indeed, the condition according to which there is no alternative source of supply available may be easier to demonstrate based on the holding of the Zurich Court. Furthermore, the Court held that the service provider's failure to comply with many standards set by the manufacturer justified the latter's refusal to offer a new contract to the service provider; a breach of trust did not have to be demonstrated by the manufacturer under these circumstances.[43]

III. Dominant positions

9. At the heart of the *Alloga* case[44] lie the specificities of *drug distribution* in Switzerland. This sector is notably characterized by the presence of prewholesalers handling logistic and storage tasks. Prewholesalers do not enter into contractual relationships with wholesalers but typically bear the credit risk related to these market players *(delcredere)*.[45] In the case at hand, Alloga, which is a dominant prewholesaler, required a security in the amount of CHF 20 million from Amedis, a drug wholesaler, on the basis that Amedis was allegedly in a difficult financial situation. Absent such security, Alloga would stop supplying Amedis.[46] According to Amedis, this requirement was rather an attempt by Alloga to drive Amedis out of the market in order to support Alloga's sister company Galexis which is competing with Amedis at the

36 Judgment of December 17, 2014, RPW/DPC 2014/4, p. 825.
37 *Idem,* § 7.3.3.
38 *Idem,* § 7.3.4.
39 *Idem,* § 7.4.
40 *Idem,* § 7.2.4.
41 Judgment of March 6, 2015, RPW/DPC 2015/3, p. 724.
42 *Idem,* § 4.5.3 *et seq.*
43 *Idem,* § 4.5.5 *et seq.*
44 DPC/RPW 2015/3, p. 363 *Medikamentenvertrieb in der Schweiz betreffend Teilgegenstand Prewholesale – Lieferstopp durch Alloga AG.*
45 *Idem,* § 23 *et seq.*
46 *Idem,* § 2.

wholesale level.[47] Comco held that Alloga's requirement (in particular the amount and the duration of the security required) may qualify as the *imposition of unfair trade conditions.*[48] However, since Alloga gave up on the requirement imposed on Amedis to provide securities and agreed to adopt terms and conditions governing in a predictable manner the provision of securities by wholesalers, Comco closed the case.[49] One should nevertheless note that Comco will continue to monitor this issue and, more importantly, that it is investigating several other practices relating to the distribution of drugs in Switzerland.[50]

IV. Merger control

10. Swisscom Directories' acquisition of Search, which was owned by Tamedia, is one of the largest transactions ever in the *Internet sector* in Switzerland.[51] As a result of the transaction, Search will be incorporated into Swisscom Directories; Swisscom will retain 69% of this company, while Tamedia will acquire the remaining 31%. The purpose of this transaction is to create an alternative to Google and social networks such as Facebook in the field of *directories* at the Swiss level. While the transaction should allow for synergies (in particular regarding the development of new technologies), Swisscom Directories however contemplates to keep both local.ch and search.ch, and to operate the platforms separately.[52]

Comco's decision, which was rendered at the end of Phase II, provides for comprehensive developments on relevant markets and dynamics on the Internet in relation to the activities of the parties. In its assessment of the transaction at stake, Comco focused on the market for advertising in directories and services relating to directories.[53] At the outset, Comco stated that the main competitors of the parties to the transaction, namely gate24.ch, kompass and help, hold only limited market shares. Thus, Swisscom Directories will have a dominant position.[54] However, Comco did not limit its assessment to the position of undertakings in the relevant market but took into account indirect effects as well, namely the competitive pressure that Google effectively puts on the parties via Google Adwords, even if it held true that Google Adwords is not perfectly competing with the advertising services of the parties since searches on Google (underlying the success of Google Adwords given the two-sided nature of the market) are not in any case perfectly substitutable for searches on local.ch or search.ch.[55] By contrast, free advertising services such as Google Places, Foursquare, Yelp or Maps Connect do not put any pressure, according to Comco, on the paying advertising services provided by the parties. In light of the competitive pressure exercised in particular by Google, Comco concluded that the parties would not be able to eliminate effective competition and thus allowed the concentration without charges or conditions.

11. The acquisition of home.ch, an online market place for *real estate,* by Tamedia (which owns the competing platform homegate.ch) is another example of the concentration process in the *Internet sector* in Switzerland.[56] This transaction affected numerous markets, namely the markets for the placement of (printed and online) real estate advertising in the German- and French-speaking parts of Switzerland, the markets for the users of real estate advertising in the same geographical areas, and the markets for providing advertising spots for static advertising in the German-, French- and Italian-speaking parts of Switzerland, with combined market shares going up to 50–60%.[57] However, Comco considered that these online markets are very dynamic and that therefore, high shares in such markets do not mean that the parties would even hold a dominant position.[58]

47 *Idem,* § 4.
48 *Idem,* § 80 *et seq.*
49 *Idem,* § 103 *et seq.*
50 *Idem,* § 21.
51 DPC/RPW 2015/3, p. 375 *Stellungnahme vom 23. März 2015 in Sachen Zusammenschlussvorhaben betreffend Swisscom Directories AG/Search.ch AG.*
52 *Idem,* § 2 *et seq.*
53 *Idem,* § 373 *et seq.* See also the interesting developments relating to the market for users of address directories and services about companies and the market for users of address directories and services about individuals (*Idem,* § 435 *et seq.* and 441 *et seq.*).
54 *Idem,* § 373 *et seq.* As a side note, it is hard to understand why Comco did not provide any range for the market share of competitors; on the one hand, such ranges are common practice and, on the other hand, they are necessary for the public in order to understand the authority's reasoning.
55 *Idem,* § 409 *et seq.*
56 DPC/RPW 2014/4, p. 758 *Tamedia/home.ch.*
57 *Idem,* § 52.
58 *Idem,* § 55.

12. Further to a request based on LCart/KG, Article 23(2), Comco clarified that, for the application of *LCart/KG, Article 9(4),* a joint venture together with its mother companies qualify as a single undertaking[59] and, as in the case of group companies, the duty to notify under LCart/KG, Article 9(4), applies when one of the mother companies has been considered as holding a dominant position. Otherwise, an undertaking could circumvent its duty under LCart/KG, Article 9(4), by transferring into a joint venture the activities in relation to which it was held dominant. Obviously, such outcome would not be in line with the purpose of LCart/KG, Article 9(4).[60]

13. In relation to another request based on LCart/KG, Article 23(2), Comco had an additional opportunity to clarify the scope of *LCart/KG, Article 9(4)*.[61] The facts at stake were quite singular. Indeed, Orange had been considered in an earlier decision rendered by Comco as dominant on the market for mobile communications terminating on its network. This dominant position had however been established in the reasoning section of that decision, but was neither relevant to nor covered by the conclusions *("Dispositiv")* of said decision. Therefore, the question arose as to whether such established dominant position could trigger the application of LCart/KG, Article 9(4), a question that Comco eventually answered in the negative.

14. The *KKR & Co. L.P./Allianz SE/Selecta AG* transaction[62] could be used as a textbook example of possible *vertical foreclosure.* In the case at hand, such negative effect could have resulted from the integration of WMF (a KKR-owned company which sells vending machines) and Selecta, whose main business is to operate vending machines, given that WMF has a 20–30% share on the upstream market and Selecta a 40–50% share on the downstream market.[63] First, Comco excluded the risk of input foreclosure based on the fact that producers of vending machines competing with WMF would be able (in terms of production) to supply Selecta's competitors. In addition, WMF would have no incentive to stop supplying these competitors since Selecta would not purchase sufficient quantities of vending machines.[64] The risk of customer foreclosure could also be excluded given that Selecta sources vending machines from WMF only to a very limited extent, such machines being generally inappropriate and too expensive in light of Selecta's needs.[65]

V. Procedure

15. The *Tunnelreinigung* decision[66] is another example of the importance given by Comco to issues relating to *evidence.*[67] Comco recalled first that the assessment of evidence should be made on a case-by-case basis. In this context, Comco enjoys full discretion and can rely on indirect evidence *("Indizien")*. This means notably that Comco can rely on the statements made by one party under investigation even though other parties object to this statement. In this connection, it should be noted that Comco referred to modern psychology, according to which the authority should not focus on the general credibility of a person but rather on the credibility of concrete statements.[68] Second, in relation to the standard of evidence, Comco held that absolute certainty *("absolute Gewissheit")* is not required; some minor doubts may remain. Thus, the principle of full proof needs to be put into perspective; the relevant test is the predominant

59 DPC/RPW 2015/1, p. 81 *Beratungsanfrage zur Meldepflicht gemäss Art. 9 Abs. 4 KG bei einem Kontrollerwerb durch ein Gemeinschaftsunternehmen.*

60 *Idem,* § 12.

61 DPC/RPW 2015/1, p. 84 *Beratungsanfrage zur Meldepflicht des Verkaufs von Orange Communications SA.*

62 DPC/RPW 2014/4, p. 751 *KKR & Co. L.P./Allianz SE/Selecta AG.*

63 *Idem,* § 38.

64 *Idem,* § 41 *et seq.*

65 *Idem,* § 51 *et seq.*

66 DPC/RPW 2015/2, p. 193 *Tunnelreinigung.*

67 On this topic, see also *Bovet/Alberini (note 20),* § 4. One can find similar developments in the *Saiteninstrumente (Gitarren und Bässe) und Zubehör* decision, of June 29, 2015, § 33 *et seq.* This decision, which deals with vertical restraints in the above-mentioned markets, is available on Comco's website at *<http://www.weko.admin.ch/aktuell/00162/index.html?lang=fr>*. Finally, one should refer to the *BMW* judgment (note 17), § 3 (for instance: *"Eine strikte Beweisführung ist kaum möglich; allerdings muss die Logik der wirtschaftlichen Analyse und Wahrscheinlichkeit der Richtigkeit überzeugend und nachvollziehbar erscheinen")* or § 4.2 (relationships between the assesment of evidence and the standard of evidence, on the one hand, and the presumption of innocence, on the other hand).

68 *Tunnelreinigung* decision (note 66), § 41 *et seq.*

degree of likelihood *("überwiegende Wahrscheinlichkeit"),* even in investigations leading to sanctions.[69] Moreover, the decision is interesting as it contributes to shape the principles governing *leniency* applications. Going in second, just one day after the opening of the investigation, and significantly contributing to said investigation leads to a 50% reduction of the penalty.[70] By contrast, going in third, long after the first and second leniency applicants and after the investigation has opened, with cooperation limited to the absolute minimum, leads to the penalty being reduced by only 10%.[71]

16. Beyond the usual aspects of substantive law, the competition authority presented once again, in the so-called "door products" decision,[72] its views on the assessment of evidence *(Beweiswürdigung)* and the standard of evidence *(Beweismass)*. In summary, Comco recalls that it is bound by no specific rule in the former process: the authority is therefore free to assess the elements of evidence it collects or which it receives from the parties; no means or piece of evidence should be given greater weight than another.[73] In particular, Comco may consider facts as proven by a party's statements, in spite of the other parties' objections or contradictory statements.[74] Still citing several judgments, decisions and legal authors,[75] Comco emphasized that one could not apply a strict standard of evidence in determining whether economic aspects had been established in a competition law case; however, a high level of likelihood was required in these situations.[76] Incidentally, it should be noted that this decision is also made quite interesting by the publication of elements of evidence, such as e-mails, throughout the presentation of the factual background of the case.

17. LCart/KG, Article 40, imposes on parties to agreements, undertakings with market power, undertakings concerned in concentrations and affected third parties the obligation to provide the competition authorities with all the information required for their investigations and produce the necessary documents. Should a party refuse to do so, it may be fined up to 100,000 Swiss Francs if it is an undertaking,[77] while individuals risk a penalty up to 20,000 Swiss Francs.[78] As emphasized by Comco itself in its decision, the information request must respect the principle of proportionality: the authority has to use means that are both appropriate and necessary to fulfil the objective of its investigation; there must be a reasonable encroachment on the personal freedom of the person to whom the information request is addressed.[79]

18. Legal costs are often a sensitive issue for undertakings, including for those participating in a possible anticompetitive agreement eventually terminated thanks to a settlement with the authority before an in-depth investigation.[80] Comco reminded parties objecting to the amount of such costs that the meaning of "decision" in LCart/KG, Article 53a(1)(a), was broader than the definition given by Article 5 of the Federal Law on Administrative Procedure.[81] Moreover, the former provision encompasses both preliminary and in-depth investigations.[82] As a result, an undertaking that accepts a proposal made by Comco's Secretariat in order to end a likely unlawful behavior, may be charged for all or part of the costs generated because of this situation.[83]

69 *Idem,* § 45 *et seq.*
70 *Idem,* § 317.
71 *Idem,* § 318.
72 DPC/RPW 2015/2, p. 246 *Türprodukte*.
73 *Idem,* § 42–43.
74 *Idem,* § 44.
75 Comco relied quite heavily on the jurisprudence of the former federal appeal commission for competition law matters ("REKO/WEF").
76 *Türprodukte* decision (note 72), § 47–52.
77 LCart/KG, Article 52. DPC/RPW 2014/4, p. 771 *Zwischenverfügung in Sachen Auskunftspflicht,* § 25.
78 LCart/KG, Article 55. *Auskunftspflicht* decision (note 77), § 26.
79 *Idem,* § 17.
80 DPC/RPW 2015/2, p. 143 *Kostenverfügung: Meldesystem Baumeisterverbände.*
81 RS/SR 172.021. *Kostenverfügung* decision (note 80), § 11 *et seq.*
82 *Idem,* § 17.
83 In particular, *idem,* § 22, citing ATF/BGE 128 II 247, § 6.1.