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Alberini, Adrien; Bovet, Christian

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Adrien Alberini | Christian Bovet*

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I. Introduction

1. Further to the public consultation on the preliminary draft amendment[1] to the Federal Law on Cartels and other Competition Restraints,[2] the Federal Council adopted a *revised draft amendment* and an explanatory report *("Message"/"Botschaft")* on 24 May 2023.[3] These texts also aimed to implement the proposal made by *Olivier Français* and were successively approved by the Parliament's two Chambers.[4] In addition, the following points should be noted:
   - The facilitated merger control procedure in case of a concentration being assessed by the EU Commission (exemption of notification)[5] and the intention to introduce the SIEC (significant impediment to effective competition) test in Swiss law were confirmed.[6]
   - Several measures were proposed in order to strengthen the position of the parties to an administrative procedure. In particular, a duty to investigate both incriminating and exonerating facts would be explicitly imposed on the Federal Competition Commission (Comco).[7] The parties' position would also be reinforced by the emphasis put by two new provisions on the presumption of innocence[8] and the principle that the burden of proof lies with the competition authorities.[9]
   - A series of non-mandatory deadlines would indicate to the various authorities how much time they would theoretically have at their disposal to solve competition law issues. For instance, Comco should decide on the merits of a case within 30 months,[10] while the Federal Administrative Tribunal would be granted 18 months to rule on appeal.[11]
   - A more balanced effort was made in respect of civil procedure: on the one hand, the circle of possible plaintiffs would be broadened by admitting all persons whose economic interests are threatened or affected by an unlawful restraint on competition;[12] similarly, the *dies a quo* of the statute of limitation would start running only once the decision of the competition authority was in force.[13] On the other hand, indemnities paid to the victims of an infringement to competition law would be taken into account in the calculation of a fine under LCart/KG, Article 49*a*.[14]

2. The reluctance to acknowledge the negative impact of certain types of agreements, including price fixing, is shared to some extent by certain jurisdictions. Most importantly, the European Court of Justice reaffirmed in a preliminary ruling of 29 June 2023 its restrictive approach to *competition restrictions by object.* Indeed, for the Court, "[t]hat concept applies only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects."[15] This should be assessed while taking into account the provisions of the agreement as well as its objectives "and the economic and legal context of which it forms a

* Dr. *Adrien Alberini*, attorney-at-law, LL.M. Stanford Law School, and *Christian Bovet*, professor at the University of Geneva.

1 See *Alberini A./Bovet C.*, Recent Developments in Swiss Competition Law, RSDA/SZW 2022/1, p. 89 § 2.
2 LCart/KG; RS/SR 251.
3 FF/BBl 2023 1463 (explanatory report) and 1464 (draft law).
4 See *Alberini A./Bovet C.*, Recent Developments in Swiss Competition Law, RSDA/SZW 2023/1, p. 108 § 1. Draft law (n. 3), Article 5(1bis).
5 Draft law (n. 3), Article 9(1bis & 1ter).
6 Draft law (n. 3), Article 10(1 & 2).
7 Draft law (n. 3), Article 39*a*(3). In this chronicle, the term "Comco" refers invariably to the Commission and its Secretariat.
8 Draft law (n. 3), Article 53(3).
9 Draft law (n. 3), Article 53(4).
10 Draft law (n. 3), Article 44*a*(1)(b).
11 Draft law (n. 3), Article 44*a*(1)(c).
12 Draft law (n. 3), Article 12.
13 Draft law (n. 3), Article 12*a*(1).
14 Draft law (n. 3), Article 49*a*(5).
15 European Court of Justice (ECJ), case C-211/22 *Super Bock Bebidas*, judgment of 29 June 2023, § 32.

part";[16] this context includes elements such as the nature of the goods and services affected or the structure of the market(s) in question.[17] Provided they are demonstrated, procompetitive effects invoked by the parties have to be taken into account by the competition authority if they "may give rise to reasonable doubt as to whether the agreement concerned caused a sufficient degree of harm to competition".[18] *In casu*, vertical agreements fixing minimum resale prices have to be assessed in light of these principles and may not automatically qualify as restrictions of competition by object.[19] While recognizing the specific role of the list of hardcore restrictions in block exemption regulations,[20] the Court recalled that "the concepts of 'hardcore restrictions' and of 'restriction by object' are not conceptually interchangeable and do not necessarily overlap".[21] As a result, resale price maintenance, while being clearly a hardcore restriction under Regulation 2022/720, Article 4(a),[22] is not presumed to be a restriction by object. Although this might be satisfactory from a theoretical standpoint, one may still wonder what this reasoning brings in terms of legal certainty for business firms, especially when in its most recent guidance on vertical restrictions the European Commission states that "[h]ardcore restrictions within the meaning of Article 4 of Regulation (EU) 2022/720 are generally restrictions by object within the meaning of Article 101(1) of the Treaty."[23]

3. While the draft law already incorporates several *parliamentary motions and interpellations*, one should expect additional debates pertaining to recent inquiries. For instance, at the end of December 2023, *Niklaus-Samuel Gugger* raised several questions relating to a possible abuse of market power by big tech companies (Google, Amazon, Microsoft, Apple and Meta) vis-à-vis small and medium undertakings as well as hospitals.[24] This member of the Swiss National Council argued that these business categories depend heavily on big tech firms and therefore have no other choice than to accept abusive general conditions. This approach is consistent with the EU Digital Market Act (DMA),[25] which – based on size, gateway and durability criteria – designates as "gatekeepers"[26] certain undertakings providing core platform services[27] such as search engines,[28] social networking services[29] or cloud computing services.[30] Most DMA rules became applicable in May 2023, and in September 2023 the European Commission designated six gatekeepers, namely Alphabet (Google), Amazon, Apple, ByteDance (TikTok), Meta and Microsoft.

II. Agreements

4. With respect to the *cartels in the construction sector in the Canton of Graubünden*, the Federal Administrative Tribunal largely upheld Comco's decisions[31] sanctioning several undertakings for participating in global agreements over many years.[32] As an interesting note, the Federal Administrative Tribunal admitted the reduction of the fine imposed on one of the undertakings concerned thanks to the compensation paid by said undertaking to the Canton of Graubünden,

16 ECJ *Super Bock* (n. 15), § 35.
17 ECJ *Super Bock* (n. 15), § 35.
18 ECJ *Super Bock* (n. 15), § 36.
19 ECJ *Super Bock* (n. 15), § 37.
20 ECJ *Super Bock* (n. 15), § 38.
21 ECJ *Super Bock* (n. 15), § 41.
22 EU Commission Regulation 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty of the European Union to categories of vertical agreements and concerted practices, OJ 2022 L 134, p. 4. See also European Commission, Guidelines on vertical restraints, OJ 2022 C 248, p. 1, § 185 et seq.
23 Guidelines on vertical restraints (n. 22), § 179.
24 Interpellation 23.4513 – Big Tech: Missbrauch von Marktmacht gegenüber KMU und Spitälern, available at <*https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20234513*>.
25 EU Regulation 2022/1925 of the European Parliament and of the Council of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives 2019/1937 and 2020/1828, OJ 2022 L 265, p. 1.
26 DMA (n. 25), Articles 2(1) and 3.
27 DMA (n. 25), Article 2(2).
28 DMA (n. 25), Article 2(2)(b).
29 DMA (n. 25), Article 2(2)(c).
30 DMA (n. 25), Article 2(2)(i).
31 With respect to Comco's decisions, see *Alberini A./Bovet C.*, Recent Developments in Swiss Competition Law, RSDA/SZW 2020/1, p. 73 § 2.
32 Federal Administrative Tribunal, cases B-3096/2018, B-3097/2018 and B-3290/2018, judgments of 28 November 2023.

even though the compensation was made after the issuance of Comco's decision.[33] Moreover, the Federal Administrative Tribunal upheld Comco's decision against an undertaking for having covered a competitor by submitting a higher offer in a procurement procedure.[34] It should be noted that the court validated the approach taken by Comco whereby the amount of the fine has to be determined based on the amount of the offer that was submitted in the procurement procedure as well as on the severity of the unlawful practice under scrutiny.[35] Furthermore, the fact that the undertaking which has filed a leniency application later objects to its participation in an unlawful agreement should not automatically lead to the exclusion of this undertaking from the leniency program; it should rather be assessed whether the information provided by the undertaking is useful in establishing the existence of an unlawful agreement.[36]

5. Comco dismantled an unlawful *horizontal agreement between authorized dealers of cars* of the Volkswagen Group located in the Canton of Ticino, including the retail company of AMAG in this Canton, which gave rise to a detailed (and welcome) decision in Italian.[37] The global agreement took place between 2006 and 2018, concerned public procurement procedures and involved both price fixing and territorial allocations. It should particularly be noted that AMAG had filed for leniency but a full sanction waiver was denied by Comco since AMAG played a leading role in the cartel.[38] Comco further rejected the application of the bonus plus program claimed by AMAG, which can lead to a reduction of up to 80% of the fine, considering that all elements disclosed by AMAG related to the same set of facts.[39] In the end, Comco admitted a reduction of 50% of the fine for the benefit of AMAG in relation to its leniency application. Overall, the fines amounted to more than CHF 44 million and – this is worth pointing out – the costs of the procedure to more than CHF 1 million.[40]

6. The *[Elektroprodukte]* case relates to a preliminary investigation in which Comco assessed the potentially *confusing behaviour* of two related companies in connection with public and private procurement procedures. The main takeaway is the principle recalled by the authority according to which companies should not create any confusion in such procedures and, particularly, should not submit their respective offers while giving the impression that these offers are fully independent from each other. Moreover, if any of these companies does not submit an offer, the explanation as to the refusal to participate in a procurement procedure must be crystal clear. Finally, the companies may submit an offer together as a consortium or with one company being the subcontractor of the other.[41]

7. Further to a request for advice, Comco addressed the question as to whether the contemplated distribution of the TV package provided by the undertaking A through the undertaking B may qualify as an *unlawful allocation of markets* between the parties within the meaning of LCart/KG, Article 5(3)(c), it being specified that (i) A and B each provide access to their own TV platform and thus both companies are competitors, and (ii) A would not be allowed to actively contact the customers purchasing its TV package distributed through B for a two-year period. Even though more information would have been needed to reach a more robust conclusion, the authority considered that an unlawful allocation of markets between the parties was likely, unless the whole transaction was deemed to be a concentration and the non-compete obligation qualified as an ancillary restraint.[42]

33 Federal Administrative Tribunal, cases B-3096/2018, judgment of 28 November 2023 (n. 32), § 135 *et seq.*

34 Federal Administrative Tribunal, case B-645/2018, judgment of 14 August 2023.

35 *Idem*, § 15.2.1 *et seq.*

36 *Idem*, § 16 *et seq.*

37 Comco, case 22-0489, decision of 23 May 2022, *Concessionari Volkswagen*, available on the authority's website at <*https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html*>.

38 *Idem*, § 658 *et seq.*

39 *Idem*, § 682 *et seq.*

40 *Idem*, § 696 *et seq.*

41 DPC/RPW 2023/1, p. 84 *[Elektroprodukte]*.

42 DPC/RPW 2023/1, p. 96 *Zusammenarbeit im TV-Bereich.*

8. *Price calculation schemes* have always been scrutinized by competition authorities. The well-known association of engineers and architects (SIA) envisaged to replace its old fee calculation schemes with a new app developed with the ETH (the so-called Value App), the purpose of which would be to assist architects in calculating the work required in relation to the projects they carry out. In essence, Comco considered that this app would not be problematic since each architect would remain free to determine his or her own fees after assessing the time needed for a project thanks to the app. In particular, the app would not provide any information relating to the price per hour recommended in connection with a defined project. In addition, all data uploaded through the app would be processed through an independent third party and the information available in the app would be aggregated. Finally, the app would not be available only to architects but to any interested person, so that the information provided through the app could be verified by the clients of the architects.[43]

9. Swissolar, the association of producers, dealers, installers and other service providers in the solar industry in Switzerland, intended to issue an *index relating to the purchase price* of solar panels and the price paid by end clients for solar equipment, and to publish this index. Acting on a request for opinion, Comco carried out an assessment very similar to the one in relation to the Value App mentioned in the preceding paragraph, and stated particularly that this index would not prevent market players from setting their own prices. In addition, the data would be processed by an independent third party and only aggregated data would be made available to the users of the index. Finally, the publication of an average price *(Mittelwert)* was deemed to be confusing, as such price may be influenced by certain unusually high or low prices. For this latter reason, the authority recommended to seek the assistance of a provider of statistical services. This notwithstanding, and subject to its concrete implementation and impact on competition, the project did not raise competition law issues at this juncture.[44]

10. *IT platforms* increasingly raise competition law issues and Comco was this time faced with a request to provide an opinion relating to a platform in the sport sector. In short, the project in question concerned a centralized system for the management of data from suppliers and dealers operating in the sport industry. Since the undertaking seeking the opinion ensured that no commercially sensitive information would be shared between competitors using the platform and that no price recommendations would be communicated by suppliers to dealers through the platform, the authority indicated that the platform should not raise competition law issues.[45]

11. The producers of hops decided to set up a new *professional association*, in which the beer producers could not participate. This project was submitted to Comco on several counts.[46] First, the sale of hops through a single point of sale would amount to a horizontal agreement on prices; however, the authority did not exclude that the agreement might be justified on economic efficiency grounds, if it were to lead to lower commercialization costs.[47] With respect to the quality control system contemplated by the association, the authority considered that it would not qualify from the outset as an agreement between competing undertakings but might eventually lead to such an agreement, for instance if the members of the association were to share through this system the quantity of hops they were to produce. As regards the concept of collaborative processing of hops, it has been considered as a horizontal agreement, which would however benefit from the SME exemption.[48]

12. As most readers probably know, TCS has launched a *platform allowing for the comparison of the prices* in gas stations in Switzerland. This kind of ser-

43 DPC/RPW 2023/1, p. 100 *SIA – Value App.*

44 DPC/RPW 2022/4, p. 895 *Swissolar Index.*

45 DPC/RPW 2023/1, p. 113 *Datenplattform in der Sportindustrie.*

46 DPC/RPW 2023/3, p. 655 *Konzept Erzeugergemeinschaft für Schweizer Hopfen.*

47 *Idem*, § 19 *et seq.*

48 *Idem*, § 54 *et seq.*

vice raises long-debated issues in economic theory about the impact of transparency. On the one hand, price transparency of homogeneous goods helps consumers to compare different prices and purchase at the lowest one available. On the other hand, such price transparency increases the risk of collusion among dealers, as it is easier for them to compare and align their prices. From the authority's perspective, the risk of negative impact on competition would be significantly lower if the platform did not make all prices available, but only the lowest prices of some dealers in any specific geographical area.[49]

13. Two undertakings in the printing sector sought Comco's opinion with respect to their *potential collaboration*, which would be made necessary by the very difficult economic conditions prevailing in this industrial sector. Referring notably to the EU regulation on specialization agreements, the authority considered that the cooperation might be justified on efficiency grounds, with the exception of the matching offer right set forth in the collaboration agreement, which would go beyond the restraints necessary for the collaboration to work and produce a positive impact on the market.[50]

14. Further to a parliamentary motion, the Federal Council adopted an Ordinance on Agreements in the *Motorcar Sector*, which entered into force on 1 January, 2024, and replaced Comco's corresponding notice.[51] Furthermore, this new Ordinance has been supplemented by an Explanatory Notice issued by Comco, which replaced the current notice on this same topic.[52] On the merits, the new Ordinance makes no fundamental changes to the application of competition law in the motorcar sector as compared to Comco's previous notice, but it will be binding not only for Comco but also for courts (courts having traditionally refused to be bound by Comco's previous notice).

15. *Access to spare parts*, particularly in the motorcar sector, is still a sensitive topic. A company aiming to operate as a procurement agency that would purchase original spare parts from authorized dealers and then resell them to independent repair service providers, sought Comco's opinion as to its potential qualification as an agent of such providers and, should this qualification be admitted, its right to be supplied with spare parts from authorized dealers.[53] Referring to the applicable sources under Swiss and EU law, the authority recalled that an agent should not bear any significant financial or commercial risk in relation to the contracts entered into on behalf of independent repairers. At first glance, this test would not be passed in the case at hand given that the company seeking advice would become the owner of spare parts and be liable towards authorized dealers in the event of lack of payment by independent repairers.[54] With respect to the duty to provide spare parts, Comco, referring to its notice, recalled that the refusal by an authorized dealer to provide spare parts to an independent repairer may qualify as an unlawful agreement.[55]

III. Dominant positions

16. One of the most significant developments in the field of abuse of a dominant position is the much-awaited judgment handed down by the Federal Tribunal in the *SIX/Access to Dynamic Currency Conversion Services (DCC)* case.[56] One may recall the lengthy decision rendered by the Federal Administrative Tribunal in 2018, which was over 500 pages long and addressed around 60 points of law.[57] As a preliminary note – and in quite an unusual (but understandable) way – the Federal Tribunal has instructed the lower court to issue

49 DPC/RPW 2023/3, p. 666 *Online-Plattform für Konsumenten und Konsumentinnen zum Vergleich von Treibstoffpreisen an Tankstellen.*

50 DPC/RPW 2023/3, p. 673 *Kooperation im Druckereibereich.*

51 RS/SR 251.6.

52 The new Explanatory Notice is available on the authority's website at <*https://www.weko.admin.ch/weko/fr/home/rechtliches_dokumentation/communications---notes-explicatives.html*>.

53 DPC/RPW 2023/2, p. 276 *Accès aux pièces de rechange automobiles par une représentante de réparateurs indépendants.*

54 *Idem*, § 9 *et seq.*

55 *Idem*, § 19 *et seq.*

56 Federal Tribunal, case 2C_596/2019 (*DCC*), judgment of 2 November 2022.

57 *Alberini/Bovet* (n. 31), p. 73 § 11.

shorter decisions: "[...] *ist das angefochtene Urteil mit einer Länge von 527 Seiten eindeutig zu lang ausgefallen. Das Bundesgericht fordert die Vorinstanz auf, in Zukunft solch weitschweifige Urteile zu unterlassen und sich kürzer zu fassen.*"[58] Moreover, one of the critical issues to be addressed was whether the restriction of competition was time barred. According to the Federal Tribunal, LCart/KG, Article 49*a*(3)(b), sets forth expressly that a restriction to effective competition is time barred if it has stopped producing effects more than five years prior to the opening of an investigation. In addition, the procedure is of administrative nature, so that it would not be justified to apply by reference the statutes of limitations set forth in criminal law.[59] Moving on to the merits of the case, the Federal Tribunal focused on tying and bundling, and confirmed that such unlawful practice can occur through various steps. In the case at hand more specifically, a double tying strategy took place. First, the DCC functionality worked as an incentive for merchants. By using this functionality, the merchants would notably receive an amount that would reduce the fee owed to the acquirer. In other words, by using the DCC functionality, the merchants would benefit from the services of the acquirer at more favourable terms. Second, from a technological perspective, the DCC functionality would work at a specific time only in relation to the terminals of the undertaking under scrutiny. As a last note in connection with this assessment, and referring to the case law and literature in the EU and in Switzerland, the Federal Tribunal recalled that a concrete impact on the market is not required, the risk of a negative effect being sufficient to establish a breach of LCart/KG, Article 7.[60] Finally, considering that Comco had initiated the proceedings in 2006 and rendered its decision in 2010, and further that it then took the Federal Administrative Tribunal eight years to issue its judgment, the appellant claimed that the procedure had lasted for too long. While acknowledging that the upper limit was close to being reached, the Federal Tribunal stated that the complexity of this case has justified such a lengthy procedure (of approximately 16 years).[61]

17. In another important matter relating to an abuse of a dominant position, namely the *Naxoo* case, the Federal Tribunal[62] upheld the judgment rendered in 2021 by the Federal Administrative Tribunal.[63] Thus, the highest court confirmed that Naxoo, in its contracts with real estate owners, had unlawfully *prevented the setting up of technical systems enabling the mix of satellite and cable TV signals.* By acting in this way, Naxoo made it impossible for companies providing such systems to serve customers contractually bound to Naxoo. The decision handed down by the Federal Tribunal, which is quite detailed without being excessively lengthy, is interesting on several counts. First, and in line with the existing case law, the Cartel Act and the Telecommunication Act supplement each other and, more specifically, Articles 11 and 11*a* of the Telecommunication Act do not qualify as so-called "reserved provisions" within the meaning of LCart/KG, Article 3(1)(a).[64] Second, while recalling that it is both a matter of facts and of law, the Federal Tribunal dedicated significant developments to the definition of the relevant market, confirming eventually that the relevant market had to be defined as encompassing the cable television connections in the Geneva territory.[65] Third, the Federal Tribunal acknowledged that it was the first time that it had the opportunity to interpret LCart/KG, Article 7(2)(e), namely the limitation of markets or technical development. In accordance with the literature, the court stated that, besides exclusive supply agreements, the limitation of markets may take the form of contractual provisions generating a technical effect or an incentive, such as general terms and conditions or fidelity rebates, which may prevent trading partners of the dominant undertaking to have commercial relationships with other companies. As regards the limitation

58 Judgment *DCC* (n. 56), § 3.1.2.
59 *Idem*, § 6.
60 *Idem*, § 8.
61 *Idem*, § 11.
62 Federal Tribunal, case 2C_395/2021 *(Naxoo)*, judgment of 9 May 2023.
63 With respect to the judgment of the Federal Administrative Tribunal, see *Alberini/Bovet* (n. 1), p. 89 § 12.
64 Judgment *Naxoo* (n. 62), § 7.
65 *Idem*, § 8.

of technical development, it may result from the abusive use of intellectual property rights or the exclusive right to dispose of or use certain goods that are necessary to access the market.[66] Finally, considering that the duration of the unlawful behaviour was in reality shorter than that cited by the Federal Administrative Tribunal, the highest court slightly reduced the amount of the fine imposed on Naxoo.[67]

18. Swisscom went up to the Federal Tribunal[68] against the (lengthy) judgment of the Federal Administrative Tribunal confirming the provisional measures ordered by Comco in relation to the construction of an *optical fibre network in peripheral areas* (outside urban areas) by Swisscom alone, it being recalled that Comco and the Federal Administrative Tribunal had insisted on having a network enabling sufficient direct (i.e. physical) access to competitors through so-called Layer 1 offers.[69] First, the Federal Tribunal confirmed, under the standard of prohibition of acting arbitrarily and in light of the relationship between LCart/KG and the Telecommunication Act, that Comco had the power to issue provisional measures in the case under scrutiny.[70] Second, with respect to the conditions to be met for provisional measures, the Federal Tribunal considered in particular that the later change of the network architecture would affect significantly not only one competitor but effective competition more generally.[71] Third, the Federal Tribunal rejected arguments raised by Swisscom according to which the provisional measures ordered did not comply with the principle of proportionality and the prohibition of acting arbitrarily.[72]

19. *Belagswerke Bern* is an interesting case as it *combines an abuse of a dominant position and an unlawful agreement over a lengthy period,* namely from 2004 to 2021. In essence, the bituminous coating plant BERAG AG offered more favourable terms to its shareholders than to other companies, while locking in all customers through fidelity rebates. In addition, some of these shareholders agreed not to compete against one another by creating their own coating plant or acquiring participations in other companies operating such plants, it being specified that bituminous coating plants have to be located close to the roads which are built using the bitumen produced in these plants. Eventually, Comco imposed a range of measures, including measures relating to acceptable, respectively unacceptable rebates, as well as the prohibition for certain categories of individuals affiliated with the shareholders to play a role in BERAG. Considering all circumstances, the authority imposed a fine over CHF 1,500,000 to BERAG and over CHF 400,000 to 11 of its shareholders.[73]

20. Last year, the Federal Administrative Tribunal had confirmed Comco's sanction on Swisscom for abuse of a dominant position on the market for pay TV broadcasting of football and ice hockey games of the Swiss major leagues for the refusal to grant full access to such content.[74] Similarly, the Federal Administrative Tribunal recently upheld Comco's decision[75] sanctioning Sunrise (replacing UPC following its takeover) for the abuse of a dominant position on the market for pay TV relating to the *broadcasting of games of the National and Swiss Hockey Leagues*.[76] Indeed, Sunrise has refused during approximately three years to

66 *Idem,* § 10.3, particularly 10.3.2.
67 *Idem,* § 11.
68 Federal Tribunal, case 2C_876/2021 *(Netzbaustrategie – Anordnung vorsorglicher Massnahmen),* judgment of 2 November 2022. As a side note, one may recall that Swiss Fibre Net AG plans to set up an FTTH infrastructure and, because of the procedure against Swisscom, Swiss Fibre Net AG sought Comco's opinion on a number of counts (*Alberini/Bovet* [n. 4], p. 108 § 19). This year, this undertaking submitted to the authority a range of additional questions relating to very specific aspects of Layer 1 access (DPC/RPW 2023/1, p. 110 *Rangierbares Glasfasernetz II*).
69 With respect to the judgment of the Federal Administrative Tribunal, see *Alberini/Bovet* (n. 1), p. 89 § 15.
70 Judgment *Netzbaustrategie* (n. 68), § 5.
71 *Idem,* § 7, particularly § 7.5.2.
72 *Idem,* § 8 *et seq.*
73 Comco, case 22-0497, decision of 6 December 2021, available on the authority's website at <*https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html*>.
74 *Alberini/Bovet* (n. 4), p. 108 § 16.
75 With respect to Comco's decision, see *Alberini A./Bovet C.,* Recent developments in Swiss competition law, RSDA/SZW 2021/1, p. 86 § 10.
76 Federal Administrative Tribunal, case B-5819/2020, judgment of 31 October 2023.

provide Swisscom with the TV rights on live hockey games. It should be noted that the Federal Administrative Tribunal considered that the full access to hockey games was not objectively necessary for Swisscom to compete, since Swisscom was already able to provide a full offer for football games. Unlike in the aforementioned *Swisscom* case, it was not possible to determine objectively the content required to create or maintain effective competition in the case at hand. That said, broadcasting a minimum number of hockey games was considered as necessary to compete effectively in the market for pay TV.[77]

21. In the internet sector, a local media agency complained that none of the press articles published on its online news portals were displayed on *Google News*, whereas articles published by competing agencies were available on the same platform. After investigating the case, Comco concluded that the minimum requirements defined by Google for news sites to be listed in Google News were legitimate business reasons. On this basis, Comco rejected any abuse of a dominant position in the form of a refusal to deal or the discrimination of trading partners.[78]

22. Comco has contacted Google in relation to the judgment rendered by the General Court of the EU in 2021 in the landmark *Google Shopping* case, according to which Google has abused its dominant position in the market for online search by downgrading various services offered by competitors, including price comparison websites, and simultaneously offering more favorable listing positions to its own vertical services, notably Google Shopping. The purpose of this contact was to obtain from Google the commitment that it would apply in Switzerland the commitments agreed in the EU, a solution which had as a matter of fact already been implemented by Google since 2017.[79]

23. The *supply of assortments* remains a touchy topic in Switzerland. One may recall that Swatch Group had made a statement in 2013 according to which Nivarox, one of its subsidiaries, would progressively stop supplying such mechanical watch components to other market players in Switzerland (so-called phasing out).[80] Against this background, the question arose as to whether Nivarox may have, since then, limited the supplies or increased its prices in a way incompatible with the prohibition of the abuse of a dominant position.[81] Comco reached the conclusion that a violation of competition law was likely to have taken place, but such violation would be rather limited since Nivarox has essentially kept supplying all market participants. Therefore, based on the principle of proportionality, it would not have been justified to open a formal investigation.[82]

24. In the financial sector and more specifically with respect to *high-frequency trading*, SIX intended to make available a so-called *Einheitsverbindung* on its trading platform, a project that has been submitted to Comco. As per the opinion issued by the Secretariat, this type of connection would accelerate only one connection to the trading platform, namely the one operated by SIX itself. This situation may amount to a discriminatory behavior by SIX and, thus, an abuse of a dominant position. That said, the technological features of this market show that, in any event, only one market player may be able to create the fastest connection possible and, consequently, take the whole market. At least, the project contemplated by SIX would put an end to the heavy and inefficient investments by market players aiming to develop the fastest connection. Competition would then take place on other parameters such as the products and services relating to high-frequency trading. While the competition authority seems at first glance to have assessed rather positively the project presented by SIX, it also recalled, on several occasions, the regulatory framework

77 *Idem*, § 9.3 *et seq.*
78 DPC/RPW 2023/3, p. 606 *Google News.*
79 DPC/RPW 2023/2, p. 262 *Google Shopping.*
80 *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2015/1, p. 42 § 7, and *Bovet C./Alberini A.*, Recent developments in Swiss competition law, RSDA/SZW 2012/2, p. 150 § 13.
81 DPC/RPW 2023/3, p. 617 *Assortiments.* For the specific practices at stake, see § 164 *et seq.*
82 *Idem*, particularly § 234.

and the powers of FINMA with respect to the infrastructure of financial markets.[83]

25. In the food retail industry, a new system implemented by *Coop* to improve the *processing of payments* to its suppliers led to an informal investigation by Comco. In this context, the authority assessed whether this new system, and the constraints related thereto for suppliers, would amount to imposing unfair terms to trading partners within the meaning of LCart/KG, Article 7(2)(c). The replies provided by market participants in essence stated that the new payment scheme would entail higher costs at their end, which would not be related to any corresponding economic counterpart. In light of this situation and the concrete risk for Coop of abusing its dominant position, Coop decided to give up on its new payment processing system and Comco closed its informal investigation.[84]

IV. Merger control

26. The *allocation of turnover* to determine whether the Swiss merger control thresholds are met raises occasionally difficult questions. Upon request of an acquiring company, Comco issued an opinion according to which the turnover in Swiss francs realized by the Swiss target company, the purpose of which was only to serve as a procurement entity within a group of companies, is not relevant as such, in the event the products are sent directly by the counterparty of the target company to other entities located outside Switzerland.[85]

27. In a series of decisions handed down a few years ago, the Federal Administrative Tribunal had stated that the concepts of *upstream, downstream and neighbouring markets* within the meaning of LCart/KG, Article 9(4), have to be interpreted extensively and provided various criteria to assess whether such conditions are met. Referring to this case law in relation to a contemplated acquisition by the Swiss Post, Comco considered first that the market for packaging of parcels, on which the target company operates, and the market for customer mails, respectively of letter delivery services of the Swiss Post, are neither in an upstream nor in a downstream relationship. However, it could not be excluded that the packaging solution provided by the target, particularly its innovative concept of returning empty kickbags, would be in a neighbouring relationship with the products and services of the Swiss Post, and therefore that the transaction might have a competitive impact on the market dominated by the Swiss Post.[86]

28. The *Swissgenetics* case is useful as it recalls that Comco monitors transactions mentioned in press releases and intervenes in the event of *gun jumping.* The organization, which later became Swissgenetics, was considered as dominant by Comco in a 1999 decision. Therefore, the question arose as to whether Swissgenetics had violated LCart/KG, Article 9(4), when it acquired a target based in the US, without prior notification to the Swiss competition authority. In quite a detailed decision, Comco first considered that the decision stating that Swissgenetics was holding a dominant position on the market for artificial insemination of bovine animals had entered into force, and that the transaction under scrutiny concerned an upstream market thereof. The authority went on to say that while Swissgenetics was quite a significant organization that should have been aware of its obligation under LCart/KG, Article 9(4), the transaction in question was unlikely to create or reinforce a dominant position capable of eliminating effective competition. For this latter reason, a limited sanction in the

83 Comco, case 54-0641, opinion of 13 October 2022 *(Beratung betreffend die Übermittlung von Datensignalen im Zusammenhang mit dem Hochfrequenzhandel bei der SIX Swiss Exchange AG),* available on the authority's website at *<https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html>.*

84 Comco, case 32-0273, decision of 28 February 2023 *(Zahlungsabwicklung Coop),* available on the authority's website at *<https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html>.*

85 DPC/RPW 2023/3, p. 678 *Geografische Zuordnung von Umsätzen bei Unternehmenszusammenschlüssen.*

86 DPC/RPW 2022/4, p. 898 *Beratung betreffend Meldepflicht nach Art. 9 Abs. 4 KG.*

amount of CHF 50,000 was justified, it being specified, however, that in future similar cases, the fine would be significantly higher.[87]

29. A short opinion rendered by Comco upon request of two undertakings having joint control over a joint venture is a useful reminder, if need be, that some minor *changes in a shareholders' agreement* (relating in the case at stake notably to the lock-up period and the powers of the board of the joint venture) do not necessarily affect the nature of the control.[88]

30. The acquisition by TX Group of the Swiss business of Clear Channel gave rise to a decision which is worth reading for several reasons. First, this decision relates to the *out-of-home advertising sector,* which can be divided in several relevant markets. In connection with the transaction under scrutiny, a single market for both analog and digital ads has been defined. Second, and this may be of practical importance in various contexts, a collective dominance between TX Group and APG (which remains the market leader) might not be excluded in certain geographical areas further to the strengthening of TX Group's activities in the out-of-home advertising sector. Such collective dominance was however not envisaged at this juncture considering the limited symmetry between the positions and activities of respectively TX Group and APG.[89]

V. Procedure

31. In a rather straightforward judgment, the Federal Administrative Tribunal largely upheld a decision rendered by Comco imposing on two companies a fine of CHF 20,000 each (plus approximately CHF 10,000 of legal fees each) for the *failure to comply with their duty, as third parties to the procedure, to provide information* to the authority upon request (LCart/KG, Article 52).[90] A slight reduction of the fine has been admitted by the court on the ground that the two companies were actually part of a single undertaking within the meaning of competition law and, therefore, it was not correct to simply impose an amount of CHF 20,000 on each of them. Comco should have set the amount of the fine in relation to the first violation of the duty to provide information and, then, increased that fine further to the second violation, imposing in the end one single fine.[91] Proceeding that way, the Federal Administrative Tribunal imposed a single fine of CHF 35,000 on the two companies being jointly liable.[92]

32. In the latest ongoing preliminary procedure relating to the four-party systems of Visa and Mastercard, it appeared that no settlement agreement seemed possible with Visa with respect to the level of interchange fees for debit cards. In this context, Visa notified Comco *based on LCart/KG, Article 49(3)(a).* As a consequence, Comco opened a formal investigation; in this connection, Comco indicated that if Visa were to accept, as a temporary measure, to set the fees in the amount proposed by the authority in view of an amicable settlement, Visa would not face the risk of being sanctioned. Interestingly, Visa reacted by filing with Comco a *request for interim measures* according to which the interchange fees would have to be set in the amount Visa (and not Comco) had proposed in the discussions about an amicable settlement. In essence, Comco denied this request notably on the ground that it was unlawful, because Visa was actually trying to waive the risk of sanctions without meeting the conditions set forth in LCart/KG, Article 49(3)(a) or, in other words, attempting to circumvent the regime provided for under this regulation.[93] Visa appealed to the Federal Administrative Tribunal, and, considering the controversial application of the aforementioned provision by Comco (which tends

87 DPC/RPW 2022/4, p. 932 *Verletzung der Meldepflicht,* particularly § 122.

88 DPC/RPW 2023/2, p. 266 *Beratung betreffend die Meldepflicht infolge der Änderung des Aktionärbindungsvertrags.*

89 DPC/RPW 2023/2, p. 284 *TX/Clear Channel.*

90 Federal Administrative Tribunal, case B-3882/2021, judgment of 16 February 2023.

91 *Idem,* § 9.7, particularly § 9.7.2.

92 *Idem,* § 9.8.

93 Comco, case 22-0523, decision of 25 September 2023, *Interchange Fees für Debitkarten von Visa,* available on the authority's website at <*https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html*>, particularly § 51 *et seq.*

to systematically open formal investigations), the Tribunal's decision will certainly be worth reading.

33. For several years, *access to documents by third parties*, especially authorities and public entities whose interests were harmed by anticompetitive behaviours in public procurement contracts, has been disputed, such access being generally denied.[94] Further to one of the Graubünden cartel cases, a public authority tried a different approach and, instead of requesting direct access to documents, asked whether it had been concerned by procurement procedures which had been affected by a cartel involving specific bidding companies; more specifically, the authority requested information as to the number of projects concerned, as well as the amounts in Swiss francs and a list of said projects. Interestingly, Comco assessed various legal bases that could potentially support such a request for administrative assistance (including LCart/KG, Article 41), but concluded that none of them would be sufficient and, thus, refused to provide the requested pieces of information.[95]

34. The Federal Administrative Tribunal refused to assess the *legal action* filed by one of the undertakings that had been fined by Comco in the *Leasing und Finanzierung von Fahrzeugen* case. In essence, the plaintiff argued that Comco's decision was too detailed, given that an amicable agreement had been reached between the authority and the plaintiff. It came as no surprise, however, that the Federal Administrative Tribunal stated that these issues have to be challenged through the ordinary appeal procedure against the decision issued by Comco imposing the fine or the decision issued by Comco relating to the publication of its decision on the merits.[96]

35. Even though the judgment rendered by the Administrative Tribunal of the Canton Graubünden on 6 December 2022 (case U 20 66) does not relate directly to competition but to public procurement law, it deserves to be mentioned as it states that an awarding authority is authorized to *cancel and relaunch a public procurement procedure* if there is *suspicion that the bidding companies have colluded.* It should particularly be noted that, in the case at hand, the awarding authority had consulted Comco before interrupting the public procurement procedure; furthermore, Comco had opened a formal investigation after the interruption.[97]

94 See *Alberini/Bovet* (n. 4), p. 108 § 28.

95 DPC/RPW 2022/4, p. 949 *Herausgabe von Verfahrensakten an den Kanton bezüglich der noch nicht rechtskräftigen Sanktionsverfügung Engadin I*, particularly § 82 *et seq.*

96 Federal Administrative Tribunal, case B-6759/2019, judgment of 13 October 2020.

97 DPC/RPW 2023/1, p. 252 *Sentenza del Tribunale amministrativo del Cantone dei Grigioni del 6 dicembre 2022 concernente appalto.*