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Recent developments in Swiss competition law

Adrien Alberini | Christian Bovet*

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I. Introduction

1. New provisions pertaining to *relative market power* have been in force since the beginning of 2022.[1] This reform aims to introduce a new situation giving rise to competition restraints and a new type of abuse. The first step was reached by integrating into LCart/KG, Article 4, a paragraph 2bis defining an undertaking with relative market power as "an undertaking on which other undertakings are dependent for the supply of or demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other undertakings". The Competition Commission[2] issued a notice and a form in order to assist economic actors in the application of this new concept.[3] The adequacy of supply or demand should be determined on the basis of objective criteria taking into account, for instance, the characteristics of the product, the supplier's market share or the reputation of a trademark.[4] Interestingly, Comco deals with the reasonableness test in a negative manner, i.e. by defining what should be considered as *un*reasonable; in this case, the individual situation of the undertaking depending on a firm allegedly holding relative market power is relevant (e.g. significant investments already made, switching costs or part of the turnover).[5] Consistently with the general legal system, holding relative market power is not unlawful *per se:* the claimant or the authority must in addition establish the existence of an abuse. This should be founded on LCart/KG, Article 7(2)(g), which qualifies as abusive: "the restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned." As pointed out by Comco, the purpose of this new provision is mainly to combat unjustified higher acquisition costs imposed on Swiss undertakings purchasing products abroad.[6] Other discriminatory practices and refusal to deal by an undertaking holding relative market power are also deemed abusive.[7] Finally, one should point out that:
   – Only undertakings may claim the benefits of this new regime. This means that consumers are not entitled to claims under LCart/KG, Articles 4(2bis) and 7(2)(g).
   – Contrary to the regime applying to abuses of dominant positions, no direct sanction may be imposed in the case of an abuse of relative market power.[8]

2. At the end of November 2021, the federal government launched a consultation on a *first draft* amending several fields of the Federal Law on Cartels.[9] It relates mainly to merger control and the rules of civil procedure. Thus, an EU-inspired "significant impediment to effective competition" (SIEC) test would replace the current merger-friendly test of LCart/KG, Article 10(1) and (2); in addition, a mechanism aimed at coordinating the examination of concentrations pertaining at the same time to Swiss and European markets would be introduced and, subject to the new pro-

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1 In addition to amendments to the Federal Law on Cartels and other Competition Restraints (LCart/KG; RS/SR 251), the Federal Parliament adopted a new Article 3*a* of the Federal Law against Unfair Competition (LCD/UWG; RS/SR 241) relating to discriminatory practices in respect of on-line sales.

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

3 The Notice on Relative Market Power dated 6 December 2021 is available on Comco's website at: <*https://www.weko.admin.ch/weko/fr/home/anzeigen/relative_marktmacht.html*>.

4 Notice on Relative Market Power (note 3), § 8.

5 Notice on Relative Market Power (note 3), § 8 and 9.

6 Notice on Relative Market Power (note 3), § 12.

7 Notice on Relative Market Power (note 3), § 12.

8 Notice on Relative Market Power (note 3), § 29 and 30.

9 This first draft is available on the Federal Council's website at: <*https://www.admin.ch/gov/fr/accueil/documentation/communiques.msg-id-86059.html*>.

visions, would lead to a notification exemption.[10] An enlargement of the circle of the persons entitled to file claims before civil courts as well as an adaptation of the rules governing the statute of limitation or the types of claims should improve the application of LCart/KG private law provisions.[11] In an effort to accelerate proceedings, the government is proposing a new LCart/KG, Article 44*a*, which would urge authorities to observe strict deadlines in investigations and appeal procedures. The reform also clarifies the assessment of the significant character of agreements,[12] the opposition procedure set up by LCart/KG, Article 49*a*,[13] the legal basis for administrative costs[14] and procedural rules applying to inspections.[15]

II. Agreements

3. *Installations et services électriques dans la région genevoise*[16] is the first decision imposing fines handed down by Comco in relation to a *local horizontal cartel in the French-speaking part of Switzerland,* it being specified that all undertakings under scrutiny have accepted to enter into a settlement agreement with the Federal Authority. This decision is an opportunity to highlight certain aspects relating to and reiterate a few key principles governing anti-cartel enforcement:
   - From a factual standpoint, Comco did not carry out dawn raids against all undertakings subject to the investigation but only against some of them. Moreover, most of the companies willing to cooperate with the authority filed leniency applications quickly after the opening of the formal investigation.[17]
   - Comco did not uncover sophisticated and well-organised cartels; in most cases, the undertakings under investigation had submitted so-called supporting offers in public or private procurement procedures. Such supporting offers stemmed generally out of privileged relationships between individuals directing or employed by the various electricity service providers.[18]
   - Comco calculated the basis amount for the fine based on each specific project, it being specified that, when an undertaking submitted "only" a supporting offer, the percentage applicable to the basis amount was divided by two (i.e. 5% for supporting offers in relation to agreements eliminating efficient competition, 4% in relation to agreements impeding notably efficient competition and which were effective, 2.5% in relation to agreements impeding notably efficient competition and which were ineffective).[19]
   - While Comco had been provided by the first leniency applicant with significant pieces of information, most of the undertakings which decided to cooperate with the authority nevertheless benefited from a significant reduction of the fine. Such reduction amounted up to 100% with respect to projects which were unknown to the authority and 50% for projects already known to Comco.[20]

4. As it came out of the recent discussions relating to the revision of LCart/KG, Article 5,[21] the assessment of *consortium agreements* remains a touchy topic since such cooperation among undertakings is a common practice in the construction sector. Considering the importance of this issue, Comco had carved out, in the *Graubünden* case,[22] such agreements from its investigations and decided to address them separately.[23] In its final report relating to this new case, Comco assessed two different consortium agreements.

10 Draft LCart/KG (note 9), Articles 9(1bis) and (1ter). See also draft LCart/KG (note 9), Articles 32 to 34.
11 Draft LCart/KG (note 9), Articles 12 to 13 and 49a(5).
12 Draft LCart/KG (note 9), Article 5(1bis).
13 Draft LCart/KG (note 9), Article 49*a*(4).
14 Draft LCart/KG (note 9), Article 53*a* and 53*b*.
15 Draft LCart/KG (note 9), Article 42(2) and (3).
16 DPC/RPW 2021/3, p. 632 *Installations et services électriques dans la région genevoise*.
17 *Idem,* § 12 *et seq*.
18 *Idem,* § 27 *et seq*.
19 *Idem,* § 86 *et seq*.
20 *Idem,* § 96 *et seq*.
21 See § 2 above, in particular footnote 12.
22 With respect to this case, see *Bovet C./Alberini A.,* Recent Developments in Swiss Competition Law, RSDA/SZW 2020/1, p. 73 § 2.
23 DPC/RPW 2021/1, p. 90 *Dauer-ARGE Graubünden*.

This report is worth reading at least from the following perspectives:

- Comco started by defining the concept of consortium agreement and clarifying the various forms such agreements may take in practice. Also, Comco recalled that, as a general matter, consortium agreements may actually serve as way for undertakings not to cooperate but to collude, by allocating clients and increasing prices.[24]
- With respect to the first consortium (the so-called ARGE AB), after considering that the agreement at stake qualified as horizontal agreement within the meaning of LCart/KG Article 4(1) in relation to Article 5(3), the presumption could be rebutted and Article 5(1) would apply, Comco assessed in particular whether this agreement could be justified based on the fact that it would be producing sufficient efficiency gains. While leaving this question open, Comco adopted a flexible stance and stated that the parties could maintain their consortium agreement as long as the market would be characterized by certain features. For instance, in a specific area, the parties were allowed to maintain their consortium in the context of open or selective procedures, whereas such consortium would not be tolerated in private procurement procedures or procedures launched by municipalities, unless certain specific conditions were met, such as the fact that one of the parties would objectively not be able to participate alone in such procurement procedure and this inability could be stated by an independent expert. By way of conclusion, Comco insisted on the fact that each consortium agreement should be assessed based on the particular circumstances of each case, it being specified that such circumstances may vary to quite a large extent and evolve over time.[25]
- Since the second consortium (the so-called ARGE AC) relied essentially, for the time being, on a framework agreement setting forth no restriction on the activities of the parties, it did not even fall within the scope of LCart/KG, Article 4(1).[26]

5. The association of insurance companies contemplated the implementation of an information system containing a database relating to non-life insurance risk coverage (such as insurance for cars or professional insurances). Insurance companies would then have a *right of access to the database* in the event they would reject claims for qualified reasons, i.e. legal reasons preventing the insured persons to make legally valid claims.[27] Upon request of the association, Comco assessed the scheme from the perspective of both information exchange between undertakings and a possible abuse of a dominant position:[28]
   - Comco first considered that information about the termination of insurance agreements following claims would not be exchanged between undertakings, and systematic limitation of the amount of damages in the event of concrete claims would not take place. In addition, information would be exchanged on a limited basis and several monitoring measures would be set up. In light of all these elements, Comco considered that the scheme was unlikely to qualify as a coordinated behaviour between insurance companies, respectively that this scheme would actually seem appropriate to help fighting against frauds.[29]
   - Comco assessed in detail, in light of the principles governing FRAND terms, the fee mechanism applicable to the access to the database and recalled in particular that the applicable fee should be proportionate to the economic capacity of the various subscribing insurance companies.[30]

6. Interestingly, Comco has been requested at the same time by the association of insurance companies to assess a project of *platform (and related*

24 *Idem,* § 23 *et seq.*
25 *Idem,* § 139 *et seq.*, in particular § 190 *et seq*.
26 *Idem,* § 207 *et seq*.
27 DPC/RPW 2021/1, p. 138 *Hinweis- und Informationssystem HIS,* § 1 *et seq*.
28 *Idem,* § 33 *et seq*.
29 *Idem,* § 34 *et seq*.
30 *Idem,* § 49 *et seq*.

arbitration) for handling recourse claims. While this specific project did not raise any issue from a competition law perspective thanks to the structure adopted by the parties, it is worth pointing out that even arbitration regimes may raise issues in terms of exchange of information and abusive business conditions.[31]

7. In *Financial Fairplay in der Eishockey National League,*[32] Comco was requested to advise on the compliance of the introduction of *financial fairplay rules* with competition law. As Comco acknowledged at the outset, it did not have the opportunity in the past to deal in detail so far with rules governing professional sport activities, whereas some fundamental rulings in this field have been issued in the European Union over the past decades.[33] It came as no surprise that the key issue related to a possible justification of financial fairplay rules based on efficiency gains.[34] More specifically, such rules raised the question as to whether they were necessary to create a league providing equal opportunities to clubs and ensure the economic and financial capacities thereof. Interestingly, Comco did not admit such arguments easily in the case at hand and raised the question as to whether less restrictive measures might be sufficient to reach the contemplated efficiency gains, including measures which would not affect the players.[35] As a last note, Comco did not seem to be convinced by the applicability, under Swiss law, of the Meca-Medina test, according to which, in essence, certain restraints which are strictly related to a sport activity do not even fall under competition law.[36]

8. *Schweizer Tierschutz* complained that the *price for label and organic meat* is too expensive in Switzerland and, therefore, contemplated a scheme according to which meat retailers would be forced to set the price for such meat at a maximal percentage of the price for regular meat. In its advice to Schweizer Tierschutz, Comco warned that this scheme was likely to amount to a horizontal price agreement which would not be justified based on efficiency grounds. In particular, the well-being of animals, which is already addressed in specific regulations, was not the direct purpose of the scheme, as this scheme was supposed to apply to retailers and not producers.[37]

9. *Lizenzen elektronische Lehrmittel* deserves some attention as it deals with the rather unusual field of *access to scientific journals and articles* and, from a competition law perspective, the legality of *purchasing agreements*. After recalling the well-established principles governing this type of cooperation under European law, Comco considered that the cooperating libraries would benefit from limited market power and that the cooperation between these libraries would even potentially lead to some countervailing market power which might outweigh, at least to some extent, the strong position – not to say the monopoly – of publishers of teaching material.[38]

10. *Neues Versicherungsmodell ALAG/VWFS* – which relates to the cooperation between AMAG Leasing, VW Financial Services and several insurance companies in the field of car insurance – is worth reading as Comco considered that the cooperation is justified as it produces *sufficient efficiency gains*. Particularly, the limitation of one insurance product per car brand would facilitate the work and improve the efficiency of both authorized retailers and insurance companies. Comco also considered that the decrease in insurance options would be in the interest of end users as they would benefit of improved services from their retailers.[39]

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31 DPC/RPW 2021/1, p. 148 *Regressplattform Schweiz*.
32 DPC/RPW 2021/3, p. 603 *Einführung Financial Fairplay in der National League*.
33 *Idem,* § 14 *et seq*.
34 *Idem,* § 48 *et seq*.
35 *Idem,* § 56 *et seq*.
36 *Idem,* § 70 *et seq*.
37 DPC/RPW 2021/3, p. 614 *Maximale Produzenten-/Konsumentenpreisrelationen bei Fleisch*.
38 DPC/RPW 2021/3, p. 623 *Lizenzen elektronische Lehrmittel*.
39 DPC/RPW 2021/1, p. 132 *Neues Versicherungsmodell ALAG/VWFS*.

11. In the field of *vertical restraints,* the *Hors-Liste Medikamente* case[40] is not over yet: the Federal Tribunal has once again admitted an appeal by the Federal Department for Economy and sent the file back to the Federal Administrative Tribunal along with the instruction to carry out a new assessment of the fine to be imposed on the three drug manufacturers under scrutiny.[41] The ruling handed down by the Federal Tribunal is of essence as it deals in detail with the concept of agreement under competition law and, more particularly, the conditions in which price recommendations qualify as such in the form of concerted practices:
    - The Federal Tribunal clarified first that concerted practices require, cumulatively, a contact between undertakings and a corresponding behaviour on the market (whereas, in the event of an agreement strictly speaking, the fact that undertakings decide together to adopt a behaviour, the purpose or effect of which is to affect competition, is sufficient to qualify as an agreement within the meaning of competition law).[42] Second, after recalling the various positions supported by legal scholars, the Federal Tribunal stated that the percentage of retailers observing price recommendations issued by the producers is not a determining factor as such. Rather, a general and critical assessment *(wertende Gesamtbetrachtung)* has to be carried out; in order to qualify as a concerted practice, the relationship between the contact among undertakings and the result arising out thereof must reach a certain qualitative level.[43]
    - In the present case, the daily electronic communications over months or even years between producers and retailers reduced the uncertainty regarding the behaviour of market participants.[44] In addition, more than 50% of retailers observed the recommended prices.[45] Based on these elements, as well as the fact that the price recommendations aimed at or had the effect of restricting competition, the Federal Tribunal qualified this situation as an agreement within the meaning of LCart/KG, Article 4(1).
    - As a last note, it is interesting to see that the Federal Tribunal dedicated quite significant developments to efficiency gains which may be produced by vertical restraints. It came as no surprise, however, that the Highest Court would admit such gains only in limited circumstances. One may conclude from the decision issued by the Federal Tribunal that undertakings and their outside counsel are advised to provide concrete data supporting alleged efficiency gains generated by such vertical restraints in order for such gains to stand a chance to outweigh the negative impact on competition.[46]

III. Dominant positions

12. At the beginning of 2021, the Federal Administrative Tribunal had to deal with the *Naxoo* case, which relates to an abuse of a dominant position in the telecommunication sector.[47] In essence, the court largely upheld the decision of Comco, which had considered 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*. Thus, Naxoo made it impossible for companies providing such systems to serve customers contractually bound to Naxoo. In addition to offering a detailed judgment in French in relation to an abuse of a dominant position to readers in the French-speaking part of Switzerland, the Naxoo judgment contains some useful (though not entirely new) developments on the relationship be-

40 On this saga, see *Bovet C./Alberini A.,* Recent Developments in Swiss Competition Law, RSDA/SZW 2019/1, p. 73 § 2.

41 Federal Tribunal, case 2C_149/2018, judgment of 4 February 2021.

42 *Idem,* § 3.4.1, in particular § 3.4.5.

43 *Idem,* § 4.5.1 *("Das Zusammenspiel zwischen Abstimmung und Abstimmungserfolg muss also ein gewisses qualitatives Mass erreichen, damit von einer aufeinander abgestimmten Verhaltensweise ausgegangen warden kann")*.

44 *Idem,* § 5.2.

45 *Idem,* § 5.3.

46 *Idem,* § 7.1 *et seq*.

47 Federal Administrative Tribunal, case B-2798/2018, judgment of 16 February 2021. With respect to Comco's decision in this case, see *Bovet/Alberini* (note 40), p. 73 § 14.

tween the Cartel Act and the Telecommunication Act; in short, these two bodies of rules 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).[48] In addition, the Federal Administrative Tribunal addressed extensively the complex issue of the relevant market in the case in question and, after reviewing in particular the various technologies available for infrastructure connection purposes, confirmed that the relevant market had indeed to be defined as encompassing the cable television connections within the territory covered by zip codes 1201 to 1209.[49] Considering such market definition, Naxoo was obviously considered as being dominant.[50] With respect to the abuse of a dominant position, it should be highlighted that the Federal Administrative Tribunal started by determining – referring explicitly to Swiss Code of Obligations, Article 18[51] – the intent of the parties (i.e. Naxoo and the real estate owners) in relation to the agreements they had entered into. The Court then went on to analyze how these agreements had been concluded and enforced in practice, as well as the behaviour adopted by Naxoo towards the plaintiff, concluding eventually that Naxoo had indeed prevented the latter from accessing the buildings concerned.[52] Notably, in light of these elements, the breach of LCart/KG, Articles 7(2) (c) and (e), was confirmed.[53]

13. A few months after the *Naxoo* case referred to above,[54] the Federal Administrative Tribunal largely upheld the fine imposed by Comco[55] to Swisscom as a consequence of the *margin squeeze strategy* implemented by this undertaking in the context of the public procurement procedure launched by the Swiss Post in relation to the setting up of a wide area network (WAN).[56] One may recall that Swisscom had particularly imposed unreasonably high prices on Sunrise for preliminary services, it being specified that Sunrise was dependent on Swisscom's services to provide its own services to certain post office locations; thus, Sunrise was unable to make any profit margin and to make a competitive offer to the Swiss Post. The ruling handed down by the Federal Administrative Tribunal is interesting from several perspectives:

- In the section dedicated to the dominant position held by Swisscom, and more specifically the position of Swisscom on the wholesale market for broadband connections for professional customers, the Federal Administrative Tribunal recalled that the conditions prevailing at the time of the procurement procedure (i.e. in 2008) were significantly different as compared to the infrastructure existing today. In particular, the cable and optical fibre network were no acceptable substitutable solutions at that time.[57]
- In relation to the conditions underlying margin squeeze, the Federal Administrative Tribunal clarified in particular that a margin squeeze can be admitted in a specific case, even if the competitor affected by this strategy is not at risk to be totally driven out of business. As a consequence, margin squeeze can be admitted in each and every procurement procedure.[58] Moreover, Comco was right when it did not rely on the internal costs of Swisscom and, thus, disregarded the self-profitability test (or reasonably efficient competitor test); as a matter of principle, the "as efficient competitor test" has to be applied.[59]
- With respect to the calculation of the fine, the Federal Administrative Tribunal considered that Comco had erred in setting the basis amount at 10%, which is the upper li-

48 Case B-2798/2018 (note 47), § 6.
49 *Idem,* § 9.
50 *Idem,* § 10.
51 RS/SR 220.
52 *Idem,* § 11.2.2.1 *et seq*.
53 *Idem,* § 11.3 *et seq*. In this context, one should pay attention in particular to the developments relating to the protection of the investments made by Naxoo, even though this argument has been rejected by the Court.
54 See § 12 above.
55 With respect to Comco's decision in this case, see *Bovet C./ Alberini A.,* Recent Developments in Swiss Competition Law, RSDA/SZW 2017/1, p. 102 § 9.
56 Federal Administrative Tribunal, case B-8386, judgment of 24 June 2021.
57 *Idem,* § 7.5.
58 *Idem,* § 8.4.1.b.
59 *Idem,* § 8.4.2.

mit for this amount. Comco indeed took into account the fact that Swisscom had adopted two separate behaviours (towards the Swiss Post and Sunrise), which is an element that is relevant as an aggravation factor. Thus, the Federal Administrative Tribunal reduced the basis amount and set it up at 8%, which eventually led to a reduction of the fine of approximately CHF 500,000.[60]

14. One may remember that, a decade ago, Comco refused to approve some of the provisions set out in the cooperation agreements between Swisscom and several public utilities governing the rolling out and *access to the optical fibre network* in most of the major cities in Switzerland.[61] Obviously, Comco continues to worry about sufficient access to this type of network and, therefore, opened an investigation against Swisscom in relation to the construction of its network in (more remote) areas in which this undertaking planned to build it alone.[62] According to Comco, the structure of the fibre network contemplated by Swisscom does not offer direct access to the network to Swisscom's competitors which, consequently, should not be able to compete efficiently against this dominant undertaking. It should be pointed out that Comco, like in the *Apple/Twint* case,[63] ordered provisional measures in order to protect competition in a fast-evolving market characterized by technological innovation. In this context, Comco defined the relevant market as the market for Layer 1 offers, it being specified that (i) the existing copper network – while currently allowing such direct access to the infrastructure – does not allow for sufficient internet speed, (ii) the cable network does not enable Layer 1 access, and (ii) the mobile network is not considered as a viable alternative.[64] Furthermore, it was likely, given the particular features of this situation, that Swisscom would refuse to contract with potential trading partners, discriminate among such companies, and limit the products and services available to end-users.[65] As a last note, Comco insisted on the public interest in preventing Swisscom from going ahead with the construction of its infrastructure without Layer 1 access as such closed infrastructure would stand for decades and prevent consumers in the long term from enjoying competitive offers.

15. *Swisscom appealed against Comco's injunction*[66] relating to the construction of the *optical fibre network in peripheral areas* and the Federal Administrative Tribunal was thus faced with a third complex abuse of a dominant case in the telecommunication sector.[67] Undoubtedly, this Court was not willing to give up and, in light of the critical implications at stake, issued a judgment of more than 200 pages upholding Comco's decision. The section of this judgment (approximately 70 pages!) dedicated to the assessment of alleged legitimate business reasons is of significant interest.[68] Particularly, the Federal Administrative Tribunal has rejected Swisscom's argument according to which the Confederation has requested the rolling out, as fast as possible, of a very broadband network in peripheral areas, such compelling request making it impossible to build a network enabling a Layer 1-type connection; the Court considered that such a public policy argument cannot be made in the context of LCart/KG, Article 7, and could be admitted only further to a request to the Federal Council based on LCart/KG, Article 8.[69] Furthermore, Swisscom argued that the building of a network not enabling a Layer 1 connection would be significantly easier and cheaper because Swisscom could partially rely on its existing infrastructure in peripheral areas, it being specified that the additional cost generated by the building of a more open network could not be compensated by a sufficient turnover. This economic argument, as well as additional arguments relating to the technological features of the type of network

60 *Idem,* § 10.4.4 and 10.4.10.
61 See *Bovet C./Alberini A.,* Recent Developments in Swiss Competition Law, RSDA/SZW 2012/2, p. 150 § 11.
62 DPC/RPW 2021/1, p. 227 *Netzbaustrategie Swisscom*.
63 See *Bovet/Alberini* (note 22), p. 73 § 12.
64 *Idem,* 115 *et seq*.
65 *Idem,* 137 *et seq*.
66 See § 14 above.
67 Federal Administrative Tribunal, case B-161/2021, judgment of 30 September 2021.
68 *Idem,* § 279 *et seq*.
69 *Idem,* § 339 *et seq*.

that Swisscom was contemplating, were not supported by sufficient evidence and, therefore, the Federal Administrative Tribunal rejected them all.[70]

16. The Federal Roads Office (FEDRO) sought advice from Comco with respect to an agreement entered into with a private company relating to the *exclusive supply of valuable data* by FEDRO; in this connection, FEDRO was also contemplating an open data strategy, according to which the data it would collect would be made available for a fee to a larger group of companies.[71] While considering that FEDRO was likely to qualify as an undertaking within the meaning of competition law because it was providing valuable data to private companies which would use them as part of their commercial activities, Comco eventually left this question open.[72] Then, Comco warned against a possible exchange of strategic information which would allow the current beneficiary of the data to have access to confidential data of its own business partners. Thus, Comco recommended to limit the scope of data made available by FEDRO to its current exclusive counterparty.[73] From the perspective of the risk of abuse of a dominant position, Comco insisted on the need to make the data available to all interested users in order to avoid any risk of unlawful discrimination. Also, such data should be made available for a reasonable fee.[74]

17. PostFinance faces the following problem: in both face-to-face and online transactions, merchants tend to increasingly refuse payments made through the PostFinance card. In order to solve this issue, PostFinance contemplates the introduction of a *so-called co-badging system* with the debit card from Mastercard, based on Regulation (EU) 2015/751 of the European Parliament and of the Council of 29 April 2015 on interchange fees for card-based payment transactions, Article 2(31).[75] In essence, this would enable the PostFinance card to work directly with the merchants accepting the card from Mastercard.[76] Against this background, PostFinance raised the question as to whether the aforementioned co-badging scheme would modify the position of PostFinance on the acquiring market, it being recalled that Comco had defined (i) a separate market for the access of merchants to the acquiring of PostFinance in face-to-face transactions, and (ii) a market for the access of merchants to the acquiring of debit cards in online markets (in light of the limited use of such cards in e-commerce transactions).[77] Comco concluded that the relevant market in face-to-face transactions would probably be enlarged given the new solution available through the co-badging system and, in the event this solution would be widely used, PostFinance would no longer hold a dominant position in the market for acquiring. With respect to online transactions, a dominant position of PostFinance remains unlikely.[78]

IV. Merger control

18. The notification to Comco of mergers reaching the thresholds of LCart/KG, Article 9(1), but relating to activities taking place *outside Switzerland* has long been subject to debate, and Comco ended up clarifying, in the Notice on the Notification and Assessment under Merger Control (§ I), the conditions under which full function joint ventures with no link to Switzerland are exempted from the duty to notify. A case relating to a joint venture, the purpose of which was to set up high power charging stations for electric cars in Italy, shows that Comco intends to apply this exception very restrictively. Comco considered indeed that the merger was subject to mandatory notification in Switzerland because end customers as well as E-Mobility service providers based in Switzerland might be interested in

70 *Idem,* § 348 *et seq*.
71 DPC/RPW 2021/3, p. 619 *Zuverfügungstellung von Daten über die Neuzulassung und die Standorte von Fahrzeugen durch das ASTRA*.
72 *Idem,* § 10 *et seq*.
73 *Idem,* § 15 *et seq*.
74 *Idem,* § 19 *et seq*.
75 OJ L 123, 19.5.2015, p. 1–15.
76 DPC/RPW 2021/3, p. 627 *Co-Badging der PostFinance Card mit Debit Mastercard*.
77 *Idem,* § 8 *et seq*.
78 *Idem,* § 18 *et seq*.

using the power charging stations set up in the Italian border area.[79]

19. Which *currency conversion rate* should be applied when the turnover of a participating undertaking, which realizes its turnover in a foreign currency, has to be converted in Swiss Francs, and when the fiscal year of this undertaking lasts from April 1 to March 31? Comco clarified that the average annual conversion rate based on the twelve months average rate of the Swiss National Bank corresponding to the fiscal year applied by the undertaking has to be taken into account in such case.[80]

20. An undertaking challenged up to the Federal Tribunal[81] Comco's practice to charge *CHF 5,000 as a lump sum for its preliminary assessment* under LCart/KG, Article 32, it being specified that in the case in question the thresholds of LCart/KG, Article 9(1), were not met and that it was not clear whether the merger was subject to mandatory prior notification based on LCart/KG, Article 9(4).[82] According to the Federal Tribunal, the preliminary assessment aims to identify both the obligation to notify and the existence of elements which would support the creation or strengthening of a dominant position. Thus, the notification of a concentration triggers the procedure set out in LCart/KG, Article 32, regardless of whether there is actually an obligation to notify in the case in question.[83] Moreover, the Federal Tribunal considered that the amount of CHF 5,000 as a lump sum relies on a sufficient legal basis.[84]

21. One may remember that, one year ago, Comco had approved, without imposing any remedies, the planned acquisition of *UPC by Sunrise* after an in-depth assessment of the transaction.[85] Surprisingly though, the majority of shareholders had eventually rejected the acquisition. Subsequently, the parties have contemplated the reversed transaction (i.e. the takeover of Sunrise by UPC) and, since the market conditions have remained largely unchanged, Comco has cleared the transaction at the end of phase I.[86]

V. Procedure

22. *Access to decisions and evidence* remains an issue of topical importance. It is hoped that the Federal Tribunal's judgment of March 2021 in the *Aargau* public and private procurement case will support the parties and the authorities in determining which documents may be made available.[87] The Court's reasoning focused on the interpretation of LPD/DSG,[88] Article 19(1)(a), pursuant to which: "Federal bodies may disclose personal data […] if the data is indispensable to the recipient in the individual case for the fulfilment of his statutory task." Regarding the latter aspect, three elements could be taken into account: (i) answering parliamentary questions at the cantonal level; (ii) examining whether a torts lawsuit should be launched; and (iii) determining whether the undertakings that participated in the anticompetitive agreement should be excluded from future public procurement procedures.[89] On the other hand, the indispensa-

79 DPC/RPW 2021/3, p. 625 *Gründung eines Gemeinschaftsunternehmens durch Enel X S.r.l. und Volkswagen Finance Luxembourg S.A.*

80 DPC/RPW 2021/3, p. 617 *Währungsumrechnung des Umsatzes für die Schwellenwerte nach Art. 9 Abs. 1 KG.*

81 Federal Tribunal, case 2C_934/2020, judgment of 23 September 2021.

82 *Idem,* § 4.

83 *Idem,* § 4.1 *et seq*.

84 *Idem,* § 4.3. With respect to another case relating to the costs relating to Phase I (from a different perspective, though), see *Bovet/Alberini* (note 55), p. 102 § 13.

85 See *Bovet C./Alberini A.,* Recent Developments in Swiss Competition Law, RSDA/SZW 2021/1, p. 86 § 14 (this summary refers incorrectly to the takeover of Sunrise by UPC; for the sake of clarity, this first case related to the takeover of UPC by Sunrise).

86 Comco, case 41-0939, decision of 28 October 2020 (Liberty Global/Sunrise), available on the authority's website at <*https://www.weko.admin.ch/weko/fr/home/praxis/dernieres-decisions.html*>.

87 ATF/BGE 147 II 227 (Federal Tribunal, cases 2C_1040/2018 / 2C_1051/2018, judgments of 18 March 2021). Also Federal Tribunal, cases 2C_1039/2018/ 2C_1052/2018, judgments of 18 March 2021.

88 Federal Act on Data Protection of 19 June 1992 (LPD/DSG; RS/SR 235.1).

89 ATF/BGE 147 II 227 (note 87), § 5.3.

bility condition was more difficult to establish, since the Federal Administrative Tribunal had opted for a rather strict interpretation.[90] However, the Federal Tribunal showed a more flexible approach based also on constitutional grounds and, in particular, considered that LPD/DSG, Article 19(1)(a), required neither that a sanction decision be in force nor that a breach of competition law had been established.[91] As a consequence, this provision constituted a legal ground for the Comco to lift official secrecy[92] and transfer data to another authority within the strictly defined framework it set up.[93]

23. As a rule, undertakings may not appeal against orders pertaining to unannounced inspections *("dawn raids"),* since they lack a present interest to object to measures, which have already been performed by the authority.[94] However, the Federal Administrative Tribunal departed from this principle, since it was the first time that such a Comco order was being challenged before this jurisdiction; a parallel procedure before the Federal Criminal Tribunal aiming at unsealing documents was not deemed sufficient to override this exception, and the Court insisted on seizing this opportunity to examine fundamental legal aspects relating to searches.[95] A detailed analysis of the four cumulative conditions governing inspections – namely (i) a sufficient suspicion of an anticompetitive behaviour; (ii) the likelihood that evidence may be found on the searched premises; (iii) the principle of proportionality must be observed; and (iv) the existence of a valid search order[96] – led the Federal Administrative Tribunal to fully validate Comco's order in this case. More precisely, the competition authority must base its decision on a factual background showing that a violation of the law is possible; enough elements should be provided in order to carry out a legal subsumption in respect of one or a few alternative qualifications of the evidence and clues already gathered.[97] Following legal authors, the Tribunal retained two main criteria to assess proportionality: the type and seriousness of the infringement, on the one hand, and the stage of proceedings, on the other hand.[98]

24. A series of judgments on *sanctions* pertaining to agreements in the building sector in the *Graubünden* case gave the opportunity to the Federal Administrative Tribunal to clarify several issues:[99]
    - The Court confirmed what the text of LCart/KG, Article 49*a*(3)(b), says in substance, i.e. that the pronouncement of a fine may be waived only if the competition restraint ended five years before the opening of an investigation by the authority in accordance with LCart/KG, Article 27(1).[100]
    - Changes in ownership or corporate structure – including asset deals – should be assessed on a case-by-case basis in order to determine whether new entities or entities having new controlling shareholders should bear the costs of the sanction; an internal transaction should generally have no impact on the issue.[101]
    - Competition law sanctions are governed by their own rules, including the Ordinance on sanctions imposed for unlawful competition restraints under LCart/KG, Article 49*a*.[102] Because of their administrative nature and despite their direct or analogous criminal law character pursuant to CEDH/EMRK,[103]

90 *Idem,* § 5.4.1.
91 *Idem,* § 5.4.8.
92 See LCart/KG, Article 25(2).
93 ATF/BGE 147 II 227 (note 87), § 7.3 and 7.4.
94 Federal Administrative Tribunal, case B-4839/2020, judgment of 4 March 2021, § 4.4.5.
95 *Idem,* § 4.4.6.
96 *Idem,* § 6.1.
97 *Idem,* § 6.3.1.
98 *Idem,* § 6.5.12.
99 See also DPC/RPW 2021/3, p. 688 *A SA / B SA* (failure to reply to Comco's questionnaire leading to a sanction under LCart/KG, Article 52).
100 DPC/RPW 2021/3, p. 770 *Urteil vom 9. August 2021 in Sachen C Bauunternehmung Centorame AG gegen WEKO,* § 4 and 5, esp. 5.6. Also DPC/RPW 2021/3, p. 776 *Urteil vom 9. August 2021 in Sachen Schlub AG, Schlub AG Nordbünden, Schlub AG Südbünden gegen WEKO,* § 4 and 5, esp. 5.7.
101 DPC/RPW 2021/3 (note 100), p. 776, § 7.4 to 8.3.3.
102 RS/SR 251.5.
103 Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (CEDH/EMRK; RS/SR 0.101).

Article 6, the provisions of the Criminal Code[104] – including its Article 48(e) – do not apply to the calculation of these fines.[105]

– The combination of sanctions under LCart/KG, Article 49*a*(1), and measures under LCart/KG, Article 30(1), is not contrary to the principle *"ne bis in idem"*.[106] Moreover, these measures were justified in spite of the compliance programme set up by the undertaking, since there was still a risk of reiteration in this case.[107]

25. An *amicable settlement* formally approved by a Comco decision loses its autonomous function as an administrative law contract.[108] As such, it may not be therefore the object of a claim before the Federal Administrative Tribunal; only an appeal against the authority's decision approving or refusing the amicable settlement is open.[109]

26. The Federal Department of Economic Affairs, Education and Research (DEFR/WBF) rightly refused to examine on the merits the complaint *(dénonciation/Aufsichtsbeschwerde)* filed by Swissterminal against Comco regarding its assessment of the concentration giving rise to Gateway Basel Nord AG (GBN).[110] Considering among other things the special rules governing Swiss merger control, the Department pointed out that such a procedure would be in contradiction not only with the law but also with the Federal Tribunal's jurisprudence, in particular in respect of LCart/KG, Articles 33(1) and 43(4).[111] Subsequently, Swissmetal requested that the *publication* of the DEFR/WBF's decision in RPW/DPC be deferred and at least the name of the company be deleted.[112] Comco rejected both demands, stating first that the Department was a "competition authority" within the meaning of LCart/KG, Article 48(1).[113] Second, there was no piece of information that could be characterized either as a business secret[114] or as personal data, which private or public interest would prohibit their publication under LPD/DSG, Article 19(4)(a);[115] in particular, the Swissmetal's opposition to the GBN project was a well-known fact, the media having widely publicized the company's communication strategy.[116]

104 RS/SR 311.0.

105 DPC/RPW 2021/3 (note 100), p. 776, § 10.

106 DPC/RPW 2021/3, p. 789 *Urteil vom 9. August 2021 in Sachen Implenia Schweiz AG gegen WEKO,* § 4.4.

107 *Idem,* § 5.4.2.

108 DPC/RPW 2021/3, p. 765 *Urteil vom 13. Oktober 2020 – Untersuchung betreffend Leasing und Finanzierung von Fahrzeugen wegen unzulässiger Wettbewerbsabrede gemäss Art. 5 Abs. 3 und 1 KG,* § 5.3.1.

109 *Idem,* § 5.3.2.

110 DPC/RPW 2021/1, p. 299 *Aufsichtsbeschwerde von Swissterminal gegen WEKO betreffend Zusammenschlussvorhaben SBB/Hupac/Rethmann/GBN*.

111 *Idem,* § 5.

112 DPC/RPW 2021/1, p. 292 *Verfügung vom 20. November 2020 betreffend Publikation des Entscheids des WBF in Sachen Aufsichtsbeschwerde gegen die WEKO*. See also Federal Administrative Tribunal, case B-902/2016, judgment of 21 April 2021, where the Court rejected on procedural grounds the request filed by an undertaking with respect to the amendment of WEKO Secretariat's final report; indeed, there was in this case no independent decision subject to appeal.

113 DPC/RPW 2021/1 (n. 112), p. 292, § 20.

114 *Idem,* § 28. For a definition of the term "business secrets", see Federal Administrative Tribunal, case B-4139/2015, judgment of 16 April 2021, § 5.1.1.

115 DPC/RPW 2021/1 (n. 112), p. 292, § 35 *et seq*.

116 *Idem,* § 44.