Andreas Heinemann, Swiss Competition Commission

Keeping Competition Policy Up to Date

The interview was conducted in writing by David Mamane, attorney-at-law and partner with Schellenberg Wittmer in Zurich and Pranvera Këllezi, attorney-at-law in Geneva and member of the Swiss Competition Commission.

Switzerland has had a competition law since 1962. The creation of an independent federal administrative commission in 1996 (the Swiss Competition Commission; COMCO) with its investigative body of about 75 professionals (COMCO's Secretariat) was a milestone in competition law enforcement. The interviewers had the pleasure to discuss current issues and trends in competition law enforcement with Professor Andreas Heinemann, President of the COMCO.

Last year marked the 25th anniversary of the current Swiss Cartel Act and the organisational setup of the COMCO. What changed with the Cartel Act of 1995 that came into force in 1996? What are in your view the most important milestones over the last 25 years?

We have had competition laws before 1996, but they were full of loopholes, and the old institutions did not have the necessary competences. The Swiss economy was characterized by a large number of cartels that were disappearing only gradually. The Cartel Act of 1995 brought a paradigm shift: For the first time, the goal of the law was to protect effective competition. Precise rules have been formulated, and it is not possible any longer (except for the government) to justify restrictive behaviour based on public interest considerations as it was the case before. A preventive merger control has been introduced. And, most importantly, the COMCO has been given the competence to take its own decisions. Before, the ministry had to be asked which then decided if action was needed. This considerably weakened enforcement. However, even with the Cartel Act of 1995 one element was still missing. The law did not provide for fines against infringements. Firms could only be fined for not complying with a COMCO decision. In 2004, fines for competition law violations as well as a leniency system were introduced. Since then, public enforcement in Switzerland is state of the art and follows the leading enforcement model in Europe, i.e., the administrative system where the authority has the competence to take decisions and to impose fines, under the control of the courts, of course.

Milestones have been the procedures against hardcore cartels including but not limited to the construction sector. The large number of procedures against bid-rigging in the Canton of Grisons have attracted great public attention. Another series of cases concerned restrictions of parallel imports into Switzerland. The GABA, BMW and NIKON cases set out the principles based on which the COMCO fights against the foreclosure of Swiss markets to foreign markets. These decisions, all confirmed by the courts, have had important practical consequences. In the past, so-called European Economic Area (EEA) clauses were common in European distribution contracts. They prohibited exports to countries outside the EEA and thus also to Switzerland. Today, contracts have been adapted so that exports not only to EEA countries but also to

Switzerland are allowed. And finally, it is worth mentioning the proceedings against network monopolies in infrastructure: Twenty years ago, the COMCO opened up electricity markets, and in 2020 we did the same in the gas sector.

Is Switzerland still the land where the cartelists meet without being disturbed? What are the most recent focal points of the COMCO and what are your main concerns for the near future?

Thanks to the vigorous enforcement of the law including the possibility to impose fines, the attitude towards cartels has considerably changed. Firms and their associations have adopted a competition culture, not only in their mission statements and their codes of conduct but also in their actual behaviour. So, cartelists no longer feel at ease in Switzerland. However, this does not mean that there are no more cartels in the country. Therefore, one of the focal points of the COMCO remains the fight against hardcore cartels. Another focus is the policy against absolute territorial protection in distribution agreements sealing off Switzerland and thus contributing to the higher price level that we observe in Switzerland. My main concern for the future is that the successful practice of the COMCO in these areas may be put at risk by a current legislative proposal.

You are alluding to a current draft legislation that plans to reintroduce the need to assess anti-competitive effects for all types of agreements. The bill is a reaction to the GABA judgment of the Federal Supreme Court (FSC) according to which anti-competitive effects do not have to be considered in assessing certain types of agreements (eg price restrictions or prohibition of parallel trade). The ruling was criticised by commentators as being too broad and formal. What do you think of the legislative proposal?

This legislative proposal is a major threat to the effectiveness of the Cartel Act. It is based on the argument that the GABA judgment has impaired legal certainty and that cooperation between companies is made more difficult. In the parliamentary debate, it was also argued that consortia and purchasing groups were in danger. None of these arguments are correct: The GABA decision has not weakened legal certainty, but, on the contrary, has strengthened it. The twists and turns that have been taken in interpreting the requirement of a “significant” restriction of competition are breath-taking. In the GABA decision, the Federal Supreme Court has restored legal certainty by returning to the will of the legislator who construed “significance” as a *de minimis rule*, comparable to the condition of “appreciability” in EU competition law. Cooperation between companies is not made more difficult. The COMCO does not get tired of pointing out the legality of consortia and purchasing groups. If doubts remain, the legislator could introduce specific rules on consortia and purchasing groups. The proposal as it is on the table now would strike at the heart of current enforcement. Cartelists and firms sealing off Swiss markets would try to defend themselves with the argument that they are small fry or that the proven restrictions only had a small market coverage. The deterrent effect of the law and legal certainty would be compromised.

You have been a member of the COMCO since 2011 and have been the president of the COMCO since 2018. What do you consider as your biggest accomplishments and is there anything that you regret?

The work of competition authorities is team work. Accomplishments have to be attributed to the whole authority, in our case both to the Secretariat with its full-time professionals and to the Commission, the decision-making panel, composed of experts in law and economics. The greatest achievement of the authority has been the successful defence of our decisions in court in most cases. This has not only implemented the legislation, but has profoundly shaped Swiss competition law. What I have especially promoted is the adaptation of our practice to the challenges of our time. It is essential to keep competition policy up to date. Therefore, I have been interested very much in the mutual relationship between competition law on the one hand, and questions of innovation, digitization and sustainability on the other hand. Moreover, I have always emphasised the necessity of basing competition law on a solid economic foundation. However, this does not mean that in each and every case a full-fledged effects-based approach has to be pursued. Modern competition laws are based on a mix of form-based elements providing for legal security and effects-based elements ensuring economic coherence. An example is EU competition law with its distinction between restrictions by object and by effect and the availability of an efficiency defence.

I regret that I do not seem to have conveyed this message sufficiently. The legislative proposal just mentioned, adopted by the Swiss Parliament, aims at abolishing the category of restrictions by object. If this becomes law, legal certainty will be seriously affected. The proponents of this motion overlook the fact that the economics of competition law have not only to take into consideration substantive law but also enforcement including its costs and duration. The COMCO will bring these points of view into the debate.

Your academic career has given you a very broad knowledge of international competition law developments and you regularly also publish on EU competition law. How has this influenced your work with the COMCO? Conversely, do you think that there are any specific Swiss law approaches that should be of interest for foreign competition authorities?

Swiss competition law is strongly influenced by EU law, but to varying degrees. The prohibition of the abuse of a dominant position closely follows the EU model while merger control is based on a different approach. The rules on restrictive agreements are constructed differently, but aim at leading to the same results as EU competition law. For example, the Federal Supreme Court (FSC) has decided that the rules on vertical agreements are “materially identical” with EU law. We are following closely the developments in the EU, and this has been very fruitful for our work. Moreover, thanks to the Cooperation Agreement on competition matters with the EU, in force since 2014, we can even exchange confidential information under certain conditions. However, these influences should not obscure the fact that Swiss competition law has its own objectives and features. For example, the legislature has entrusted us with the task of combating the foreclosure of Swiss markets. We therefore do not hesitate to oppose territorial protection even more strictly than EU competition law already does.

Regarding developments of Swiss competition law that could be of interest abroad I would like to stress the cases where we have broken new ground. For example, in the Swatch case on an obligation to supply mechanical watch movements to competing watch manufacturers under the abuse of dominance rules we have created a “phasing

out" model that allowed the dominant firm to stop deliveries after six years. The idea was to create incentives for market participants to build up an alternative production of watch movements. According to our observations, this strategy has been successful. Moreover, innovation has been promoted since the market has generated watch movements with new features. The example shows that it may be fruitful to limit in time an obligation to supply imposed on a dominant firm because market participants thus know that they cannot rely on supplies by the dominant firm forever. Another interesting case is *Hors-Liste*. Here, the COMCO, confirmed by the FSC, fined manufacturers for vertical price fixing because their allegedly non-binding price recommendations were followed in the market widely. The decision has been criticized by some observers because no pressure and no incentives in order to respect the recommended prices were involved. What the critics overlook is that the price recommendations were constantly conveyed to retailers by independent third parties via an electronic database and appeared as soon as retailers scanned the barcode of the product. Apparently, the COMCO was the first to deal with a vertical price fixing scenario in the digital economy and has developed new "plus factors" that transform a non-binding price recommendation into illegal resale price maintenance.

The EU is about to introduce new legislation to ensure contestability of digital markets (DMA and DSA). Do you think Switzerland needs a similar legislation? If not, how does the COMCO deal with market power in the digital economy? Have there been examples of procedures against the GAFAM and will COMCO get inspired by the material rules in the DMA?

Small and medium-sized jurisdictions do not have the capacities to set up a new organism dealing with *ex ante* regulation of the world leading platforms. The number of employees of our entire authority is smaller than what will be needed for the application of the DMA. Even without a "Swiss DMA", traditional competition law could be adapted to the specific challenges of the platform economy, either by legislative changes or by application of the general rules. In Switzerland, short laws with rather broad concepts are given preference. For example, there are no explicit rules on provider liability as provided for in the EU E-Commerce Directive or in the Draft DSA. Authorities and courts are entrusted with applying the existing rules to the new phenomena.

Regarding the topics covered by the DMA, it will be the task of the COMCO to deal with them by applying general competition law concepts. I could imagine the notion of abuse being opened up to the behaviours banned by the DMA, but in a competition law way, i.e. after a careful analysis of the single case and taking into account legitimate business reasons. The COMCO has already dealt with competition law problems of GAFAM. We regularly contact platform companies when a competition law procedure is opened in the EU in order to ensure that the solution found in the EU will be applied to Switzerland as well. And we have our own GAFAM cases. For example, the Swiss mobile payment app TWINT faced problems on iPhones because Apple Pay in some cases launched automatically when users tried to pay with TWINT. We agreed with Apple that a technical solution is offered to TWINT in order to guarantee an undisturbed payment process.

This year the Swiss Parliament has reinforced the concept of economic dependence and the new rules entered into force on January 1, 2022. What will

be the main challenges for the COMCO when investigating and assessing this new piece of legislation?

Explicit rules on economic dependence and relative market power are new to Swiss law. It will be an important task for the COMCO to unfold these rules. On the one hand, it has to be clarified under which conditions one company is dependent from another one. On the other hand, it has to be worked out which behaviour is prohibited for a firm with relative market power. Contrary to other jurisdictions, all the general rules of conduct for dominant firms apply. It will be challenging to develop what sense these prohibitions have in the context of relative market power. In order to create a common starting point, we have published on our website an explanatory note and a form for filing a complaint. In this context, I would like to stress the following point: The application of the new rules is not in the exclusive competence of the COMCO. Private litigation is supposed to play a major role. The COMCO would like to make guiding decisions and to contribute its expertise to the civil proceedings through its *amicus curiae* function. It would be an excellent side effect if private enforcement, which is totally unsatisfactory in Switzerland today, were fuelled by the new concept of relative market power. At best, civil courts could take over completely after some leading cases and enough experience.

In particular, the new rules would force suppliers outside of Switzerland to provide Swiss buyers with products at the same price and market conditions in any country worldwide. Does the mere fact that a product is commercialised at a higher price in Switzerland than in any other country already imply a position of economic dependence?

Relative market power and abusive behaviour are two prerequisites that have to be distinguished. It is true that a new rule in the law declares abusive the restriction of the opportunity for buyers to purchase certain goods or services at foreign prices. However, this rule only applies to firms with relative market power. Therefore, relative market power has to be proved separately. One of the reasons to introduce the new concept was to create a level playing field between domestic and foreign manufacturers. Swiss firms shall not be disadvantaged vis-à-vis their foreign competitors by having to pay higher factor prices. Therefore, one could think about assuming dependence when the access to cheaper input factors abroad is indispensable in order to create or maintain international competitiveness. On the other hand, this would go beyond the concept of economic dependence in other jurisdictions. The COMCO will deal with this and many other questions as and when relevant complaints arrive.

It can also be noted that the courts had to deal with a number of procedural aspects of the investigations by the COMCO. Would you be in favour of clarifying procedural rules in a procedural act for competition law investigations?

Procedural issues occupy the authority intensively. The COMCO has developed best practices for example regarding the right to be heard, *nemo tenetur*, access to files, the conduct of dawn raids and the publication of decisions and case reports. Our decisions have been confirmed by the courts in most cases, sometimes corrected. Of course, procedural rules could be laid down in more detail. However, one should not have too high expectations. Even if procedural rules are further elaborated, problems

in practice are often so specific that you will not find the answer in the law, no matter how detailed it has been drafted. Just to give one example: We had to deal with the question if former directors can be heard as witnesses (under a duty to testify) or as parties (with the right to refuse to testify). The FSC eventually confirmed that former directors are witnesses. I doubt if such a detail would be part of new procedural rules. Against this backdrop, the added value of a specific procedural act would be limited.

If we look at COMCO's action over the years, the COMCO has built a two-fold tradition on the one hand in regulating markets, e.g. in the watch or the card payment industry, and on the other hand in using competition law to deregulate markets, e.g. in the electricity and gas supply industries. What is the right blend in your view of regulation and competition, and is the competition law regime always a good basis for regulating markets?

In Switzerland, we have an approach towards regulation which differs considerably from the situation in the EU: The danger of excessive interventionism by the regulator is emphasized. This leads to a preference for self-regulation and negotiated solutions. Only when decentralized solutions fail, state regulation is considered necessary, and then only *ex post* and not *ex ante* like in the EU. The reluctance to regulate is regularly accompanied by the argument that any problems that may arise could be solved by general competition law. Thus, the COMCO has an additional task: We have to ensure competition in sectors that in other jurisdictions would be liberalized and supervised by a specific sector regulation. Examples of liberalization by competition law concern the electricity and gas supply industries. An example for a supervision by competition law is the card payment industry: In the EU, interchange fees for card-based payment transactions are the object of detailed regulation. As we do not have that, it is the COMCO's job to intervene against excessive tariffs.

Our case law in the watch industry is different: Here we had to deal with a classical question of competition law: Under which conditions is a dominant firm under a duty to supply? In this case, as already mentioned, we have developed an innovative phasing-out model. According to our observations, this approach has been successful. In sum, in a jurisdiction characterized by a prudent approach to regulation, the competition authority is charged with several tasks: Not only the general goals of competition law have to be fulfilled, but also the absence of regulatory law has to be compensated. In my view, the COMCO is well up to this multitasking.

You have a long career in competition law as academic and enforcer. How were you introduced to competition law? Have your views changed with the time on any position on competition law? Do you see a change in the perception of the public and politicians towards competition law?

I studied both law and economics in the 1980s, before the fall of the Iron Curtain. In that era, newspapers, politicians, scholars and the general public were still discussing intensively the comparison between market economy and centrally planned economy, between Adam Smith and Karl Marx, so to speak. In economics, the history of economic thought was my favourite subject. I was fascinated to see how Walter Eucken had dissected the weaknesses of *laissez faire* on the one hand and central planning on the other hand. The ordoliberals opted for a market economy based on competition and therefore strongly condemned cartels. Convinced by these insights, I

turned to competition law and policy at an early stage. I think that this subject is more than just an area of law (although I am aware that every specialist feels this way about her field). The decision on how the economy should be organised has far-reaching consequences, also for the flourishing of democracy. The most important extension of my view on competition law occurred in the 1990s when I worked on a book dealing with the relationship between competition law and intellectual property protection. Fields that had been seen as conflicting turned out to share the same goal, namely to foster innovation. This dynamic interpretation has had a strong impact on my concept of competition law.

The public perception of competition law varies over time. However, there is one constant. The market mechanism works in a decentralised way. Often, the positive effects of functioning markets are not directly observable. Therefore, the contribution of competition law to general well-being is often under-estimated. Reforms are only successful if the resulting benefits are clearly illustrated. For example, the introduction of the concept of relative market power into Swiss law, mentioned above, was due to the “Fair Price Initiative” that held out the prospect of lower prices in Switzerland. It is more difficult to push pro-competitive reforms if you cannot show clear and tangible improvements, or to fight anti-competitive reforms if you cannot present direct harm. For example, a specific characteristic of our time is protectionist tendencies, also in competition policy. In Switzerland, a “reimport clause” was on the table, that would have exempted domestic manufacturers from certain consequences of the relative market power rules. Eventually, this proposal did not prevail, but that was a close call. I think that it belongs to the DNA of competition law to have its rules applied equally to domestic and foreign companies. Competition authorities should use their advocacy role in order to inform the public debate in this sense.

What would you recommend to a young student or practitioner who is interested in competition law? Should she pursue a career in academics, in the authority or private practice, or a blend of all that?

I would recommend students to start already at university, focusing not only on competition law but also on neighbouring fields like intellectual property protection, public procurement, international trade law, and the internal market law of the European Union, no matter if you live in- or outside this area. The next step could be an internship at the authority or with a law firm specialized in competition law. Then the young colleague will see if the fascination lasts. I am sure that this will be the case for many who immerse themselves in this matter. Competition law is the field where law and economics meet in the closest way. It also raises fundamental questions about economic policy. And not to forget, competition law is a very international subject. During your career, you will come into contact with many international issues and meet people from all over the world. The number of related networks is impressive. As a result, you will rethink your own views all the time. What could be more enriching?