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Question A: Abuse of a Dominant Position and Globalization

Is there any consistency between the recent approaches of the different jurisdictions to the notion of abuse?

Are there too many restrictions on legal rights and business opportunities?

National Reporter

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1. Introduction

The scope of this report is to provide general information on the Swiss regulations related to abuse of a dominant position and their interpretation and application by the Swiss competition authority and courts. It follows the structure of the questionnaire addressed to the national reporters.

Switzerland is a small market, geographically embedded in the European Union. It has consistently refused to join the Union, even if close relationships are maintained and some economic integration has been achieved through bilateral agreements, in particular on the free movement of persons and free trade. In this framework, the Swiss export industry faces tough international pressure from outside competitors, particularly given the strength of the Swiss Franc. On the other side, the internal market has, on several aspects, remained immune from external pressure.

The Swiss practice on unilateral conduct of dominant firms reflects this economic setting. During the last years, the competition authorities have dealt exclusively with national matters related to the national market. Most of them were related to access to some input (a network, a product) in order to ensure that markets remain open for competitors who, otherwise, would have no alternatives.

2. Provision Prohibiting the Abuse of Dominant Position

2.1. *Relevant provisions of the Cartel Act*

Article 7 of the Federal Act on Cartels and other Restrictions to Competition¹ (hereafter “ACart”) prohibits unlawful practices by dominant undertakings. Its content is the following:

“¹ Dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.

² The following behaviour is in particular considered unlawful:

- a. any refusal to deal (e.g. refusal to supply or to purchase goods);
- b. any discrimination between trading partners in relation to prices or other conditions of trade;
- c. any imposition of unfair prices or other unfair conditions of trade;
- d. any under-cutting of prices or other conditions directed against a specific competitor;
- e. any limitation of production, supply or technical development;
- f. any conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services.”

The law also provides for a definition of what is a dominant position at article 4 para. 2 ACart, whose wording is the following: “Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.” As the notion of dominant position is not the topic of this report, it will not be discussed further.

2.2. *Historical Development, Amendments to the Statutory Regulation and Relation to EU law*

The ACart has been enacted by the Swiss Parliament on 6 October 1995 and entered into force on 1 July 1996. Its adoption followed Switzerland’s refusal in 1992, by popular referendum, to join the European Economic Area (EEA) and was intended to foster the competitiveness of the Swiss economy². The ACart has been further reinforced in 2004 with the introduction of direct sanctions that may amount to up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years (art. 49a ACart). Before 1996, Swiss competition law was merely based on private enforcement and lacked a provision specifically geared towards the abuse of a dominant position. The practice in this field remained limited³.

To a large extent, art. 7 ACart has been modelled after art. 102 TFEU (previously art. 82 TEC) and the practice resulting thereof. Given its conception, its wording and the history of its adoption, both the literature and the practice of the competition authorities have recognized that art. 7 ACart should not be interpreted in a notably different manner than art. 102 TFEU⁴. For this reason, the practice and jurisprudence of the European authorities and courts have been widely taken into account by Swiss authorities in the application of art. 7 ACart.

However, the Federal Court ruled in the “Mobilfunk” decision of 11 April 2011 in favour of an autonomous interpretation of Swiss law. According to the Federal Court, there are no common rules of competition law that have been agreed between the EU and Switzerland in the framework of a bilateral treaty. In addition, the legislator’s primary purpose in the adoption of the ACart was not to align Swiss law with EU competition law. Finally, the principles underlying Swiss competition law are different than those underlying EU competition

¹ Available in an (unofficial) English translation at <https://www.admin.ch/opc/en/classified-compilation/19950278/index.html>.

² Message of the Federal Council related to the Act on Cartels and other Restrictions of Competition, pp. 13 ff; V. Martenet and A. Heinemann, *Droit de la concurrence*, Schulthess 2012, p. 16.

³ E. Clerc, in : V. Martenet, C. Bovet and P. Tercier, *Commentaire Romand – Droit de la Concurrence*, 2nd edition, Helbing Lichtenhahn 2013 (hereafter “CR-LCart”), ad art. 7 I LCart N. 24 ss.

⁴ Decision of the Comco of 19 October 2009 “Preispolitik Swisscom ADSL”, DPC 2010/1 116, 147; E. Clerc, in: CR-LCart, ad art. 7 N. 49.

law⁵. Therefore, the mere use of the same terminology would not automatically imply an identical application of the rules and autonomous Swiss law shall thus be interpreted autonomously from EU law.

Notwithstanding the “Mobilfunk” ruling, which has been criticized⁶, both the Competition Commission and the courts have continued to refer to EU practice and jurisprudence as a source of inspiration and an important method of interpretation in the application of art. 7 ACart⁷.

In 2012, a proposal to revise the ACart has been submitted to the Swiss Parliament, but was never voted into law and was definitively abandoned in September 2014. This proposal would have substantially changed the nature of the ACart and the prohibitions it contains. In relation with the abuse of dominant position, it was proposed to introduce an art. 7a ACart, with the title “unlawful obstruction to purchase in foreign countries”. This provision would have prohibited the imposition of higher prices in Switzerland than abroad by undertakings or groups of undertakings who would have, as a second condition of the prohibition, refused to sell to Swiss customers from their foreign branches. Such behaviours can indeed not be caught in the same way as vertical agreements in the framework of distribution networks.

Art. 7a ACart would have applied to all undertakings without respect of their power on the market, based on the controversial idea that an undertaking that is in a position to charge higher prices to Swiss customers has, by nature, some market power⁸. It would have prohibited the refusal to supply Swiss customers in a country of the OECD at the prices and conditions applied in this country, if the concerned products or services were also offered in Switzerland and the prices were publicly disclosed or the customers relied on these goods or services to satisfy their own customers and couldn't purchase them in Switzerland at comparable prices or conditions.

Despite the obvious difficulties inherent in the application of such a prohibition, the proposal found some political support before the whole revision process was abandoned. However, an attempt to lower the threshold of relative market power was recently reintroduced in the Parliament, with a similar purpose⁹.

2.3. *Other Statutory Provisions*

While art. 7 ACart is the only provision of Swiss law which directly and globally regulates the behaviour of undertakings with market power, some other statutory provisions either prohibit certain behaviours that are similar to those covered by art. 7 para. 2 ACart or command certain obligations to undertakings with a dominant position in regulated markets.

First, the Federal Act on Price Supervision applies to undertakings with “market power”. It establishes a regime of price supervision by a federal authority, the “Price Supervisor” with the power to order price reductions or to prohibit price increases. Prices are deemed abusive if their level is not the result of effective competition. The assessment of abusive prices must take into account the evolution of prices on similar markets, the requirement to achieve equitable profits, the evolution of costs, specific services provided by the undertakings as well as particular circumstances inherent to the market. The application of these regulations has never gained much traction, mostly because of the difficulty to assess what constitutes a fair level of price under the criteria set by the law.

Second, Art. 3 let. f of the Federal Act against Unfair Competition prohibits the repeated offering of selected goods, works or services below cost price and the making of particular mention of such offers in the offeror's advertising, thus deceiving the customers as to the offeror's capabilities or those of its competitors. This provision aims at protecting customers against the deception triggered by specific offers advertised below cost price as to the general price level of the products sold by an undertaking. It applies to all firms, irrespective of

⁵ ATF 139 II 99, c. 4.3.1.

⁶ E. Clerc, in : CR-LCart, ad art. 7 I LCart N. 50.

⁷ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 8.2.3.

⁸ See B. Merkt, Abus de position dominante: développements récents de la pratique, in: I. Hochreutener, W. Stoffel and M. Amstutz (eds), *Pratique du droit de la concurrence: Abus de position dominante, procédure, révision*, Schulthess 2013, p. 66.

⁹ Parliamentary initiative of Mr Hans Altherr in the Council of States dated 25 September 2014. See http://www.parlament.ch/e/suche/Pages/geschaefte.aspx?gesch_id=20140449.

their market power. In contrast, art. 7 para. 2 let. d ACart protects the market against the reinforcement of a dominant position through the under-cutting of prices directed towards a specific competitor.

Finally, certain sector-specific regulations provide for obligations that are only applicable to undertakings with market power.

Under art. 11 ff of the Federal Telecommunications Act (hereafter “TCA”), providers of telecommunications services that have a dominant position in the market must provide access to other providers in a transparent and non-discriminatory manner at cost-oriented prices to their facilities and their services in certain forms provided by law (including access to the local loops, interconnection and access to cable ducts). Disputes over access conditions are decided by the Communication Commission, an administrative body with decisional powers. If the question of dominance in the market must be assessed, the Comco must be consulted (art. 11a para. 2 TCA). Finally, dominant providers of telecommunications services may bundle their services only if they also offer the services included in the bundle individually (art. 12 TCA).

This sector-specific regulation replaces the general rules of competition law for the particular market that it regulates. This does not mean that competition law is entirely excluded from the telecommunications market. On the contrary, the incumbent provider, Swisscom, has been considered dominant in several decisions rendered by Comco in application of art. 7 ACart.

In the sector of supply of electricity, art. 13 ff of the Federal Act on Electricity compel the operators of electricity networks to grant access on a non-discriminatory basis and at prices that should not exceed the sum of their costs. While the law does not mention the holding of a dominant position as a condition of these obligations, it implies that electricity networks are, by nature, natural monopolies exempt of competition¹⁰.

Finally, art. 75 of the Federal Act on Radio and Television provides that a broadcaster or another undertaking active in the radio and television market who has jeopardised diversity of opinion and offerings as a result of an abuse of its dominant position may be compelled to ensure diversity by measures such as granting broadcasting time for third parties or cooperating with other participants in the market, to take measures against corporate journalism, such as issuing editorial statutes to ensure editorial freedom, or, should such measures prove to be clearly inadequate, adapt the business and organisational structure of the undertaking.

3. Definition of Abuse

3.1. *Structure of art. 7 ACart: general rule and list of abusive behaviours*

Art. 7 ACart contains, in its first paragraph, a general clause dealing with the abuse of a dominant position. Its second paragraph contains a list of abusive behaviours. This list reflects art. 102 TFEU, with the addition of refusal to deal and under-cutting of prices, which have long been recognized as possible abusive behaviours by the European practice and jurisprudence. It is a list of examples, as specified by the use of the words “in particular” in the law. The indicative nature of this list has always been recognized in literature, by the Comco and by the courts¹¹.

The exemplative nature of the list has two consequences. First, other forms of behaviours by dominant undertakings may infringe art. 7 para. 1 ACart and be qualified as abusive even if they do not correspond to one of the examples listed in art. 7 para. 2 ACart¹². However, the courts have ruled that, while such behaviours may be deemed to constitute an abuse of a dominant position, they may not be subject to administrative sanctions (fines) because the general clause of art. 7 para. 1 ACart did not, in its own right, fulfil the predictability requirements imposed by art. 7 of the European Convention of Human Rights. Such requirements are only fulfilled if the abusive behaviour falls into one of the categories listed in art. 7 para. 2 ACart¹³.

¹⁰ FF 2005 1502.

¹¹ For the latest occurrence in the jurisprudence of the Federal Court, see ATF 139 I 72 c. 10.1.2. See also the decision of Comco of 29 November 2010 “SIX/Terminals mit Dynamic Currency Conversion”, DPC 2011/1, 96 ss, 142.

¹² E. Clerc, in : CR-LCart, ad art. 7 I LCart N. 109.

¹³ Judgement of the Administrative Federal Court of 24 February 2010, DPC 2010/2 242 c. 4.5.1; Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 8.

Second, the listing of abusive behaviours in art. 7 para. 2 ACart does not create a per-se prohibition, nor a presumption of illegality. A substantial analysis of the dominant firm's behaviour is required in each particular case¹⁴. Thus, a behaviour falling into one of the categories listed in art. 7 para. 2 ACart may only be deemed abusive if it fulfils the test set forth by art. 7 para. 1 ACart.

Art. 7 ACart shall thus be read as an “indivisible unity”, meaning that, in practice, no abusive behaviour may be sanctioned by the Comco unless it fulfils the test of para. 1 and can be attributed to one of the examples provided in para. 2¹⁵.

3.2. *Definition of Abuse*

Art. 7 para. 1 ACart does not provide an explicit definition of what abuse means. It does, however, state that the behaviour of dominant firms is illegal if it “hinders other undertakings from starting or continuing to compete, or disadvantage trading partners.” Therefore, the law does not define abuse through the form of the indicted behaviour, but through its effects.

The Comco has not developed a more precise definition in its decisions. In general, it is recognized that abusive behaviours of dominant firms can take multiple forms and yield ambivalent results, both pro- and anticompetitive. The same behaviour, such as low prices, can either be beneficial to competition or, if such prices have a predatory effect, harmful to competition¹⁶. A test has thus been developed to analyse whether a particular behaviour meets the conditions of art. 7 para. 1 ACart.

In its landmark judgment “Publigroupe”¹⁷, the Federal Court stated that abuse includes “all possible behaviours which have a damaging economic effect as well as those behaviours which hinder the economic freedom of the concerned undertakings.” Thus, the Federal Court confirmed that abusive behaviours could take all kinds of forms, provided they were harmful to competition. It also confirmed that art. 7 ACart did not seek to protect only competition as a process, but also the economic freedom of the dominant firm's trade partners.

4. **Distinction Between Exploitative and Exclusionary Abuse**

Art. 7 para. 1 ACart makes a distinction between behaviours which “hinder other undertakings from starting or continuing to compete” and those which “disadvantage trading partners”. Thus, the distinction between exploitative and exclusionary abuse results already from the wording of the legal provision. This distinction has been acknowledged since the redaction of the law, has been consistently applied ever since and is inherent to the definition of abusive behaviour under Swiss law¹⁸.

Exclusionary abuses are the most common type of illicit behaviours. According to Comco, they usually occur in the form of restrictions to competition directed against competitors and are, by nature, competition-related. Through exclusionary abuses, other undertakings are obstructed in the entry into or exercise of competition; actual competitors are weakened or driven out of the market or the entry into the market of potential competitors is made more difficult or even impossible. This results in an anticompetitive foreclosure. Exclusionary abuse leads to the exclusion of competitors by means that are different than the competitiveness of the dominant undertaking's products or services. The result is not only an obstruction of the competitors, but also a restriction of the competition as such¹⁹.

¹⁴ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.2; P. Reinert, in: Baker & McKenzie (eds), Kartellgesetz, Stämpfli 2007, p. 90; for a critic of the systematic of the interpretation, see M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 29.

¹⁵ E. Clerc, in : CR-LCart, ad art. 7 I LCart N. 110.

¹⁶ M. Amstutz and B. Carron, in: M. Amstutz and P. Reinert, Basler Kommentar – Kartellgesetz, Helbing Lichtenhahn 2010 (hereafter “BK-KG”), ad art. 7 KG N. 24.

¹⁷ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.2.

¹⁸ See M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 41; B. Merkt, Abus de position dominante: développements récents de la pratique, in: I. Hochreutener, W. Stoffel and M. Amstutz (eds), Pratique du droit de la concurrence: Abus de position dominante, procédure, révision, Schulthess 2013, p. 63 ss.

¹⁹ Decision of Comco of 21 October 2013 “Swatch Group Lieferstopp”, DPC 2014/1 215, 253.

According to the Administrative Federal Tribunal, exclusionary behaviours always occur in the form of restrictions to competition directed against competitors and are, by nature, competition-related²⁰. With the exception of the use of the word “always”, which most likely has no proper meaning, this definition is very close to the one provided by Comco.

According to the Federal Court, in cases of exclusionary abuses, other undertakings (usually actual or potential competitors, but potentially also other participants to the market) are hindered in the entry into (i.e. through the erection of barriers to entry) or exercise of competition. The hindrance of exercise of competition encompasses multiple forms of behaviours, including disciplining hindrance, which tends to destroy the achievements of competitors on the market, price hindrance and strategic hindrance, which relates to other parameters as the price. Whether the hindrance occurs on market dominated by the dominant undertaking or on an upstream or downstream market is irrelevant. Exclusionary behaviour thus includes all actions of a dominant undertaking which are not akin to fair competition on the merits, which are directed towards actual and potential competitors and limit the scope of action of the latter on the dominated market or on a neighbouring market²¹.

Exploitative practices, on the other side, happen on a market with limited or no competition and are geared towards the dominant undertaking’s trade partners (suppliers or customers), which are disadvantaged by constrained, exploitative prices or business terms²². This is the case, for instance, when a monopolist on the offering side uses his situation to impose usurious prices to customers knowing that the latter – given the monopoly – do not have any reasonable alternative²³.

This being said, the distinction between exclusionary and exploitative abuse is purely heuristic and is legally irrelevant. What matters is that the abusive dimension – including the harm to competition – is determined on a case by case basis²⁴. Moreover, the examples listed in art. 7 para. 2 ACart cannot be attributed by principle to a particular type of abuse. Abusive behaviours can simultaneously cover several matters of fact of art. 7 para. 2 ACart and can be, at the same time, both exclusionary and exploitative.

A third category of abusive behaviours, namely structural abuse, has been proposed by literature. It would cover the cases where a dominant undertaking reinforces its position on the market by directly affecting the market structure through a series of transactions not related to the company’s products (i.e. through the acquisition of a stake in another undertaking, the acquisition of an intellectual property right, etc.)²⁵. However, this approach has been criticized²⁶ and has never really found its way into practice.

5. Distinction between Price-Based and Non-Price-Based Abuse

The statutory provision related to abuse of dominant position (art. 7 ACart) does not make a distinction between price-based and non-price based abuse. This distinction has been cited in case law, however without any relevancy attached hereto²⁷. Literature has mentioned it, mostly with reference to European law²⁸.

The distinction between price-based and non-price based abuse does not have any legal relevance beyond its illustrative purpose. Both types of abuses are assessed using the same test.

²⁰ Judgement of the Administrative Federal Court of 24 February 2010 “Terminierungspreise im Mobilfunk”, B-2050/2007, c. 11.1.1.

²¹ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.2.

²² Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.1.

²³ Judgement of the Administrative Federal Court of 24 February 2010 “Terminierungspreise im Mobilfunk”, B-2050/2007, c. 11.1.

²⁴ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.1; M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 42.

²⁵ D. Cherpillod, L’abus structurel, Bruylant and Schulthess 2006, p. 251.

²⁶ M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 47 ff.

²⁷ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.1.

²⁸ M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 45; J. Borer, Wettbewerbsrecht I – Schweizerisches Kartellgesetz, 3rd edition, Orell Füssli 2011, p. 102; E. Clerc, in: CR-LCart, ad art. 7 I LCart N. 95; D. Cherpillod, L’abus structurel, Bruylant and Schulthess 2006, p. 67; M. Ruffner, Unzulässige Verhaltensweisen marktmächtiger Unternehmen, AJP/PJA 7/96, 834, 838.

6. Enforcement Practice

6.1. *Decision Making Practice*

6.1.1. *Comco*

Between 2010 and 2014, the Comco has rendered a total of 6 decisions related to the prohibition of unilateral conduct (art. 7 ACart). For comparison purposes, the total number of decisions issued by Comco during the same period in relation with either anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart) amounted to 29. These numbers include only final decisions rendered at the outcome of a formal investigation in accordance with art. 27 ACart. They exclude preliminary decisions such as interim measures.

The following table shows the allocation of cases on a yearly basis:

Year	Cases related to anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart)	Cases related to unilateral conduct (art. 7 ACart)
2010	5	1
2011	6	1
2012	5	1
2013	7	1
2014	6	2
Total	29	6

The most significant decisions were the following:

In its decision “SIX/Terminals mit Dynamic Currency Conversion²⁹”, the Comco ruled that SIX Group AG had abused its dominant position on the market for acquiring of credit and debit cards by refusing to grant access to the Dynamic Currency Conversion System to other providers of payment terminals than its subsidiary SIX Card Solutions AG. Thus, retailers could only offer Dynamic Currency Conversion if they had purchased a payment terminal from SIX Card Solutions AG. The Comco considered that this behaviour amounted to refusal to deal with other suppliers of terminals, discrimination between trade partners, limitation of technical development and tying between acquiring and sale of payment terminals. The decision determines that SIX Group AG’s conduct hindered the exercise of competition and allowed SIX Card Solutions AG to increase its market share substantially. The decision examines the concept of leverage as well as, for the first time, an efficiency defence related to incentives to invest and innovate.

The “Swatch Group Lieferstopp³⁰” case is particular insofar as it was initiated by Swatch Group AG itself. In light of a previous case in which it had been held dominant on certain markets in the watch industry, Swatch Group AG spontaneously notified the Comco of its plan to phase-out the supply of mechanical watch movements and assortments (regulating components of a mechanical watch movement) to other watch manufacturers. Upon receipt of this notification, the Comco opened an investigation and ordered interim measures based on an amicable agreement with the Swatch Group.

The Comco ruled that Swatch Group AG (through its subsidiaries ETA and Nivarox) was in a dominant position on the markets for mechanical watch movements and assortments. Their plan to stop supplying such products to undertakings outside of the Swatch Group was qualified as abusive behaviour, more specifically of refusal to supply. It was established that these inputs were necessary in order for competitors of Swatch to efficiently compete against Swatch on the market for mechanical watches. It was determined that this refusal to sell would have substantially eliminated competition on the market for mechanical movements and strongly restricted it on the market for manufactured watches, because manufacturers of movements and watches had no meaningful

²⁹ Decision of Comco of 29 November 2010, DPC 2011/1 96.

³⁰ Decision of Comco of 21 October 2013 “Swatch Group Lieferstopp”, DPC 2014/1 215. See also B. Merkt, *Abus de position dominante: développements récents de la pratique*, in: I. Hochreutener, W. Stoffel and M. Amstutz (eds), *Pratique du droit de la concurrence: Abus de position dominante, procédure, révision*, Schulthess 2013, p. 65 ff.

alternatives to Swatch for the supply of these products (particularly assortments) and would thus be hindered in the exercise of competition.

The Comco refused to see a justification in incentives to invest and innovate. While accepting the argument on the principle in the framework of a refusal to deal, the Comco ruled that it did not apply in the particular case because the products at stake were relatively old, had been on the market for a long time and the investments for their development had already been amortized. Further, the fact that Swatch Group had supplied these products to its competitors for more than 25 years showed that it considered such supply as efficient, so that a short term discontinuation of supply would hardly increase efficiency. Finally, Swatch Group continued to innovate even while supplying its competitors.

Surprisingly, the Comco only examined the effects of the discontinuation of supply on the incentives of Swatch Group to invest and innovate (which it denied), but not those of its competitors.

In “Preispolitik und andere Verhaltensweisen der SDA³¹”, the Comco found that SDA (a news agency) held a dominant position on various markets for news services for media publishers. The exclusivity rebates granted by SDA to some of its customers included a reduction of up to 20% of the price if the customer purchased news services exclusively from SDA. Those rebates were assimilated to abusive fidelity rebates and were qualified both as discrimination between trading partners and as limitation of production, supply or technical development in the meaning of art. 7 para. 2 ACart. Comco established that the rebates were specifically directed against SDA’s main competitor, AP Schweiz, which had been hindered in the exercise of competition by the incriminated rebate scheme. It also found out that this scheme had led to a restriction of competition among the media that were customers of SDA.

6.1.2. Administrative Federal Tribunal

Between 2010 and 2014, the Administrative Federal Tribunal rendered a total of 21 judgements pertaining to either anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart), of which only two were related exclusively to cases of abuse of dominant position. This statistic does not include appeals against decision of the Communications Commission where the issue of the dominant position was at stake, nor appeals against interim measures.

The following table shows the allocation of cases on a yearly basis:

Year	Cases related to anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart)	Cases related to unilateral conduct (art. 7 ACart)
2010	8	2
2011	1	0
2012	1	0
2013	4	0
2014	7	0
<i>Total</i>	<i>21</i>	<i>21</i>

The only two judgments rendered by the Administrative Federal Tribunal in relation with unilateral behaviour have been appealed to the Federal Court and will be explained below.

6.1.3. Federal Court

Between 2010 and 2014, the Federal Court rendered a total of 5 judgements pertaining to either anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart), of which three were related exclusively to cases of abuse of dominant position.

³¹ Decision of Comco of 14 July 2014 “Preispolitik und andere Verhaltensweisen der SDA”, DPC 2014/4 670.

The following table shows the allocation of cases on a yearly basis:

Year	Cases related to anticompetitive agreements (art. 5 ACart) or unilateral conduct (art. 7 ACart)	Cases related to unilateral conduct (art. 7 ACart)
2010	0	0
2011	1	1
2012	1	1
2013	2	1
2014	1	0
<i>Total</i>	5	3

The three cases related to unilateral conduct were the following:

In a judgement dated 11 April 2011, the Federal Court rejected an appeal from the Swiss government³² in proceedings against Swisscom, the incumbent telecommunications operator. Initially, the Comco had ruled that Swisscom, which operates a mobile telecommunications network and has the largest market share on the mobile telecommunications market, was dominant on the wholesale market for incoming services onto its mobile network (so-called termination services). Swisscom was found to have abused its dominant position by charging overrated termination prices to other providers of telecommunications services for calls terminating on its mobile network. This behaviour was qualified of imposition of unfair prices in the meaning of art. 7 para. 2 ACart. Swisscom was fined more than CHF 333 million.

Upon appeal by Swisscom, the Administrative Federal Tribunal first ruled that the relevant market had been correctly defined and that Comco was right in its finding that Swisscom held a dominant position on this market. However, the Tribunal denied that Swisscom has committed an abuse insofar as it could not “impose” unfair prices because of the interconnection regime set forth in the telecommunications regulatory framework.

The Federal Court upheld this ruling. The Administrative Federal Tribunal had previously ruled that the “imposition” of unfair prices required that the dominant firm’s trade partners should be forced “against their own will” to enter into a contract on unfair terms, while the mere acceptance of such terms against their own interests in light of the situation on the market couldn’t be qualified as “imposition”. The Federal Court stated that the question could be left open. What is required for the “imposition” of unfair prices or terms is that the trade partners cannot resist or have no alternative to the economic pressure deriving from the dominant position. In the case at stake, it found that the interconnection regime was applicable to termination services also in the field of mobile telecommunications if a dominant position could be established, which it was in this particular case. Therefore, other providers of telecommunications services had an alternative to the unfair prices of Swisscom, who could thus not “impose” such prices.

This case has been the only case of exploitative abuse rendered in the last 5 years in Switzerland. It also had an exclusionary aspect insofar as the alleged overrated prices were paid by customers who were simultaneously competitors.

The landmark judgment of 29 June 2012 in the case “Publigruppe³³” settled several core issues pending at the time in Swiss competition law. First, it definitively confirmed that sanctions for infringement of competition law had a criminal character. Thus, the guarantees provided in art. 6 and 7 of the European Convention on Human Rights (ECHR) were applicable. It also confirmed that the institutional setting of the Swiss competition authorities was compliant with art. 6 ECHR.

Second, the Court ruled that art. 7 para. 1 ACart was not written in a sufficiently clear and precise manner to fulfil the requirements of art. 7 ECHR. Therefore, sanctions could only be imposed if the incriminated behaviour also fulfilled one of the categories of art. 7 para. 2 ACart.

³² Judgment of the Federal Court of 11 April 2011, ATF 137 II 199.

³³ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72.

Third, the Court held that a rigorous proof of evidence was hardly possible in relation to the definition of the relevant market, because the authorities had to rely on experience, observation of the market and market surveys. The determination of the relevant products as well as the assessment of their substitutability cannot be stated with accuracy, but relies necessarily on certain economic assumptions. Therefore, in light of the objectives of the law, which is to prevent the harmful economic or social effects of restraints of competition, the standards of proof for such elements should not be exaggerated. In the case at stake, the Federal Court confirmed the finding of the Comco, supported by the Administrative Federal Tribunal, that Publigroupe held a dominant position on the market for placement and sale of advertising spaces in written media.

Finally, the Federal Court laid down in details the criteria for the assessment of abusive unilateral conduct under Swiss law, which are presented in this report with frequent reference to the Publigroupe judgment.

The “Etivaz” judgment of 23 May 2013³⁴ was rendered on appeal against a judgment of a court of civil law. The defendant was a cooperative exploiting a cheese maturing cellar. It had obtained a protected designation of origin (AOP) for the cheese it produced, the “Etivaz”. Its cellar was the only one to produce cheese that could be marketed under this valued name. The plaintiff was a farmer who wanted to produce Etivaz cheese and, for that purpose, applied for membership in the cooperative, which would have allowed him to use the cooperative’s infrastructure. In spite of the fact that he met all criteria of the AOP, he was denied this membership, mainly because the cooperative wished to maintain some residual maturing capacity for local young farmers. The plaintiff required the court to order his admission as a member of the cooperative, which was granted.

In the definition of the relevant market, the Federal Court attached a great importance to the nature and purpose of the AOP. Under the regulations governing the AOPs, the legal protection is granted without regard to the commercial performance of the protected products, to the influence of this protection on the balance of powers between competitors or the profit made by the producers. Anyone should be free to appreciate freely whether there is an interest in competing under the AOP, with the related constraints. Therefore, in the definition of the relevant market, the particular nature of the AOP, which is conceived as an instrument of the struggle between competitors, was given an important weight. According to the Federal Court, where a competitor claims to be wrongfully hindered to access an AOP, the relevant market shall necessarily be limited to the products protected by the AOP. In the present case, the market was thus limited to the “Etivaz” cheese, although the Comco, in its opinion to the court of first instance, had defined a broader market including the much more powerful “Gruyères” cheese. The Federal Court seized the occasion to confirm that the civil courts were not bound by the Comco’s opinion, provided they explained their diverging assessment.

Almost by definition, the defendant was found to be dominant on this narrow market and to have abused this position by refusing to admit the plaintiff as a member. According to the Federal Court, a dominant undertaking behaves in an abusive manner if it is the only one to possess equipment or installations that are necessary to deliver a product or service, if there is no competition on the market for this product or service, if it refuses without any objective motive to allow a potential competitor to use this infrastructure and if the potential competitor has no alternative replacement source of supply.

It remains to be seen whether the narrow definition of the market applied by the Federal Court in the “Etivaz” case can be applied by analogy outside the specific domains of AOPs, for instance in relation with a brand of strong reputation. Given the importance given to the AOPs’ regulatory regime in the Court’s wording, this appears unlikely, but cannot be excluded.

6.2. Competent Court and Authorities

This section presents, in a very summarized way, the enforcement regime for Swiss competition law.

The ACart is applied by the Competition Commission (Comco), a specialized administrative authority with extended investigation and decision powers.

³⁴ Judgment of the Federal Court of 23 May 2013, ATF 139 II 316.

The Comco is made up of up to 15 members, a majority of whom being independent members (mostly professors of law and economics). The non-independent members include representatives of business, trade and consumer associations and workers unions. The Comco is formally independent from the Swiss federal government. However, it cannot be considered as a tribunal in the meaning of art. 6 para. 1 ECHR. Despite the criminal nature of the sanctions that the Comco can impose, the Federal Court has ruled, in the wake of the *Menarini* ruling of the European Court for Human Rights, that this setting was compliant with the ECHR insofar as the parties have a right to appeal of full jurisdiction to the Administrative Federal Tribunal³⁵.

The Comco is assisted by a Secretariat, with a staff of around 80 people, whose duties are to prepare the Comco's business, to conduct investigations (including dawn raids and searches) and, together with a member of the presiding body, to issue any necessary procedural rulings. It proposes motions to the Comco and implement its decisions.

The Comco has the power to impose financial sanctions of up to 10 per cent of the turnover achieved in Switzerland in the preceding three financial years. There exists a leniency program similar to the one in place in the European Union. It also applies to cases of unilateral conduct, although only for a reduction of the sanction, not a full immunity.

The amendments to the ACart proposed in 2012³⁶ included the proposal to replace the Comco by a so-called Competition Authority, which would have retained only the powers to investigate the restrictions to competition. The infringement decisions, including the imposition of a financial sanction, would have been rendered by the Administrative Federal Tribunal, upon a proposal of the Competition Authority. This setting would have ensured that sanctions were imposed by a tribunal compliant with art. 6 para. 2 ECHR. However, after the aforementioned judgment of the Federal Court, this proposal became purposeless and the whole project was abandoned by the Parliament.

Decisions of the Comco are subject to an appeal of full jurisdiction before the Administrative Federal Tribunal, which is the appellate court for all decisions rendered by the Swiss federal administration. It is therefore not a specialized court. However, some of its judges have extended knowledge of competition law and are assigned to the assessment of appeals pertaining to this particular field.

Judgments of the Administrative Federal Tribunal are subject to a final appeal before the Federal Court. The appeal is limited to the application of law. The Federal Court may thus not review facts. The Federal Court is a general court of law. It has no chamber specialized exclusively in the treatment of cases of competition law.

Aside from the administrative enforcement of the ACart, courts of civil law also have jurisdiction to rule on restraints to competition, including abusive behaviours of dominant undertakings. According to art. 12 ACart, a person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request from a court of civil law the elimination of or desistance from the hindrance, damages and the surrender of unlawfully earned profits. The courts may in particular rule that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard (art. 13 ACart).

While each canton is required to designate a single court with the competence to handle competition law matters in order to ensure some degree of knowledge within such courts, there is no requirement for a specialized court.

In order to ensure some coherence in the application of the ACart, art. 15 ACart requires that the case shall be referred to the Competition Commission for an expert report if the legality of a restraint of competition is questioned in the course of civil proceedings. However, the expert report is not binding upon the civil courts, which may choose to assess the case differently.

Application of the ACart by civil courts has remained scarce over the last years, mainly due to the difficulty for the plaintiff, who has the burden of proof, to establish the relevant facts and to the high costs of civil proceedings.

³⁵ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 4.

³⁶ See 2.2 above.

6.3. *Approach Followed by Competent Courts and Authorities*

Neither the Comco nor the courts have issued any guidelines related to the enforcement of art. 7 ACart. However, they have developed and consistently applied a single test for all abusive behaviours, whether listed in art. 7 para. 1 ACart or not and whether exclusionary or exploitative. This test is twofold. In a first step, the restriction to the competition, both as a process and as a protection to the economic freedom of participants to the market, (i.e. hindrance or disadvantage of other undertakings) must be carved-out. In a second step, the existence of possible justifications (“legitimate business reasons”) is analysed³⁷.

To determine whether a restriction to competition has occurred, Comco usually proceeds in two additional steps. First, it investigates the incriminated behaviour to determine whether, from a formal point of view, it falls within of the categories listed in art. 7 para. 2 ACart. Second, it analyses the effects of the behaviour on the competition. Such effects may include foreclosure, erection of barriers to entry, etc. and may occur either on the dominated market or on different markets, such as upstream or downstream markets. A simple exclusionary effect, which restricts effective competition, is sufficient. It is not required that the incriminated behaviour eliminates effective competition in order to be abusive³⁸.

As an example, in the case “Swatch Group Lieferstopp”, Comco first established that Swatch refused to supply its customers, which were mostly other manufacturers of mechanical watches, with mechanical movements and assortments (an important part of the watch movement). It further established that these inputs were necessary in order for competitors of Swatch to efficiently compete against Swatch on the market for mechanical watches. It finally determined that this refusal to sell would substantially eliminate competition on the market for mechanical movements and strongly restrict it on the market for manufactured watches, because manufacturers of movements and watches had no meaningful alternatives to Swatch for the supply of these products and would thus be hindered in the exercise of competition³⁹.

In “Preispolitik und andere Verhaltensweisen der SDA”, the Comco found that the exclusivity rebates granted by SDA (a news agency) to its customers were assimilated to fidelity rebates, which were thus qualified both as discrimination between trading partners and as limitation of production, supply or technical development in the meaning of art. 7 para. 2 ACart. Comco then established that SDA’s main competitor, AP Schweiz, had been hindered in the exercise of competition by the incriminated rebate scheme. It also found out that this scheme had led to a restriction of competition among the media that were customers of SDA⁴⁰.

The requirement for a causal relation between the dominant position, the abusive behaviour and its effects on the market has been a subject of discussion in legal literature and is still unclear. The Federal Court has mentioned that a causality between the dominant position and the abusive behaviour was required (in a case pertaining to unfair conditions of trade). It noted however that a causal relation should usually be given if both the dominant position and, in the particular case, the unfairness of the conditions of trade were established, which makes the requirement of causality not very relevant⁴¹. These considerations must however be read in the particular context of this case and cannot apply on a general level.

The most common opinion in literature is that there must be some degree of causal relationship not between the dominant position and the abuse thereof, but between the abusive behaviour and its effects on the market. Otherwise, it would remained unclear whether the negative effects on competition can be attributed to the dominant undertaking, with the risk that firms be punished for the mere holding of a dominant position⁴². It should be noted that this particular requirement has never been thoroughly discussed by the Comco and the courts.

³⁷ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.2.

³⁸ Decision of Comco of 29 November 2010 “SIX/Terminals mit Dynamic Currency Conversion”, DPC 2011/1 96, 152.

³⁹ Decision of Comco of 21 October 2013 “Swatch Group Lieferstopp”, DPC 2014/1 215, 257.

⁴⁰ Decision of Comco of 14 July 2014 “Preispolitik und andere Verhaltensweisen der SDA”, DPC 2014/4 670, 683 ff.

⁴¹ Judgment of the Federal Court of 11 April 2011, ATF 137 II 199, c. 4.3.4.

⁴² M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 19 ff; E. Clerc, in: CR-LCart, ad art. 7 I LCart N. 66; P. Reinert, in: Baker & McKenzie (eds), Kartellgesetz, Stämpfli 2007, p. 88; D. Cherpillod, L’abus structurel, Bruylant and Schulthess 2006, p. 69.

Abusive behaviours may be justified by legitimate business reasons. Although this possibility of justification does not appear in the wording of art. 7 ACart, it has been developed in the practice of the Comco and the courts, based on a historical and teleological interpretation of the legal provision⁴³. A first category of legitimate business reasons include the reference to commercial principles (eg protection against insolvency of the trade partner, health or safety considerations, etc.), but also the modification of demand, costs savings, administrative simplifications, transport and distribution costs, as well as technical reasons⁴⁴.

A second category of legitimate business reasons include efficiency gains. The possibility of an efficiency defence has been recognized for the first time by the Comco in its decision “SIX/Terminals mit Dynamic Currency Conversion” of 29 November 2010, with explicit reference to the Communication of the European Commission related to the application of art. 102 TFEU, although a defence based on incentives to invest and innovate has been rejected in this particular case⁴⁵. A similar defence has also been rejected in the “Swatch Group Lieferstopp” case⁴⁶.

A justification for legitimate business reasons further requires that the incriminated behaviour be necessary for and proportionate to the alleged justified motives for such behaviour, in light of all circumstances of each specific case.

The test applied by Swiss competition authorities and courts relies thus, at first sight, more on an effects-based than on a form-based approach. This is consistent with the wording of art. 7 ACart, which makes no mention of a particular form of behaviour as a condition of its prohibition and only lists examples of behaviours without creating presumptions or per-se prohibitions. The fact that the effects, not the form of the abusive behaviour, were ultimately relevant has been acknowledged for more than a decade now⁴⁷. The analysis of abuses of a dominant position is thus clearly based on a rule of reason.

However, Comco has never issued guidelines for the assessment of abusive behaviours. In addition, in the landmark case “Publigroupe”, the Federal Court has ruled that exclusionary behaviour would include all actions of a dominant undertaking which are “not akin to fair competition on the merits”⁴⁸. It remains to be seen whether this possibly unfortunate wording by Switzerland’s supreme court will be read as a more form-based approach than previously advocated.

In addition, the analysis of the effects of an abusive behaviour is mostly limited to the restrictions suffered by the dominant firm’s competitors or trade partners. The harm caused to competition as a process and to consumer welfare is presumed to derive from such restrictions, but is not specifically evaluated in the decisions rendered by the Comco. An example for this limited analysis can be found in the aforementioned case “Preispolitik und andere Verhaltensweisen der SDA”, where the possible economic efficiency and benefits of the fidelity rebates applied by SDA for its customers and, ultimately, the consumers have not been assessed. It is also striking that the analysis of possible efficiency gains remains limited and occurs only after the anti-competitive effect has been established, as a possible justification for the incriminated behaviour, but not as an element of the harm to competition as a process.

6.4. Claimed objective of the prohibition of anticompetitive unilateral conduct?

Aside from the general purpose of preventing the harmful economic or social effects of restraints of competition and promoting competition (art. 1 ACart), there is no claimed objective of the prohibition of the abuse of a dominant position.

Switzerland being a small market embedded within the European Union but without being part of it, the general trend of the Comco has been to ensure that restrictions to competition were not used to foreclose markets in

⁴³ E. Clerc, in: CR-LCart, ad art. 7 I LCart N. 99; P. Krauskopf and O. Kaufmann, Das System der Rechtsfertigungsgründe im Kartellrecht: Einwendungen bei Marktmachtmissbrauch, in: sic! 2013 499.

⁴⁴ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.2.

⁴⁵ Decision of Comco of 29 November 2010 “SIX/Terminals mit Dynamic Currency Conversion”, DPC 2011/1 96, 165 ff.

⁴⁶ Decision of Comco of 21 October 2013 “Swatch Group Lieferstopp”, DPC 2014/1 215, 263 ff.

⁴⁷ M. Amstutz and B. Carron, in: BK-KG, ad art. 7 KG N. 29.

⁴⁸ Judgment of the Federal Court of 29 June 2012, ATF 139 I 72 c. 10.1.1.

order to eliminate competitive pressure from outsiders. Comco's main line of engagement has thus been to maintain open markets. This also applies to the cases of unilateral conduct. Looking at Comco's practice in the field of abuse of dominant position in the last five years, it is noteworthy that almost all prohibition decisions were related to behaviours that were hindering competitors from accessing to a particular product or service, be it a technology, a connection to a network or a product, and were thus restricted in the exercise of competition.

6.5. Criticism of the Decisional Practice and Case law?

Although the debate about this controversial field of law has remained lively on an academic level, the practice of the Comco and the courts has not given rise to much criticism in the recent years, be it for its lack of rigour or, on the opposite, for its excessive rigour.

What has been criticized are the Comco's attempts to regulate the market by way of decision or amicable settlements with dominant undertakings. In the wake of the "Swatch Group Lieferstopp" case, the amicable settlement concluded with the Swatch Group, which provided for a gradual reduction of the supply of mechanical watch movements until a complete stop after a few years, has been criticized as illegitimate "market engineering". In the eyes of the critics, this was not part of Comco's tasks⁴⁹.

⁴⁹ M. Amstutz, Planwirtschaftlicher Eingriff der Wettbewerbsbehörden, in : Neue Zürcher Zeitung of 13 March 2013. The author disclosed that he acted as advisor to one of the parties in the Swatch proceedings.