

market intelligence

Cartels

Hans-Jörg Niemeyer
leads the global
interview panel covering
18 key economies

EU's Private
Damages Directive –
a game-changer on
the horizon?

market intelligence

Welcome to GTDT: *Market Intelligence*.

This is the second annual issue focusing on the global cartel markets.

Getting the Deal Through invites leading practitioners to reflect on evolving legal and regulatory landscapes. Through engaging and analytical interviews, featuring a uniform set of questions to aid in jurisdictional comparison, *Market Intelligence* offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most interesting cases and deals.

Market Intelligence is available in print and online at www.gettingthedealthrough.com/intelligence.

Getting the Deal Through
London
May 2016

Publisher: Gideon Robertson
Senior business development manager:
Adam Sargent
adam.sargent@gettingthedealthrough.com
Business Development Manager:
Dan Brennan
dan.brennan@gettingthedealthrough.com
Readership Development Manager:
Rosie Oliver
rose.oliver@gettingthedealthrough.com
Product marketing manager: Kieran Hansen
subscriptions@gettingthedealthrough.com

Head of production: Adam Myers
Editorial coordinator: Eve Ryle-Hodges
Subeditor: Claire Ancell
Designer/Production editor: Nathan Clark

Cover: iStock.com/carterdayne

No photocopying. CLA and other agency licensing systems do not apply. For an authorised copy contact Adam Sargent, tel: +44 20 3780 4104

This publication is intended to provide general information on law and policy. The information and opinions which it contains are not intended to provide legal advice, and should not be treated as a substitute for specific advice concerning particular situations (where appropriate, from local advisers).

Law

Business

Research

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4104
Fax: +44 20 7229 6910
©2016 Law Business Research Ltd
ISSN: 2056-9025



Strategic Research Sponsor of the
ABA Section of International Law



Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

In this issue

Private Damages Action	2
Australia	6
Brazil	12
China	18
European Union.....	24
France.....	30
Germany.....	36
Hong Kong.....	41
India	47
Indonesia	52
Italy	58
Mexico.....	64
Romania.....	70
Spain	76
Switzerland	83
Turkey	88
United Kingdom.....	94
United States	98



Patrick L Krauskopf

CARTELS IN SWITZERLAND

Patrick L Krauskopf, founder and chairman of AGON Partners, is a qualified attorney-at-law and admitted to all Swiss courts, as well as to the New York Bar. Alongside his Doctor of Law title from the University of Fribourg, he holds an LLM from Harvard Law School. He offers extensive legal and strategic expertise and represents clients in competition and antitrust law, merger law matters as well as in intellectual property rights, public procurement law and contract and construction law issues. He is the head of the Center for Competition and Commercial Law at Zurich University of Applied Sciences and regularly lectures on contract, tort and competition law.

Prior to founding AGON Partners, Mr Krauskopf held the position of deputy director at the Swiss Competition Commission, before being appointed as chief of international affairs.

Mr Krauskopf has published numerous articles on competition law and

construction law and is the co-author of a practical manual about competition law.

Blaise Carron joined Agon Partners in 2014 as of counsel. He specialises in competition and antitrust law, merger law, construction law, contract law and distribution law. He has published various articles and publications in these areas. He acts as a non-governmental adviser to the International Competition Network. Also, he is a professor at the University of Neuchâtel and acts as an arbitrator and mediator in numerous domestic and international cases.

Before joining AGON Partners Mr Carron was the head of a competition law team for a corporate law firm in Berne, Basel and Zurich and operated as a consultant at SECO for projects of legal cooperation COMPAL in South America and Vietnam. Additionally, he worked as a lawyer for the Swiss Competition Commission and has lectured at the University of Fribourg.

GTDT: What kinds of infringement has the antitrust authority been focusing on recently? Have any industry sectors been under particular scrutiny?

Patrick L Krauskopf & Blaise Carron:

Automobile industry: The investigations of the Swiss Competition Commission (COMCO) focused on possible agreements affecting competition relating to discounts and delivery charges in the retail sale of new vehicles (2015). The Swiss concessionaire of the VW Group is accused of fixing, in cooperation with other car dealers, a common terms list concerning discounts and standard deductions ('horizontal agreement'). The concessionaire was granted full immunity leniency by COMCO, but in April 2016 that was declared void by the Swiss Federal Administrative Court. The four dealers were fined but appealed the decision. In another case, COMCO's fine (156 million Swiss francs) imposed on BMW AG for preventing car dealers in Switzerland's neighbouring countries from selling BMW cars to Swiss consumers ('vertical restraint') was upheld on appeal (2015).

Financial services industry and banking sector:

COMCO has launched several investigations relating to the financial services sector. The investigations against Swiss banks, as well as foreign banks, concerned possible collusive behaviour regarding the LIBOR, TIBOR and EURIBOR reference interest rates (2012), and they also are targeting foreign currency traders for possible price-fixing (2014) and banks for alleged antitrust violation in the trade of precious metals (2015).

Online-booking platforms for hotels:

Investigations into the application of wide parity clauses concerning prices, availabilities and conditions between Booking.com, HRS, Expedia and their respective partner-hotels constituted vertical agreements affecting competition (2015). These clauses prevented the hotels from offering their rooms at a cheaper price than the one being offered on the booking platforms, even if a guest wanted to book a room late at night at the reception desk. Additionally, there were strong indications that Booking.com holds a dominant position in the national market of the intermediation of bookings between hotels and customers.

GTDT: What do recent investigations in your jurisdiction teach us?

PLK & BC: Cartel Act as a tool against currency fluctuation: COMCO has been acting offensively against any prevention or restriction of parallel and direct imports, has opened several investigations and made numerous unannounced inspections. In doing so, COMCO hopes to

weaken the effects of currency fluctuation affecting the Swiss market.

Broad use of leniency: Recent investigations into vertical restraints were triggered through leniency applications. Immunity applications are usually used when fighting horizontal cartels.

Challenges to claims of consumers: Whenever a suspected ban on parallel imports exists, consumers often make a notification and point out potential infringements. Under Swiss law and based on the principle of opportunity, COMCO can choose the cases that are considered to be the most important. COMCO receives around 1,200 notifications per year.

Dawn raids: COMCO has been allowed to conduct dawn raids since 1 April 2004, and it regularly makes use of this power. To date, dawn raids have taken place at 100 companies. In its 2005 yearly report, COMCO made it clear that dawn raids have proven to be the most effective and efficient tool for discovering evidence of anticompetitive behaviour.

Amicable settlement: An amicable settlement with COMCO often reduces costs and time for the client. However, there are situations where court proceedings offer the better option. This is especially the case where COMCO is not able to show evidence that a potential antitrust violation is affecting competition. There are no per-se rules in the Swiss Cartel Act.

GTDT: How is the leniency system developing, and which factors should clients consider before applying for leniency?

PLK & BC: The leniency system can impose an incentive to reveal a cartel because it causes a 'prisoner's dilemma'. This means it destroys the solidarity between members of the cartel. Such circumstances allow COMCO to investigate an increasing number of cases, as it offers an advantage for the participants who want to terminate the cartel. The system is well-established, given the growing number of applications for leniency. As of today, most cartel investigations are triggered by leniency applications. COMCO's case law shows that the leniency applicant will always have a separate file and that access to the file will be strictly limited. An important setback to COMCO's handling of leniency applications should be mentioned: in April 2016, a court ruled that a separate amicable settlement with the leniency applicant was void.

The following factors should be considered: (1) in a leniency application, full immunity is granted only to the 'first in' and only if the applicant is not the ringleader of the cartel (amnesty). In order to assess a company's ranking among leniency applicants, COMCO is willing to share reasonable



Blaise Carron

information on a no-name basis with counsel at an early stage; (2) in amnesty-plus applications, COMCO can provide up to an 80 per cent reduction in a fine in an 'old' cartel case if the applicant fulfils all requirements for full immunity in a 'new' case.

Once an inspection is launched and the proceedings have reached a certain stage, COMCO will need to grant access to the file to other defendants. Even if the file has to be consulted on-site, there is an enhanced risk that the identity of the leniency applicant will become public.

An international agreement between Switzerland and the European Union governing cooperation on the application of their competition laws came into force on 1 December 2014. This agreement provides that information obtained under leniency or settlement procedures cannot be exchanged unless the leniency applicant agrees to the exchange.

GTDT: Tell us about the authority's most important decisions over the year. What made them so significant?

PLK & BC: COMCO: In the broadband connections market, in the area of business clients, the telecommunications carrier is market dominant. Swisscom abused this position when

tendering for the networking of post office locations, in order to obstruct the competitors and to push through unreasonably high prices. As a result, COMCO fined Swisscom almost 8 million Swiss francs.

Swiss Federal Administrative Court: The Swiss Federal Administrative Court recently issued an important judgment on vertical agreements. In the *BMW AG* case, the court confirmed a previous decision with regard to the standard applicable to vertical agreements, and levied a penalty of 156 million Swiss francs against BMW AG for restricting direct and parallel imports by dealers located in Switzerland's neighbouring countries. Because of the conduct of BMW AG, end customers domiciled in Switzerland were not able to benefit from the significant exchange rate advantages between the Swiss franc and the euro. The main question in this case was whether strong restrictions on prices or territories constituted illegal restraints of competition per se. This issue is still being discussed in Switzerland.

The *Gaba* decision involved a company that contractually prohibited its Austrian licensee from exporting its goods to other countries, including Switzerland. COMCO imposed a fine amounting to 4.8 million Swiss francs, which was confirmed by the Swiss Federal Administrative Court. It is up to the Swiss Federal Supreme Court to decide in



“Well-structured antitrust compliance programmes are the most effective measures of protection against the consequences of an antitrust violation.”

iStock.com/fatogaby

2016 if COMCO’s assessment using perse rules is valid under Swiss law, or if there is a need – even for hard-core restrictions – to show harmful effects of the collusion on the market.

GTDT: *What is the level of judicial review in your jurisdiction? Were there any notable challenges to the authority’s decisions in the courts over the past year?*

PLK & BC: Decisions issued by COMCO are subject to full judicial review by the Swiss Federal Administrative Court. There is a 30-day period during which an appeal has to be filed. The Court has full jurisdiction to review COMCO’s findings, under all aspects of facts and law. A judgment of the Court can then be appealed to the Swiss Federal Supreme Court, which acts as an appellate tribunal and mainly reviews questions of law. The judicial control seems to be effective. There has been a substantial increase in the number of cases decided by the courts in the past couple of years.

GTDT: *How is private cartel enforcement developing in your jurisdiction?*

PLK & BC: Swiss antitrust law does provide for private actions before civil courts. However, this kind of enforcement is currently of little

importance. In Switzerland, private enforcement is still underdeveloped (and amounts to approximately 5 per cent of the cases).

The reason that only a tiny minority of cases are being dealt with before civil courts in Switzerland lies within the applicable rules. In the case of civil litigation, the plaintiff has to provide the court with evidence that there is an infringement of antitrust law that leads to damage on the plaintiff’s side. This barrier is difficult to overcome. In addition, there is the substantial risk that the plaintiff will have to finally bear the cost of the proceedings, along with the legal costs for both parties.

The amendments to the Cartel Act, aimed at strengthening private enforcement, were rejected by the Swiss Parliament in 2014.

GTDT: *What developments do you see in antitrust compliance? What features should a state-of-the-art compliance system have to be most effective?*

PLK & BC: Well-structured antitrust compliance programmes are the most effective measures of protection against the consequences of an antitrust violation. They offer prevention and control, and aim at helping companies to avoid

THE INSIDE TRACK

What do you find most interesting about cartel cases?

Cartel cases always have a significant influence on the business side of things, as the fines imposed are generally extremely high and may thus have a major impact on the business of the clients. This leads to close cooperation with companies (large enterprises and SMEs), associations, industry organisations and private individuals, and to the provision of a full service approach (legal, economics, media, etc), in order to properly advise clients.

What has been the most notable change to this practice area in recent years? What has triggered this change?

The practice area of antitrust law in Switzerland has grown enormously in recent years. Dawn raids and large fines, as well as press coverage of antitrust infringements, have boosted the awareness of the business world into COMCO's activities. Undertakings are nowadays extremely sensitive to antitrust procedures.

Patrick L Krauskopf & Blaise Carron
AGON Partners
Zurich, Pfäffikon & Berne
www.agon-partners.ch

threats and to identify anticompetitive behaviour or activity at an early stage.

In the last attempt to amend the Cartel Act, the federal government proposed new provisions providing for a reduction in sanctions for companies that operated an appropriate and effective compliance programme. However, this proposal was turned down by the Swiss Parliament in 2014.

In connection with the investigations of COMCO and the recent substantial increase of fines, companies have increased their efforts with regard to their compliance programmes. However, there is still more reactive compliance taking place

(in the aftermath of a fine) than there are proactive activities to implement compliance programmes.

GTDT: Does an effective compliance programme also need to include monitoring and testing? If so, what form should that take?

PLK & BC: Yes, compliance programmes need to include monitoring and testing. With the help of counsel – who in contrast to in-house lawyers enjoy legal privilege – the compliance programme has to meet regulatory standards set by the authorities. An effective and reliable antitrust compliance programme starts 'at the very top', meaning that a company must establish a system in which compliance is prioritised starting out from its leadership. Specifically, this includes ensuring that the whole company, and every single employee, is fully knowledgeable about the programme and that all necessary resources are available. This requires a qualified team that proactively and regularly monitors the correct application of the programme.

GTDT: What changes do you anticipate to cartel enforcement policy or antitrust rules in the coming year? What effect will this have on clients?

PLK & BC: Vertical restraints: Since the Swiss National Bank abolished the minimum exchange rate between the Swiss franc and the euro, the former became significantly stronger vis-à-vis the latter. The Swiss parliament is currently discussing ways to adopt new provisions of the Swiss Cartel Act to make it easier for COMCO to challenge unjustified price differentiation between Switzerland and surrounding countries.

Private enforcement: The scope of application of private enforcement will increase in the upcoming years. On one hand, this is due to the need for enterprises to settle antitrust matters by themselves in a fast and efficient way, and on the other hand due to the fact that COMCO is working to its full capacity and is thus not able to handle all of the cases. Therefore, parties to amicable settlements with COMCO should proceed very cautiously with regard to the use of evidence.

Also available online



www.gettingthedealthrough.com



*Strategic Research Sponsor of the
ABA Section of International Law*