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Antitrust Litigation 2025

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Switzerland: Law and Practice & Trends and Developments

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SWITZERLAND



Law and Practice

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1. Introduction

1.1 Current Framework for Private Antitrust Litigation

The substantive Swiss antitrust rules are set out in the Swiss Cartel Act (CartA; SR 251). They apply to both public and civil enforcement procedures. Specific civil procedure rules are set out in the Swiss Code of Civil Procedure (CPC; SR 272). The CartA provides certain specifications on private enforcement of antitrust law (Articles 12, 13 and 15 CartA, in particular).

Cases on private enforcement of Swiss antitrust law are still scarce. The last noteworthy civil antitrust proceeding deals with relative market power (Article 4 para. 2bis CartA) before the Cantonal Court of Basel-Landschaft (BL), dating from 2023, decided in a proceeding requesting interim measures. A distributor, running a mail-ordering business, had been integrated into the distribution system of the defendant for almost 30 years. He heavily depended on turnover generated with the sale of the defendant's products. The collaboration had been very close. Then, the defendant decided to enter the Swiss market himself, and he terminated the collaboration – ie, he cancelled the special “partner status” of the plaintiff. The court dismissed the plaintiff's arguments as they were not persuasive on the issue of relative market power and its abuse. The court emphasised that while the abuse of relative market power is unlawful, the mere existence of such a position is not. Further, the plaintiff did not take the requisite steps for preventing a state of dependence from the defendant. The case as such is complex. The main takeaway, however, is that a civil procedure requesting interim measures under

the CartA may be more efficient and faster than an administrative proceeding before the Swiss Competition Commission (ComCo). However, plaintiffs must take early and decisive steps to avoid dependence on a business partner (eg, by negotiating sound cancellation terms), and they must document such steps. Otherwise, they are unlikely to fulfil the standard of proof on the alleged facts. Swiss civil courts are still reluctant to take bold action in civil antitrust cases, and they apply common civil law principles, such as the standard and burden of proof.

Another civil law case from August 2024 (Supreme Court of the Canton of Zug) concerns the termination of a “service partner” contract of a car distributor in a selective distribution system implemented by the car importer. The distributor requested, inter alia, that these contracts be continued, that it be granted access to certain relevant information, and to the importer's IT system, and that it still be listed and named as an authorised distributor vis-à-vis customers. The distributor had been involved in the importer's distribution system for almost 40 years. The facts of the case are complex. The case has been decided as a proceeding of intermediary measures for abuse of a dominant market position (Article 4 para. 2, Article 7 CartA) by the importer.

A large part of the decision concerns the interpretation of an agreement of jurisdiction between the parties, and if such agreement had been entered into at all, reflecting a variety of cantonal, and federal decisions. The court confirmed that actions in violation of the CartA are torts. Further, the court held that a distributor that had been involved in a variety of contract

negotiations, and which is aware of industry practices over a long period of time, can hardly be surprised by the termination of a distribution contract, even though the importer may have a strong market position.

The distributor's request for interim measures was dismissed. The main takeaway from this case, from a substantive antitrust perspective, is that distributors and other business partners of allegedly "strong" counterparties must be cautious and vigilant in contract negotiations, and must monitor and document the development of their business relation to be able to file a successful claim for violation of the CartA (in the case at issue: abuse of a dominant market position) before a court. Interestingly, the case apparently did not relate to issues of relative market power.

1.2 Recent Developments

The CartA is currently under revision. The revision aims, *inter alia*, at facilitating civil actions based on the CartA. Civil antitrust case law (ie, private enforcement) is still scarce in Switzerland – only a handful of cases have been decided by Swiss civil courts by now.

The revision plans to introduce the possibility of a declaratory judgment that a certain behaviour has been illegal under the CartA. Further, not only undertakings, but all persons and entities affected by illicit acts relevant under the CartA may file civil actions – including consumers and actors from the public sector (such as authorities awarding public contracts; ie, the Federation, cantons, and municipalities). Finally, the limitation rules for filing a civil complaint are planned to be extended: limitation periods are to be suspended during a ComCo investigation until a ComCo decision (with or without appeal) has become final. It is expected that this change will considerably facilitate civil antitrust claims as limitation issues have often been detrimental to civil enforcement of the CartA.

It is expected that the revision will enter into force in the near future. However, the revision process before the Swiss Parliament has not yet been concluded, and surprises cannot be excluded.

2. Private Antitrust Claims: Basis and Procedure

2.1 Statutory Basis

Currently, any undertaking hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request:

- the elimination of or desistance from the hindrance;
- damages and satisfaction (in accordance with the Swiss Code of Obligations; CO; SR 220); and
- surrender of unlawfully earned profits in accordance with the provisions on agency without authority.

Hindrances of competition, in particular, include the refusal to deal and discriminatory measures. The rights just set out are also accorded to persons who are hindered by a lawful restraint of competition more than is necessary for the implementation of that restraint (ie, disproportionate restraints; Article 12 CartA).

To enforce the right to elimination and desistance, the courts may, at the plaintiff's request, rule that any contracts are null and void in whole or in part, and that the person responsible for the hindrance of competition must enter into contracts with the person so hindered on terms that are in line with the market or the industry standard (Article 13 CartA).

Although Article 13 and Article 15 CartA provide some specific rules for private antitrust enforcement procedures, private antitrust enforcement is (procedurally) governed by the rules of the Swiss Code of Civil Procedure (CPC).

Parties are free to initiate either a proceeding before ComCo (public enforcement by means of administrative procedure), or before a civil court (private enforcement by means of civil procedure). No previous decision or proceeding by ComCo is required to file a civil action. It may, however, be efficient for a civil plaintiff (or defendant) to rely on the findings of ComCo in a public enforcement procedure. Nevertheless, the civil court remains solely competent to gather and assess the facts according to the CPC. Any findings from a public enforcement proceeding may facilitate this proceeding. This is why it is to be expected that

civil follow-on proceedings will increase in light of the current revision of the CartA, although there are no specific provisions on civil follow-on proceedings in antitrust matters in Switzerland.

2.2 Courts

In the cantons of Zurich, Berne, St. Gallen and Aargau, so-called commercial courts have jurisdiction for antitrust matters. They are, however, not specialised in antitrust matters. Nevertheless, certain commercial courts (eg, in the Canton of Berne) retain part-time court members specialised in antitrust laws, predominantly antitrust lawyers from private practice.

In the absence of such commercial courts, private antitrust enforcement matters are assigned to common civil courts. Nevertheless, Article 5 CPC, on the federal level, requires that the cantonal law designate a court that has jurisdiction as the sole cantonal instance for “cartel law disputes” (ie, private antitrust enforcement matters).

It further deserves to be mentioned that civil courts take on certain matters upon ComCo deciding not to pursue a certain matter when it mainly concerns individual competition law positions, and when it is of lesser importance to public enforcement.

2.3 Impact of Competition Authorities

Decisions by ComCo have no binding effect on civil courts. Civil courts remain competent to establish and assess the facts of the case. Nevertheless, ComCo cases are important to any civil court procedure as ComCo is the dedicated and specialised Swiss administrative body in charge of antitrust law. Civil courts are rather unlikely to deviate from ComCo decisions related to a certain case brought before them, and ComCo decisions will facilitate civil follow-on actions.

If the legality of a restraint of competition is questioned in a civil proceeding, the case has to be referred to ComCo to render an expert opinion (Article 15 CartA). The civil court, however, retains the discretion to determine how this expert opinion is taken into consideration. It is not binding on the court and should be treated like any other piece of evidence.

Foreign NCA decisions may be submitted by the parties as evidence. It is the duty of the court to assess such cases and decide, based on the principle of free evaluation of evidence, whether they are relevant and suited to influence the proceedings.

2.4 Proof

The party claiming any right out of a disputed fact bears the burden of proof (Article 8 Swiss Civil Code; SR 210). This is a core principle of Swiss law. This means that the burden of proof mainly stays with the plaintiff in a civil antitrust case alleging a certain fact potentially favourable to it. Particular difficulties are connected to proving and quantifying damages. The court may rely on an estimate of damages if damages cannot be exactly quantified (Article 42 para. 1 CO). The evidence must be persuasive, and the court must be convinced that the facts a party has been alleging have taken place. The court is free to assess the evidence – there are no specific rules for this process, but the court’s findings must not be arbitrary and must respect the principle of free evaluation of evidence.

Article 5 para. 3 CartA presumes that efficient competition is eliminated in the case of “hard core” agreements in restraint of competition (agreements on price fixing, quota, and territorial market allocation as well as allocating trading partners). Once the nature of the agreement is established, the legal presumption must be rebutted, which requires considerable efforts from the parties. A similar presumption is stipulated for resale price maintenance, and vertical market foreclosure (Article 5 para. 4 CartA). Any residual restraint of competition in such cases remains considerable according to Federal Supreme Court case law. If the agreement, in a next step, turns out not to be economically efficient (Article 5 para. 2 CartA), the agreement remains illegal.

Final ComCo decisions are generally binding on a civil court, and the court can only deviate from them with good reasons. While a ComCo decision that is not yet final holds less weight, civil courts will still typically refer to these cases, as well as to those from the Federal Administrative Court (which is the court preceding the Federal Supreme Court in administrative antitrust cases), and not deviate from it unless there

are convincing arguments in the specific case to take a different course of action.

2.5 Pass-On Defence

The defendant may use the pass-on defence and claim that the plaintiff has not suffered any damage from an act allegedly violating the CartA as the plaintiff was able to pass on higher prices (or other allegedly anti-competitive effects) to its customers. The plaintiff must still be fully compensated for any damages suffered, but it must not be awarded any compensation going beyond such damage. The defendant bears the burden of proof for the pass-on defence.

3. Limitation Periods and the Duration of Litigation

3.1 Statute of Limitations

Private antitrust claims are a matter of tort law in terms of limitation and governed by the CO (Article 67). A claim for restitution on the grounds of unjust enrichment becomes time-barred three years after the date on which the person suffering damage learned of his or her claim, and in any event ten years from the date on which the claim first arose.

Currently, a ComCo proceeding can influence the plaintiff's knowledge of any potential damage. This may put the plaintiff in a difficult situation as it is not always evident when such knowledge has become sufficient to file a civil action – which means that the limitation period may expire before a ComCo proceeding has produced solid evidence. This situation is intended to be altered by the current revision of the CartA (see **1.2 Recent Developments**).

3.2 Typical Length of Private Antitrust Litigation

The duration of a private antitrust litigation heavily depends on the specific case. It is influenced, among other factors, by the urgency of the matter, the type of procedure applicable, the workload of the competent court, the length of deadlines for briefs, the types of proofs requested and approved, possible suspensions of the proceedings and possible appeals. The proceedings can, therefore, last anywhere between

a few months (particularly for injunctions) to several years.

4. Class and Collective Actions

4.1 Statutory Basis

Swiss law does not recognise class actions. Nevertheless, the growing prevalence of class actions in Europe in recent years has prompted renewed debate on their possible introduction in Switzerland. In March 2024, however, the National Council declined to open discussions on the matter. The proposal will now be considered by the Council of States, which may ultimately reject it definitively.

However, joint actions of several parties are possible under certain circumstances, and in some cases are even mandatory. Two or more persons may jointly appear as plaintiffs or be sued as joint defendants, provided (i) rights and duties resulting from similar circumstances or legal grounds are to be assessed; (ii) the individual cases are not subject to different types of procedures; and (iii) the same court has jurisdiction (Article 71 CPC). The joinder is mandatory if two or more persons are in a legal relationship that calls for one single decision with effect for all of them (Article 70 CPC). In both cases, the joint parties may appoint a joint representative if they wish.

Furthermore, under certain conditions, associations can sue in the name of the association for groups of persons. However, an association cannot claim damages for itself, or for the members of the group. It can merely request the court to prohibit an imminent violation, put an end to an ongoing violation or establish the unlawful character of a violation if the latter continues to have adverse effects.

4.2 Opting In or Out

As class action suits are not available in Switzerland, this is not applicable (see **4.1 Statutory Basis**). While joint actions are possible (see, also, **4.1 Statutory Basis**), the parties to the proceedings are identified at the start of the procedure and typically cannot be changed or added later.

4.3 Direct/Indirect Purchasers

As class action suits are not available in Switzerland, this is not applicable (see 4.2 **Opting In or Out**) from a class action perspective. The current revision nevertheless aims to enable, for example, consumers to bring civil claims for breaches of antitrust law. This does not, however, alter the fact that Swiss law does not recognise any form of class action system.

4.4 Class Certification

As class action suits are not available in Switzerland, this is not applicable (see 4.2 **Opting In or Out**).

5. Choice of Jurisdiction

5.1 Rules on Jurisdiction and Applicable Law

In national disputes, the Swiss Civil Procedural Code (CPC) is applicable. In antitrust litigation cases, the claimant can generally choose between the courts at the domicile of the aggrieved person, the domicile of the defendant, the place where the act took place or the place where the act had its effect (Article 36 CPC). The parties can, however, agree on a different court (Articles 17 and 18 CPC).

For interim measures (see 10.1 **Injunctions**), Article 13 CPC stipulates a mandatory jurisdiction at the court that has jurisdiction to decide the main action or at the place where the measure is to be enforced.

In national disputes, the applicable law is always Swiss law.

In international disputes, the Federal Act on Private International Law (PILA; SR 291) is generally applicable if no international treaty between the jurisdictions in question supersedes it. For antitrust as well as other tort and delict cases, the PILA provides three alternative places of jurisdiction in Switzerland: (i) the Swiss courts at the domicile (or, in the absence of a domicile, at the habitual residence) of the defendant; (ii) the Swiss courts at the place where the act took place; or (iii) the place where the result of the act had its effect. The parties can deviate from these places of jurisdiction by way of agreement.

Analogous to national disputes, for interim measures (see 10.1 **Injunctions**), Swiss courts that have jurisdiction over the main action or at the place where the measure is to be enforced have jurisdiction (Article 10 PILA).

Switzerland is a member of the Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007 (LugC). In relation to other signatory states, the jurisdiction and applicable law with regards to antitrust litigation, therefore, is determined by its provisions. It provides for a place of jurisdiction at the domicile of the defendant (Article 2 para. 1 LugC). Additionally, antitrust cases can be brought before the courts of the place where the harmful event occurred or may occur (Article 2 para. 1 LugC). This includes both the place where the act took place and the place where it had its effect (see, for example, *EuGH, 30. 11. 1976, C-21/76, Handelskwekerij Bier vs. Mines de Potasse d'Alsace*, Nr. 15/19 as well as decision nr. 125 III 346, para. 4a of the Swiss Federal Supreme Court).

For interim measures, Article 31 LugC provides that the courts of the states that have jurisdiction over the substance of the matter have jurisdiction.

The applicable law in international disputes is governed by the PILA where no international treaty is applicable. Claims based on a restraint of competition are governed by the law of the state in whose market the restraint has direct effects on the injured party (Article 137 para. 1 PILA). If claims based on a restraint of competition are governed by a foreign law, no compensation may be awarded in Switzerland beyond what would be awarded for a restraint of competition pursuant to Swiss law (Article 137 para. 2 PILA). If and to what extent the parties are free to deviate from Article 137 PILA by way of agreement (Article 132 PILA) is controversial.

6. Disclosure/Discovery

6.1 Disclosure/Discovery Procedure

Swiss procedural law knows no general duty or right to discovery of all relevant information or documents between the parties. In certain instances, the party

may have a right to information based on substantive law. However, the CartA does not provide for such rules or any right of the plaintiff to access information in a private enforcement proceeding.

Once the action has commenced, the parties can request the taking of evidence for their claims. However, it is up to the court to order the taking of evidence. After having heard both sides' factual claims and evidence requests, the court will decide which requests to grant. It will decide whether to allow the submitted documents into the evidence phase and which witnesses to hear, etc. If a party knows of the existence of a document, but they are not in control of it, the court can order the other party to submit it. However, it must be shown that this information is directly relevant to the case.

A plaintiff, as a party to an administrative proceeding before ComCo, may access the ComCo file except for leniency documents. To date, it has not been decided whether ComCo must open its files to a cantonal civil court. The Federal Supreme Court has, however, ruled that a canton must be granted partial access to a ComCo file if it contemplates filing a civil action (eg, in bid rigging cases). ComCo still takes great care to safeguard leniency information from access by third parties, in particular parties to civil or criminal proceedings. This also encompasses the blacklining and paraphrasing of decisions relying on leniency information – but this is typically subject to disputes in any given case.

6.2 Legal Professional Privilege

Practising and registered attorneys are protected by the legal professional privilege as far as they are acting for a client in a specific case. They must not be ordered to testify against a client, or to produce documents regarding a client who has been retaining them as counsel. The privilege has a broad effect, and it applies regardless of when any documents have been created, or where they are located.

In contrast, the legal professional privilege does not apply to in-house counsels, or to lawyers not acting as retained attorneys (eg, as board members and the like).

6.3 Leniency and Settlement Agreements

Currently, ComCo will not disclose leniency documents to claimants in a civil procedure. Further, only parties to a ComCo investigation may access leniency files. They are, however, prohibited by restrictive ComCo rules from taking copies, or from using leniency information to back up a civil claim. This also encompasses attorneys acting for such parties.

Documents produced on settlement agreements may not be used for a civil claim, either. However, a settlement decision (which ideally is shorter than a regular ComCo decision) may contain certain information that may be used by a plaintiff in a civil procedure. It is, however, a matter of negotiation between ComCo and the party to a settlement agreement as to how much information will be used in such a decision.

If a parallel investigation is pending before the EU Commission, and if the leniency applicant has agreed to disclose leniency information to the EU Commission ("waiver"), it is possible for the plaintiff to gain access to such information. Any restrictions on the use of such information for civil actions are subject to EU regulation. The same is true regarding parallel investigations in Germany. Switzerland, the EU, and Germany have concluded bilateral treaties on cooperation in competition law matters.

7. Witness and Expert Opinions

7.1 Witness Procedure

Witness testimonies can be requested by the parties. If the court approves the request, the witnesses are typically heard orally in front of a judge. Since 1 January 2025, they can be conducted by video call under certain conditions. The questions are asked by the judge; however, the parties (and their counsels, respectively) may request additional questions or, with the court's consent, ask them directly.

Written testimonies can be obtained by the court if the testimony in person seems unnecessary. Also, ComCo will send out questionnaires to witnesses in administrative proceedings, pointing out their respective rights as witnesses.

It should be mentioned that, in ComCo proceedings, normal (low-ranking) and former employees of a company subject to an investigation will be interrogated as witnesses. They will not benefit from the principle of *nemo tenetur* with regard to the company. Only high-ranking, current employees, or members of the management board or of the board of directors may invoke the *nemo tenetur* principle on behalf of the company.

7.2 Expert Witness Role and Procedure

Two types of expert witnesses are typically distinguished: experts consulted directly by the parties and court-appointed experts. As of 1 January 2025, both types are considered as evidence. However, the latter will, in most cases, carry more weight in the consideration of the evidence, though the court is entirely free in their weighing of the evidence.

If the parties appoint their own experts, they will typically submit a written statement by the expert with their briefs. If requested by the parties, the court may later choose to question the expert.

A court-appointed expert opinion can be requested by the parties or ordered *ex officio*. If the legality of a restraint of competition is questioned in the course of civil proceedings, the case shall be referred to ComCo for an expert report (Article 15 para. 1 CartA). Unlike a party expert, a court-appointed expert must be neutral. Before giving their expert opinion, they are cautioned under the criminal penalty of perjury. The court will, after having consulted the parties, choose the experts, instruct them and pose the necessary questions. In most cases, the experts submit their answers in written form. The court may also choose to hear the experts orally.

8. Damages

8.1 Damages: Assessment, Passing On and Interest

Awards for punitive damages are foreign to Swiss law. However, plaintiffs affected by a breach of antitrust law may demand restitution of the illegal gain the defendant has realised based on the illicit conduct. The latter may be relevant if the plaintiff fails to substantiate the amount of its losses when filing for damages.

There are no specific rules in Swiss law on the passing-on defence. However, the defence is admissible, also in light of the prohibition of overcompensation of the plaintiff. If the plaintiff has not suffered any losses due to the passing on of any alleged anticompetitive behaviour by the defendant, such losses may not be claimed from the plaintiff, and only the remaining losses (if any) are subject to a civil claim.

Interest on damages awarded for a breach of antitrust law is normally payable at the rate of 5% per annum, unless the parties have agreed on a different rate.

9. Liability and Contribution

9.1 Joint and Several Liability

If a breach of antitrust law has been caused by several undertakings which are defending parties in a civil procedure, they are jointly and severally liable for the damages caused. The plaintiff may claim the full amount of the damages awarded from each defendant, also from one defendant only (following a “deep pocket” approach). The selected defendant may subrogate against the other defendants.

Civil liability of leniency applicants in a ComCo proceeding is not limited. However, information on and provided by leniency applicants in a ComCo proceeding is afforded a relatively high level of protection against disclosure to civil claimants. ComCo, however, does not actively protect leniency applicants from civil claims, although it has been taking care to safeguard leniency information for the sake of the leniency system.

According to the current revision of the CartA, a potential fine against a defendant in an administrative procedure before ComCo may be reduced if the defendant has taken voluntary steps to eliminate the hindrance caused, or to pay damages and satisfaction in accordance with the CO. This, however, is only an indirect effect on an administrative procedure produced by alternative dispute resolution, or a civil procedure.

9.2 Contribution

A party can bring contribution proceedings against a third party according to Article 81 CPC if they believe they will have a claim against the third party if they are unsuccessful against the main party (regress). The admission of such a contribution presupposes that the claims are factually related to the main action, that the court has jurisdiction and that the main action and the contribution procedure are to be asserted in the ordinary procedure. Whether a contribution is also possible in a summary procedure (for example, interim measures; see also **10.1 Injunctions**) is controversial.

10. Other Remedies

10.1 Injunctions

Swiss law permits a claimant to require another party to act, to refrain from acting, or to tolerate a particular action, provided the claimant has a substantive right to do so (Article 84 CPC). In antitrust law, a person hindered by an unlawful restraint of competition from entering or competing in a market may seek the removal of, or abstention from, the hindrance (Article 12 CartA).

An injunction can be obtained in three different ways: through an ordinary procedure, interim/provisional measures or ex parte interim/provisional measures.

The interim measures are granted if the claimant can credibly demonstrate (strict proof is not required) that a right they have or are entitled to, has been violated or a violation is anticipated (Article 261 para. a CPC). In antitrust cases this will often be the violation of Article 12 CartA in connection with Article 5 and Article 7 CartA (agreements in restraint of competition and abuse of a dominant market). Furthermore, they must credibly demonstrate that the violation threatens to cause “not easily reparable harm” to the claimant (Article 261 para. b CPC). If granted, the court can forbid a particular action, order to remedy an unlawful situation, give an order to a register authority or to a third party, or allow performance in kind. However, orders to pay a sum of money are generally excluded (Article 262 CPC).

Applications for interim measures are handled under summary proceedings, and the timeframe depends on the urgency of the matter and the court’s workload. It will usually be considered in a few weeks to a few months. To expedite the procedure, documentary evidence is usually the only form of proof accepted.

An ever faster route is available through ex parte interim measures (a subcategory of interim measures). They can be granted without notice to the other party often within a few days, in some cases even hours. They are only granted in cases of special urgency, and particularly if there is a risk that the enforcement will be jeopardised if the counterparty is warned of the planned measures beforehand (Article 265 CPC). Furthermore, the claimant will have to credibly demonstrate the same requirements as for interim measures (see above). Immediately after the ex parte interim measures have been granted, the court must either hold a hearing or – as most courts will – allow the counterparty to respond in a written brief. This turns the ex parte interim measures into an interim measure procedure.

When granting interim measures (with or without prior ex parte interim measures), the court will set the claimant a deadline to start ordinary proceedings (unless this has already been done). If no ordinary procedure is started within the deadline, the interim measures will lapse. Ordinary proceedings can also be started without prior interim measures having been ordered.

In the ordinary proceedings, the court will determine whether the claimant has a right to the measures on a long-term basis. In this procedure, all types of evidence will be allowed, and the court has to apply the full standard of proof.

Security and Damages for (Ex Parte) Interim Measures

If damages for the defendant are anticipated, the court may make the interim measures conditional on the payment of a security deposit (Article 264 para. 1 CPC). If the interim measures are unjustified and cause a loss or damage for the defendant, the claimant will be held liable. If they can prove that they applied for the interim measures in good faith, the

damages may be reduced or entirely waived (Article 264 para. 2 CPC).

10.2 Alternative Dispute Resolution

Several different possible methods of alternative dispute resolution are available. Most proceedings before the Swiss courts must be preceded by a mandatory conciliation procedure (Article 197 CPC). Summary procedures (which are applicable for interim measures) are exempt (Article 198 CPC). Furthermore, if a commercial court has jurisdiction (see **2.2 Courts**) the conciliation procedure is voluntary (Article 199 para. 3 and Article 6 CPC). The parties can also agree to mediation instead of the conciliation procedure (Article 213 CPC).

Furthermore, the parties can agree on arbitration instead of litigation in front of the state courts (Article 61 CPC). In such cases, the Swiss Federal Court acts as the sole appellate court (Article 77 of the Federal Supreme Court Act (FSCA, SR 173.110).

11. Funding and Costs

11.1 Litigation Funding

Litigation funding is possible and available.

Third-Party Funding

A third-party funder typically advances court costs (see **11.2 Costs**) alongside all other procedural expenses. The funder assumes the cost risk if the case is unsuccessful, and in return receives a share of the proceeds if the claim succeeds. In practice, this share generally ranges between 20% and 40% of the proceeds, depending on the nature of the case.

To secure funding, the dispute must usually involve a substantial amount at stake and present at least a reasonable prospect of success, in order to make the investment worthwhile. In many cases, the funder will, furthermore, require some form of security for the duration of the proceedings.

The funder is typically not the attorney, as the Swiss rules of professional conduct prohibit attorneys from entering into agreements with clients whereby their

fees are settled using anticipated proceeds from legal disputes.

Legal Aid

For private persons (but not legal entities) the government may grant legal aid if the applicant lacks the means to pay court costs and party expenses (see **11.2 Costs**) while still ensuring subsistence for themselves and their family. Legal aid is therefore available only where the payment of these costs would reduce the applicant below the subsistence minimum.

11.2 Costs

Award of Costs

Two types of costs must be distinguished: court costs and party expenses (attorney's fees). Both types of costs are, as a general rule, borne by the losing party. However, the court has a certain discretion, particularly in atypical situations.

The amount of the costs is regulated by cantonal laws. Court costs usually depend on the value in dispute. With regards to party expenses, some cantons likewise base the amount on the value in dispute. Others determine the amount based on the complexity and the effort appropriate for the specific case. Either way, the amounts awarded rarely cover the actual expenses of the parties.

Security for Costs

To secure the court costs, the courts will usually ask for an advance in court costs payable by the claimant. In most cases, they can ask for up to half of the expected amount. In some types of procedures, they can demand the full expected amount. Furthermore, the court may ask for an additional advance for certain costly types of evidence taking (ie, an expert opinion).

In most proceedings, a defendant can request security for party expenses if the claimant (i) is domiciled outside of Switzerland; (ii) appears to be insolvent; (iii) owes costs from prior proceedings; or (iv) presents another substantial risk that the costs will not be paid. With regards to point (i), it must be noted that this may be inapplicable with regards to persons domiciled in certain jurisdictions with which Switzerland has concluded a treaty forbidding such clauses. In some types of procedures, such as the summary pro-

cedure (which is applicable to injunctions), no security deposit for party expenses can be obtained.

The court will determine the amount of the security deposit after having heard the parties, and will set a deadline. The security can be provided in cash (via bank transfer) or in the form of a guarantee from a bank with a branch in Switzerland or from an insurance company authorised to operate in Switzerland.

12. Appeals

12.1 Basis of Appeal

Decisions of first instance courts can generally be appealed to a cantonal high or supreme court (their denomination varies, depending on the cantons). Decisions of cantonal high or supreme courts can generally be appealed to the Federal Supreme Court. Where a commercial court has jurisdiction for anti-trust cases (see **2.2 Courts**), the decision can only be appealed once to the Federal Supreme Court.

In the second instance, in most cases, the appeal can regard both points of the law and the facts. In some exceptional cases, the facts can only be appealed if they are obviously incorrect. The Federal Supreme Court typically only decides on points of law. Only in exceptional cases of arbitrariness will it allow appeals regarding the facts.

13. Looking Forward

13.1 Legislative Trends and Other Developments

The pending revision of the CartA is intended, *inter alia*, to facilitate civil procedures as it eases the statute of limitation for plaintiffs (in relation to a ComCo investigation, see **1.2 Recent Developments**). This is expected to facilitate follow-on procedures as plaintiffs may more easily rely on ComCo's findings and assessments.

It is uncertain which sectors this will have an impact on, as the procedural and financial risks in a civil procedure are considerably higher than in a ComCo investigation (which is basically free for a plaintiff). However, ComCo can freely decide whether to open an investigation or not (based on the principle of opportunity). In contrast, a civil court must take a case at hand once an action has been filed.

It can be expected that cases of relative market power will increase before civil courts. The concept of relative market power has only recently been introduced to the CartA. ComCo has been dealing with a number of pioneering cases where it has laid out the principles of how such cases are to be assessed. These cases may guide both parties and civil courts in future disputes.

Beyond this, there are currently no indications of a rise in civil proceedings relating to agreements restricting competition or abuses of a dominant position.

However, further damages claims may emerge in light of the relatively high number of bid-rigging investigations concerning public tenders in several cantons. These claims are predominantly rooted in tort or contract law, with antitrust provisions and ComCo decisions forming the substantive competition law background. It also deserves to be mentioned that the revised laws on public procurement in Switzerland (implementing the GPA 2012) stipulate harsh contractual and procedural sanctions for undertakings that engage in bid-rigging agreements. This means that both administrative and civil measures may increasingly be applied, while alternative dispute resolution between public authorities and undertakings in public procurement proceedings may become a more attractive option.

There is no indication that there will be an increase in civil cross-border cases in Switzerland. Civil claims primarily seem to be filed in other countries, but not in Switzerland as Swiss civil procedure law – as set out above – poses considerable financial risks to plaintiffs and does not provide for a class action option.

Trends and Developments

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Wenger Plattner is a leading Swiss business law firm. The firm addresses complexity with sustainable and straightforward concepts. Through specialised teams and innovative methods, Wenger Plattner achieves efficient, and effective solutions for its cli-

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Beyond Bid-Rigging: ComCo's Expanding Agenda in Competition Law

In 2024, the Swiss Competition Commission (ComCo) has, inter alia, carried out 24 investigations (21 of them pending from previous years), 11 preliminary investigations, and about 50 market monitoring procedures, dealt with 43 merger procedures and rendered opinions in approximately 350 official consultations. ComCo's workload remains high, and ComCo obviously is very active.

In the reporting year, however, only one new civil anti-trust case before a cantonal court (private enforcement of the Swiss Cartel Act; CartA, SR 251) has been publicly reported (August 2024, Supreme Court of the canton of Zug). It concerned the termination of an extensive services contract of an authorised car distributor by the importer. The distributor had been involved in the importer's distribution system for almost 40 years. The case was decided in a proceeding for interim measures, and was dismissed. The case mainly concerned the interpretation of an agreement of jurisdiction within Switzerland between the parties, and whether such an agreement had been entered into at all; it reflects a variety of cantonal, and federal decisions which, however, are of procedural rather than substantive antitrust law interest. The main takeaways from this case are, from a substantive antitrust perspective, that distributors and other business partners of allegedly "strong" counterparties must be cautious and vigilant in contract negotiations (in particular, concerning termination issues), and that they must monitor and document the development of their

business relation to be able to file a successful claim for violation of the CartA before a court.

The court further held that a distributor which had been involved in a variety of contract negotiations in the past, and which has been aware of industry practices over a long period of time, can hardly be surprised by the termination of a distribution contract, even though the importer may have a strong market position. Dependence on a certain business partner must not be self-inflicted. Otherwise, taking actions under the CartA – be it in an administrative, or a civil procedure – is unlikely to be successful.

In terms of private enforcement of antitrust law, several ComCo cases of indirect relevance are worth noting.

Relative market power

After rendering a first decision on the abuse of relative market power (Article 4 para. 2bis and Article 7 CartA) in 2024 ("Fresenius Kabi / Galexis" on the distribution of medicinal products), ComCo rendered a second decision in July 2025. It concerns relative market power in the automotive sector. After many years of co-operation, BMW terminated a distribution and service contract with one of its distributors. Before this step, BMW had allegedly informed the distributor that the relationship was to be continued. This is why the distributor had considerably invested in its business development. The termination of the relationship thus was unexpected. The distributor had no opportunity to switch to another manufacturer of cars, and the manufacturer was considered to hold relative market

power vis-à-vis the distributor. During the ComCo investigation, both the manufacturer and the distributor agreed on a limited prolongation of their relationship. The investigation has therefore been closed. The case shows that ComCo is still eager to render leading cases in the field of relative market power. This may promote civil litigation in this field in the future, relating to ComCo case law.

This is also shown by the fact that ComCo initiated a new investigation on relative market power against Beiersdorf/Nivea in June 2025. ComCo is investigating whether Beiersdorf, with its household brand “Nivea”, holds relative market power vis-à-vis Migros, one of Switzerland’s leading retailers. Before that, ComCo held, in another investigation, that the French press company “Madrigall” held, and abused, relative market power vis-à-vis the Swiss bookstore “Payot” as regards the distribution of French books in Switzerland. Madrigall had failed to supply Payot at conditions similar to those in France. Madrigall has been sentenced to allow direct imports of books from France by Payot at the conditions applicable in France. Such constellations are of increasing relevance to ComCo due to the latest legislative steps taken against the “high price island situation” in Switzerland. The latter case is under appeal.

Employment markets

ComCo led a preliminary investigation on employment markets in several industries. It concluded that companies had been exchanging information on wages, and on other benefits for employees. However, no investigation has been initiated. Rather, ComCo is currently drafting rules of best practice together with the industries involved. This, however, demonstrates that ComCo is increasingly interested in employment markets as has been the case for a long time in other jurisdictions. Agreements on wages and other benefits, as well as no-poaching agreements, are also to be avoided in Switzerland. The results of this process will be crucial for the development of antitrust law in the Swiss employment market.

Agency v distribution contracts

ComCo, in September and October 2024, rendered two decisions on the distinction between distribution, and agency contracts. This distinction is particularly

relevant when a manufacturer, or an importer, considers implementing measures that can be associated with resale price maintenance (RPM). RPM, which is prohibited under the CartA (Article 5 para. 4) and presumed to eliminate competition, is subject to high fines. ComCo essentially enforces the strict rules set out in EU law on the distinction between distribution and agency contracts. However, the decisions demonstrate that a detailed, case-by-case analysis is performed, requiring that a considerable number of criteria be met to establish a “genuine” agency system. It is advisable for companies involved in a distribution system to ask ComCo for guidance, and ComCo will – as the cases show – ask detailed questions on the system. The new case law by ComCo on this issue has also been noted in Europe and should be taken seriously, as its systematic approach could potentially influence future EU jurisprudence.

Purchasing consortia

In a complex investigation involving “Markant Handels- und Industriewaren-Vermittlungs AG” as well as 16 retailers, ComCo specified the conditions under which it deems purchasing consortia to be in line with the CartA. Markant offered several services to retailers, including financial services. Markant granted kickbacks, and it also negotiated delivery conditions and rebates with suppliers in their relationship with the retailers. The case is very complex, and the decision has not yet been published; only press releases are available to date. ComCo, however, seems to acknowledge that the creation of countervailing power by a purchasing consortium is, under certain circumstances, in line with the CartA and pro-competitive as it may be conducive to creating lower purchase prices.

However, non-transparent kickbacks, as well as collective measures to enforce certain measures, remain problematic. The full decision, once published, is expected to clarify the circumstances under which purchasing consortia are considered either pro- or anti-competitive. This is a critical question that remains unresolved in Switzerland, as existing decisions from ComCo and its Secretariat are controversial and open to inconsistent interpretation. In any case, it must be borne in mind that, according to ComCo case law, purchasing consortia may still constitute horizontal

agreements on prices which are presumed to eliminate competition, and which are subject to high fines should they not be justified for economic reasons – which requires a case-by-case assessment, and for which the burden of proof is high.

Bid-rigging cases, especially in the construction sector, continue to rank among ComCo's top enforcement priorities, and further decisions have recently been issued in this area. The cantons and municipalities are increasingly aware of the issue, and they play an essential role in preventing, and discovering bid-rigging cases. Some cantons even apply dedicated software to evaluate offers in public tender proceedings and to discover illicit collusion. The probability of follow-on litigation subsequent to ComCo bid-rigging cases remains considerable, as well as sanctions set out by public procurement law (implementing the GPA of 2012).

In terms of legislation, the partial revision of the CartA is ongoing. It focuses on if and how detrimental effects of agreements in restraint of competition are to be assessed in detail (in particular, in "hard core" cases on price- and quota-fixing, market and customer allocation as well as resale price maintenance and vertical market foreclosure), in contrast to the current, rather rigid "per se" approach in such cases as set out by

the Federal Supreme Court (the "Gaba/Elmex" case). Further, it focuses on the reform of merger control (the introduction of the SIEC test in Switzerland) and on a review of the setup of the competition authorities ("institutional reform"). As regards the institutional reform, several issues in the procedural relation between ComCo (as the deciding body), and its Secretariat (as the investigating body) are discussed.

There is widespread criticism that ComCo and the Secretariat are not sufficiently separated, and that parties of an investigation may suffer from procedural disadvantages which cannot be justified under basic procedural rules. This approach, of course, is controversial. It must further be borne in mind that the partial reform relates to a fairly large number of parliamentary procedural requests, and that it is very demanding to take all of them into account in a coherent picture. The parliamentary process is still in progress. It can be expected that it will be concluded in the near future. Judging by the various deliberations by Parliament, there is a good chance that the bill for the revised CartA will be accepted, subject to an optional referendum (ie, a democratic, public voting process if a certain number of citizens request such voting). It also remains uncertain when it will enter into legal force as this date will ultimately be set by the Federal Council (ie, the federal government).

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