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Questionnaire A : THE ROLE OF ANTITRUST AUTHORITIES REGARDING THE DIGITAL ECONOMY

Switzerland National Report

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1. Introductory remarks on the approach of the Swiss Competition authorities in the digital economy

This report discusses the role of the Swiss competition authorities, *i.e.* the Competition Commission in the digital economy.

It is the responsibility of the Competition Commission to prevent the harmful consequences of cartels and other restrictions on competition in Switzerland, including in the context of digitalization. That encompasses the fight against illegal competition agreements, the monitoring of abuses committed by companies in a dominant position and merger control. The prevention of abusive pricing is however of the competence of the Price Supervisor.

The increasing digitization of the economy has not yet led to amendments of the fundamental principles of Swiss competition law. The wording of the relevant provisions of the Swiss Cartel Act ('CartA') and of the Federal Law regarding the monitoring of prices is open enough to allow for an adaptation of the current practices of the Swiss authorities to react to practices deriving from a world that keeps getting more and more digitalized. It is noteworthy that the Swiss federal government issued a report in January 2017[1] exposing the existing framework conditions for the development of the digital economy in Switzerland, underlining that many of the tools of existing competition law can be directly applied in the digital economy.

Nevertheless, the increasing digitalization of the economy poses new challenges for Swiss competition policies. Two phenomenon are noteworthy: the attention given to data and the increasing diffusion of platform markets. While the digital economy has not directly led to amendments of the CartA, the analysis of the facts relevant to competition must be adapted, particularly with regard to the delimitation of the market such as online platforms and marketplaces and, for example, the examination of possible abuses of a dominant position or merger control. The Competition Commission stated that errors of appreciation could lead to regulations that hinder competition, instead of allowing the different players to compete on equal terms: "*a fight with equal arms is more useful to competition than the blind application of old rules in the face of new forms of economy. It is therefore necessary to take a critical look at existing regulations*"[2].

1 Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf
2 Competition Commission annual report, 2016, pp. 24 and 28.

In 2014, the Secretariat of the Competition Commission created an internal working group named "*Digitization*" with the aim of maintaining an up-to-date basis for the evaluation of digital markets[3]. This working group supports the Competition Commission in its decision-making and follows international developments and case law in this field. In addition, in 2017, the Competition Commission declared digitization to be one of its priority topics, thereby signalling the special attention it intends to devote to this area[4]. It is "*aware of the particularities of the digital markets, observing its current developments and taking the potential for innovation in this sector particularly into account in its decision-making practice*"[5]. In addition to this organizational and material reorientation, the Competition Commission conducted a series of investigations and merger control procedures in which digitalization played an important role. To name a few, the use of broad price parity clauses on targeting online reservation platforms was prohibited by the Competition Commission in 2015. As regards to merger control in the field of telecom, the Competition Commission approved the planned merger between Sunrise and Liberty Global without remedies in 2019, after refusing the one between Sunrise and Orange four years before that.

Finally, it will be necessary to consider whether an adaptation of intervention criteria in Switzerland in the event of concentration of undertakings would be relevant in regards to mergers or acquisitions of internet platforms. Despite the trend in convergence of Swiss and European competition law, notable differences persist, as Switzerland's merger review is more permissive than the one in the European Union. The Swiss Government explained, in the report on the legal framework of the digital economy published in 2017, that it may be necessary and useful to adapt the merger notification criteria so that the authorities can examine mergers or acquisitions of young internet platforms that could possibly impact competition[6]. The introduction of the SIEC (*Significant Impediment to Effective Competition*) test would allow the Competition Commission to take into account potential efficiency gains during platform concentrations.

2. Swiss digital competition policy: specific issues

In this section, we consider specific issues relating to Swiss competition policy towards the digital economy in more detail. We will discuss hereafter: data protection and data collection (2.1), market definition and market power (2.2), online advertising (2.3), telecom and digital infrastructure (2.4), abuse proceedings in the absence of a dominant position (2.5) and price parity clauses (2.6).

2.1 Data protection and data collection (Q1 and Q6)

Swiss data protection and competition laws have two different purposes. The goal of data protection is to ensure the safety of the rights of individuals that are the subjects of data processing. The goal of competition

[3] Competition Commission annual report, 2020, p. 31.
[4] Competition Commission annual report, 2020, p. 31.
[5] Competition Commission annual report, 2017, p. 4.
[6] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 8f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

law is to prohibit firms from engaging in conducts that will harm competition. Data protection plays a part in competition law only when, by being disrespected, it has or presents the risk of distorting the competitive process[7].

In Switzerland, the enforcement of DFPR and protection of privacy are assigned to the Federal Data Protection and Information Commissioner. The Competition Commission hence follows the lead of the European commission on these issues: having complementary competences, the Competition Commission will only interfere due to concerns about anti-competitive conducts or agreements, or abuses of dominant positions. In case of a merger, the collection of data would have to give rise to competitive concerns.

The are no case precedents in Switzerland pertaining to the specific combination of data collection and a potential abuse of a dominant position in an undertaking's general terms and conditions.

The debate concerning the interface between competition and data protection issues is hence in its early stages. Nevertheless, the Competition Commission expressed itself on the challenges related to big data, the use of data opening, and, among others, new possibilities when it comes to pricing. The Competition Commission explained that "*personalized prices, such as individual discounts, can be offered on the basis of a large amount of data specific to clients. The peaks and declines of demand can be recognized more easily and faster thanks to data collected at different moments*"[8]. The Competition Commission then specifies that such practices can potentially deploy hindering effects or exploiting effects on competitors. Thus, new questions arise, which the Competition Commission finds difficult to answer with a "*final judgement from the point of view of cartel law, which is currently not possible due to a lack of experience*"[9].

2.2. Market definition and market power (Q2, Q3 and Q 4)

In the digital economy, the simple approach aimed at determining the markets on which an undertaking is effectively active, especially platforms, can be complex. The specificities of platforms, be it two-sided or multi-sided, can influence the delimitation of the market, which usually constitutes the starting point of a competition analysis. In such a context, it can be extremely complicated to properly understand the competitive relationships linking the different actors. For example, on the Android platform, at least five parties interacted in addition to Google: the product suppliers, the smartphone manufacturers, the application developers, the telecommunication companies and the users. Once the multi-sided market is identified, one must evaluate whether only one market covering the entirety of the multi-sided market should be defined or if it must be distributed over two or more markets linked between them[10].

Furthermore, digital platforms and online services adopt specific features that differ from traditional offers: given the fact that many digital goods are "free", the possibility of analysing prices disappears. Users on

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[7] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 162f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

[8] Competition Commission annual report, 2016, p. 26.

[9] Competition Commission annual report, 2016, p. 27.

[10] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 162f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

online markets do not pay with money anymore but with their interest or with data pertaining to them and their behaviours when it comes to research and shopping, which makes it possible for the platform to perform a targeted analysis of shopping behaviours and to differentiate pricing. Hence, in the practice of the Competition Commission, the services offered "for free" by a platform are usually considered as a market activity[11]. Indeed, the fact that a requesting party does not pay for the use of a platform is not a valid reason not to consider them to be a part of a commercial relationship and not to take them in consideration when defining the relevant market. First, because that side of the market often pays a price, albeit an implicit one, for example in the form of data pertaining to their usage of the platform, or the provision of personal data. Second, the fact that one side of the market does not have to pay reflects precisely a given price structure, which is optimal for the platform[12].

In principle, the relevant test for market definition in Switzerland is the substitutability of products and services (pursuant to Article 11 (3) lit. a of the Ordinance on the Control of Concentrations of Undertakings) and, in particular, the cross-price elasticity and small but significant and non-transitory increase in price (SSNIP) test[13]. While it is often used to delimit relevant markets based on prices, it cannot be used as it is for two-sided markets since one of the user groups does not pay a (monetary) price for the use of the platform, and the platforms usually apply different prices for different user groups. Finally, the use of the SSNIP test is made even more complex because the determination of prices for each side depends on the determination of prices for the other side, and therefore cannot be considered separately for both parties[14].

When it comes to market shares of online undertakings, turnovers do not always disclose much information on their respective positions in the market. There are no specific guidelines in Switzerland to assess the market power of a digital platform or social media networks. In this author's view, the formula to determine the position in the market of undertakings in the digital economy could rely, on a case-by-case basis, on criteria such as the qualitative competition, the ability of the undertaking to control access to the services online and to charge high fees, or the vulnerability of its position in the market in relation with innovation cycles.

Finally, rules pertaining to interventions on merger controls in the European Union show significant discrepancies. In Germany, an additional intervention threshold has already been instituted for mergers exceeding a certain transactional value. The introduction of this new criteria gave rise to criticism: beyond the uncertainties which taint the evaluation of transactions, the core of the issue is the fact that a single precedent can justify an intervention[15].

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[11] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 160, retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

[12] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 160f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

[13] Decision of the Swiss Federal Supreme Court 2C_484/2010 of 29 June 2012, consid. 9.2.3.5.

[14] Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, p. 160f., retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

[15] More information in the "*Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification (Section 35 (1a) GWB and Section 9 (4) KartG)*" report, retrievable from: https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf

In this context, it is noteworthy that the annual report of the Competition Commission in 2016 stated that the turnover-based thresholds in merger control could lead to a situation wherein mergers are not controlled, even though, in relation to customer data, a dominant position exists[16]. Following this statement of the Competition Commission, the Swiss Government explained, in the report on the legal framework of the digital economy published in 2017, that it may be necessary and useful to adapt the merger notification criteria so that the authorities can examine mergers or acquisitions of young internet platforms that could possibly impact competition. The introduction of the SIEC test would allow the Competition Commission to take into account potential efficiency gains during platform concentrations[17].

2.3. Online advertising (Q5)

As of today, the number of decisions of the Competition Commission in the field of online advertising and comparison portals is relatively scarce. The decisions described hereafter were taken in specific merger control cases and do not result from sector-wide investigations.

The first significant decision pertaining to online advertising dates back to 2015. In this matter, the Competition Commission authorized, without charges nor conditions, a co-enterprise between Swisscom, the SSR and Ringier whose purpose was to commercialize and place advertisements in different media (internet, television, print and radio)[18]. The investigation focused on televised advertising aimed at specific target groups that the co-enterprise had planned to introduce in Switzerland.

Notwithstanding the fact that the joint venture would create one of the strongest actors in advertising, the Competition Commission ruled that it would not lead to a dominant position that would put an efficient competition at risk in the two or three following years. Other than the current competition, the investigation specifically took into account the following dynamic competitive relationships: the substitutability with other advertisement channels and the possibility of televised advertisement aimed at specific target groups, the strong growth of over-the-top services such as Zatoo, Wilmaa or Teleboy, and the uncertainties pertaining to the association effects or synergies emanating from targeted advertising.

In the field of media and advertising, the Competition Commission also had to examine two mergers, namely Tamedia/Tradono Switzerland[19] and Tamedia/Neo Advertising[20], through which Tamedia wanted to gain exclusive control over Tradono Switzerland and Neo Advertising SA respectively. Tradono Switzerland

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https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2

16 Competition Commission annual report, 2016, p.28.

17 Report of the Federal Council on the main framework conditions for the digital economy, 11 January 2017, pp. 8 and 10, retrievable (in French) under: https://www.newsd.admin.ch/newsd/message/attachments/46894.pdf

18 Decision of the Competition Commission "*Schweizerische Radio and Television Company/Swisscom AG/Ringier AG*", LPC 2016/1, pp. 299ff.

19 Decision of the Competition Commission "*Tamedia/Tradono Switzerland*", LPC 2017/4, pp. 579ff.

20 Decision of the Competition Commission "*Tamedia AG/Neo Advertising AG*", LPC 2017/3, pp. 505ff.

operates a digital marketplace for small ads, which can only be used by means of a small ad application. Neo Advertising SA is active in the field of outdoor advertising ("out-of-home advertising"). The Competition Commission has given its approval after having conducted a preliminary investigation on these projects.

It is interesting to note that the Tamedia/Tradono Switzerland merger was approved notwithstanding the high market share of Tamedia thanks to the dynamic evolution of online advertisement, market shares volatility, low barriers to entry and Tradono's marginal market share. Such considerations were not required for the Tamedia/Neo Advertising merger, which was authorized on the following grounds: the low market share of Neo Advertising and the fact that both companies, while both active in the advertising business, were not competitors (indeed, Tamedia is active in the print and internet advertisement market, but Neo Advertising is active in outdoor advertising).

In the context of the acquisition of Websheep GmbH by Swisscom Directories SA in 2019, the Competition Commission investigated the situation from the point of view of competition law regarding comparison platforms, and did not notice the elimination of effective competition[21]. The grounds for the approval were the fact that the resulting increase of Swisscom Directories' market share was insignificant.

Finally, more recently, in December 2019, the Competition Commission opened a preliminary investigation in the case of Swisscom Directories due to a potential abuse of a dominant position on the directories and digital marketing market[22]. Suspicions are related to data withholding from third parties and the linkage of various services. The investigation was ongoing in 2020[23] and no decision seems to have been issued by the Competition Commission yet.

2.4. Telecom and digital infrastructure (Q8)

The enforcement of competition law in the telecom sector in merger controls, happened on multiple instances in Switzerland.

In 2019, the Competition Commission approved the planned merger between Sunrise and Liberty Global without remedies. With the takeover of UPC and its cable network infrastructure, Sunrise would become the second-largest telecommunications company in Switzerland, which would be able to offer fixed network, broadband internet and mobile telephony services, as well as digital television on its own infrastructure in Switzerland, like the market leader Swisscom. The Competition Commission concluded that there would not be any collective dominance with Swisscom and that coordination between the two companies was unlikely, because the parties to the mergers and Swisscom are differently positioned on the market[24].

Interestingly, in 2010, the Competition Commission had prohibited the planned concentration between Orange (France Télécom) and Sunrise, which would have reduced the number of competitors from three to

[21] Decision of the Competition Commission "*Swisscom Directories/Websheep*", LPC 2019/2, pp. 535ff.
[22] LPC 2020/1, p. 66.
[23] LPC 2021/1, p. 73.
[24] Decision of the Competition Commission "*Sunrise/Liberty Global*", LPC 2020/2, p. 841.

two on the mobile communication market. According to the Competition Commission, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telephony market, likely to end effective competition, without new entrants on the market being able to exercise a disciplining power. The undertaking born from the merger and the third actor on the market, Swisscom, would not have offered effective competition to each other: it would have been more advantageous for both undertakings to maintain a high price range, rather than to attack each other hoping to get their market shares. However, since UPC is mainly active on its cable network market and not in the mobile communication market, the current merger project would not have resulted in a three-to-two merger according to the Competition Commission[25].

Regarding the access to competition in the field of network infrastructures, the Competition Commission examined in 2016 the behaviour of network providers in the field of peering (direct interconnection agreements between networks) as well as the communication between such providers[26]. Furthermore, the Commission opened an investigation against Naxoo SA in 2015, holding a dominant position on the wired network of the city of Geneva, for abusing its position vis-à-vis building owners, third-party system providers and end users[27]. Naxoo imposed unfair conditions of trade through its contracts to connect buildings to the cable television network and which consequently limited both market opportunities and technical development. Whenever physically connecting buildings to the cable television network, Naxoo took advantage of the fact that proprietors viewed its services as indispensable by taking control over the usage of the buildings' wiring and, in this way, preventing proprietors from installing third-party systems using the same coaxial cable socket. In doing so, Naxoo ensured its sole ability to use the indoor installations required to distribute the coaxial signal to end users. Thus, by being prevented from setting up competing parallel systems, proprietors were impeded by Naxoo's business practice to freely use their buildings' wiring. This has also limited the market opportunities for third parties providing, for instance, satellite based systems, and has hampered technological development. Finally, end consumers have been prevented from accessing other telecommunication services that are complementary to or in competition with the cable network, in particular those offered via satellite. The Competition Commission fined Naxoo SA in december 2017[28]. The Federal Administrative Court upheld in 2021, in principle, the sanction imposed by the Competition Commission[29].

2.5. Abuse proceedings in the absence of a dominant position (Q10)

As of now, the prohibition of unilateral anti-competitive conduct applies only to dominant companies, pursuant to Article 7 CartA and similarly to Article 102 of the Treaty on the Functioning of the European Union (TFEU).

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[25] Decision of the Competition Commission "*Sunrise/Liberty Global*", LPC 2020/2, pp. 759ff.

[26] LPC 2017/1, pp. 73ff.

[27] LPC 2016/1, pp. 54f. and LPC 2017/1, p. 62.

[28] Decision of the Competition Commission "*Supermédia*", LPC 2018/3, pp. 508ff.

[29] Decision B-2798/2018 of the Federal Administrative Court. An appeal to the Swiss Federal Supreme Court is pending.

However, in its spring session in 2021, the Swiss Parliament introduced into Swiss competition law the concept of relative market power. With the new revised law, which is expected to enter into force by the end of 2021, the rules on abuse of a dominant position will be extended to companies with relative market power[30]. A company has relative market power if another company depends on it, as it does not have sufficient and reasonable possibilities of switching to other companies. The introduction of the concept of relative market power will potentially lead to a large number of currently non-dominant companies being newly deemed as having relative market power. The legal consequence of the abuse of relative market power is a prohibition of the conduct in question and, potentially, a claim for damages.

New types of abuses will also be introduced: companies with relative market power (as well as dominant companies) are prohibited from restricting the ability of customers to purchase goods or services offered in Switzerland and abroad at local prices and conditions.

The concept of relative market power is inspired by the similar concept used in German competition law, however, unlike German law, it will not include relative dominance for intermediation on platforms (e.g. Amazon) and data. Furthermore, the manner in which the concept will be used in Switzerland, compared to the German practice, is uncertain. Due to the need to interpret the new rules, the Competition Commission and the Swiss civil courts are expected to develop their own practice when applying the new law in the near future. Therefore, there will be considerable legal uncertainty after the new rules come into force, until enough leading cases have been litigated.

2.6. Price parity clauses (Q11)

With the emergence of internet platforms, some contractual agreements, such as price parity clauses, became more important. Price parity clauses aim to ensure that the products presented on the platform cannot be offered at a better price through another commercial channel. They can have distinct reaches. The "tight" clauses simply forbid the provider from offering better conditions himself. The "broad" ones widen this prohibition to other platforms.

Whether a price parity clause is harmful in practice must always be established on a case-by-case basis. In 2015, the Competition Commission – after an investigation targeting online reservation platforms Booking.com, Expedia and HRS from 2012 onwards – prohibited the use of broad price parity clauses[31]. However, it did not act against tight clauses that prohibit hotels from offering more advantageous prices on their own websites. According to the Competition Commission, those are not problematic because they do not exclude competition between platforms and simply avoid providers from taking advantage of the services

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[30] Following the "*Fair-price initiative*" (19.037). See in more details (in French) under: https://www.parlament.ch/fr/ratsbetrieb/amtliches-bulletin/amtliches-bulletin-die-verhandlungen?SubjectId=48671

[31] Decision of the Competition Commission "*Online-Buchungsplattformen für Hotels*", LDC 2016/1, p. 67ff.

of a commercial platform[32]. However, the Competition Commission decided to observe the development of new clauses in the market, reserving its right to intervene again if deemed necessary[33].

Nevertheless, the Swiss Parliament has recently approved a motion prohibiting the unfair contracts of online booking platforms, introducing a general ban of all clauses pertaining to price parity in the hotel industry, although the Federal government considered that the main problem of the broad clauses had been solved and that competition was working between the various platforms [34]. This should lead to an amendment of the Swiss Unfair Competition Act to prohibit all price parity clauses in the future[35].

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[32] *See* Decision of the Competition Commission "*Online-Buchungsplattformen für Hotels*", LDC 2016/1, p. 76 N 67.

[33] Competition Commission annual report, 2015, p. 5.

[34] Motion "*Bischof*" to prohibit the unfair contracts of online booking platforms, which are hurting the hotel industry of 30 September 2016 (16.3902) approved on 18 September 2017. Consultation for amendments of the Law on unfair competition was opened in November 2020. See in more details (in French) under: https://www.parlament.ch/fr/ratsbetrieb/suche-curia-vista/geschaeft?AffairId=20163902

[35] RS 241, available (in French) under: https://www.fedlex.admin.ch/eli/cc/1988/223_223_223/fr