International League of Competition Law-Congress 2019

Question A:

To what extent should competition law be concerned with differences in prices, terms and conditions and quality to different purchasers?

Draft National Report for Switzerland

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I. Overview of this Report

1. This national report for Switzerland addresses the issue of differentiation and respectively discrimination in Swiss competition law. In section II, we first make a few introductory remarks on the Federal Law on Cartels and other Restraints of Competition ("***LCart***").

2. Section III contains the National Report for Switzerland. First, we briefly set out the present rules concerning discrimination in Swiss competition law (**A**). Following, we look at the practice of the Swiss Competition Commission and address, whether discrimination is an issue in all three pillars of the LCart, these being cartels, abuse of dominance and merger control (**B**). Thereafter, we discuss, on what grounds conduct which would otherwise constitute an abuse of dominance can be justified (**C**). We continue and address the policy justifying the intervention of the Competition Commission against discriminatory conduct practiced by dominant undertakings (**D**). Then, we discuss whether other areas of law, such as sector specific or subject matter specific laws seem more appropriate to deal with the issue of discrimination and to what extent ex ante regulation and ex post control of anticompetitive practices should interact with each other (**E**). Finally, we give a brief outlook of possibly new fields of action for the Competition Commission relating to discrimination (**F**).

II. Introduction to the LCart

3. Competition law in Switzerland is in essence governed by the LCart and the Federal Law against Unfair Competition ("***LUC***"). In simple terms, the LCart aims at safeguarding competition as such whereas the LUC aims at safeguarding the integrity of competition. Both contain, expressly or impliedly, rules against discrimination. The legislative framework governing competition is complemented by the Federal Law on the Internal

Market[1] and the Federal Law on Price Surveillance.[2] At this juncture, we deem it helpful to briefly set out the general traits of the LCart, which is discussed in more detail in the below report.

4. The LCart sets out the fundamental provisions on behavioral and structural control in order to prevent the harmful economic or social effects of cartels and other restraints of competition and for this purpose aims at promoting competition in the interests of a liberal market economy.[3] It applies to anti-competitive practices that have an effect in Switzerland, even if they originate in another country.[4] The current LCart is effective since 1 July 1996.[5] In 2003, the LCart was substantially revised with the amended rules coming into force on 1 April 2004.[6]

5. In substance, the LCart stipulates

   5.1 that agreements which significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful (article 5 para. 1 LCart);[7]

   For certain types of agreements, the LCart presumes they eliminate effective competition:

   – agreements between actual or potential competitors to directly or indirectly fix prices, to limit the quantities of goods or services to be produced, purchased or supplied, or to allocate markets geographically or according to trading partners are presumed to lead to the elimination of effective competition (art. 5 para. 3 LCart); and

   – agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted (art. 5 para. 4 LCart).

   Art. 5 para. 3 and 4 LCart are not substantive provisions. They only stipulate a statutory, rebuttable presumption that the agreements covered in these provisions

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1 The Federal Law on the Internal Market is a framework law that aims at eliminating market access restrictions imposed by the Swiss cantons and municipalities.

2 The price surveillance authority aims at ensuring reasonable prices in sectors where competition is weak or nonexistent. Based on the Federal Law on Price Surveillance, the authority monitors prices charged by undertakings having market power and can intervene if it considers the prices abusive.

3 Article 1 LCart.

4 Article 2 para. 2 LCart.

5 With some articles on the Competition Commission entering into force on 1 February 1996.

6 Introduction of direct sanctions.

7 Note that the anticompetitive effects of an agreement need not arise in the market where it was concluded.

are deemed to eliminate effective competition. As the Federal Supreme Court recently confirmed, such agreements, if the presumption can be rebutted, *a majore ad minus* significantly restrict effective competition. The competition authorities need not establish actual effects.

5.2 that dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners (article 7 para. 1 LCart).

Pursuant to art. 7 para. 1 LCart, dominant undertakings behave unlawfully if by abusing their position in the market, they hinder other undertakings from starting or continuing to compete, or disadvantage trading partners. In order for art. 7 LCart to apply, a causal link between dominance and abusive conduct is necessary. Furthermore, competitors or upstream or downstream market participants must not have means to oppose to or avoid a dominant undertaking's conduct. Note that the abuse need not necessarily occur on the market where the undertaking is found to be dominant.

5.3 that planned concentrations of undertakings must be notified to the Competition Commission before their implementation if in the financial year preceding the concentration the undertakings concerned exceeded a certain turnover threshold (article 9 para. 1 LCart).

6. Articles 5 and 7 LCart rest on the same premises as art. 101 and 102 in the Treaty on the Functioning of the European Union ("***TFEU***"). It is therefore common practice in Switzerland to look at pertinent EU precedent and guidelines. Merger control is different in particular with regard to the intervention threshold.[8]

III. National Report

A. The notion of discrimination in national / regional substantive competition legal framework

7. Swiss commercial law rests upon the principle of freedom of contracts. Within the framework of the law, everyone is free to engage in economic activities as he or she pleases.[9] Sellers may thus in principle apply different prices, terms and conditions and quality to different purchasers.

8. Anti-discrimination rules emerged from the rules in the Civil Code on the protection of legal personality and their application to boycotts and other forms of discrimination, these being understood as the concerted avoidance or discrimination of a business in order to

[8] Switzerland: dominance; EU: significant impediment to effective competition (SIEC).

[9] E.g., DTF 86 II 365 – Vertglas, cons. 1.

force it into or sanction for a certain conduct.[10] Inherently, a remedy required that the boycott or discrimination was exercised by one or several firms which dominate the relevant market or are at least capable of exercising a significant influence on it.

9. The rules that emerged from the Civil Code were later – more or less – codified in the LUC[11] and in the LCart.[12]

(1) LCart

10. Specifically, Article 7 para. 2 let. b of the Federal Law on Cartels and other Restraints of Competition (LCart) declares unlawful "any discrimination between trading partners in relation to prices or other conditions of trade" by a dominant undertaking.[13] The term "in relation to other conditions of trade" must be interpreted broadly and applies to any contractual provisions that result in an economic advantage or disadvantage of a trading partner vis-à-vis another trading partner. It is an exemplary variation of the general prohibition standard of article 7 para. 1 LCart, according to which dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete, or disadvantage trading partners.[14]

11. The Federal Supreme Court defined discrimination in the seminal *Publigroupe* case as follows: Discrimination regularly entails unfavorable conditions being imposed on a trading partner which result in a distortion of the structure of competition at different levels: the abusive character of discriminatory conduct results from an aspect of exploitation (so-called "*Ausbeutungsmissbrauch*") and from an aspect of restraining competition (so-called "*Behinderungsmissbrauch*"). At first, discrimination means

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10 An interesting overview can be found in Andreas Thier, Schweizerische Kartellrechtstradition und "more economic approach": zur bundesgerichtlichen Rechtsprechungspraxis 1896-1960, in: Rolf Sethe, Kommunikation: Festschrift für Rolf H. Weber zum 60. Geburtstag. Bern 2011, pp. 621-645.

11 The first version of the LUC dates from 1943, the second (current) version from 1986. We discuss the current version.

12 The first version of the LCart dates from 1962, the second from 195 and the third (current) version from 1994. We discuss the current version.

13 Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.

14 Same as article 102 TFEU, article 7 LCart is composed of a blanket clause and a non-exhaustive list of possibly abusive conduct. In full, article 7 LCart reads as follows:

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

[2] The following behavior is in particular considered unlawful:

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

putting trading partners of a dominant undertaking, who have no adequate alternative trading channels at hand, at a disadvantage without justification. As a consequence, their competitive position in upstream or downstream markets will be impaired, a situation, article 7 para. 2 let. b aims at preventing. As opposed to creating disadvantages for some trading partners, discriminatory conditions always create advantages for other trading partners. Accordingly, their interest in entering into transactions with competitors of the dominant undertaking can be eliminated and thus result in competition being impaired at the same level of the value chain as the dominant undertaking operates.[15]

12. In substance, article 7 para. 2 let. b LCart restricts the contractual freedom of dominant undertakings; however, it does not require dominant undertakings to treat all business partners strictly, i.e. schematically, the same way as regards "prices" or "other conditions of trade". Rather, it requires dominant undertakings to treat comparable situations equally whereas it prohibits dominant undertakings to treat entirely different situations the same way, without reasonable, objective justification.

13. Although article 7 para. 2 let. b LCart specifically deals with discrimination of trading partners, discrimination is not an element solely confined to this provision. Discrimination may occur also in relation to other forms of abuse. For instance, a refusal to deal may be discriminatory conduct and thus be captured by both article 7 para. 2 let. a and let. b as the latter does not require that a business relationship, i.e. a contract, exists. It suffices for competition to be distorted if the dominant undertaking maintains contractual relationships with some trading partners and refuses to enter into contractual with other potential trading partners. Also, a selective price cutting may possibly constitute a violation of both article 7 para. 2 let. b and let. d LCart, e.g. when the lowered prices are only offered to trading partners having received an offer from a competitor of the dominant undertaking.[16] This is similar to the problem described by the European Court of Justice ("***ECJ***") in the well-known case concerning the *Compagnie Maritime Belge*.[17] As described below, discriminatory conduct may also be an issue under article 5 LCart.

14. In cases lacking a reasonable, objective justification for the different treatment of trading partners, the LCart assumes (impliedly) that the different treatment is solely aimed at hindering other undertakings from starting or continuing to compete or to disadvantage, i.e. exploit market participants on the opposite side of the market.

15. The provision on discrimination in the LCart – as well as the entire article 7 LCart – largely bases on article 102 let. c of the TFEU which prohibits discriminatory practices by dominant undertakings, such as when it "applies dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage".

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15 ATF 139 I 72, cons. 10.2.2

16 For further examples, see BSK KG-Amstutz Carron, Art. 7 N 185 ff.

17 C-395/96 P - Compagnie Maritime Belge Transports and Others v Commission.

(2) LUC

16. Also the Law on Unfair Competition (LUC) prohibits in article 2[18] discriminatory conduct in particular with respect to prices or terms and conditions, for instance if such unequal treatment aims at preventing a market entrance or causing a market exit. A dominant position of the discriminating undertaking, however, is not a legal requirement.

17. Whereas the LCart is enforced by both the Competition Commission and the civil courts, the LUC is subject to the jurisdiction of the civil and the criminal courts. The Competition Commission has no powers relating to unfair competition or misleading business practices. Neither the federal nor any cantonal government, however, can take action against such business conduct.

18. Whereas proceedings under the LCart are predominantly administrative proceedings, proceedings under the LUC primarily occur before the civil courts. In the former, the principle of judicial investigation ("*Untersuchungsgrundsatz*") applies whereas the latter is governed by the principle of party presentation ("*Verhandlungsgrundsatz*").

19. In the following, we shall focus on discriminatory practices under the LCart.

B. The notion of discrimination in practice by competition authorities / courts

(1) General Principles – Analytical Scheme to determine an Abuse of Dominance

20. Dominant undertakings have a special responsibility for their behavior. They must not use the leeway they have as a result of their dominant position to distort competition.[19]

21. Abuse within the context of article 7 para. 1 LCart means any conduct which cannot be pursued under conditions of competition without suffering a competitive disadvantage and which results in anti-competitive effects, such as a hindrance of competitors or an exploitation if the opposite side of the market.[20] Whether actual effects are necessary or it suffices that conduct is from an objective perspective capable of producing these effects is disputed in legal doctrine. Recently, the Federal Administrative Court, taking into account the case law of the European Court of Justice considered that actual effects need not be established by the Competition Commission in order for the element of "distortion of competition" to be fulfilled and that *e contrario* it suffices to demonstrate that the conduct at issue is capable of having anti-competitive effects.[21]

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[18] Article 2 states that any behavior or business practice that is deceptive or that in any other way infringes the principle of good faith and which affects the relationship between competitors or between suppliers and customers shall be deemed unfair and unlawful.

[19] Cf. Stäuble/Schraner, DIKE-KG, Art. 7 N 6.

[20] Cf. Stäuble/Schraner, DIKE-KG, Art. 7 N 75.

[21] Federal Administrative Court, B-831/2011 of 18 December 2018 concerning SIX, cons. 1198 et seq.

22. Accordingly, in order to determine an abuse of dominance, the authorities will first examine whether the conduct at issue is capable of having an anti-competitive effect, that is, hindering competitors or exploiting the opposite side of the market, and secondly, whether there are business reasons which may justify the conduct.

(2) Discrimination as an abuse of dominance

(a) General Principles of Article 7 para. 2 let. b LCart

23. Having outlined the general principles, we shall now turn specifically to article 7 para. 2 let. b LCart.

24. As per the practice of the Swiss competition authorities, article 7 para. 2 let. b LCart requires cumulatively the following elements: (i) an unequal treatment on a market where the undertaking applying unequal treatment is dominant which (ii) concerns a trading partner (iii) causing either a hindrance of competition or a disadvantage of the opposite side of the market which (iv) cannot be justified by legitimate business reasons.[22]

- *Unequal treatment* is meant to cover both the equal treatment of dissimilar factual circumstances (indirect discrimination) and conversely the unequal treatment of similar factual circumstances (direct discrimination). The factual circumstances are considered similar – or equivalent – if the undertakings concerned compete on the same market with the same or similar products or services.

  The requirement of "similar factual circumstances" is pierced in situations where the dominant undertaking is made up of a group of companies. In this case, undertakings not belonging to the group of companies must be treated the same way as affiliated companies.

- *Trading partners* are deemed suppliers or customers, i.e. market participants belonging to the opposite side of the market where the dominant undertaking operates. A concrete business relationship is not required; it suffices if the undertaking concerned attempted to come to agreement with the dominant undertaking. In principle, the provision applies to secondary line discrimination, however, doctrine is not uniform on this subject.[23]

- The unequal treatment must be causal to a *competitive disadvantage*. Accordingly, the undertaking concerned must suffer from a competitive disadvantage vis-à-vis its actual or potential competitors in that the disadvantaged trading partner may

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22 E.g., Verbändevereinbarung Erdgas Schweiz, RPW 2014/1, p. 110 et seq., para. 113; Sport im Pay TV, RPW 2016/4, p. 920 et seq., para. 722.

23 See the discission in Geschäftskunden Preissysteme für adressierte Briefsendungen, decision of the Competition Commission of 30 October 2017, para. 852 et seq. This discussion does not yet include the latest commentary from Stäuble/Schraner, which seem to take the position that the provision only captures secondary line discrimination (Stäuble/Schraner, DIKE-KG, Art. 7 N 326).

either be prevented from effectively competing (or forced to cease operations) on the relevant market or prevented from entering a particular market.

– As stated above, the provision by its wording targets secondary line discrimination. Conversely, article 7 para. 2 let. b does not impose on a dominant undertaking an obligation to treat its competitors who are not trading partners equally, i.e. on non-discriminatory terms. Nevertheless, the conduct in question regularly targets competitors of the dominant undertaking. Indeed, as the Competition Commission stated, secondary line discrimination is a means to hinder smaller competitors in effectively competing against the dominant undertaking.[24]

– *Legitimate business reasons* are manifold. In essence, they originate from differences in the factual situations, for instance in cost savings on the side of the dominant undertaking or different distribution costs. Also deemed legitimate business reasons are for instance the establishment of long-term cooperations which warrant a different treatment.

25. The Competition Commission applied the above scheme, amongst others, in a case concerning the broadcasting of pay TV sport events. Swisscom, through its subsidiaries Teleclub AG and Cinetrade, was considered dominant in the national markets for live pay TV sport broadcasting because Cinetrade owns long-term and comprehensive exclusive broadcasting rights for Swiss pay TV. As per the Competition Commission's decision, Swisscom (through Teleclub) applied different treatment in various forms. It granted competing broadcasting platforms only access to a reduced range of sport content, whereas customers of Swisscom TV could enjoy a broader range of live TV content; it permitted some platforms the distribution of its (reduced) program through their own set-top boxes, whereas customers of other platforms could only receive the program through a dedicated set-top box; it tied the reduced program for its competitors to the purchase of a basic set of additional TV content whereas customers of Swisscom TV could purchase live broadcasting through an exclusive channel and hence were not subject to the bundling. The Competition Commission considered the above practices an abuse of dominance pursuant to article 7 para 2 let. b LCart as it put competitors of Teleclub at a competitive advantage against other platform service providers.[25]

26. Unequal treatment may take various forms, such as price discrimination, unequal conditions, rebate systems, English clauses or cross-subsidies aimed at putting the opposite side of the market in a competitive disadvantage against competitors. We discuss some examples below.

(b) Rebate Systems

27. Trading partners may in particular be discriminated using rebate systems. Rebate systems by dominant undertakings are only lawful if granted in exchange for a certain economic performance or service of the customer. For instance, fidelity discounts and target

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24 ETA Preiserhöhungen, RPW 2014/2, p. 402, para. 79.

25 Sport im Pay TV, RPW 2016/4, p. 920 et seq., para. 726 et seq. The matter is pending on appeal.

discounts have a similar effect as agreements which induce/require a purchaser to purchase a specific share or all of the goods or services from one dominant supplier, i.e. generate a certain "pull-in" effect in favor of the dominant firm and as a consequence may prevent competitors from entering or competing on the market. Also, discount schemes which favor particular undertakings on the downstream market (called "preferential discounts"), are considered unlawful where as a result of the thresholds of the different discount brands and the levels of discount offered, only particular undertakings are eligible for the highest discounts, and whereby such discounts cannot be justified with any cost benefit for the dominant undertaking applying them. By the same token, the beneficiaries of the discount scheme receive cost benefits against their competitors giving them a competitive advantage.

28. In a case concerning the former Swiss Telegraphic Agency (SDA; Schweizerische Depeschenagentur), the Competition Commission found SDA to be dominant on certain news markets in Switzerland. SDA granted so-called exclusivity discounts which the Competition Commission qualified as fidelity discounts. These were granted on the basic German language news services – where SDA was dominant – provided that customers procured all news services exclusively from SDA. The Competition Commission considered that customers benefiting from the discount scheme achieved a competitive advantage on the downstream news and advertising markets against other media companies for which reason the Competition Commission found that competition amongst the various media companies was impeded.[26]

29. In a case concerning the Swiss Postal Service, the Competition Commission found the Swiss Postal Service dominant in respect of a market for addressed domestic bulk mailings exceeding 50 grams by contract customers and in respect of a market for addressed domestic single mailings and bulk mailings below 50 grams by contract customers. Contract customers are business customers with an annual turnover with the Swiss Postal Service exceeding CHF 100'000 and by agreement were granted discounts on the federally administered prices. The discounts were dependent on the expected sales and quality criteria. The Competition Commission found that the rebate scheme was not transparent and applied dissimilar to contract customers with similar demand for postal services. Later, the Swiss Postal Service implemented a new pricing system where contract customers were segmented and within the various segments categorized into rebate levels based on their expected sales. In addition, the Swiss Postal Service granted additional discounts to contract customers exceeding their expected ("target") sales. The Competition Commission found that the new pricing system again discriminated trading partners in that the main criterion for the additional discount was the accuracy of the expected sales and not the sales a contract customer in fact achieved and as a result contract customers belonging to the same category and price list and achieving the same turnover would be treated unequally. A consequence of the non-transparent rebate scheme, contract customers could also not calculate the effects of outsourcing some of the bulk mailings to a competitor of the Swiss Postal Service and thus the rebate scheme

[26] Preispolitik und andere Verhaltensweisen der SDA, RPW 2014/4, p. 670 et seq.

at the same time impaired a competitor of the Swiss Postal Service in competing against the Swiss Postal Service.[27]

(c) Cross-subsidies

30. Another form of discriminating trading partners occurs by means of cross-subsidies in favor of an affiliated company. Cross-subsidies aim at covering losses in an unprofitable business unit. Profits from another – profitable – business unit are transferred to the business unit operating at a structural deficit in order for the latter business unit to operate at a predatory strategy. Legal doctrine considers cross-subsidies a problem only in cases where the profits from a business unit operating as a monopoly are systematically used to cover losses in a business unit operating at a structural deficit. In our view, the problem arises not only if profits from a business unit operating as a monopoly are transferred but also from a business unit operating as a dominant undertaking.

31. The competition authorities dealt with cross-subsidies in several cases,[28] however, pertinent case law where an unlawful cross-subsidy was established is sparse.

(d) Margin Squeeze

32. As per the Competition Commission's case law, a margin squeeze occurs when a vertically integrated undertaking is dominant on both an upstream and a downstream market and hence is capable of setting the difference between retail prices and wholesale prices at a level which deprives downstream competitors who are dependent on input from the dominant undertaking to achieve a sufficient margin even if operating highly efficient.

33. Margin squeeze, in essence, results in vertical foreclosure. The dominant undertaking uses its market position to impede or exclude competition on downstream markets. In a case concerning Swisscom, the Competition Commission observed that competitors could not offer broadband internet services at profitable levels. The vertically integrated Swisscom offers both broadband services to its customers as well as upstream input to competitors. Swisscom competitors required the upstream input to provide their own broadband services. The Competition Commission found that Swisscom priced the input for competitors at a level not allowing them to make profits.[29] Swisscom appealed and the Federal Administrative Court largely upheld the Competition Commission's finding.[30]

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27 Geschäftskunden Preissysteme für adressierte Briefsendungen, decision of the Competition Commission of 30 October 2017.

28 E.g. Eignerstrategie Energie Wasser Bern (ewb), RPW 2014/1, p 79 et seq. (no unlawful conduct); Switch/Switchplus, RPW 2011/1, p. 87 et seq. (no unlawful conduct); Telekom PTT/Blue Window, RPW 1997/2, p. 161 et seq.

29 Preispolitik Swisscom ADSL, RPW 2010/1, p. 116 et seq.

30 B-7633/2009, judgment of 14 September 2015. The matter is pending on appeal before the Federal Supreme Court.

(3) Discrimination pertaining to anti-competitive agreements

34. Applying dissimilar conditions to similar circumstances is not only an issue of article 7 LCart but may also be an issue of article 5 LCart. Same as article 7 LCart, article 5 LCart is quite similar in substance to article 101 TFEU, although article 101 TFEU specifically mentions in para. 1 let. d that applying dissimilar conditions to equivalent transactions with other trading parties may be unlawful under this provision.

35. To the extent known to the author, there is not much pertinent current case law on article 101 para. 1 let. d TFEU. In the past, the EU Commission, for instance, applied this provision to "*Gesamtumsatzrabattkartelle*" (total revenue rebate cartels).[31] Depending on the nature and circumstances, such types of cartels may be caught by article 5 para. 1 LCart or, specifically article 5 para. 3 let. a LCart.[32]

36. Price differentiation in an international context is a common practice and requires undertakings operating in different countries or geographic regions to find ways and means to prevent arbitrage by customers. Price differentiation is generally not objectionable from a competition law point of view unless achieved by unlawful agreements. (Geographic) price discrimination in the context of unlawful agreements gained widespread attention in the context of the so-called "high-price island Switzerland", which was even accentuated when the Euro devaluated against the Swiss Franc.

37. According to article 5 para. 4 LCart, the elimination of effective competition is presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding fixed or minimum prices, and in the case of agreements contained in distribution contracts regarding the allocation of territories to the extent that sales by other distributors into these territories are not permitted.

38. The focus of the competition authorities was on agreements effectively restricting passive sales. In this respect, the Competition Commission imposed considerable sanctions on undertakings having entered into agreements making imports more difficult or impossible and thus prevent customers from arbitrage.[33] In its seminal decision concerning *Gaba*, the Federal Supreme Court held that such types of agreements (and other hardcore restrictions) generally constitute significant restraints of competition within the meaning of article 5 para. 1 LCart and that the Competition Commission need not show actual effects.

39. Clauses in distribution agreements stipulating that products may only be sold with the EU/EEA are thus generally unlawful from a perspective of Swiss competition law.

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31 E.g., Commission decision of 29 December 1970 – Rabattbeschluss der Interessengemeinschaft der deutschen keramischen Wand- und Bodenfliesenwerke.

32 We shall not discuss in the context of this report the conditions for such conduct to fall under article 5 para. 1 LCart or 5 para. 3 let. a LCart.

33 E.g., Gaba, RPW 2010/1. p. 65 et seq.; BMW, RPW 2012/3, p. 540 et seq.; Marché du livre écrit en français, RPW 2018/2, p. 245 et seq.

40. Unlike in the European Union, there are no pertinent rules on geo-blocking. At present, geo-blocking may only be prohibited when implemented in the context of an unlawful agreement. For instance, an agreement obliging a distributor to block, reroute, or terminate initiated transactions with customers accessing its online store from a territory that is not assigned to the distributor is considered a hardcore restriction on passive sales in Switzerland.

(4) Discrimination as part of merger analysis

41. The Competition Commission may prohibit a concentration or authorize it subject to conditions and obligations if the investigation indicates that the concentration if it creates or strengthens a dominant position liable to eliminate effective competition and if it does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

42. Conditions can be of a structural or behavioral nature or can be composed of a mix of structural and behavioral measures. In this context, there may certainly exist situations where the Competition Commission imposes conditions aimed at preventing any form of discrimination, be it primary or secondary line discrimination.

43. For instance, in a recent merger decision concerning electronic payment, the Competition Commission specifically addressed the issue of discrimination in respect of a non-discriminatory access to interfaces.[34]

C. Objective justifications to discriminatory practice

44. Albeit not specifically written in the LCart, the application of article 7 LCart requires that there are no legitimate business reasons for the dominant undertaking's conduct. Legitimate business reasons are either objective reasons ("*sachliche Gründe*") or efficiency reasons.

44.1 Conduct may be objectively justified if the dominant undertaking would have acted the same way if it were not dominant. That is normally the case if the conduct was motivated by commercial principles.[35]

Literature and case law suggest many examples which are deemed objective reasons, e.g. a change in demand, cost savings, facilitation/streamlining of administrative processes, etc.[36]

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34 PostFinance AG/SIX Payment Services AG/TWINT AG, PPW 2016/4, p 1062 et seq., para. 104 et seq.

35 E.g., ETA Preiserhöhungen, RPW 2014/2, p. 402, para. 94 et seq..

36 Cf. Stäuble/Schraner, DIKE-KG, Art. 7 N 116.

The Federal Supreme Court held that the threshold for an objective justification to be successful is high in particular in situations where access restrictions to networks and access dependency exist at the same time.[37]

44.2 There is not much pertinent case la on efficiency reasons. In several decisions,[38] the Competition Commission made reference to the EU Commission's Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings,[39] which requires in para. 30 four cumulative conditions for an efficiency defense to be successful:

- the efficiencies have been, or are likely to be, realized as a result of the conduct. They may, for example, include technical improvements in the quality of goods, or a reduction in the cost of production or distribution;

- the conduct is indispensable to the realization of those efficiencies: there must be no less anti-competitive alternatives to the conduct that are capable of producing the same efficiencies;

- the likely efficiencies brought about by the conduct outweigh any likely negative effects on competition and consumer welfare in the affected markets; and

- the conduct does not eliminate effective competition, by removing all or most existing sources of actual or potential competition.

The Competition Commission also noted that in terms of efficiency reasons the criteria of article 5 para. 2 can be applied by analogy.[40]

45. In terms of article 5 LCart regarding agreements, conduct is lawful if it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally and it will under no circumstances enable the parties involved to eliminate effective competition (article 5 para. 2 LCart).

D. Objectives justifying to prohibit discriminatory practices

46. In 1957, i.e. before the LCart existed, the Swiss *Preisbildungskommission* stated that the use of market power by an undertaking to increase its earnings was permissible to the

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37 ATF 129 II 497, cons. 6.5.4, Entreprises Electriques Fribourgeoises (EEF)/Watt Suisse AG, Fédération des Coopératives Migros.

38 SIX/Terminals mit Dynamic Currency Conversion (DCC); RPW 2011/1, p. 95 et seq., para. 408; Sport im Pay TV, RPW 2016/4, p. 920 et seq., para. 695; also Geschäftskunden Preissysteme für adressierte Briefsendungen, decision of the Competition Commission of 30 October 2017, para. 848.

39 OJ C 45/7 of 24 February 2009.

40 Geschäftskunden Preissysteme für adressierte Briefsendungen, decision of the Competition Commission of 30 October 2017, para. 850.

extent that it would not restrict or eliminate the opportunities for other undertakings to compete and that accordingly, undertakings must not take measures aimed at market foreclosure.[41] In 1992, the Head of the Swiss Federal Department of Economic Affairs sought clarification to what extent the Constitution would permit a competition policy which was compatible with that of the European Union.[42] Later, he tasked an advisory committee to prepare a draft for a revised law on cartels and in this context requested the advisory committee to specify the offence of an abuse of market power and in particular, to give examples of conduct which would constitute an abuse.[43] In the preliminary draft, the committee took the view that the conduct of undertakings having market power would entail harmful effects if such undertakings by using their position on the market would impair other undertakings in competing or disadvantage consumers.[44]

47. Whereas in the preliminary draft, the intervention threshold was market power, the draft law finally dispatched for the parliamentary debate the intervention threshold was elevated to dominant undertakings.[45] In its Dispatch, the Federal Council explained that dominant undertakings were capable of abusively limiting the scope of action for their competitors or trading partners and as a result weakening competition (exclusionary abuse; "*Behinderungsmissbrauch*"). In addition, their conduct could discriminate against customers in an anti-competitive manner (exploitative abuse; "*Ausbeutungsmissbrauch*"). Yet, the Federal Council held that competition policy cannot aim at prohibiting the use of market power and that the possibility of achieving a dominant position through market success and internal growth must remain open.[46]

48. In view of the object and purpose of the LCart and the explanatory statements of the Federal Council, the policy objective for an intervention against discriminatory practices is the protection of competition.

49. Whereas the original policy object for the intervention was the protection of competition, i.e. the freedom of trade and commerce, case law shows that the provision to a certain degree also resulted in a market liberalization. For instance, in its judgment of 17 June 2003, the Federal Supreme Court confirmed the decision of the Competition Commission of 5 March 2001 that the LCart also applied to electricity sector, unless otherwise

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41 BSK KG-Amstutz/Carron, Art. 7 N 7 with reference to Eidgenössisches Volkswirtschaftsdepartement (ed), Kartell und Wettbewerb in der Schweiz, 31. Veröffentlichung der Preisbildungskommission des Eidgenössischen Volkswirtschaftsdepartements, Bern 1957, p. 170.

42 Dispatch of the Federal Council on a Federal Law on Cartels and other Restraints of Competition, BBl 1994 468, p. 489 et seq.

43 Dispatch of the Federal Council on a Federal Law on Cartels and other Restraints of Competition, BBl 1994 468, p. 489 et seq.

44 BSK KG-Amstutz/Carron, Art. 7 N 8.

45 Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants in the market (article 4(2) LCart in the version of 1994). The current wording of article 4(2) LCart, which is in force since 1 April 2004, is different: " Dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market." (Emphasis added).

46 Dispatch of the Federal Council on a Federal Law on Cartels and other Restraints of Competition, BBl 1994 468, p. 569.

provided in cantonal law. According to the judgment, the Entreprises électriques fribourgeoises (EEF) were required to permit Watt AG to transmit electricity through their power grid.[47] The background of the dispute was that Migros, one of the large retailers in Switzerland, concluded a multisite energy contract with Watt AG and Migros subsidiaries terminated their contracts with EEF. Accordingly Watt AG sought to transmit electricity for Migros through EEFs grid and EEF denied third party access to its power grid. Also, in the natural gas sector, transmission rights in the low pressure networks were enforced based on article 7 LCart.

50. The fact that the LCart could also trigger liberalization steps is owed in particular to article 3 LCart, which governs the relationship between LCart and other federal or state laws. Accordingly, other statutory provisions take precedence over the LCart in cases they do not allow for competition in a market for certain goods or services, in particular, when they establish an official market or price system or grant special rights to specific undertakings to enable them to fulfil public duties.

E. Relevance of other legal "areas" to apprehend discriminatory practices?

51. In particular in respect to digital markets, competition authorities and regulators must reflect on how competition law may tackle relevant issues or whether ex ante sector specific regulations or other laws provide for better solutions. The Dutch Authority for Consumers & Markets ("ACM") stated in a paper dated 6 August 2019:

> *The basic framework of competition law, as embedded in Articles 101 and 102 of the TFEU, is generally adequate to address the most pertinent competition problems in the digital economy. One drawback, however, is that ex-post application can be too slow in these highly dynamic and innovation driven markets. When such markets are characterized by winner-takes-most dynamics, driven by strong network effects, high barriers to entry due to data collection and consumer lock-in, there is a risk that ex-post enforcement comes too late to keep them competitive and contestable.*[48]

52. The ACM seeks for a non-punitive ex ante toolbox to intervene against dominant undertakings even absent abusive conduct noting that once a company becomes dominant its incentives may shift to protecting its market position by foreclosing actual and potential competitors or deliberately raising switching costs. Given the often long political process until a sector specific ex ante regulation is adopted, the ACM`s proposal certainly is worthy to be discussed.

53. Contrary to the ACM, the Swiss Federal Council does not see any need to fundamentally change the LCart and implement ex ante regulatory powers for the Competition Commission. Nevertheless, he notes that it may be necessary and useful to adapt the

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47 ATF 129 II 497, Entreprises Electriques Fribourgeoises (EEF)/Watt Suisse AG, Fédération des Coopératives Migros.

48 https://www.acm.nl/sites/default/files/documents/2019-08/ex-ante-tool.pdf.

merger notification criteria so that the authorities could examine mergers or acquisitions of young internet platforms that could possibly impact competition.[49]

54. Whether or not the tool boxes for competition authorities are enhanced, one should always bear in mind that such tools carry the risk that inadequate measures are imposed which result in hampering innovation instead of strengthening competition. Also, one should be careful in tasking the Competition Commission with matters which are outside of the scope of the LCart. For instance, geo-blocking, when applied by non-dominant, vertically integrated undertakings, is not a matter of the LCart. Switzerland currently investigates how to tackle geo-blocking measures which are not in the scope of the LCart under IP law. The Monitoring Office for Technological Measures examines whether the use of technological measures such as country restrictions unjustifiably impedes the use of works expressly authorized by law. Currently, it evaluates whether country restrictions which impede the cross-border portability of copyrighted content. And the so-called "Fair-Preis-Initiative" (public initiative calling for a stop of the high price island Switzerland and fair prices) calls for a provision in the LUC to address discriminatory geo-blocking measures.

55. In the European Union, as part of the digital single market strategy,[50] the Geo-Blocking Directive[51] addresses unjustified on line sales discrimination based on customers' nationality, place of residence or place of establishment within the internal market. Whereas such strategies are unlawful as a matter of EU competition law when originating from agreements or unilateral conduct by a dominant undertaking, the Geo-Blocking Directive tackles geo-blocking below the intervention threshold of EU competition law.

56. A form of discrimination also not tackled by the LCart is dynamic pricing, a technique frequently used in the online sales channel. Unless originating from agreements or unilateral conduct by a dominant undertaking, dynamic pricing is a matter best addressed by data protection laws and/or the LUC.

F. VI. Future of the prohibition of discriminatory practices on a competition law perspective

57. Digital markets/products increasingly cause the Competition Commission to investigate whether the market participants' conduct is compliant with the LCart. The Competition Commission launched several preliminary investigations (article 26 LCart) and investigations (article 27 LCart) into online services. In the foreword to the Competition Commission's annual report, then president of the Competition Commission, Mr Martenet, stated:

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49 Federal Council, Report on the Basic Conditions of a Digital Economy, 11 January 2017.

50 Which is not part of EU competition law.

51 Regulation (EU) 2018/302 of the European Parliament and of the Council of 28 February 2018 on addressing unjustified geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market and amending Regulations (EC) No 2006/2004 and (EU) 2017/2394 and Directive 2009/22/EC, OJ L 60I of 2 March 2018, p. 1–15.

> *In 2016, the competition authorities also conducted a detailed examination of the digitalisation the economy and the resultant competition law issues, both in the form of a theoretical appraisal and analysis of the matter and by studying specific cases. Assessing the developments in the digital economy is complicated: the digital economy offers opportunities, but also harbours risks for competition. Misjudgements can lead to regulations that obstruct competition rather than provide a level playing field. The competition authorities are confronting these new challenges and taking account of the changing conditions and characteristics of the new business models. Innovative business models are highly desirable, but the competition authorities will issue warnings if they identify risks to competition, and intervene if competition is being restricted.*[52]

58. The Federal Council closely monitors the developments in the EU relating to the digital single market strategy and where appropriate is willing to adapt domestic regulations. Indeed, in response to a parliamentary intervention, the Federal Council stated that a removal of barriers to trade within the EU/EEA could result in market access being made more difficult for companies from third countries such as Switzerland, or companies not being able to benefit to the same extent from the removal of such trade barriers. This risk increases for Switzerland with every step towards EU integration. In the view of the Federal Council, it is therefore important to work consistently to ensure that Switzerland does not suffer any disadvantages as a result of a strengthened European digital single market.[53]

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[52] RPW 2017/1, p. 57.

[53] Federal Council, Effects on the EU-Strategy for a Digital Single Market on Switzerland, Report of 7 December 2018 in response to postulate no. 16.3080 Vonlanthen of 15 March 2016.