Private Antitrust Litigation

Consulting editor
Samantha Mobley

2017

GETTING THE DEAL THROUGH

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Law Business Research

THE QUEEN'S AWARDS FOR ENTERPRISE: 2012

Published by
Law Business Research Ltd
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London, W11 1QQ, UK
Tel: +44 20 3708 4199
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2003
Fourteenth edition
ISSN 1742-2280

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

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Switzerland

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Legislation and jurisdiction

1 How would you summarise the development of private antitrust litigation in your jurisdiction?

In Switzerland, competition law is primarily enforced by the competition authority. These investigations are governed by administrative law. The reasons why the administrative procedure is more attractive are manifold. First, in civil proceedings the cost risk is substantial. Second, the claimant bears the burden of proof, whereas in the administrative procedure the Secretariat of the Competition Commission has several measures and tools to gather evidence (such as dawn raids, requests for information, etc).

2 Are private antitrust actions mandated by statute? If not, on what basis are they possible? Is standing to bring a claim limited to those directly affected or may indirect purchasers bring claims?

Private antitrust actions in Switzerland are provided by statutory law (see question 3).

3 If based on statute, what is the relevant legislation and which are the relevant courts and tribunals?

Private antitrust actions in Switzerland are governed by articles 12–17 of the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act). Article 12 of the Cartel Act governs the remedies that are available to a claimant, including the elimination of or desistance from the hindrance, damages and satisfaction or the surrender of lawfully earned profits. Article 13 prescribes the enforcement of the right to elimination and desistance and article 15 sets forth an obligation for the civil courts to refer questions on the lawfulness of a restraint of competition to the Competition Commission (articles 14 and 16–17 were repealed with effect as of 1 January 2011).

The Federal Act on Swiss International Private Law of 18 December 1987 (SIPLA) governs international private antitrust actions. Article 137, paragraph 1 of the SIPLA provides that the applicable law shall be the law of the state in whose market the direct effect of the restraint of competition on the claimant occurs.

On 22 February 2012, the Swiss Federal Council submitted its draft for a number of amendments of the Cartel Act to Parliament for approval. The proposals submitted to Parliament for consideration included the recognition of legal standing to final consumers and the suspension of the statute of limitations for civil actions during an investigation of an alleged anticompetitive practice by competition authorities. On 17 September 2014, Parliament rejected the proposed revisions to the Cartel Act in their entirety.

The EU Damages Directive is not applicable in Switzerland and there are no concrete endeavours to implement its rules in domestic law after the rejected revision of the Cartel Act (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member states and the European Union, OJ L 349/1). The EU Damages Directive differs from Swiss legislation in various aspects. For example, the Damages Directive governs the disclosure of evidence and states that national courts are able to order the defendant or a third party to disclose relevant evidence that lies in their control (article 5). Another example is the limitation periods for bringing an action for damages. According to article 10 of the Damages Directive the limitation periods are at least five years (see question 15 and 17 for the Swiss legislation).

Material and territorial jurisdictions of the civil courts in domestic antitrust cases are determined by the Civil Procedure Code of 19 December 2008 (CPC, in force as of 1 January 2011) and cantonal law. Pursuant to article 36 CPC, the case shall be filed by the competent court at place of business of the claimant or the respondent or where the restraint of competition has occurred or had its effect. Cantonal law shall designate the specific court that has jurisdiction as sole cantonal instance for cartel law disputes. The 'single cantonal court' has an exclusive jurisdiction to order interim measures.

In international antitrust cases, a venue is determined by articles 2 and 5 of the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007 (Lugano Convention), or by article 129 SIPLA if the convention is not applicable. Both the Lugano Convention and SIPLA provide for the same venues as the CPC, except for the place of business of the claimant, which is not available in international contexts.

4 In what types of antitrust matters are private actions available? Is a finding of infringement by a competition authority required to initiate a private antitrust action in your jurisdiction? What is the effect of a finding of infringement by a competition authority on national courts?

In Switzerland, private actions may be brought in cartel cases (horizontal and vertical infringement of competition) and cases of an abuse of a dominant position. Swiss law does not provide for private actions in merger control cases. A finding of infringement by a competition authority is not required to initiate a private antitrust action in a civil litigation in Switzerland.

If the competition authority finds an infringement, the civil court usually does not need to get an expert report about the legality of a restraint of competition.

Principally, the civil and the administrative procedures are separate. There is an academic debate whether a decision of the Competition Commission is binding. The prevailing doctrine is in favour of a binding effect to avoid contradictory decisions. In any case, the finding of infringement by the Competition Commission will have an impact on the private antitrust action, provided it covers the same time period.

5 What nexus with the jurisdiction is required to found a private action? To what extent can the parties influence in which jurisdiction a claim will be heard?

A claimant may bring an action before the civil court under the Cartel Act, as long as he or she is affected by the restraint, regardless of whether the restriction is directly aimed at the claimant or not. The person should be an undertaking under the Cartel Act. Undertakings (all buyers or suppliers of goods or services active in commerce regardless of their legal or organisational form (article 2 Cartel Act)) which encounter a restriction of competition have legal standing to bring a claim under the Cartel Act, irrespective of whether they are competitors, purchasers, suppliers or enterprises which operate in neighbouring markets. Thus, indirect purchasers can bring an action before the civil court too. Final consumers, however, do not currently have standing to bring a private claim under the Cartel Act (see proposed but rejected revisions to the Cartel Act, question 3).

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6 Can private actions be brought against both corporations and individuals, including those from other jurisdictions?

In Switzerland, a private antitrust action may only be brought against an undertaking. The Cartel Act qualifies all buyers or suppliers of goods or services active in commerce as undertaking, regardless of whether it is a corporation or an individual (see question 5). It is not necessary that the undertaking is domiciled in Switzerland. The Cartel Act applies to practices that have an effect in Switzerland, irrespective of their origin. Accordingly, the competition authorities may investigate conduct that occurred in a foreign jurisdiction and that have an effect in Switzerland. Whether Swiss or foreign antitrust law must be applied by the court in a civil proceeding is subject to the relevant international treaties and private international law, such as the Lugano Convention or the SIPLA in Switzerland (for the relevant courts and tribunals, see question 2). Bringing same private antitrust actions (that is, same parties, same matter) before different courts is not possible in both domestic and international cases. If the same action is pending before two courts, the second court in Switzerland shall suspend its proceeding until the first has decided on its jurisdiction. In contrast, bringing connected private antitrust actions (different parties, but claims based on the same facts and grounds) before different courts is basically possible. However, the second court may transfer the case to the first court provided the first court agrees.

Private action procedure

7 May litigation be funded by third parties? Are contingency fees available?

There is no rule applicable in Switzerland that would prohibit third parties from funding a private antitrust litigation procedure.

However, contingency fees are problematic. Pure profit-sharing schemes replacing the fees for the services rendered are prohibited. However, it is now allowed to agree upon an additional remuneration in the case of a success. For instance, it is possible to agree upon an hourly fee that would be increased if the result of the litigation meets defined criteria.

8 Are jury trials available?

No, there are no jury trials available in Switzerland.

9 What pretrial discovery procedures are available?

Common law-style discovery procedures are not available in Switzerland. Swiss law does not provide for pretrial discovery procedures. There is no general right for the (potential) claimant to request that the defendant produces documents or other relevant information. The parties have to rely on the evidence in their hands, and they will be able to ask for witness interrogations and interrogations of the parties. However, there is a special procedure for the preliminarily collection and securing of evidence if the applicant demonstrates an interest worthy of protection, or if the evidence-gathering process would be more difficult or not possible at a later stage (see article 158 of the CPC).

10 What evidence is admissible?

The claimant may base its claim on any available evidence, including:

- documents (contracts, letters, printouts of emails, etc);
- witness statements;
- expert opinions;
- evidence by interrogation of the parties; or
- evidence by inspection.

These are the means of evidence that are normally admitted in civil proceedings. In case of antitrust law damages cases, expert opinions are of great importance with regard to the calculation of fine.

11 What evidence is protected by legal privilege?

Swiss law generally recognises the attorney–client privilege, where all information is protected if such information derives from the professional representation of the respective party by an external attorney. The following conditions have to be met for a document to be protected from search and seizure during dawn raids. First, the attorney must be entitled to practise before Swiss courts in accordance with the Attorney Act of 23 June 2000. The concept of legal privilege does not extend to in-house counsel. Second, only profession-related activity such as litigation and legal advice are protected. Last, the documents need to be issued in connection with a mandate. Pre-existing evidence that was originally not prepared for attorneys is not protected.

Trade secrets are protected under Swiss civil procedural law, as well as in proceedings before the Swiss Competition Commission. Parties may request the non-disclosure of documents containing such trade secrets.

12 Are private actions available where there has been a criminal conviction in respect of the same matter?

There is no specific statutory provision under Swiss law condemning infringements of competition law. For this, there is no restriction of private actions regardless of whether there has been a prosecution under competition law or criminal law (ie, fraud in connection with an infringement of competition). Furthermore, affected plaintiffs may seek indemnification within the criminal procedure. The judgment of a criminal court is not binding upon a civil judge with respect to guilt and the determination of the damage.

13 Can the evidence or findings in criminal proceedings be relied on by plaintiffs in parallel private actions? Are leniency applicants protected from follow-on litigation? Do the competition authorities routinely disclose documents obtained in their investigations to private claimants?

Evidence obtained in proceeding before the Swiss Competition Commission or in criminal proceedings may be used in civil proceedings without limitation. However, all documents relating to leniency applications may not be copied or otherwise duplicated by the involved parties. The authority holds that the access to such leniency files is limited to consultation on the premises only (eg, see the case involving road construction companies operating in the canton of Aargau: *RPW 2012/2 Zwischenverfügung vom 10 August 2011 in Sachen Wettbewerbsabreden im Strassen- und Tiefbau im Kanton Aargau betreffend Akteneinsicht*, 264 ss). In addition, the Swiss Competition Commission has not disclosed documents submitted by leniency applicants to civil courts. Apart from this, leniency applicants are not protected from litigation and may be subject to follow-on litigation as any other party involved in an administrative proceeding.

14 In which circumstances can a defendant petition the court for a stay of proceedings in a private antitrust action?

The court may suspend proceedings if it finds it in its wide discretion appropriate. Therefore, a party may request the court for a stay at any time. The proceedings may be suspended in particular if the decision depends upon, or is likely to be influenced by the outcome of other proceedings. Another generally accepted petition for a stay is settlement negotiations of the involved parties.

In article 15(1), The Swiss Cartel Act obliges civil courts to obtain an expert opinion from the Swiss Competition Commission if the legality of a restraint on competition is questioned in the course of the civil proceeding (the Federal Supreme Court is relieved from this obligation). However, the expert opinion is not binding on the civil judge, and there has been an example in the *Etivaz* case confirmed by the Federal Supreme Court, where the court has ruled against the expert opinion of the Swiss Competition Commission.

15 What is the applicable standard of proof for claimants? Is passing on a matter for the claimant or defendant to prove? What is the applicable standard of proof?

The plaintiff bears the burden of proof and must therefore demonstrate that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor (including the tortfeasor's culpability). Therefore, any plaintiff, including direct or indirect customers, must prove and quantify its damage. A court takes its decisions on the balance of probabilities.

The Swiss Cartel Act provides for rebuttable presumptions of certain hard-core horizontal and vertical agreements that such agreements lead to the elimination of effective competition. The most recent judgment of the Federal Supreme Court no longer requires the Swiss Competition Commission to take an effects-based approach for hard-core restrictions. According to the Federal Supreme Court, even undertakings with low market shares can get sanctioned if they have participated in a hard-core restriction (see 'Update and trends').

The defendant has a duty to allege the passing-on damage, but the ultimate burden of proof in connection with the quantification of damages

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Update and trends

In a judgement dated 28 June 2016, the Federal Supreme Court rejected the appeal filed by Elmex manufacturer Colgate-Palmolive Europe Sàrl (formerly Gaba International Ltd) against the Federal Administrative Court's decision. It confirmed that the contractual obligation between Gaba International Ltd and its Austrian licensee was a vertical infringement that affected the Swiss market significantly. Furthermore, the Federal Supreme Court stated in a 3:2 vote that agreements regarding fixed or minimum prices, the quantity and the allocation of territories according to article 5(3) and (4) of the Cartel Act are considered unlawful based on their quality even when the presumption of elimination of competition can be overturned. This applies regardless of the quantitative criteria such as market share. Such agreements are unlawful and fines can be imposed subject to grounds of economic efficiency. This judgment lowers the burden of proof for future antitrust claims.

The Altherr initiative aims to expand full abuse control (including sanctions) to companies that are not dominant but have relative market power. The threshold for relative market power is lower than the dominance test. The concept of relative market power is well known in Germany, but German law is not as extensive as Altherr's proposal. The concept as proposed in the parliamentary initiative would probably force many small and medium-sized entities to invest in compliance systems to avoid the risk of sanctions. This could lead to an increase in private antitrust litigation owing to the fact that more undertakings may bring a claim against suppliers or other (potential) contractual partners. A claimant could base its claim on the proposed concept of relative market power if it is not supplied at all or if it is supplied at higher prices than other buyers. The claimant would not have to prove that the defendant is dominant. However, the Altherr initiative does not foresee any specific stimuli for private antitrust litigation (ie, recognition of legal standing to final consumers or suspension of the statute of limitations during the investigation by the competition authority).

remains with the plaintiff. If the undertaking harmed by an unlawful restraint of competition cannot establish the exact amount of damages, the judge estimates and assesses the amount at his discretion.

16 What is the typical timetable for collective and single party proceedings? Is it possible to accelerate proceedings?

Procedures regarding interim measures in antitrust matters are usually treated within one and six months from the filing of the application.

The ordinary procedure before the first instance lasts usually between 12 and 24 months, depending on the complexity and the workload of the court and the judges responsible for the procedure.

In case of an appeal to the Federal Supreme Court, the length of the procedure may take up to four years in total.

17 What are the relevant limitation periods?

According to tort law, a private antitrust action for damages or for remittance of profits becomes time-barred one year after the injured party has learned of the damage, and in any event 10 years after the date on which the claim first arose. If the restraint of competition continues without interruption for a period of time, the limitation period runs from the moment the restraint of competition is abandoned.

The EU Damages Directive is not applicable in Switzerland (see question 3).

18 What appeals are available? Is appeal available on the facts or on the law?

Decision of the civil court of first instance is subject to appeal before the Federal Court. As a rule, the minimum amount in dispute is 30,000 Swiss francs. However, the court will deal with cases below this threshold if a question of law is of 'fundamental significance'. However, only the court's findings of law and certain due process issues are subject to appeal. The court's findings of fact are basically not subject to appeal (unless a court of first instance made a manifestly incorrect or inaccurate appraisal of the facts).

Collective actions

19 Are collective proceedings available in respect of antitrust claims?

In Switzerland, collective proceedings (as known, for example, in US law with their system of class actions) are not available in respect of antitrust claims. In general, claims must be brought by individual plaintiffs. However, provided that the claims of different individual parties are based on similar facts or similar legal basis, several plaintiffs may jointly bring proceedings against the same defendant.

20 Are collective proceedings mandated by legislation?

See question 19.

21 If collective proceedings are allowed, is there a certification process? What is the test?

See question 19.

22 Have courts certified collective proceedings in antitrust matters?

See question 19.

23 Can plaintiffs opt out or opt in?

See question 19.

24 Do collective settlements require judicial authorisation?

See question 19.

25 If the country is divided into multiple jurisdictions, is a national collective proceeding possible? Can private actions be brought simultaneously in respect of the same matter in more than one jurisdiction?

With regards to collective proceedings, see question 19. In general, private actions cannot be brought simultaneously in respect of the same matter in more than one jurisdiction. A claim is only admissible if the dispute is not subject to a pending litigation elsewhere, in order to avoid multiple contradicting rulings. The CPC requires each canton to designate a court that shall have jurisdiction as sole cantonal instance for cartel law disputes. However, if there are multiple plaintiffs, it is possible that each of them brings its action to a different court.

26 Has a plaintiffs' collective-proceeding bar developed?

No. See question 19.

Remedies

27 What forms of compensation are available and on what basis are they allowed?

According to article 12 Cartel Act, a claimant may claim damages if a person unlawfully causes loss or damage to the claimant, whether wilfully or negligently. The rules for calculating damages are set forth in the Code of Obligation of 30 March 1911, and specified by the Federal Court Jurisprudence. Civil courts can award damages in the amount of the actual loss incurred by the claimant and caused by the tortfeasor, including both property loss and lost profits. It consists of the difference between the actual net position on assets and liabilities of the injured party at the time of judgment and the hypothetical net position on assets and liabilities at the time of the judgment, assuming that no restraint of competition occurred. The claimant bears the burden of proof, and it must be demonstrated that it incurred damages as a result of an unlawful restraint of competition attributable to the tortfeasor. Negligence by the tortfeasor is sufficient for this purpose. Article 137 of the SIPLA provides that, if a claim for damages is based on foreign antitrust law, no award may be rendered by a Swiss court in excess of what would be available under Swiss law.

Alternatively, the claimant can petition the court to order the remittance of unlawfully earned profits by the tortfeasor (article 12 Cartel Act). Similarly as with a claim for damages, the claimant bears the burden of proof and must demonstrate the tortfeasor's earned profits that are attributable to the unlawful restraint of competition, and that the tortfeasor acted with malice.

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28 What other forms of remedy are available? What must a claimant prove to obtain an interim remedy?

The other forms of remedy available in Switzerland are request injunctive or performance claims and declaratory relief (article 12 Cartel Act). Courts may also order interim remedies, suitable to prevent the imminent harm, in particular:

- an injunction;
- an order to remedy an unlawful situation;
- an order to a registered authority or to a third party;
- performance in kind; or
- the payment of a sum of money in the cases provided by the law.

However, the applicant must show credibly that a right to which it is entitled has been violated, or a violation is anticipated, and the violation threatens to cause not easily reparable harm to the applicant (article 261 CPC). Given that the harm resulting from anticompetitive behaviour might not be fully compensated by damages or the restitution for the unlawful profits, the interim measures constitute the main object of private civil enforcement.

An example of a private antitrust action that was brought successfully under the Cartel Act is a recent decision regarding an abuse of a dominant position in the cheese market. The Swiss civil courts considered whether the refusal to provide access to the defendant's caverns could constitute an abuse of dominant position in a case related to IP rights. Specifically, a producer of a type of Swiss cheese (called Etivaz), which is subject to an appellation of protected indication of origin regulation, requested access to certain caverns of the defendant (IP holder) in order to stock its cheese during its ripening process. The Cantonal Court in Vaud confirmed in its decision the view of the Secretariat of the Competition Commission, ruling that the defendant's refusal to provide storage space in its caverns was not abusive pursuant to the Cartel Act. However, the Swiss Federal Court overruled the lower courts in its decision of 23 May 2013 (case 4A_449/2012) and held that the refusal to provide access to the defendant's caverns was based on unjustified reasons and, thus, constitutes an abuse of a dominant position.

29 Are punitive or exemplary damages available?

Punitive or exemplary damages are not available in Switzerland, even if the court must apply foreign antitrust law.

30 Is there provision for interest on damages awards and from when does it accrue?

Swiss tort law provides for interest on the damages award. Damages yield a 5 per cent minimum rate of interest from the moment of causation. The claimant is allowed to plead a higher interest rate.

31 Are the fines imposed by competition authorities taken into account when setting damages?

The direct sanctioning regime in case of infringements against article 5 (unlawfully agreements) or against article 7 (abuse of dominant position) was introduced in 2005. There are not many final and conclusive sanctioning judgments. Therefore, there are no decisions that deal with the question of whether fines imposed by competition authorities should be taken into account when setting damages. According to the general rules on the calculation of damages, the claimant has the right to seek full compensation. Therefore, the majority of the scholars in Switzerland reject the opinion that sanctions should have an influence on the level of the damage.

32 Who bears the legal costs? Can legal costs be recovered, and if so, on what basis?

Legal costs include the fees for the court procedure and the cost of external counsel. Costs are imposed on a pro rata basis to the parties in accordance with the success of each party.

The successful party is entitled to recover the cost of external counsel. However, the courts do not usually accept the full amount charged by counsel for the winning party.

33 Is liability imposed on a joint and several basis?

Yes, if two or more undertakings have infringed competition law and caused damage (eg, in horizontal cartel cases or abuse of collective dominance), then they shall be jointly and severally liable.

34 Is there a possibility for contribution and indemnity among defendants? How must such claims be asserted?

If several undertakings have caused the damage together, each undertaking is jointly and severally liable for the total damage. If one of these undertakings has compensated more than its portion, it can take a recourse action against the other undertakings involved in the infringement. Such claims are pursued after a judgment or settlement or in the same proceedings as the principal claim.

35 Is the 'passing on' defence allowed?

The Federal Supreme Court has never decided whether the passing on defence is allowed in private antitrust litigations. However, according to general tort law principles the plaintiff cannot ask for more than full compensation of the damage suffered. If the damage is reduced because increased price levels have been passed on to the customers, then the plaintiff should only be entitled to seek for compensation for this reduced loss. As the EU Damages Directive is not applicable, the general principles regarding the burden of proof for the passing-on defence apply (see question 15).

36 Do any other defences exist that permit companies or individuals to defend themselves against competition law liability?

According to article 41 of the Code of Obligations of 30 March 1911, four conditions must be met in order to establish liability for compensation claims:

- the claimant must have suffered damage;
- the defendant's act that caused the damage was unlawful;
- there is a link of proximate causation between the wrongful act and the damage; and
- the defendant was at fault (ie, it acted intentionally or negligently).

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Therefore the respondent may try to defend itself by alleging no damage suffered out of infringement, the absence of causality between the damage and the restraint of competition or the absence of fault. Additionally, the judge may reduce the amount of compensation if the claimant's behaviour caused the damage to increase or not to diminish.

37 Is alternative dispute resolution available?

Pursuant to article 124 paragraph 3 CPC, the court may at any time during the civil proceeding attempt to achieve an agreement between the parties. The court may schedule a special hearing or submit to the parties a written proposal for a settlement. The settlement can cover all claims or only a part of the claims. The parties may also at any time try to negotiate a settlement by their own volition and without the knowledge of the court. In that respect, an administrative proceeding before the competition authorities may also be settled amicably (article 29 Cartel Act). However, in this case such settlement does not in principle release the tortfeasor from being sanctioned. It may, however, result in a reduction of the sanction.

Civil antitrust matters may be resolved before an arbitral tribunal. Domestic arbitration is normally governed by the CPC, while international arbitration is governed by the SIPLA.

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ISSN 1742-2280

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