



Adjusting Competition Law and Policy – Switzerland

CIPCO-Workshop

"Algo Market Activity – Competition (Law) – Policy Session"

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1. Market Features & Case Law

➤ Stocktaking

- **Dynamic pricing** in Switzerland, but **not much personalised pricing**
- **Tendering procedures:** Bidders sometimes use the **same software** leading to offers based on the **same price calculation method** and having the **same format**
- The Swiss Competition Commission (Comco) has **no competence for consumer protection**



➤ **Comco – *Hors Liste* (2009)**

- **Resale price recommendations** issued by producers of drugs for erectile dysfunction (Pfizer: *Viagra*, Eli Lilly: *Cialis* and Bayer: *Levitra*)
- **Automatic** (although alterable) **transfer of price recommendations** from manufacturers via wholesalers to retailers by means of a **database**; the price is alterable, but 90 % of the pharmacists do not modify the recommended price
- The vast majority of pharmacists have subscribed to this database
- By **scanning the barcode**, the recommended price is **automatically entered into the cash register**.
- Although there is no written RPM agreement, Comco found unlawful vertical agreements restricting competition
- **confirmed by the Swiss Supreme Court 2021** (not yet published): Incentives or pressure are not necessary
- parallel to ECJ – *Eturas* (2016): It is burdensome to modify the price proposed by the system
- ➔ **Feeding a price into a technical system** is like the action of a system administrator.



2. Comco's Enforcement Priorities

- **Comco** is a **medium-sized** competition authority
 - Secretariat: ≈ 65 full-time equivalents
- **Focus areas**
 - Cartels including bid rigging
 - Market foreclosure (CH as a "high-price island")
 - Abuse of dominant positions (e.g. infrastructure)
- **BigTech**
 - Limited resources to be invested for global issues
 - Often, BigTech companies apply the EU solution to Switzerland
 - For a Swiss case, see Comco – *Apple / TWINT* (2018)



➤ **Comco: Core Group on Digitization**

- Representative of Comco's **sector units**
- **Part-time assignments** (no capacity for a full-fledged digital markets unit)
- Observation of **international developments** (including the discussion on algorithms)
- Participation in **academic discourse**
- **Price observation by web scraping?**



3. Adjustments to the Swiss legal framework

- **No plans for a digital reform** of competition law
- A special rule on *tacit collusion* is not in sight
- For a long time, the **ANIC presumption has not been endorsed** by the courts
 - *ANIC presumption*: ECJ – *ANIC* (1999) regarding the concept of concerted practices: a **causal connection is presumed** once the concertation and a subsequent behaviour have been shown
 - but see now Swiss Federal Supreme Court – *Hors Liste* (2021): rebuttable presumption



4. Screening Tool

- Active role of Comco in elaborating a screening tool
 - Part of a **long-term strategy** against bid rigging since 2008
 - foundation: **variance** and **relative distance**
 - It is an instrument to **launch an investigation**, not to prove a cartel
 - The **Swiss screening tool** was discussed internationally, e.g. also in OECD workshops
- Comco **discovered a cartel** thanks to this tool
 - Comco – *Bid rigging Seegaster* (2016; not final)
 - **For the first time**, the trigger of the investigation was an ex ante statistical analysis of tender data
 - The **investigation confirmed** the conclusion of the screening tool
- Challenge: **stay up to date**
- Some **procurement offices** do their **own screening** now.