

Bernhard C. Lauterburg

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## 17.1 Introduction

This report addresses the characteristics of competition on the food retail market in Switzerland and the legal framework competition is subject to. As will be outlined below, the Swiss food retail market is largely dominated by two large retailers that are organized as cooperatives. Despite the high degree of concentration, acquisitions by the two large retailers have occurred in the past and were not considered to harm efficient competition. Furthermore, market entries of foreign retailers, namely the German Lidl and Aldi retailers, could be observed in the past.

While there are no provisions generally taking precedence over the Swiss Law on Cartels (the “LCart”)<sup>1</sup> in the food retail sector, hence limiting competition, the food retail sector is affected by a multitude of norms limiting its *competitiveness*, such as high degree of protection in the agricultural sector (e.g., import quotas, regulations and agreements with respect to the price of milk on the manufacturer and supplier level), technical barriers to trade (e.g., labeling regulations) or higher labor costs.

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## 17.2 The Food Retail Market in Switzerland

The food retail market is largely dominated by the two large retailers Migros and Coop with a combined market share of roughly 80 % on the retail market. Private labels account for a large share of the product range of both Migros and Coop. Other

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<sup>1</sup> Federal Law of 6 October 1995 on Cartels and other Restraints on Competition (Law on Cartels, LCart; SR 251).

B.C. Lauterburg (✉)  
Prager Dreifuss Ltd., Berne, Switzerland  
e-mail: [bernhard.lauterburg@prager-dreifuss.com](mailto:bernhard.lauterburg@prager-dreifuss.com)

retailers include Aldi, Lidl, Denner (recently acquired and now owned by Migros), Spar, Primo/Vis-à-Vis, Volg and others. Switzerland historically has a high degree of concentration in the grocery retail sector. The two largest retailers are organized as cooperatives with a history dating back to the end of the nineteenth century (Coop, 1890) and early twentieth century (Migros, 1925).

In 2007, Accenture undertook a study of the Swiss retail market, which was referred to by the competition authorities in the case Coop/Carrefour in 2008. According to the study, a large majority purchase goods for daily use at either Migros or Coop and participate in their loyalty program. Swiss consumers attach great importance to accessibility and a choice of fresh products and regional products and such from ecological and sustainable production.<sup>2</sup> While Aldi and Lidl pursued an aggressive market entry strategy, recent research by Credit Suisse reveals a slowdown of their expansion within Switzerland but notes in the context of shopping tourism their strong position at the German–Swiss border.<sup>3</sup> The combined market share of Aldi and Lidl, however, remains low, at 5 %.<sup>4</sup>

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## 17.3 Legal Framework

### 17.3.1 The Law on Cartels

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.<sup>5</sup> The retail grocery sector is subject to the behavioral<sup>6</sup> and structural provisions set forth in the LCart to the extent that there are no other statutory provisions, such as provisions that establish an official market or price system, taking precedence over the LCart. We are not aware of such provisions taking precedence over the LCart.<sup>7</sup>

To date, there are no *per se* prohibitions in a strict sense under the LCart, neither in relation to behavioral nor merger control. Hence, in each single case, the competition authority must establish the subjective and objective elements of the concerned provision and determine whether the conduct in question can be justified. The proposed amendment to the LCart, which is currently discussed in Parliament,

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<sup>2</sup> Coop/Carrefour, RPW/DPC 2008/4, pp. 593 *et seq.*, paras. 146 *et seq.*

<sup>3</sup> Credit Suisse, Retail Outlook 2013, pp. 19–20.

<sup>4</sup> Credit Suisse, Retail Outlook 2013, p. 20.

<sup>5</sup> See Article 1 LCart.

<sup>6</sup> The LCart does not include provisions on unfair competition. The LCart governs horizontal and vertical agreements, abuse of dominance and merger control. Unfair competition is dealt with in the Federal Law of 19 December 1986 on Unfair Competition (Law on Unfair Competition, LUC; SR 241).

<sup>7</sup> *Cf.*, CoopForte, RPW/DPC 2005/1, pp. 146 *et seq.*, paras. 20 and 34.

provides for a directly effective prohibition of certain horizontal and vertical agreements (price fixing, agreement on quantities or territorial allocation) and a shift in the burden of proof from the competition authorities to the undertakings.

Pursuant to Article 45(1) LCart, the competition authority shall constantly monitor the status of competition. In this context, the competition authority may conduct informal market observations that may or may not result in a preliminary investigation (Article 26 LCart) or a formal investigation (Article 27 LCart). In a preliminary investigation, the competition authority may propose measures to eliminate or prevent restraints of competition (Article 26(2) LCart). While the details of market observations are normally not revealed, the competition authority releases information on the number of market observations and the products covered, such as in 2011 gluten-free products<sup>8</sup> and whether it found any indications of potentially anticompetitive conduct. The outcome of preliminary investigations as well as formal investigations is published in a report or, respectively, a decision.

### 17.3.2 The Competition Authority's Eyes on the Retail Grocery Sector

In the past, the competition authorities repeatedly examined the retail grocery sector on the occasion of concentrations involving the two large retailers Migros and Coop.<sup>9</sup> In *CoopForte*,<sup>10</sup> the competition authorities examined the structures on the supply market in the context of an alleged abuse of buying power by Coop.

With the high euro/CHF exchange rate, the passing on of currency exchange benefits to consumers has been placed on the agenda of competition enforcement agencies and consumer advocacy organizations. The Competition Commission even established a subsection on this issue on its website,<sup>11</sup> and the Price Supervision Authority noted in a report that retailers—with some delays—largely pass on currency exchange benefits to consumers but that Switzerland for structural reasons will remain a nation with a high price level.<sup>12</sup> Credit Suisse noted in their market research that the price level for grocery products decreased by 6 % in the last 3 years.<sup>13</sup>

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<sup>8</sup> See Annual Report of the Competition Commission, RPW/DPC 2012/1, p. 4.

<sup>9</sup> Given the high degree of concentration in the retail grocery sector involving the two large retailers Migros and Coop, virtually all relevant case law involves these entities. In 2003, Coop acquired Waro, which at that time was owned by the parent company of Denner. In 2008, Migros acquired Denner, the then largest discounter in Switzerland, however subject to significant remedies, and Coop acquired sole control over the operating company of the Swiss Carrefour stores with Carrefour withdrawing from the Swiss market.

<sup>10</sup> CoopForte, RPW/DPC 2005/1, pp. 146 et seq.

<sup>11</sup> <http://www.weko.admin.ch/aktuell/01054/index.html?lang=de>.

<sup>12</sup> Report of the Price Supervision Authority of 20 September 2012.

<sup>13</sup> Credit Suisse, Retail Outlook 2013, p. 10.

## 17.4 Merger Control

### 17.4.1 Thresholds

The retail grocery sector is subject to the same threshold levels as all other industries. Accordingly, transactions are subject to notification if the undertakings concerned together reported a turnover of at least 2 billion Swiss francs, or a turnover in Switzerland of at least 500 million Swiss francs, and at least two of the undertakings concerned each reported a turnover in Switzerland of at least 100 million Swiss francs (Article 9(1) LCart). In addition to these numerical criteria, notification shall exceptionally be mandatory if one of the undertakings concerned has been held to be dominant in a market in Switzerland in proceedings under this Act in a final and nonappealable decision and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof (Article 9(4) LCart). Currently, Migros is subject to this exception.<sup>14</sup>

### 17.4.2 Product Market

The product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use (Article 11(3)(a) MCO).<sup>15</sup> Hence, authorities distinguish between a market for sales (downstream) and a market for supply (upstream).

On the downstream market, the authorities base their assessment on a range of products that typically include fast-moving consumer goods. According to the decision in *Migros/Denner*, the range of products would typically include food, near-food and nonfood products for daily use, with an emphasis the basis of a one-stop shopping approach.<sup>16</sup> Excluded from the relevant product market were specialty and convenience stores,<sup>17</sup> although it was not excluded that such store formats may have a certain disciplinary effect on traditional retailers.<sup>18</sup> Also excluded from the relevant product market was “shopping tourism.”<sup>19</sup>

In *Migros/Denner*, the competition authorities noted that the retail grocery sector cannot generally be considered the only distribution channel for manufacturers of

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<sup>14</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 4 of the operative part of the decision.

<sup>15</sup> Ordinance of the Swiss Federal Council of 17 June 1996 on the Control of Concentrations of Undertakings (Merger Control Ordinance, MCO; SR 251.4).

<sup>16</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 164.

<sup>17</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 166 et seq.

<sup>18</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 185.

<sup>19</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 197 et seq. The authorities, however, did not exclude that “shopping tourism” may have a disciplinary effect on the retail sector.

retail business goods; however, the competition authorities hitherto left open whether gastronomy, hospitals, specialty stores, convenience shops and exportation should be considered a part of the relevant product market.<sup>20</sup>

In *Coop/Waro*,<sup>21</sup> *Migros/Denner*<sup>22</sup> and *Coop/Carrefour*,<sup>23</sup> the following food product markets were defined on the upstream market:

- dairy products, eggs;
- bread and pastry products;
- meat;
- frozen food products;
- traiteur/convenience (fresh and chilled);
- vegetables/salads;
- fruits;
- canned food/sauces;
- soups/cooking ingredients;
- basic foodstuffs/baking ingredients;
- hot beverages/cereals;
- confectionery/biscuits;
- snacks/apéro;
- pet food/pet supplies;
- alcoholic beverages;
- soft drinks.

In *Migros/Denner*, the competition authorities further had to determine whether the Migros-owned manufacturing businesses should be considered a part of the supply market.<sup>24</sup> The competition authorities determined that retailers consider products from integrated and independent manufacturers as substitutes (although the Migros-owned industries are normally favored over independent manufacturers), for which reason the Migros-owned industries belong to the relevant supply market.<sup>25</sup>

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<sup>20</sup> See *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 211.

<sup>21</sup> *Coop/Waro*, RPW/DPC 2003/3, pp. 559 et seq., para. 43.

<sup>22</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 208.

<sup>23</sup> *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq., para. 82.

<sup>24</sup> Note that Migros owns and operates various manufacturing businesses such as Jowa (bakery products), Bischofszell (convenience food), Midor (biscuits), Chocolat Frey (chocolate bars, confectionary), Aproz (mineral water), Delica (the largest coffee roaster in Switzerland), Mibelle (cosmetics). A full list is available at <http://www.migros.ch/de/migros-gruppe.html>.

<sup>25</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., paras. 224 et seq.

### 17.4.3 Geographic Market

The geographic market comprises the area in which, on the one hand, consumers purchase and, on the other hand, suppliers sell the goods or services that constitute the product market (Article 11(3)(b) MCO).

Referring to EU practice,<sup>26</sup> the competition authorities in *Migros/Denner* and *Coop/Carrefour*, as well as earlier in *Coop/EPA*, distinguished between a local market and a national market on the downstream market. The market radius of small retail stores was estimated at ca. 10 min, for medium retail stores at 15 min and for large-scale hypermarkets at 20 min.<sup>27</sup> Although the competition authorities considered that the relevant geographic market is local from a consumer perspective, pricing and sales policy of the large retail chains are coordinated on national level; hence, competition for consumers occurs on a national level.

As regards the upstream market, the competition authorities considered that it is at least national with a possibility that for nonperishable goods not subject to local consumer habits the relevant geographic market could be international.

### 17.4.4 Competition Analysis

#### 17.4.4.1 Clearance Despite High Degree of Concentration

Concentrations that are subject to notification may be prohibited or authorized subject to conditions and obligations if the investigation indicates that the concentration creates or strengthens a dominant position liable to eliminate effective competition and does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.<sup>28</sup>

In both *Migros/Denner* and *Coop/Carrefour*, the authorities noted that the conditions for collective market power by Migros and Coop were satisfied and that disciplinary effects from the German discounters Aldi and Lidl on the *Migros/Coop* duopoly should not be overestimated.<sup>29</sup> The competition authorities determined that high market entry barriers existed in Switzerland. In *Migros/Denner*, the competition authorities distinguished among three types of market entry barriers: (1) structural entry barriers, (2) administrative entry barriers and (3) strategic entry

<sup>26</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 236; *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq., para. 103. Reference was made by the Swiss competition authorities to *Rewe/Meinl* (Commission Decision of 3 February 1999, M.1221), *Rewe/Billa* (Commission Decision of 27 August 1996, M.803), *Ahold/Superdiplo* (Commission Decision of 23 October 2000, M.2161) and *Carrefour/Promodes* (Commission Decision of 25 Janvier 2000, M.1684).

<sup>27</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., paras. 237 et seq.; *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq., paras. 104 et seq.

<sup>28</sup> Article 10(2) LCart.

<sup>29</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., paras. 419 et seq.

barriers.<sup>30</sup> As regards structural barriers, the competition authorities noted that establishing a new retail network would require considerable investments due to the already high density of retail stores in Switzerland and the multilingualism prevalent in Switzerland. As regards administrative barriers, the competition authorities particularly referred to strict zoning and planning laws, nontariff barriers (Swiss-specific standards and prescriptions on product declaration), the high degree of protection in the agricultural sector (import restrictions). As regards strategic barriers, the competition authorities particularly noted the limited availability of prime retail locations as well as possible imbalances on the supply market.

Despite high market entry barriers, low existing and potential competition, the competition authorities cleared the transactions involving Migros and Denner on the one hand and Coop and Carrefour on the other hand, however, subject to certain remedies:

- In *Migros/Denner*,<sup>31</sup> where Migros acquired the discount chain Denner, substantial behavioral remedies were imposed on Migros. E.g., Migros was enjoined from integrating Denner, hence was obliged to operate Denner legally and organizationally independent entity with its own policy regarding pricing, product range and sales, loyalty programs of both Migros and Denner could not be integrated and/or merged, both Migros and Denner were enjoined from jointly procuring goods intended for resale and Migros was enjoined from acquiring any other retailers in Switzerland. In addition, Migros was ordered to waive exclusivity in relation to any product suppliers. With respect to the notification requirement, Migros was put under an obligation to notify any concentration on the grocery retail market independent of the threshold amounts (Article 9 (4) LCart).
- In *Coop/Carrefour*,<sup>32</sup> Coop was enjoined from acquiring any other retailers in Switzerland for a duration of 6 years, divest some of its retail space in certain areas. Same as in *Migros/Denner*, Coop was ordered to waive exclusivity in relation to any product suppliers.

In both cases, Migros and Coop could apply to waive or amend the remedies starting 1 January 2010<sup>33</sup> provided that the conditions on the retail market substantially changed (i.e., new market participants Lidl and Aldi operate a combined number of 250 retail stores in Switzerland). To our knowledge, Migros recently

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<sup>30</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., paras. 383 et seq.; see also *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq., paras. 313 et seq.

<sup>31</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq.

<sup>32</sup> *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq.

<sup>33</sup> *Migros/Denner*, RPW/DPC 2008/1, pp. 129 et seq., para. 1.12 of the operative part of the decision; *Coop/Carrefour*, RPW/DPC 2008/4, pp. 593 et seq., para. 1.6 of the operative part of the decision.

filed an application in this regard, and Credit Suisse states that by the end of 2012, Aldi and Lidl combined operate 250 stores.<sup>34</sup>

#### **17.4.4.2 “Countervailing Force” of Retailers as an Argument to Put into Perspective the Emergence of Market Power**

In various merger decisions concerning producers of retail products, the competition authorities touched on the issue of buying power by the large retailers. In this context, the competition authorities used the “countervailing force” of retailers as an argument to put into perspective the emergence of market power on certain producer markets as a result of such mergers amongst producers.<sup>35</sup>

#### **17.4.4.3 Competitive Pressure by Internet Stores?**

Although both large retailers operate Internet stores (Migros: LeShop; Coop: Coop@Home), Internet commerce to date only plays an insignificant role in the retail grocery sector. Both Internet stores achieved a combined turnover of approximately CHF 250 million, which represents only a small fraction of the overall retail turnover in the grocery sector (e.g., in 2012, Coop achieved an overall turnover in the food sector of more than CHF 12 billion). Internet and brick-and-mortar retail stores are subject to the same laws and regulations concerning grocery retail.

<sup>34</sup> Credit Suisse, Retail Outlook 2013, p. 20.

<sup>35</sup> Cf., e.g., Bell AG/SEG-Poulets AG (RPW/DPC 1998/3, pp. 392 et seq); Toni AG/Tochtergesellschaften der Säntis Holding AG (RPW/DPC 1999/1, pp. 93 et seq); Unilever/Bestfoods (RPW/DPC 2001/4, pp. 701 et seq); Gemeinschaftsunternehmen The Coca-Cola Company/Nestlé (RPW/DPC 2001/4, pp. 746 et seq).

In “Bell AG/SEG-Poulets AG”, the competition authorities noted the extraordinary vertical integration of Coop and Migros with respect to the slaughtering and distribution of poultry and the market power that came along with it. In other decisions, such as “Toni AG/Tochtergesellschaften der Säntis Holding AG” (concerning milk processing and the sale of milk products with combined market shares up to 75%) and “Gemeinschaftsunternehmen The Coca-Cola Company/Nestlé” (concerning soft drinks with combined market shares up to 55%), the competition authorities also noted and used as an argument the vertical integration of retailers to put into perspective the increase of market shares resulting from the concentrations. Furthermore, the market power of the retailers was explicitly used to answer in the negative the potential emergence or increase of a dominant position resulting from the concentration. In “Toni AG/Tochtergesellschaften der Säntis Holding AG”, the competition authorities held that the concentration with market shares up to 75% would create a countervailing power to the high degree of concentration on the retail market. In “Unilever/Bestfoods” the competition authorities equally noted that the market shares of up to 60% resulting from the concentration on certain food-markets would not lead to a dominant position as the principal competitors Nestlé, Migros and Coop would account for sufficient competition. Moreover, Coop (being active on both the supply and the retail market) noted that its own position would be strong enough so as to permit the substitution of Unilever/Bestfoods products with other products.



## 17.5 Anticompetitive Practices

### 17.5.1 Abuse of Buying Power, Abuse of Dependency

#### 17.5.1.1 Definition of Buying Power

Buying power is relevant under competition legislation if it involves a dominant position of the buyer. Pursuant to Article 4(2) LCart, 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.

Referring to an opinion of the French *Conseil de la Concurrence*,<sup>36</sup> the competition authorities for the first time applied the principle of buying power in *CoopForte*. Accordingly, a supplier is deemed dependent if two criteria are satisfied: (1) there are no comparable customers on the market for the concerned goods, and additional demand by other customers would not suffice to cover the suppliers fixed costs, and (2) production-specific assets may not be used or adjusted to be used with reasonable efforts to manufacture other goods.<sup>37</sup> Later, in *Denner/PickPay*<sup>38</sup> and, in particular, in *Migros/Denner*,<sup>39</sup> the competition authorities held that the two criteria need not be satisfied cumulatively but alternatively. Furthermore, in *Migros/Denner*, the competition authorities distinguished between suppliers of branded products and suppliers of store brands. The criteria for both groups of suppliers are the following:

*a) Suppliers of branded products:*

- The supplier achieves more than 30 % of its turnover on the retail market with Migros and Denner; and
- The bargaining power of the supplier is not sufficient so as to avoid that Migros and Denner can unilaterally impose their terms and conditions on the supplier, which in particular the case when the supplier is not an important participant on the market, the supplier is unable to export its products and the supplier does not offer “leader brands” or offers products which can be easily replaced; and
- There are no alternate supply channels within and beyond the retail sector but Migros and Denner, i.e. the supplier’s existence would be in jeopardy the supply channel through Migros and Denner would be lost within a year.

<sup>36</sup> Avis n° 97-A-04 of 21 January 1997 regarding various questions concerning a concentration in the distribution in the retail sector (“Avis du 21 janvier 1997 relatif à diverses questions portant sur la concentration de la distribution”).

<sup>37</sup> CoopForte, RPW/DPC 2005/1, para. 98.

<sup>38</sup> Denner/Pick Pay, RPW/DPC 2006/1, p. 138, para. 57.

<sup>39</sup> Migros/Denner, RPW/DPC 2008/1, pp. 129 et seq., para. 607. The same criteria were later confirmed and applied in Coop/Carrefour, RPW/DPC 2008/4, pp. 593 et seq., para. 479.

*b) Suppliers of store brands:*

- The supplier made specific investments in order to supply Migros and/or Denner; and
- The supplier did not enter into long-term or exclusive agreements with Migros and/or Denner which would allow the amortization of its investments; and
- The amount of switching costs necessary to adjust production to alternate markets would jeopardize the supplier's existence.

Accordingly, in order to be dependent, a supplier must cumulatively satisfy the conditions under either (a) or (b) and dependency must not result from a strategic decision of the supplier that later proves unfortunate, i.e., dependency must result without fault on account of the supplier from the market conditions.

To the extent that buying power is not captured by competition law, remedies may exist under contract law (e.g., Article 21 CO, unfair advantage).

### **17.5.1.2 Is Abuse of Buying Power a Per Se Violation of Competition Law?**

In this context, it may be useful, by way of introduction, to set out the pertinent substantive provision of Article 7 LCart. Both in relation to terminology and taxonomy, Article 7 LCart is based on Article 102 TFEU. The provision consists of a blanket clause (para. 1) and a nonexhaustive catalogue of examples that may be deemed to constitute abusive practices provided that the conditions of the blanket clause are satisfied.<sup>40</sup> The practices listed in para. 2 of Article 7 LCart do not constitute *per se* abusive practices; rather, they are subject to a case-by-case analysis.<sup>41</sup>

Pursuant to Article 7(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, such as by imposing of disproportionate prices or other disproportionate conditions of trade (Article 7(2) (c) LCart). Hence, in order for Article 7 LCart to apply, a causal link between dominance (Article 4(2) LCart) and abusive conduct is necessary.<sup>42</sup> Furthermore, competitors or upstream or downstream market participants must not have means to oppose to or avoid a dominant undertaking's conduct.<sup>43</sup>

The conduct of a dominant undertaking amounts to an abuse only and is subject to the legal consequences set forth in Article 49a LCart (prohibition order and sanctions)<sup>44</sup> if it has anticompetitive effects in that other undertakings are hindered

<sup>40</sup> Jürg Borer, Wettbewerbsrecht I, Kommentar, N 4 on Article 7 KG, with further references.

<sup>41</sup> Cf., e.g., Roland von Büren, Eugen Marbach, Patrik Ducrey, Immaterialgüter- und Wettbewerbsrecht, 3rd. ed. (2008), para. 1520.

<sup>42</sup> Cf., Supreme Court of 11 April 2011, case 2C.343/2010, pt 4.3.4.

<sup>43</sup> *Ibid.*

<sup>44</sup> Pursuant to Article 49a(1) LCart, any undertaking that behaves unlawfully pursuant to Article 7 shall be charged up to 10 per cent of the turnover that it achieved in Switzerland in the preceding

from starting or continuing to compete or trading partners are suffering disadvantages and if it cannot be justified by legitimate business reasons. Accordingly, it cannot be said that abuses of buying power or dependency are prohibited *per se*.

### 17.5.1.3 Case Law

In *CoopForte*, the competition authorities held that conditions of trade are disproportionate if there is a disparity to the economic value of the benefits offered by the dominant undertaking<sup>45</sup>; however, it ultimately remained open whether Coop's practices amounted to an abuse of buying power as Coop made concessions that eventually resulted in the case being discontinued. The concerned practice that led to the investigation was the following: Coop considered that a realignment of its business would provide certain benefits to its suppliers, for which Coop deducted an amount of 0.5 % from all supplier invoices.

End of 2008, Lidl filed a complaint with the competition authorities alleging that Coop would exercise pressure on certain Swiss manufacturers of branded products to decline supplying Lidl. No formal proceedings were initiated; however, the competition authorities discovered that Coop had threatened some of the concerned manufacturers with retaliatory measures in case they would supply Lidl. Although the competition authorities did not find a causal link between Coop's conduct and the nonsupply of Lidl by the concerned manufacturers, the competition authorities admonished Coop.<sup>46</sup>

## 17.5.2 Resale Price Maintenance and Price Recommendations

*Resale price maintenance* is considered unlawful. According to Article 5(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. The presumption in Article 5(4) LCart may be rebutted by the undertakings concerned.

*Recommended resale prices* are not generally unlawful in Swiss competition law. Pursuant to sec. 15 of the Notice on the Treatment of Vertical Agreements under Competition Law (the "Notice"),<sup>47</sup> price recommendations are considered relevant (qualitative relevance) if as a result of coercion or measures reducing the resellers' and retailers' incentive to lower the resale price they have as their effect

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three financial years. The amount is dependent on the duration and severity of the unlawful behavior. Due account shall be taken of the likely profit that resulted from the unlawful behavior.

<sup>45</sup> *CoopForte*, RPW/DPC 2005/1, para. 147.

<sup>46</sup> Annual Report 2009 of the Competition Commission to the Federal Council, p. 17.

<sup>47</sup> Pursuant to Article 6 LCart, the Competition Commission may publish general notices on Categories of agreements affecting competition that are deemed justified. These notices are not considered legislative acts such as Regulation 330/2010; rather, such notices are similar to the guidelines published by the EU Commission.

that of a fixed or minimum price. Whether this applies to a particular price recommendation must be examined on a case-by-case basis. Similar as the EU Commission's Guidelines on Vertical Restraints, the Notice provides that such price recommendations may give rise to competition concerns (threshold criteria), in particular, when price recommendations are not disclosed to the public but are restricted to resellers and retailers, or are not designated as such, or when the price level of the products affected is significantly higher than for comparing products in neighboring countries or if price recommendations are adhered to by a significant part of resellers and retailers.

### 17.5.3 Reselling Below Cost

Reselling below cost is not per se prohibited by competition law; it may be an issue under the Law on Unfair Competition. However, the undercutting of prices by a dominant undertaking is considered unlawful under Article 7 LCart if the dominant undertaking, by abusing its position in the market, hinders other undertakings from starting or continuing to compete or disadvantages trading partners.<sup>48</sup>

### 17.5.4 Delisting of Suppliers

Delisting of suppliers may be an unlawful practice under Article 7 LCart, if used, for instance, as a threat by dominant retailers to obtain lower prices. Discussions with respect to the delisting of suppliers came up when retailers delisted certain products from international brand manufacturers (such as Ferrero, Kinder Schokolade) in order to obtain lower prices. Although the Swiss Brand Manufacturer Association called on the competition authorities to investigate the matter, no formal investigation is known to date; however, on October 2012, the competition authorities sent a questionnaire to Migros and Coop concerning their pricing policy in relation to branded products and potential withholding of foreign currency exchange gains.<sup>49</sup> Whether delisting may be unlawful must be determined in a two-tier analysis: firstly, the dominant undertaking must exclude the supplier from a given market or hinder the supplier in pursuing its business; secondly, the retailer's conduct must be weighed against reasons that may justify the conduct in question.<sup>50</sup>

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<sup>48</sup> Jürg Borer, *supra* n 33, N 24 on Article 7 LCart.

<sup>49</sup> *Cf.*, Handelszeitung of 18 November 2012.

<sup>50</sup> *Cf.*, Jürg Borer, *supra* n 33, N 12 on Article 7 LCart.

### 17.5.5 Pricing of Products and Abusively High Prices

Apart from Article 7 LCart,<sup>51</sup> the following provisions should be observed:

- The Ordinance on Price Disclosure requires retailers to advertise with and indicate only actual prices the consumer will have to pay (i.e., including all taxes) so as to allow for direct price comparison. Misleading price information is prohibited.
- The Law on Price Supervision (the “LPS”) provides that participants of competition agreements and dominant undertakings may voluntarily submit an envisaged price increase to the Price Supervision Authority for preemptive price control.

Prices may be subject to investigations by the Price Supervisory Authority (in particular, in the utility sector, public transportation, radio and television and state-administered prices). Only to the extent that inappropriate prices are the result of a dominant market position, they are captured by the LCart.

Article 13 of the LPS lists certain criteria in order to assess whether prices are inappropriate. These criteria are often referred to by analogy also in competition law<sup>52</sup>:

- the development of prices on comparable markets (as-if concept<sup>53</sup>);
- the necessity to achieve reasonable profits;
- the development of costs;
- particular entrepreneurial achievements, such as innovations and risk taking;
- particular circumstances on the concerned market.

### 17.5.6 Collusion at Local Level?

Only agreements that significantly restrict competition or eliminate effective competition will be considered by the competition authorities. Given the high density of retail stores, the high degree of mobility and other factors, such agreements would likely not be deemed to significantly restrict competition in the Swiss “Mittelland” (which comprises the large agglomerations). However, the situation could be different in remote alpine valleys where the density of retail stores might be lower and the distances between possible alternative retail stores are bigger.

<sup>51</sup> E.g., para. (2)(c), any imposition of unfair prices or other unfair conditions of trade.

<sup>52</sup> Marc Amstutz, Blaise Carron, N 301 on Article 7 LCart, in: Amstutz, Reinert, eds., Basler Kommentar zum Kartellgesetz.

<sup>53</sup> Adrian Künzler, Roger Zäch, N 3 on Article 13 LPS, in: Oesch, Weber, Zäch (eds.), Wettbewerbsrecht II; Marc Amstutz, Blaise Carron, N 302 on Article 7 LCart, in: Amstutz, Reinert (eds.), Basler Kommentar zum Kartellgesetz, with further references.

Note, however, that the purpose of the LCart is to “prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy” (Article 1 LCart). In this regard, it may be questionable whether the competition authorities would indeed examine and potentially sanction “micro-violations” as described above; rather, the competition authorities may refer the claimant to the civil courts.

### 17.5.7 Synthesis

To the extent that competition matters are concerned, large-scale retailers are subject to competition legislation irrespective of their legal or organizational form.<sup>54</sup> Whether certain conduct is captured by and relevant under the LCart depends on the effects on the competitive environment (such as effects on the upstream or downstream market) and is the result of a case-by-case analysis. Hence, there are no per se prohibitions.

The LCart as well as related statutes, namely the LUC and the LPS, apply independently of the store format. The same applies to statutes concerning the admission of a product to the market (e.g., labeling) and food safety.

While the LCart only governs behavioral and structural aspects of competition from a view of safeguarding the institute of competition, contractual relationships are generally governed by the Code of Obligations (the “CO”) to the extent that the parties did not agree otherwise and the CO permits the parties to do so. Contractual provisions that contravene the provisions set forth in the LCart are deemed invalid.

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## 17.6 Conclusions and Prospective

Although the grocery retail sector is historically characterized by a high degree of concentration, legislative changes aimed at reversing or dismantling the structures currently existing in Switzerland are not warranted. While in their decisions concerning Migros/Denner and Coop/Carrefour the competition authorities cautioned not to overestimate the market entries of Aldi and Lidl and imposed remedies on both Migros and Coop, recent developments indicate that the Migros/Coop duopoly is exposed to fierce competition from Aldi and Lidl with notably Aldi creating an image of retailer selling local products and thus directly “attacking” Coop and Migros with their slogans “from the region for the region” (Migros) and seeking for downtown shop units. Only recently, at least Migros sought to withdraw certain of these remedies as a result of a changing landscape in the retail grocery sector.

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<sup>54</sup> Pursuant to Article 2(1<sup>bis</sup>) LCart, undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organizational form.

Currently, the Swiss legislator discusses far-reaching—ill-founded—amendments to the LCart. Within the scope of this questionnaire are, namely, the proposed amendments providing for a directly effective prohibition of certain types of agreements (thus departing from the internationally recognized effects-based approach) and—in order to address the high level of prices in Switzerland—a supply obligation of foreign suppliers to supply Swiss retailers at the same conditions as foreign retailers. The *Council of States* approved the proposed amendments, while the *National Council* rejected to consider the matter and sent it back to the Council of States for reconsideration.

The Swiss competition authorities will have taken note of the EU Commission’s “Green Paper on Unfair Trading Practices in the Business-to-Business Food and Non Food Supply Chain in Europe.” To the extent that possible changes in the Commission’s enforcement practice or amendments to the Commission’s guidelines emerge, the Swiss authorities will likely assess the matter and—if necessary—follow the Commission with some delay.