

The Swiss Act on Cartels –A successful European Approach?

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The 1st of July 1999, there were exactly three years since the totally revised Swiss Competition Act² got in force³. This article shall first explain the main content of the revised Swiss Act on Cartels with reference to the EC competition law and secondly inform about the first experiences during the first three years under the new law. Finally it tries to give an answer to the question if the new Swiss Act on Cartels represents a *sufficient European approach* or not.

The Swiss Act on Cartels

Institutions

The Swiss Competition Authority consists of two bodies. The decisions on the lawfulness or unlawfulness of competition relevant facts are taken by a non-permanent body, the *Swiss Competition Commission*. This Commission comprises actually fifteen members which are acting in addition to their regular professional duties. Most of them are independent experts, like university professors, but there are also representatives of trade and industry, trade unions and of other circles.

To the Commission is assigned a Secretariat consisting of more than 40 permanent employees. The Secretariat conducts investigations and submits the preliminary reports to the Commission for decision.

Referring to EC competition law the institutional part of the Swiss Act on Cartels contains a *similar structure*. The *relationship* between DG IV of the European Commission and the one between the Swiss Competition Commission and its Secretariat is *absolutely comparable*. Both the European Commission and the Swiss Competition Commission have *decision-making power* whereas DG IV of the European Commission and the Secretariat of the Swiss Competition Commission both have *investigating functions*.

Substantive provisions

The Swiss Act on Cartels applies to *private or public enterprises* that are parties to *cartels* or to *other agreements affecting competition*, have *market power* or take part in *concentrations of enterprises*. It does however not apply to effect on competition that result from *public law regulations* like provisions *establishing an official market or price system* or from provisions that *entrust certain enterprises* from provisions with the performance of public interest tasks, granting them *special rights* and it does not apply to effects that exclusively result from laws governing *intellectual property* (Article 2 par. 1 and Article 3 par. 1 Acart).

This shows that the Swiss Act on Cartels is mainly based on *three pillars*:

- the control of agreements affecting competition,

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² The Swiss Federal Act on Cartels and Other Restraints of Competition of 6 October 1995, hereinafter Act on Cartels (Acart).

³ For the treatment of agreements affecting competition, however, a special transitional arrangement has been introduced: for such agreements the Act got in force only half a year later, the 1st of January 1997.

- the control of enterprises having a dominant position and
- the merger control.

1. The control of agreements affecting competition

The revised Swiss competition law understands as an agreement affecting competition *binding or non-binding agreements* and *concerted practices* between enterprises operating at the *same or different* levels of the market, the purpose or effect of which is to *restrain competition* (Article 4 par. 1 Acart). This definition *corresponds* to the one in EC competition law.

The substantive provisions concerning the *unlawfulness* of agreements restraining competition are stated in Article 5 of the Swiss Act on Cartels. According to these provisions agreements affecting competition are unlawful either if they *completely prevent* competition in a specific market or if they do not prevent but *significantly affect* competition in the relevant market and *cannot be justified by economic reasons*. The reasons of economic efficiency are the following (Article 5 par. 2 Acart):

- reduction of production or distribution costs;
- improvement of products or production processes;
- promotion of research or of the dissemination of technical or professional know-how; or
- rational exploitation of resources.

According to Article 6 Acart the *Swiss Federal Council*, the supreme Swiss governmental body, as well as the *Swiss Competition Commission* may issue *ordinances* or *communications* defining *specific categories of agreements* that *generally benefit from the exception* in Article 5 par. 2 Acart (see above).

Furthermore, Article 5 par. 3 of the Swiss Act quotes several agreements among *actual or potential competitors* that are *presumed to lead to the elimination of effective competition* and, by that, *to be unlawful*. This presumption concerns (horizontal) agreements, which:

- directly or indirectly fix prices;
- restrict the quantities of goods or services to be produced, bought or supplied;
- allocate markets geographically or according to trading partners.

This presumption of elimination of effective competition, however, is *refutable*.

Finally, Article 8 Acart is to be mentioned. This article foresees that the Swiss Federal Council may *exceptionally allow* agreements that have been *declared unlawful by decision of the Swiss Competition Commission*, if such agreements are *necessary to protect overriding public interests*.

Referring to EC competition law (Article 85 (81) of the European Treaty) the Swiss control of agreements affecting competition is, again, *very similar*. EC competition law prohibits agreements that *eliminate* competition or that *significantly affect* competition and *cannot be justified* by grounds mentioned in par. 3 of Article 85 (81) of the European Treaty.

Additionally, the Swiss Act on Cartels knows in its Article 6 Acart principally the same institution as the so called *block exemption system* in Article 85 (81) par. 3 of the European Treaty.

There are *two important differences*: the first is that in EC competition law there is *no explicit presumption of unlawfulness* like the one stated in Article 5 par. 3 AcArticle In practice, however, EC law knows practically a “per se”-prohibition of exactly these categories of agreements. The second difference is that in EC competition law there exists *no political body* that can *overrule for political reasons* a decision of the Competition Authority that prohibits an agreement affecting competition.

2. Control of behavior of enterprises in a dominant position

The *similarity* between the Swiss control of (*abusive*) *behavior of dominant enterprises* and the corresponding EC law provisions (Article 86 (82) of the European Treaty) is *even more evident*. According to Article 7 of the Swiss Act on Cartels, practices of enterprises having a dominant position are *deemed to be unlawful* when such enterprises, through the abuse of their (dominant) position, *prevent other enterprises from entering or competing* in the market or when they *injure trading partners*. This *corresponds* to the principle stated in Article 86 (82) of the European Treaty.

The Swiss definition of the term “enterprises having a dominant position in the market” in Article 4 Acart is almost literally *the same* as the one used for years in the jurisdiction of the European Commission and the European Court. The *same identity* can be stated if one compares the *examples* given in *par. 2 of Article 7 Acart* explaining the above mentioned principle in par. 1, with the examples enumerated in *Article 86 (81)* of the European Treaty.

There is, however, the same difference which was already mentioned above in relation with Article 5 Acart: the Swiss government (the Swiss Federal Council) has *also in cases of abusive practices of dominant enterprises* the possibility to *overrule (negative) decisions* of the Swiss Competition Commission.

3. Merger control

The revised Swiss Act on Cartels has adopted a *preventive merger control*. The Acart considers as a *concentration of enterprises*: “The merger of two or more enterprises hitherto independent each other” and “any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more hitherto independent enterprises or of a part thereof” (Article 4 par. 3 Acart). This definition again *corresponds* to the one used in EC competition law (Article 3 of the merger regulation).

The Swiss Act on Cartels states, as well as the EC merger control, a *notification obligation before* the concentrations are carried out. In the Acart, like in the EC merger regulation, this obligation depends principally on the *turnovers* that were reported by the enterprises involved *in the last accounting period* prior to the concentration, whereby these thresholds, of course, are *not as high* as in the EC merger control⁴.

⁴ According to Article 9 Acart concentrations must be notified if “the enterprises concerned reported joint turnover of at least 2 billion Swiss francs or turnover in Switzerland of at least 500 million Swiss francs”, and (additionally) if “at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss francs”. The turnover criteria are, like in Article 1 of the EC merger regulation, divided in world-wide turnovers and turnovers realized within the own territory. There is, however, to be mentioned a special Swiss related provision in Article 9 par. 4 Acart: according to this provision notification is – notwithstanding the above mentioned turnover criteria – mandatory „when, on termination of a procedure initiated pursuant to the present law, a legally enforceable decision establishes that a participating enterprise

Concerning the *assessment* of concentrations both, the Swiss and EC law, link the prohibition of a concentration to the *presumption* that the notified concentration will *create or strengthen a dominant position*. There is, however, a *slight difference* in the definition of the term market dominance in that sense that according to Swiss law a concentration can only be prohibited if the market dominance created or strengthened by it, is liable to *eliminate effective competition*, whereas Article 2 of the EC merger regulation (only) “requires” a dominance that *significantly hinders* effective competition. Furthermore the Swiss Act on Cartels states explicitly that a concentration creating or strengthening a dominant position will not be prohibited if it leads to a *strengthening of competition in another market outweighing the harmful effects of the dominant position*⁵. The jurisprudence of the Swiss Competition Commission until now, however, shows that these differences did *not lead to a significantly different assessment* of concentrations from the one exercised by the EC competition authorities.

Apart again from the possibility of the Swiss Federal Council to overrule a prohibition decision of the Swiss Competition Commission, we can state that the Swiss Act on Cartels includes from the substantive as well as from the procedural point of view *the same merger control system* as the one stated in the EC merger regulation.

The first three years under the revised Act on on Cartels

Beginning with the merger control, it can be noticed that the *number of notifications* of concentrations was *much higher* than expected. The legislator expected around *twelve notifications a year*, whereas the first three years the annual average number was of *more than the double*. [The treatment of the notified concentrations absorbed a *high part of the capacities of the Swiss Competition Authority*.] Until now *no concentration was prohibited*. In *five cases*, however, the concentrations were *only authorized subject to structural conditions*. In one case *the notification was withdrawn* and the concentration project cancelled after the Secretariat told to the parties that the concentration revealed signs that it creates a dominant position.

What concerns the control of agreements restraining competition and the control of enterprises having a dominant position the Swiss Competition Authority has *introduced a number of investigations*. There were *nine formal decisions* either declaring the *unlawfulness* of the agreement or practice or setting *amicable settlements* with the enterprises concerned. Among these decisions there is to be mentioned *one which is of a particular interest* - not for the direct economic impact – because it concerned a market of a minor importance (music partitions) – but for the *reasoning* of the decision. The Swiss Competition concluded that *vertical distribution systems* can, under certain circumstances, result in horizontal concerted practices and, by that, *fall under the presumption of unlawfulness* in Article 5 par. 3 Acart⁶. This conclusion may have *significant effect on other pending investigations* like the one on the *book's distribution system* that is actually pending also before the European Commission⁷.

occupies a dominant position in a market in Switzerland” and “when the concentration concerns either that market or an adjacent market or a market upstream or downstream”.

⁵ Article 10 par. 2 lit. b AcArticle

⁶ „Sammelrevers für Musiknoten“, published in RPW/DPC 1997/3, p. 334 mentioned music.

⁷ The book's distribution system was, with almost the same reasoning as in the ... partitions case, declared unlawful by decision of the Swiss Competition Commission of 6 September 1999. This decision has not been published yet.

In two important subjects, according to Article 6 Acart, the Swiss Competition Commission issued *communications defining two categories of agreements* that normally benefit from the exception in Article 5 par. 2 AcArticle The first communication concerns agreements in the *sports area (homologation and sponsoring)*⁸ and the second *calculation schemes* in general⁹. Both communications give *helpful criteria* on how agreements of these two kinds would be treated by the Swiss Competition Commission.

Conclusion

The analysis of the Swiss Act on Cartels shows that the Swiss cartel law has achieved, both from a *substantive and procedural* point of view, *a clear approach to EC competition law*, even if there are still differences like the *influence of the Swiss Federal Council* that can, for political reasons, overrule decisions of the Swiss Competition Commission or the fact that the Swiss Cartels law does still *not contain provisions corresponding to the ones in Article 90 to 93 (86 to 89) of the European Treaty*. On the other hand it must be stated that *the output* of the Swiss Competition Authority, especially what concerns the control of agreements restraining competition or the control of practices enterprises having a dominant position, is *not that enormous*.

Of course, one must be aware that the implementation of the new law *from the beginning* had very *positive effects* in that sense that, due to the fact that the new law contained *much stricter substantive provisions* than the former law, many enterprises either abandoned their anti-competitive practices or were *prevented from starting* such practices. There were also many procedures, *during which* the enterprises concerned *abandoned* their anti-competitive practices or agreements, and the procedures *got closed without any formal decision*. Nevertheless, there were, as noticed above, *only a few formal decisions*.

The *reason* of this minor number lies, first of all, in the fact that, *due to the constitutional base* of the Swiss Act on Cartels, our law is – *contrary to EC competition law* – *based on the abuse principle*. According to this principle (and its actual interpretation), the Swiss Competition Authority is *only empowered to treat actual facts* and is *not allowed* to treat *facts that happened in the past*. This principle *prohibits* also *to impose fines* directly *with the decision that states the unlawfulness* of the agreement or the practice in question. According to the Swiss Act on Cartels *finer for violation of the cartels law* because of unlawful agreements or practices of dominant enterprises can *only be imposed* if the enterprises concerned *continue with the same agreement or the same practice* that were previously declared unlawful by formal decision of the Swiss Competition Commission.

Furthermore, the enforcement of the Swiss Act on Cartels is hindered by the fact that Switzerland has, apart from the *European Free Trade Agreement* - which, however, has no practical use – *no international co-operation agreement in competition matters*. The European Union, instead, has concluded such co-operation agreements *with the United States* and *Canada* and other co-operation agreements will follow.

As a final conclusion it can be said that the Swiss legislator has, *within the constitutional barriers, achieved a successful European approach*. To make the Swiss Act on Cartels *a more effective tool*, however, the Swiss Competition Authority should - as a modification of the constitution in Switzerland takes to much time - try to *interpret the constitutional principle less strictly*. This could be done on behalf of *another revision of the law* within

⁸ Published in RPW/DPC 1998/1 p. 154.

⁹ Published in RPW/DPC 1998/2, p. 351.

which, at the same time *other amendments* should be done as well, like the *adoption of provisions corresponding to the Arts. 90 to 93 (86 to 89) of the European Treaty and of provisions facilitating the conclusion of co-operation agreements by the Swiss Competition Commission itself*. This would be the way to do *another step* towards an even *more complete European approach*.