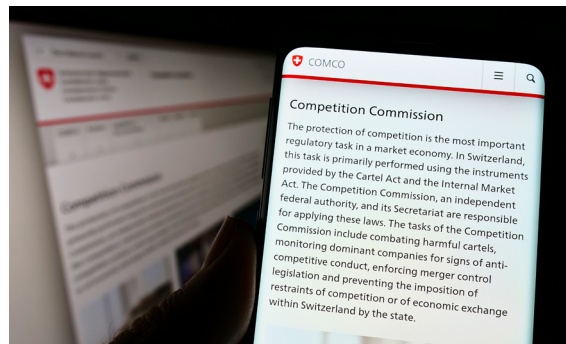


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Switzerland's Cartel Act reform: new era for competition law and private enforcement

Bernhard Lauterburg of **Prager Dreifuss** examines how Swiss private competition law litigation will be affected by changes such as expanding standing to sue and suspending limitation periods during Competition Commission investigations



On December 19 2025, the Swiss Parliament adopted the long-awaited revision of the Federal Act on Cartels and Other Restraints of Competition (the Cartel Act, or CartA). The adopted revision went further than the Federal Council's legislative proposal and was shaped by intensive lobbying from business associations, consumer protection organisations, and the Competition Commission (COMCO) itself.

This article provides an overview of the key elements of the reform, with a particular focus on the implications for private competition law litigation. Readers should note that the reform has been adopted by Parliament but has not yet entered into force, as certain implementing legislation must first be amended to reflect the changes to the CartA. The reform is expected to enter into force in the second half of 2027.

The main changes from a private enforcement perspective

The status quo: a dormant regime

Until now, private enforcement of competition law in Switzerland has played only a limited practical role. Although damages claims have been available under Article 12 of the CartA, the number of cases actually litigated



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Bernhard's focus on facts and solutions when handling complex issues helps him develop clear and persuasive legal arguments.

has remained very low. The reasons for this are well known and were extensively documented in the legislative materials:

- Standing was limited to companies that were 'hindered' in accessing or exercising competition. Indirect purchasers, end consumers, and companies whose harm did not consist in exclusion from the market effectively had no standing. This was regarded as unsatisfactory, since harm caused by an unlawful restraint of competition is often passed on in the form of higher prices to downstream market levels and ultimately to end customers, who – according to the wording of the existing Article 12(1) of

the CartA – were generally not entitled to bring a claim.

- There was no suspension of limitation periods during pending administrative proceedings. As a result, claims often became time-barred before a COMCO decision became final and enforceable.
- Evidentiary difficulties, together with the high burden of proving liability and quantifying damages, made it more attractive for potential claimants to file a complaint with COMCO rather than pursue civil proceedings.

The result was a regime of secondary, and indeed only sporadic, practical importance.

The new regime: not a paradigm shift, but important amendments

The most fundamental change is the expansion of standing to sue. Under the new regime, any person – whether natural or legal – who has suffered harm as a result of an unlawful restraint of competition may bring an action pursuant to the new Article 12 of the CartA. The reform therefore closes the liability gap that could arise where overcharges were passed on to downstream market levels, including consumers who previously lacked standing. In particular, consumers and public authorities in tender proceedings will now also have standing to sue.

A further important change concerns limitation periods. Under the new rules, the limitation period for claims arising from an unlawful restraint of competition will either not begin to run or, if it has already begun, will be suspended from the opening of an investigation into the relevant restraint of competition until a final and binding decision has been issued. Until now, injured parties with standing had to interrupt the limitation period while a COMCO investigation was ongoing, either by obtaining a waiver of limitation from the cartellists or by initiating debt enforcement proceedings. This will no longer be necessary.

Evidence and quantification of damages: cartel damages claims remain complex

Unlike the EU Damages Directive, Swiss law does not contain a statutory presumption that cartel infringements cause harm. The claimant must prove all elements of the harm it suffered:

- The existence of damage;

- Causation between the unlawful conduct and the damage suffered;
- The unlawfulness of the conduct; and
- Fault on the part of the wrongdoer.

The claimant must also obtain the necessary evidence itself. Hence, the real complexities of civil antitrust litigation in Switzerland remain. In this context, readers should be aware of the following:

Swiss law does not provide for US-style discovery – parties must therefore rely primarily on the evidence available to them when filing the claim. However, once proceedings have commenced, the parties and third parties are under a duty to assist the court in establishing the facts of the case if ordered to do so. A party seeking documentary evidence may request that the court orders the opposing party or a third party to produce specific documents. The requesting party must describe and identify the evidence sought with sufficient precision and demonstrate its relevance to the case.

Nor does Switzerland have US-style class actions – however, consumer organisations may bring claims under the general rules of civil law if consumers assign their claims to them, provided the organisations are not themselves directly harmed. It should also be possible to bundle individual claims; for example, through a special purpose vehicle.

The quantification of damage remains complex – unlike in the EU, where some member states apply rebuttable presumptions or empirical benchmarks regarding the amount of harm suffered, in Switzerland the amount of damages is determined by the court in accordance with the general rules of civil law and civil procedure. In the alternative, the court may estimate the loss, although the threshold for a judicial assessment of damages is high.

Practical implications and outlook

The reform could fundamentally change the risk profile associated with competition law infringements in Switzerland. Until now, the principal risks consisted of administrative sanctions under Article 49a of the CartA and reputational harm. Going forward, exposure to damages claims must be considered a primary risk in any competition compliance assessment. However, a possible mitigating mechanism has been introduced for companies: if a company voluntarily pays damages

following a COMCO decision, this may subsequently be taken into account as a mitigating factor in the calculation of administrative sanctions.

Conversely, the reform creates real opportunities for victims of cartel infringements to obtain compensation.

However, the reform also raises significant institutional questions. Swiss civil courts have limited experience with complex competition damages litigation, and the new regime will require the development of additional expertise. Article 15 of the CartA already provides that, where the admissibility of a restraint of competition under Article 5 or Article 7 is at issue, the civil court must obtain an expert opinion from COMCO. Accordingly, it is to be expected that the strengthening of private competition law enforcement will also lead to a higher number of such expert opinions being requested from COMCO.

Further changes at a glance

Modernisation of merger control

One objective of the reform is to avoid duplication in merger control proceedings. Under the current regime, concentrations must be notified to COMCO if the undertakings concerned exceed the applicable turnover thresholds. These thresholds require an aggregate worldwide turnover of at least CHF 2 billion or an aggregate Swiss turnover of at least CHF 500 million, and an individual turnover in Switzerland of at least CHF 100 million for each of at least two of the undertakings concerned.

Under the revised regime, the notification requirement has purportedly been eased. A notification in Switzerland will no longer be required above these thresholds if all relevant product markets affected by the transaction are to be defined geographically as comprising Switzerland and at least the European Economic Area, and if the transaction is assessed by the European Commission.

In practice, however, the relevance of this exemption may be limited. Market definition is one of the most complex aspects of competition law analysis. In addition, COMCO often leaves the precise geographic market definition open in its decisional practice. It may therefore be difficult for notifying parties to assess with sufficient certainty whether a transaction

qualifies for the exemption from the Swiss notification obligation.

Although the parties could submit a prior guidance request to the Secretariat of COMCO, such a request would entail additional time and costs. In cases of doubt, parties to a concentration may therefore still prefer to file a merger notification in Switzerland. The practical significance of the new exemption remains to be seen.

A more important change concerns the substantive assessment of concentrations. Under the current regime, COMCO may prohibit a concentration, or approve it subject to conditions and obligations, only if the concentration creates or strengthens a dominant position capable of eliminating effective competition and no countervailing improvement in competition on another market outweighs the disadvantages of that dominant position. This is a high intervention threshold. In practice, only very few concentrations have been prohibited since the introduction of modern Swiss merger control in 1996.

The reform replaces this qualified dominance test with the “Significant Impediment to Effective Competition” (SIEC) test, modelled on the EU Merger Regulation. The SIEC test permits a more nuanced assessment of unilateral effects, coordinated effects, and efficiencies.

The reform also formally introduces an efficiency defence, allowing the parties to demonstrate that efficiency gains outweigh the harm to competition and are passed on to consumers. The intervention threshold is therefore clearly lowered. For Swiss M&A practice, this means that transactions are likely to be subject to more rigorous substantive scrutiny, particularly in oligopolistic markets. Companies will need to invest more in economic analysis at the pre-notification stage, and the use of remedies or commitments is likely to become more common.

A departure from the Gaba doctrine

In its 2016 Gaba judgment, the Federal Supreme Court held that agreements falling within Article 5(3) and Article 5(4) of the CartA generally satisfy the criterion of significance and may be sanctioned under Article 49a if they are unlawful under Article 5(1). The amended Article 5 of the CartA now expressly provides that the significance of a restraint of competition must in every

case be assessed individually, on the basis of an overall appraisal comprising:

- Qualitative elements, in the form of experience-based criteria; and
- Quantitative elements, in the form of the specific circumstances on the relevant market.

There is therefore no longer any de facto per se significance for hard-core restraints. This is likely to bring COMCO’s future practice more closely in line with that of the European Commission.

The concept of price-fixing has also been reformulated. In future, it is intended to cover only “agreements on the direct or indirect fixing of minimum prices, fixed prices or maximum purchase prices”. It is unclear what exactly is intended by this amended definition of price-fixing. However, it seems clear that, particularly in relation to gross prices, a more detailed assessment will be required as to whether such arrangements fall within the presumption that effective competition has been eliminated.

In the context of directly sanctionable conduct, it is noteworthy that compliance measures taken by the company to prevent violations of the CartA – which are appropriate to that company’s size, business activity, and industry – may be considered to reduce cartel sanctions.

Modernisation of the opposition procedure

In addition, the so-called opposition procedure has been revised. Where there is uncertainty, companies may submit a request for guidance to the COMCO Secretariat or notify proposed conduct before it is implemented. The latter is referred to as the opposition procedure. Its advantage was that the notified conduct could be implemented without the risk of sanctions, unless the companies were informed within five months of the notification that a preliminary investigation or investigation had been opened and the companies did not discontinue the conduct.

Under the new rules, the opposition period is shortened to two months, and the opening of a preliminary investigation is no longer sufficient to revive the risk of sanctions. In cases where there are insufficient grounds to open a formal investigation, conduct should no longer be prevented by a latent threat of sanctions. However, the new regime does not preclude

COMCO from finding, in a subsequent investigation, that the conduct in question is unlawful and prohibiting it for the future. The imposition of a direct sanction after expiry of the two-month period, however, is no longer possible. The opposition procedure is therefore likely to become more attractive for companies.

Looking ahead

The Cartel Act reform of December 19 2025 represents an important development in Swiss competition law. The changes to private enforcement are likely to attract particular attention. By expanding standing to sue and suspending limitation periods during COMCO investigations, the legislator has removed two important obstacles that have so far limited the practical relevance of civil competition law claims in Switzerland.

It would, however, be premature to assume that private enforcement will now become a prominent feature of Swiss competition law practice. Claimants will continue to face considerable obstacles with regard to obtaining evidence or quantifying cartel damages. The coming years will show how Swiss civil courts apply these new tools, how actively claimants pursue claims, and how companies recalibrate their compliance strategies in light of this new exposure.

Whether the amendments of the merger control rules bring the desired avoidance of duplication in merger control proceedings remains to be seen. Uncertainties can be expected in terms of the new rules regarding the assessment of cartels. Generally, the importance of adequate compliance systems is likely to increase in light of recent legislative developments.