to use Section 1782, wasting the Commission's scarce resources." Last, Section 1782 discovery "poses serious threats to its anti-cartel Leniency Program by jeopardising the Commission's ability to maintain the confidentiality of documents submitted to it." (The last point apparently assumes that the target of a Commission investigation might try to use Section 1782 to obtain the Commission leniency application of a company subject to jurisdiction in the US.)

The Solicitor General responds that the Commission would have the Supreme Court construe Section 1782 to "categorically prohibit" its use in connection with Commission antitrust proceedings. Repeating this phrase numerous times, the Justice Department argued that the authority granted to the District Court, however broad, is *discretionary*. "Although the United States is sensitive to the Commission's policy concerns, Section 1782 unambiguously authorises judicial assistance in aid of Commission proceedings ... There are other means, apart from an unduly narrow construction of Section 1782's terms, to address the Commission's policy concerns." In particular, the Commission may urge that the District Court withhold assistance "as a matter of discretion based on the considerations that [the Commission has] identified as absolute obstacles to the use of Section 1782".

The Commission's counter-argument is that such a rule is impractical and "offends principles of comity by placing heavy and inappropriate burdens on" the Commission and other foreign agencies. "[E]ach of the scores of United States District Courts will have discretion to conduct a balancing process [and] could develop its own approach ... be free to differ with other district courts with respect to both the appropriate balance in a given set of circumstances and the general rules to apply in the balancing process."

The Commission has a good point, but it is arguing against what seems a fairly consistent legislative history of gradually expanding Section 1782's coverage in terms of foreign proceedings and tribunals covered. The Solicitor General could have substantially alleviated the Commission's problem by arguing that, when a Section 1782 application was filed by a private party in connection with a foreign enforcement agency proceeding, the agency's view on whether the evidence was needed should be given very substantial, or even controlling, weight by the District Court. It is not too late for the Supreme Court to take this seemingly sensible course (perhaps with the Antitrust Division even cheering quietly behind closed doors). ■

The reform of the Swiss Cartels Act

PHILIPP ZURKINDEN, partner of Prager Dreifuss, reports on the recent changes to the Swiss Cartels Act, which give the Swiss authority the ability to impose fines and a specified legal basis to conduct dawn raids

Reasons for the recent reform

The reform of the Swiss Federal Act on Cartels (Acart, SR 251), which was passed by the Swiss Parliament in the summer of 2003, and which came into force on 1 April 2004, is probably the most sustained and radical reform of the Swiss Federal Act on Cartels (Acart reform 2003) so far.

The reforms carried out in 1995 sought to reinforce the provisions of the Swiss Cartels Act (Acart 95) by extending the scope of application and introducing more precise assessment rules. This meant that the three main pillars of Acart, ie the control of agreements affecting competition in Article 5 Acart, the control of unlawful practices by market dominant companies in Article 7 Acart and the merger control in Article 9 et al Acart, had to a large extent been harmonised with EC competition law even before this latest reform.

The main deficiency in the law has laid in the fact that the immediate consequences of proceedings brought by the Competition Commission, in particular under Articles 5 and 7 Acart, were negligible. In stark contrast to EC competition law, no fines could be imposed if a ruling was made that an agreement or practice was unlawful. This inability to ensure the effective enforcement of Acart has become increasingly conspicuous in recent years. The proceedings against Roche in relation to vitamins was the impetus that led to the Acart reform in 2003, which had as its main objective the establishment of a more efficient enforcement policy.

The reform in general

The introduction of the direct sanctioning of certain infringements of competition law constitutes the centrepiece of the revised Act, and it amounts to a further decisive step towards harmonisation with EC competition law. The reform of the Act was also taken as an opportunity to tackle other problems encountered in the application of its provisions. Thus, the scope of application was extended to administrative entities without legal personality (Article 2, paragraph 1 bis). This is intended to make the Act more easily applicable to administrative agencies, which often hold monopolistic demand positions.

In a further move, the relationship between intellectual property law and the law on cartels was redefined so that future import restrictions will also fall under the terms of the Acart, even if they are based on provisions of intellectual property law (Article 3, paragraph 2, 2nd sentence). Depending on the future interpretation of the provisions by the Swiss competition authorities, this new regulation could have serious repercussions for certain companies. The principle of national exhaustion applies in Switzerland in the field of patent law, but it does not apply to other areas of intellectual property law. An extensive interpretation of the new regulation could therefore lead to the introduction 'by the back door' of international exhaustion for products subject to patent protection as well.

In the field of merger control, the so-called media clause in Article 9, paragraph 2 Acart 95, which in relation to the determination of the turnover threshold that would trigger a duty to report provided for a factor of 20 for turnovers achieved in the media industry, has been repealed. In relation to the calculation of the relevant turnover of banks and other financial intermediaries, a similar procedure to that in the EU will be applied. The relevant turnover is now calculated through the banks' gross earnings (Article 9, paragraph 3 Acart). The term 'gross earnings' is defined in the Merger Control Ordinance (MCO, SR 251.4).

Under Acart 95, doubts were repeatedly expressed as to the legal basis for the levying of fees. New regulations have now been introduced (Article 53a Acart) and the Fees Ordinance (SR 251.2) has been revised.

A further interesting change has been brought about by an implementation provision to determine terms of the European Commission's investigative powers in Switzerland (Article 42a Acart). This had to be introduced due to the bilateral Agreement on Air Transport, of 21 June 1999 (OJ L 114, 30/4/2002, pp 73-

90), between the European Community and the Swiss Confederation. In this Agreement, which came into force on 1 June 2002, Switzerland inter alia accepted the substantive and procedural EC competition law provisions and the jurisdiction of the EU competition authorities in air transport cases that do not have effects exclusively in Switzerland. This raises significant questions on the extraterritorial enforcement of EC provisions in Switzerland.

However, the most important changes brought about by the recent reform are, in practical terms:

- The introduction of direct sanctions in the case of certain infringements of competition law in Article 49 a Acart (including the leniency rules), and the related substantive law changes in Article 4, paragraph 2 Acart and Article 5, paragraph 4 Acart;
- The specification of investigative measures in Article 42 Acart.

The most important reforms in detail

The introduction of direct sanctions in the case of certain infringements of competition law

Principles

The new Article 49 a Acart states the following:

"Art. 49 a. Sanctions in the case of unlawful restraints of competition.

1. Any undertaking that participates in an unlawful agreement in terms of Article 5, paragraphs 3 and 4, or which conducts itself in an unlawful manner in terms of Article 7, shall be liable to a fine of up to 10 per cent of the turnover that it has achieved in Switzerland in the preceding three financial years. Article 9, paragraph 3 is applicable in an analogous manner. The amount of the fine is calculated in accordance with the duration and the seriousness of the unlawful conduct. Appropriate account must be taken of the probable profit that the undertaking has achieved as a result.

2. If the undertaking assists in the disclosure and the elimination of the restraint of competition, the imposition of a fine may be waived in full or in part.

3. The fine is waived in full if:

- The undertaking reports the restraint of competition before it takes effect. If the undertaking is informed of the opening of proceedings under Articles 26–30 within the five months following the report, and thereafter continues to exercise the restraint of competition, the fine is not waived;
- The restraint of competition has not been exercised for a period exceeding five years on the date on which the investigation is opened;
- The Federal Council has permitted a restraint of competition in accordance with Article 8."

The main deficiency in the law was that the immediate consequences of proceedings brought by the Competition Commission were negligible

The infringements of competition law that are subject to direct sanctions

Article 5, paragraphs 3 and 4 Acart

Article 5 of Acart 95 introduced the rule that horizontal and vertical agreements that eliminate competition or significantly restrict competition without being justified on grounds of efficiency are unlawful. In Article 5, paragraph 2 Acart, efficiency grounds are defined as the reduction of production or sales costs, the improvement of the products or the production process, the promotion of research and the dissemination of the technical or professional knowledge, or the more rational use of resources. These efficiency grounds apply only if the agreement in question does not make it possible for the participating undertakings to eliminate effective competition altogether. The similarity to EC competition law, ie to Article 81, paragraph 3 of the EC Treaty, is evident.

The presumption that competition is eliminated in the case of horizontal agreements on fixing prices and/or quantities, or allocating markets, was introduced in 1995 in paragraph 3 of Article 5. If the presumption can be rebutted, further examination is required into whether the agreement in question nevertheless significantly restricts competition and, if shown to do so, whether the agreement can be justified on the grounds of efficiency.

Under Acart 95, the requirements for the rebuttal of the presumption were not difficult to fulfil in practice. To confirm the presumption, a horizontal price or quantity agreement, or a market allocation had to be a comprehensive agreement involving the overwhelming majority of competitors active in the market in question and there had to be no other means of maintaining effective competition through other competitive parameters (for example quality). These strict requirements were laid down by the Swiss Federal Supreme Court in its judgement of 14 August 2002 on price fixing in the book market.

Under the revised Acart of 2003, the same presumption was introduced for certain vertical agreements in Article 5, paragraph 4, ie for such agreements that involve the allocation of territories or resale price fixing:

"The elimination of effective competition will also be presumed in the case of agreements between companies active at different market levels that relate to minimum or fixed prices, as well as in the case of clauses in distribution agreements on the allocation of territories, in the event that sales in a territory by a contractual party from outside that territory are not permitted."

As can be seen from the wording of Article 49 a Acart above, direct sanctions only apply to unlawful agreements in terms of Article 5, paragraphs 3 and 4 Acart.

The main bone of contention at present is whether the sanctions under Article 49 a Acart apply only to the agreements in Article 5, paragraphs 3 and 4 Acart if the presumption of the elimination of competition cannot be rebutted, or whether horizontal price, quantity and market allocation agreements, or vertical agreements involving the allocation of territories or price fixing, are also subject to direct fines in cases where it is possible to rebut the presumption, but where a significant restriction of competition nonetheless exists that cannot be justified on the grounds of efficiency. Although there are good reasons to argue that the legislator only wanted to strike at those agreements in which the presumption cannot be rebutted, informal remarks made so far by the Competition Authority lead to the conclusion that it wishes to extend Article 49 a Acart to agreements that significantly harm competition without being justified for efficiency reasons. From the point of view of the Authority, this attitude is understandable. The requirements for the rebuttal of the presumption under Acart 95 were so easily fulfilled that if Article 49 a Acart was only applicable in cases in which the presumption under Article 5, paragraphs 3 or 4 Acart could be rebutted, the Acart reform 2003 would be considerably less effective. In this regard, the question also remains unresolved of whether, in the assessment of vertical agreements under Article 5, paragraph 4 Acart, the competition authori-

ties should focus only on intra-brand competition or whether they should also look into inter-brand competition. The notice issued on 18 February 2002 on the assessment under competition law of vertical agreements and the current practice of the Competition Commission provides only limited information and it is therefore recommended that the relevant EC provisions are also consulted.

Finally, with regards to the introduction of direct sanctions in the case of agreements in terms of Article 5, paragraphs 3 or 4 Acart, reference must also be made to a further regulation that was introduced with the Acart reform 2003. Article 6 Acart provides that the Competition Commission or the Swiss Federal Council may determine in notices or ordinances the conditions under which individual types of agreements affecting competition can normally be deemed to be justified by virtue of economic efficiency in terms of Article 5, paragraph 2 Acart (see above). Notices and ordinances based on Article 6 Acart are seen as the Swiss counterpart to the EC group exemption regulations in accordance with Article 81, paragraph 3 of the EC Treaty. Based on this regulation, the most practiced-related enactments have been the aforementioned notice concerning the assessment of vertical agreements, and the notice on the assessment of vertical agreements in the automobile sector under competition law of 21 October 2002. In the course of the Acart reform 2003, an explicit authority was introduced in Article 6 to issue notices and ordinances concerning agreements which aim to improve the competitiveness of SMEs, provided they demonstrate only a limited market influence (article 6 lit e Acart). To date, however, no official draft of such a notice or ordinance has appeared.

Article 7 Acart

In Article 7 Acart, abusive practices of market dominant undertakings are declared to be unlawful. The regulation introduced in 1995 corresponds in its structure and content to Article 82 of the EC Treaty. Similarly, in Article 4, paragraph 2 Acart, a definition of market dominance, which was established in Acart 95, almost completely matches the one developed in practice by the EC competition authorities.

In terms of the Acart reform 2003, unlawful practices set out in Article 7 Acart were made subject to direct sanctions in accordance with Article 49 a Acart. Likewise, the definition of market dominance in Article 4, paragraph 2 Acart was extended to include not only undertakings occupying a dominant position within the market as a whole, but also to undertakings on which other undertakings depend due to particular market structure, or which possess a dominant market position in respect of competitors. Whether this will actually broaden the concept of relative market power, thus making it more akin to German or Austrian legislation in that regard, will have to be seen in the light of coming practice.

Outside the area of air transport, the European Commission has no investigative powers on Swiss territory

Calculation of fines and leniency

The fines provided for in Article 49a of the revised Acart are high even by European standards. They can amount to a sum of up to 10 per cent of an undertaking's annual turnover in Switzerland accumulated over the previous three financial years. The specific assessment of the fines is set down in the ordinance on sanctions in the case of unlawful restraints of competition, which also came into force on 1 April 2004 (SOCA). The regulation here largely corresponds to that of the EU (cf Guidelines on the methods of setting fines imposed pursuant to Article 15 (2) of Regulation No 17 and Article 65 (5) of the ECSC Treaty, in: OJ 1998, C 9/3). However, there are differences in the calculation of the amount of the basic fine (Article 3 SOCA) and in the way mitigating circumstances are defined (Article 6 SOCA).

An innovation in the Swiss legal tradition can be seen in the introduction of leniency rules. In the case of compliance with the requirements set out in Article 8 et al SOCA, which also reflect the rules in EU legislation (notice on immunity from fines and reduction of fines in cartel cases, in OJ 2002/C 45/3), an undertaking participating in agreements pursuant to Article 5, paragraphs 3 or 4 Acart can achieve complete release from a fine. What is important here is the indication that undertakings in Switzerland may also make information available in the form of a verbal deposition in order to avoid having to surrender documents, which were given to Swiss competition authorities, to other (foreign) bodies in connection with civil or other proceedings involving the same matters.

Specification of the investigative measures in Article 42 Acart

The specification of the investigative measures relates in the first place to searches of houses and business premises. The terms of Acart 95 already gave the Swiss Competition Authority the power, in principle, to undertake dawn raids. Due to deficiencies in the regulations, however, such a search has never been carried out. With the more precise definition in Article 42 Acart, this is likely to change and in the future there is a strong possibility that houses and business premises will be searched. But it should be noted that the new regulations also present unresolved problems and grey zones. A look at the practice of EC competition authorities will be instructive here as well.

Commencement and transitional provisions

The revised Acart came into force on 1 April 2004. If restraints of competition that were in existence at this time are notified to the Competition Commission, or are eliminated within one year, no fine will be imposed under Article 49 a Acart.

Conclusions

The Acart reform of 2003 brings a pronounced tightening of Swiss competition law and represents a further move in the direction of EC competition legislation, even though the European Commission's power to impose fines is not just restricted to 'hard' horizontal and vertical agreements and abuses in terms of Article 82 of the EC Treaty. The threat of direct fines will greatly increase the importance of investigative measures (the search of houses and business premises), and the question of exchange of information between Swiss and foreign competition authorities also acquires new relevance. Outside the area of air transport, the European Commission has no investigative powers on Swiss territory. There also continues to be no legal basis for the exchange of non-public information between the Swiss Competition Authority and the European Commission. It is also a fact that Swiss undertakings must observe the Swiss Penal Code and regulations on data protection when they supply information to foreign authorities. ■