

The Legal Regime of Competition in Switzerland

Lecturer **Ovidiu-Horia MAICAN**¹

Abstract

Competition policy plays a key role in promoting consumer welfare and market opening. Lack of competition is one of the main reasons for the high prices of many products and services in the Swiss market. Traditionally, Swiss competition policy has been relatively mild and unobtrusive, leaving a relatively uncompetitive internal market unchallenged. The impact of competition policy on economic development has therefore been neutral at best. However, as the slow pace of growth becomes an issue, a stronger competitive approach has been identified as a key factor in improving growth prospects. The 2003 Cartel Law Reform strengthened Swiss competition law, in particular by introducing direct sanctions for the most serious violations and a leniency programme, bringing it closer to that of the European Union and many other OECD countries. The Competition Commission has been given considerable new powers to combat private restrictions on competition. Following the agreement between Switzerland and the EU on cooperation and exchange of information between their competition authorities, which entered into force on 1 December 2014, Switzerland continued bilateral talks with Germany on cooperation between the respective competition authorities. Germany is Switzerland's most important trading partner. On November 1, 2022, Switzerland and Germany signed a cooperation agreement between their competition authorities. After the Swiss Federal Assembly approved the agreement, it entered into force on September 1, 2023. The agreement, like the agreement between Switzerland and the EU, allows competition authorities to apply competition law more effectively in cross-border cases and is drafted similarly to the agreement between Switzerland and the EU.

Keywords: Switzerland, competition, reform, European Union.

JEL Classification: K33

1. Introduction

The priority of the competition authorities is to fight against horizontal cartels and vertical agreements which lead to the closure of the Swiss market.

Such vertical agreements are of particular interest to Swiss, as parallel imports from the EU to the Swiss market are potentially limited. For example, agreements between parties within the European Economic Area (“EEA”) that restrict passive sales outside the EEA are considered illegal from a Swiss perspective, because imports into Switzerland – which does not not part of the EEA – have been affected by such agreements.

Companies often only examine these restrictions internally from the perspective of European competition law and do not take into account the strict regulations outside the EU.

Competition law enforcement in Switzerland has intensified and is becoming

¹ Ovidiu-Horia Maican - Faculty of Law, Bucharest University of Economic Studies, Romania, ovidium716@gmail.com.

increasingly important for global companies selling into Switzerland.

Furthermore, fines have increased over the last twenty years and many foreign companies have had to pay heavy fines in recent years.

Finally, the Swiss Federal Court has now extended the extraterritorial application of Swiss competition law to foreign companies where sales in Switzerland are possible.

2. General aspects

The original statute (1962) created the Antitrust Commission, but gave it very few powers. It was planned to carry out general studies on specific markets, both on its own initiative and at the request of the Minister of Economic Affairs.

Furthermore, the minister could ask the commission to conduct "special" investigations to verify whether the cartels (or similar organizations) are actually against the public interest.

The law specified that the Commission was made up of members (appointed by the Federal Council) from the economic and legal world, as well as representatives of businesses and consumer organisations.²

In practice, this provision has made an important contribution to ensuring broad representation of interest groups on the board, perhaps to the detriment of expertise.

It is likely that only the consumer organization has a clear interest in promoting competition, and this composition is very unusual. The statute states that council members are independent, but that apparently means they are not part of the civil service.

Although the distribution of seats between interest groups is not required by law, it has never been changed.

Members were appointed for a term of 4 years and could only be dismissed by the Federal Council in the event of serious misconduct.

The statutes do not specify what the status of the secretariat was at that time.

The law also gives the commission the obligation and right to publish an annual report.³

Finally, the Commission did not even have the right to publish the results of the investigations⁴ and none were followed by proceedings in federal court.⁵

Only part has been published. Overall, the initial regulations are characterized by a weak antitrust commission and a non-transparent procedure.

The first revision of the law led to many changes in the administrative procedure.⁶

First, although he did not change the composition of the Commission (which, as explained above, may well depend on its composition and the personality of its president), he took a first step towards strengthening of its independence. It is

² Damien Neven, Thomas von Ungern-Sternberg, „Competition Policy in Switzerland”, *The Antitrust Bulletin* 43(2) 1996, p. 21.

³ Ibid, p. 22.

⁴ Ibid, p. 22.

⁵ Ibid, p. 23.

⁶ Ibid, p. 23.

interesting to note, however, that it is expressly mentioned that representing a professional association to which one of the parties concerned belongs is not considered a reason for departure.

The organization of the Secretariat is further specified in the law, which provides that the Council of Ministers decides on its status and administrative level.

Nevertheless, members of the Secretariat were responsible to both the Minister and the Commission, and personnel decisions (particularly dismissals and promotions) were not fully delegated to the Commission (which would have ensured greater independence).

One of the key changes of Revision was to expand the Commission's powers:⁷

It could still make recommendations to the cartel, but now the parties had to declare in writing whether they accepted these recommendations. If they did so, the matter would be closed and (theoretically) possibly never made public at all, since the Commission does not automatically have the right to publish its analyses and recommendations.

If the parties did not accept the Commission's recommendations, the Minister could make a formal decision based on the Commission's proposal.

Companies could only appeal this decision to the Federal Court on questions of law and procedure.

It is important to underline that in this agreement the Commission's recommendations cannot be challenged in court (because they are not legal decisions). Only the decision of the Minister of Economy can be appealed and such legal actions are rare.

Being quite immune from the threat of judicial review, the Commission thus enjoyed a great deal of independence.

The only constraint was the acceptance of the recommendation by the Minister of Economy.⁸

In theory, this could have provided a strong incentive for the Commission to negotiate with the parties. In fact, if the Commission expects the Minister not to act on its recommendations (because the Minister represents broader or narrower interest), it will avoid rejection by the Minister by negotiating an agreement with the parties concerned.

The participation of the stakeholders or the Commission in the negotiations depends largely on what can be expected of the minister. If the parties concerned manage to win over the minister to their point of view, the Commission will find itself in a weak position.

The second revision of the law confirmed the growing role that the commission should play. It was renamed the "Competition Commission" and its opinion is now also required in civil proceedings.

The composition of the commission has been changed.⁹

The secretariat consists of four divisions relating to services, infrastructures, buildings and product markets and is led by the Board of Directors, composed of a director, deputy director and three vice-directors. The Commission is a part-time

⁷ Ibid, p. 23.

⁸ Ibid, p. 24.

⁹ Ibid, p. 24.

body and consists of 11-15 members (currently there are 14) who are appointed by the Federal Council.

The members are elected for four years and their term of office is limited to 12 years.

The majority are independent experts, for example university professors in the fields of law or economics.

The remaining members are representatives of business and consumer organizations. Although the new wording might be slightly abusive, it represents a significant improvement over the previous regulation. Unfortunately, the cancellation conditions for certain cases have not been changed.

The wording of the Commission appointment procedure has been changed.

The Council of Ministers appoints the president and two vice-presidents. It is therefore not clear from the law who appoints the other members of the Commission.

According to the Secretariat, they will also be appointed by the Council of Ministers.¹⁰

The Commission can now issue decisions that are directly binding on the parties involved. The Federal Council can still revoke the decision at the request of the interested parties for reasons of public interest. However, the law makes clear that authorization by the Council should be rare, must be of limited duration and may carry its own legal remedies.

This new procedure provides much stronger guarantees of independence than the previous law in several respects.

First, it is more costly for the executive to overturn a decision than not to follow a recommendation.¹¹

As a result, the incentive to negotiate and accommodate parties in advance is greatly reduced.

Secondly, it is now up to the entire executive, and not a single minister, to speak out against the Commission.

This is important because it will probably be much more difficult for the parties involved to convince the entire board than for a single individual.

Finally, it is clear from the law that derogation by the Federal Council should not be the norm, and this increases the costs of its implementation. The possibilities for judicial appeal have also changed. There are now two levels of judicial appeal.

One for the "appeal committee," which despite its name is a judicial body that judges both law and procedure.

A second appeal may also be lodged with the Federal Court (again on issues of both law and procedure). Since the Commission will now make "decisions", it is important that a direct appeal against the Commission's decision can be made. This new regime considerably strengthens the responsibility of the Commission.

It is important to note that the Commission now has the right and obligation to publicly announce the opening of an investigation. This reduces the risk that an agreement is reached without the public knowing that a negotiation has taken place and, therefore, increases the transparency and accountability of the process.

According to the new law, the commission also has the right to decide whether

¹⁰ Ibid, p. 24.

¹¹ Ibid, p. 25.

or not to publish its decisions.

This is an improvement compared to the previous procedure, in which the minister could block publication.

However, it is regrettable that the Commission has no obligation to publish.¹²

This also significantly strengthened the responsibility of the Commission.¹³ Effective competition is a central concept for the implementation of competition policy in Switzerland.¹⁴

The concept is used as a threshold and partly determines the type of analysis that is performed. The concept of viable competition, developed in the 1960s as an 'acceptable approximation to perfect competition', is presented as the origin of effective competition but is firmly rejected as such.

According to the "guideline", effective competition should be considered "in the context of modern theories of industrial organization, recognizing that competition is a multi-faceted dynamic process". The directive elaborates further by stating that effective competition is ensured when "the function of competition as a mechanism for the efficient allocation of resources is not impeded".¹⁵

Swiss competition law is mainly governed by the Federal Act on Cartels and Other Restrictions of Competition (Cartel Act).

The enforcement of the Cartel Act is primarily the responsibility of the Competition Commission (COMCO), whose decisions can be appealed to the Federal Administrative Court and the Federal Court.¹⁶

Civil courts play only a marginal role in the application of the CartA due to procedural obstacles.

The purpose of the Cartel Act is to prevent the harmful economic and social effects of cartels and other restrictions on competition and to this end establishes behavioral and structural rules.

It applies to anti-competitive practices that have repercussions in Switzerland, even if they originate in another country.

For decades, restrictions on competition such as cartels have been viewed ambivalently in Switzerland.¹⁷

In 1995 the Federal Act on Cartels and Other Restrictions of Competition (Cartel Act), sometimes described as a paradigm shift in Swiss competition policy, introduced a number of new provisions into Swiss competition law.

Inspired by the European counterparts of the law, three pillars for the implementation of competition policy have been built.¹⁸ First, hard-core cartels that fixed prices, limited quantities, or allocated markets were believed to eliminate

¹² Ibid, p. 25.

¹³ Ibid, p. 27.

¹⁴ Ibid, p. 28.

¹⁵ Ibid, p. 33.

¹⁶ Philipp E. Zurkinden, Bernhard C. Lauterburg, Andrea Schütz and Marino Baldi, „Switzerland: Divergence from EU law expected to transform merger control and mutual market access”, *Global Competition Review*, December 4, 2024, p. 4, <https://globalcompetitionreview.com/guide/guide-life-sciences/third-edition/article/switzerland-divergence-eu-law-expected-transform-merger-control-and-mutual-market-access>.

¹⁷ Sven Michal, Frank J. Stüssi. 2010. "Evaluation of Swiss Competition Law." *International Journal of the Economics of Business* 17 (1), p. 99, doi:10.1080/13571510903516979.

¹⁸ Ibid, p. 99.

effective competition; secondly, a merger control system was introduced, which allows the Swiss Competition Commission (COMCO) to block mergers if they create or strengthen a dominant position that could eliminate effective competition; and third, a framework has been created to assess the abuse of market power. In 2003 the sign of the cartel was partially revised and new tools were introduced. In addition, there is a new suspicion that two types of vertical similarities (vertical determination of prices and vertical geographical segmentation of the markets) eliminate effective competition and are therefore subject to the new tools introduced in 2003.¹⁹ Therefore, articles 2 and 73 of the Constitution act as prominent principles for the actions of the federal authorities, including the parade. The sustainable use of available resources, a component of sustainable development, can play a certain role in Swiss competition law.²⁰

In fact, Article 5 paragraph 2 letter a of the Cartel Act cites the more rational use of resources as a reason for economic efficiency that can justify significant restrictions on competition.

A restriction on competition is considered to be economically efficient if the result is more efficient or just as efficient with the agreement as without the agreement. In addition to the rational use of resources, it is also mentioned the rational use of public goods.²¹

3. Cartels and mergers

Swiss merger control procedures are governed by the Federal Act on Cartels and Other Restrictions of Competition (KartG) and the Merger Control Ordinance (MVO). In addition, Comco has established a uniform merger notification form and published a notice on certain procedures for registering joint ventures.

Each company obliged to notify the transaction (that is to say that the merger company or the acquisition of control) may be able to use up to 1 million CHF.

Procedurally, the Swiss competition authority can directly initiate a merger control procedure if a transaction has been carried out without notification.²²

The risk of sanctions falls on the companies which are required to notify the transaction.

In the case of a merger, this would be the companies that are jointly merging, and in the case of a takeover, this would be the company or companies that acquire control.

The current Cartel Act has been in force since July 1, 1996 and has been significantly amended twice (in 2004 with the introduction of direct sanctions and the clarification of the definition of dominant market position and in 2022 with the expansion of control of abusive behavior).

The Cartel Act is largely inspired by European competition law and is based

¹⁹ Ibid, p. 100.

²⁰ Johana Cau, Alexandra Telychko, *Sustainability and Competition Law in Switzerland*, in Pranvera Këllezi, Pierre Kobel, Bruce Kilpatrick (eds.), *Sustainability Objectives in Competition and Intellectual Property Law*, LIDC, Springer 2024, p. 189.

²¹ Ibid, p. 190.

²² David Mamane, Amalie Wijesundera, *Merger control laws and regulations Switzerland*, ICLG, December 2024, p. 5, <https://iclg.com/practice-areas/merger-control-laws-and-regulations/switzerland>.

on the same principle.²³ As in the EU, merger control in Switzerland is based on a preventive notification system. It is therefore common in Switzerland to rely on relevant EU precedents and guidelines. Essentially, the Cartel Act rests on three pillars. Agreements that significantly restrict competition in a market for specific goods or services and that are not justified on grounds of economic efficiency, and any agreement that eliminates effective competition, are expected to be illegal.

For some types of agreements, the fundamental agreements, the Cartel Act assumes that they exclude effective competition.²⁴ The Cartel Act establishes that dominant companies and those with relative market power behave illegally if, by abusing their position on the market, they prevent other companies from entering or continuing to compete or disadvantage commercial partners.

The Cartel Act prescribes that planned concentrations of companies must be notified to the Competition Commission before their implementation if the companies concerned exceeded certain turnover limits in the financial year preceding the concentration.

According to Article 5(1) of the Cartel Act, such agreements are illegitimate if they significantly restrict competition on the market for certain goods or services and are not justified on grounds of economic efficiency, or if they eliminate effective competition. The anticompetitive effects of an agreement do not necessarily have to occur in the market in which it is concluded. The Cartel Act assumes that certain types of agreements eliminate effective competition. Article 7(2) Cartel Act (similar to Article 102 TFEU) sets out a non-exhaustive list of circumstances which, according to recent case law, are likely to have anti-competitive effects, such as any refusal to sell (e.g. refusal to provide or to purchase goods), any discrimination between business partners with respect to price or other terms of trade, any imposition of prices or other unfair terms of trade, any price undercutting or other conditions directed against a particular competitor, any restriction of production, delivery or technical development, any conclusion of contracts on the condition that the other contracting party undertakes to accept or deliver additional goods or services; and restricting the ability of buyers to purchase goods or services offered domestically and abroad at market prices and conditions customary in the relevant foreign sector.²⁵

The Cartel Act provides for a system of preventive merger control which is essentially based on the EU merger control system which existed before the entry into force of the current merger control regulation. A proposed merger must be reported to Comco if, in the audited annual reports for the financial year preceding registration, the turnover of the companies concerned exceeds 2 billion francs worldwide or 500 million francs in Switzerland and if at least two of the companies concerned each own one.

The merger control procedure is divided into two phases.²⁶

After submitting a complete merger notification, the COMCO or its secretariat shall examine within one month whether there are indications that the proposed concentration would create or strengthen a dominant position. In the absence of such information, the Competition Commission cannot further examine the proposed

²³ Philipp E. Zurkinden, Bernhard C. Lauterburg, Andrea Schütz and Marino Baldi, *op. cit.*, p. 4.

²⁴ *Ibid*, p. 4.

²⁵ *Ibid*, p. 8.

²⁶ *Ibid*, p. 10.

concentration and it can be implemented without reservations.

Although the Cartel Act does not point out that no in-depth investigation will be carried out, the COMCO regularly informs the companies involved of this fact.

However, if the preliminary investigation reveals indications that the concentration would create or strengthen a dominant position, the Competition Commission or its secretariat will carry out an in-depth investigation, which could last up to four months.

The COMCO may approve, prohibit or authorize notified concentrations under certain conditions.²⁷

The dominance test was introduced as a substantive evaluation criterion. A merger plan can therefore only be prohibited by the Competition Commission if the newly created or strengthened entity creates or strengthens a dominant position that eliminates effective competition (qualified dominant position).

By law, unilateral effects below the threshold of market dominance do not fall within the supervisory competence of the COMCO. Practice shows that this qualified dominance test makes it very difficult to ban mergers. This is demonstrated by the fact that since the introduction of the preventive merger system in 1995, only three proposed mergers have been banned, with only one ban decision having become final and binding.

4. Arbitration

The arbitrability of competition law disputes has long been questioned due to its public policy nature and the fundamental importance of the legislation governing this area between the subject of the dispute and the nature of the agreement in question.²⁸

The Swiss Supreme Court has ruled that arbitration can be denied only in the case of a dispute whose judgment is entrusted exclusively to the judges of state courts according to mandatory provisions related to public order, such issues being evaluated exclusively in the light of the interests public policy that the arbitral tribunal must respect and not to any extraneous conception of public order.

The Swiss Supreme Court favors a pragmatic case-by-case approach to this concept, as it holds that the rather vague term "public order" cannot be defined in a way that fits an unlimited number of circumstances.

However, the Swiss Supreme Court usually defines the term by providing a general definition and listing non-exhaustive examples.²⁹

The approach of the Swiss Supreme Court therefore differs from the position of the European Court of Justice, according to which EU competition law must be considered a matter of public order under the New York Convention.

The question of arbitration must be distinguished from the question of which law applies to the merits of a dispute.³⁰ If that law contains mandatory provisions

²⁷ Ibid, p. 10.

²⁸ Hubert Orso Gillieron & Jean Marguerat, *Arbitration and Competition – A Swiss perspective* CPI Antitrust Chronicle July 2019, p. 3, https://mll-legal.com/wp-content/uploads/2021/06/HGI-JEM_Arbitration-and-Competition-A-Swiss-Perspective-2.pdf.

²⁹ Ibid. p. 4.

³⁰ Ibid, p. 5.

regarding the substance of the dispute, the arbitral tribunal must obviously apply those provisions in its reasoning.

In order for a dispute relating to a competition law issue to be resolved by arbitration, an arbitration agreement must exist.

In most cases, the arbitration agreement takes the form of an arbitration clause included in the commercial agreement to which the dispute relates (“compromise clause”). However, the parties may decide to arbitrate the dispute after it has arisen through a submission agreement (“compromise”).³¹

In order for competition complaints to be heard by arbitral tribunals, they must fall within the scope of the relevant arbitration clause (*ratione materiae*).

Once it is determined that the parties have first agreed to arbitration, the scope of their arbitration agreement will be expanded and interpreted fully.³²

A broadly worded arbitration clause, such as one containing word such as “arising out of or in connection with,” will cover non-contractual matters, including competition claims. Arbitrators may be specifically selected based on their expertise in areas considered particularly important to the handling of a case.³³ Besides arbitration, arbitrators can also be selected based on their knowledge of competition law or economic issues.

Additionally, arbitration procedures allow flexibility in the appointment of experts by the parties or the arbitral tribunal. As Switzerland is not a member of the European Union, the decisions of Switzerland-based arbitral tribunals are not subject to review by EU courts and competition authorities, allowing them to follow their own interpretation of the rules. competition rules of the EU.

However, an arbitral award rendered in Switzerland which is contrary to EU public policy would not be enforceable within the territory of the European Union, which imposes a certain degree of self-discipline on arbitral tribunals responsible for interpreting the awards. EU competition rules.

Arbitration courts can not only decide on the payment of sums of money, but also issue provisional injunctions. In Switzerland the grounds for setting aside an arbitration award are particularly limited. The Swiss Supreme Court processes annulment appeals quickly, generally rendering its decision within 4 to 6 months.³⁴

5. Unfair competition

The revised Cartel Act provisions entered into force on April 1, 2012, with the exception of art. 8 Cartel Act on general terms and conditions that applied from 1 July 2012.³⁵

Under the revised Cartel Act, companies (and individuals, directors, employees or agents acting on behalf of their company) shall, in addition to the existing provisions of the Cartel Act, be considered unfair if: in offers for registrations in private registers

³¹ Ibid, p. 5.

³² Ibid, p. 5.

³³ Ibid, p. 5.

³⁴ Ibid, p. 8.

³⁵ Jürg Schneider, Ahmet Kut, *The Revision of the Unfair Competition Act*, Newsletter no. 102/ January 2012, Walderwyss Attorneys at Law p. 1, <https://www.walderwyss.com/assets/content/publications/1143.pdf>.

of any kind, in placement orders, or in the promotions for these offers, do not include specific information in legible and clear language, submitting invoices for register bookings or for placement orders without having received a mandate for these bookings or orders; this new provision concerns placement and registration offers camouflaged as invoices, promise to provide goods, premiums or services under conditions that qualify as a pyramid or Ponzi scheme, advertising and marketing goods and services by means of e-commerce and omitting relevant information, promising and organizing (advertising) competitions or prize draws that are ultimately subject to a fee.³⁶

In Hertel case, the European Court of Human Rights (“ECHR”) upheld the application of provisions of unfair competition law outside of a traditional competitive relationship setting.³⁷ At the same time, the Court held that the specific application in question, that which prohibited Mr. Hertel on pain of criminal penalties from stating that food prepared in microwave ovens is a danger to health, was disproportionate in light of the freedom of speech protections found in Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms. Hertel set out to research the effects of consumption of food prepared in microwave ovens with the assistance of Professor Blanc, a technical advisor to the Federal Institute for Technology of Lausanne. Over the course of two months, eight subjects were fed a microwave irradiated macrobiotic diet while samples of their blood were taken for analysis. According to Hertel and Blanc, these tests revealed changes in the subjects’ blood composition similar to those observed in the initial stages of cancer, thereby indicating a causal relationship between the consumption of microwave irradiated food and cancer. Eventually, Hertel’s article, along with its drawings, came to the attention of the Swiss Association of Manufacturers and Suppliers of Household Electrical Appliances (“MHEA”). The MHEA immediately applied to the President of the Vevey District Court for an interim injunction based on the Federal Act against Unfair Competition (“UWG”).³⁸ The President of the Vevey District Court rejected the application and expressed doubts about the applicability of the UWG to unrelated fields of activity. The President further noted that the statements were not directed at a single manufacturer and therefore no damage could be established. Nevertheless, the President assessed the potential impact of the publication on the public and, despite little or no perceived effect, ordered the magazine *Franz Weber* not to use images of a skeleton, a cross or a tomb in connection with the presentation of a microwave oven in the future.

The MHEA was more successful in its action against Hertel.³⁹ The MHEA applied under the Cartel Act to the Commercial Court of the Canton of Bern to stop Hertel from declaring that food prepared in microwave ovens was a health hazard and led to changes in the blood indicative of a pathological condition or the beginning of a carcinogenic process and through the use of the image of death in publications and public speeches about microwave ovens. The Commercial Court of the Canton of Bern

³⁶ Ibid, p. 1.

³⁷ A. Kamperman Sanders, „Unfair Competition Law and the European Court of Human Rights: the Case of Hertel v. Switzerland and Beyond”, *Fordham Intellectual Property, Media and Entertainment Law Journal*, vol. 10, no. 1, 1999, p. 305. Available at: <https://ir.lawnet.fordham.edu/iplj/vol10/iss1/6>.

³⁸ Ibid, p. 305.

³⁹ Ibid, p. 308.

issued the injunction against Hertel, under penalty of the penalties provided for in Article 292 of the Criminal Code (imprisonment or fine) and Article 403 of the Code of Criminal Procedure of the Canton of Bern (a fine of up to 5,000 Swiss francs or imprisonment, in serious cases up to one year).

This decision was upheld before the Swiss Federal Court (First Civil Division), which ruled that Hertel's statements fell within the scope of the Cartel Act.⁴⁰ The Federal Court considered that the application of the Cartel Act was not contrary to the Convention. The Federal Court added that: any person claiming scientific freedom is therefore entirely free to expose their knowledge in the academic field but, in matters of competition, they cannot claim to have the truth on their side where the opinion that he advances is contested.

An opinion that has not been scientifically confirmed must in particular not be misused as a disguised form of positive or negative publicity of one's own work or that of others.

In reviewing the Swiss Federal Court's decision, however, the ECHR found that it would be "unreasonable to restrict freedom of expression only to generally accepted ideas" and expressed doubts about Hertel's true freedom to pursue his research, particularly when presenting results outside the economic sphere could well fall within the broad scope of the Cartel Act.

Restrictions on freedom of expression are simply opposed to the formalities of Article 10 of the Convention, requiring that the prohibition be provided for by law, consistent for a legitimate and necessary purpose, in a democratic society.⁴¹

The change proposed by the Federal Council was, however, very controversial in parliament and almost led to the failure of the entire UWG revision. In the end, a compromise was reached: the threshold of Art. 8 Cartel Act will be lowered, but only for contracts with consumers.

According to the new Art. 3 para. 1 Cartel Act, the law is designed for anyone who offers goods, works or services via e-commerce. Such person is obliged to clearly and completely state his identity and contact address (including e-mail, indicate the individual technical steps to be taken to conclude the contract, provide appropriate means to identify and correct input errors before an order is placed; and immediately acknowledge receipt of the customer's order electronically.⁴² As an exception, these requirements do not apply to voice telephony or to contracts concluded exclusively by exchange of electronic mail (e-mail) or comparable individual communications.

The Unfair Commercial Practices (UCP) Directive not only contributes to the proper functioning of the internal market, but also aims to achieve a high level of consumer protection. This is achieved through the laws, regulations and provisions of the Member States relating to unfair commercial practices which harm the economic interests of consumers.

The objective of the Swiss law, however, is much broader: it aims at fair and distortion-free competition in the interests of all parties involved (art. 1 Cartel Act).⁴³

⁴⁰ Ibid, p. 309.

⁴¹ Ibid, p. 315.

⁴² Jürg Schneider, Ahmet Kut, *op. cit.*, p. 3.

⁴³ Jung Peter, *UCP-Directive and Swiss Law against Unfair Competition*, EuCML, Issue 2/2016, p. 102, https://edoc.unibas.ch/57457/1/20171205141707_5a269c535bb25.pdf.

The UCP Directive and Swiss law aim to protect the interests of all interested parties and not just the specific economic interests of consumers. It protects the interests of both consumers and competitors and non-consumer applicants, while protecting the public interest.

Furthermore, the Cartel Act also covers non-economic interests, such as the protection of privacy if behaviors with a significant impact on competition put it at risk.

The Directive applies exclusively to commercial practices between businesses and consumers during and after a commercial transaction relating to a product.

The Swiss law applies to any conduct that could potentially harm the relationship between competitors or between suppliers and customers. The Swiss law therefore applies to all persons, such as competing suppliers in a supply market, competing buyers in a demand market and third parties such as the media, regulatory bodies or scientists. Furthermore, unlike EU law (Article 3(1) of Directive 2005/29/EC), Swiss law does not require a direct reference to a commercial transaction relating to a product to be applicable. It is often argued that the general rule is not applicable to a given case because a specific rule is generally applicable and application of the general clause is not possible. However, while it is true that the case may fall within the scope of a specific rule, in reality most of the time the specific requirements of that specific rule are not met.⁴⁴

6. Conclusions

On May 24, 2023, the Swiss government published a revised draft CartG and associated justification. Although Parliament is likely to modify at least some parts of this new proposal, some points are already worth noting. An important part of the upcoming review will be the introduction of the significant obstacle to effective competition test (“SIEC test”) as a relevant standard for merger control procedures. Today, Swiss merger control evaluates transactions based on the market dominance test.

A transaction can only be prohibited (or subject to corrective action) if it creates or strengthens a dominant position and thus eliminates effective competition.

Other elements of the planned revision include regulatory deadlines for competition authorities and courts, compensation for parties to proceedings before ComCo and a strengthening of civil antitrust law.

Furthermore, following the feedback during the consultation process, the Swiss government is currently a separate reform proposal regarding the organization of the authorities (institutional reform) to Parliament.

Bibliography

1. Cau, Johana & Alexandra Telychko, *Sustainability and Competition Law in Switzerland*, in Pranvera Këllezi, Pierre Kobel, Bruce Kilpatrick (eds.), *Sustainability Objectives in Competition and Intellectual Property Law*, LIDC, Springer 2024, 187 - 201.

⁴⁴ Ibid, p. 104.

2. Gillieron, Hubert Orso & Jean Marguerat, *Arbitration and Competition – A Swiss perspective*, CPI Antitrust Chronicle July 2019, 1-10, https://mll-legal.com/wp-content/uploads/2021/06/HGI-JEM_Arbitration-and-Competition-A-Swiss-Perspective-2.pdf.
3. Mamane, David & Amalie Wijesundera, *Merger control laws and regulations Switzerland*, ICLG, December 2024, 1 - 25, <https://iclg.com/practice-areas/merger-control-laws-and-regulations/switzerland>.
4. Michal, Sven & Frank J. Stüssi. 2010. "Evaluation of Swiss Competition Law." *International Journal of the Economics of Business* 17 (1): 99–109. doi: 10.1080/13571510903516979.
5. Neven, Damien & Thomas von Ungern-Sternberg, „Competition Policy in Switzerland”, *The Antitrust Bulletin* 43(2) 1996, 2-52.
6. Peter, Jung, *UCP-Directive and Swiss Law against Unfair Competition*, EuCML, Issue 2/2016, 102 - 106, https://edoc.unibas.ch/57457/1/20171205141707_5a269c535bb25.pdf.
7. Sanders, A. Kamperman, „Unfair Competition Law and the European Court of Human Rights: the Case of Hertel v. Switzerland and Beyond”, *Fordham Intellectual Property, Media and Entertainment Law Journal*, vol. 10, no. 1, 1999, p. 305-329. Available at: <https://ir.lawnet.fordham.edu/iplj/vol10/iss1/6>.
8. Schneider, Jürg & Ahmet Kut, *The Revision of the Unfair Competition Act*, Newsletter no. 102/ January 2012, Walderwyss Attorneys at Law p. 1-4, <https://www.walderwyss.com/assets/content/publications/1143.pdf>.
9. Zurkinden, Philipp E., Bernhard C. Lauterburg, Andrea Schütz & Marino Baldi, „Switzerland: Divergence from EU law expected to transform merger control and mutual market access”, *Global Competition Review*, December 4, 2024, p. 4-20, <https://globalcompetitionreview.com/guide/guide-life-sciences/third-edition/article/switzerland-divergence-eu-law-expected-transform-merger-control-and-mutual-market-access>.