

A major reform of the Swiss cartel legislation

by Martin Ammann, Meyerlustenberger Lachenal

This article summarises the main proposals of a comprehensive project to reform the Swiss cartel legislation published by the Swiss Federal Council in February 2012. Most of these proposals have already been discussed through a formal consultation procedure with interest groups, political parties and competition law specialists, and the results of these discussions are reflected in the submitted project which will now be discussed in the Swiss Parliament. It can therefore realistically be expected that at least some of these proposals will become law in the near future.



Reform of the Swiss cartel authorities

Under the current Swiss Cartel Act (CartA) the Swiss Competition Commission (COMCO) is organised as a commission of 12 individuals elected by the Swiss government. They either represent interest groups in the private sector of the Swiss economy or are university professors active in the field of cartel law. These individuals work only part time for the COMCO. The COMCO is supported by a professional Secretariat, which under the management of the COMCO handles the investigations in cases of presumed violations of the cartel law and in merger control cases and prepares the final decisions which are issued by the COMCO.

Through a reform of the CartA in 2003 the COMCO was given the power to impose quasi-criminal sanctions for violations of the CartA, which can include a penalty of up to 10% of the turnover of the accused enterprises realised in Switzerland and which can easily exceed the CHF100m limit.

The legal basis of this broad power as well as the composition of the COMCO has been questioned. Furthermore, a better separation of the investigation function and the deciding authority was requested.

The Swiss government now proposes to transform the Secretariat of the COMCO into a “Competition Authority” organised as a separate legal entity independent from the federal administration with authority to investigate cartel cases and to propose sanctions. In cases of merger, this Competition Authority can directly issue decisions.

The Competition Authority shall furthermore assume several other functions such as advising the public administration as well as private enterprises

in competition law matters.

The COMCO shall be transformed into a court of first instance and as such be set up as a “Competition Court” within the existing Federal Administrative Court (which already under the current law deals with competition cases, but only in cases of appeal of the decisions of the COMCO). This chamber will be composed of full time professional judges with legal expertise in cartel law and part time judges that have sufficient economic or industrial backgrounds.

This “Competition Court” will act as the court of first instance for cases prepared by the Competition Authority, in particular with regard to sanctions. In merger control cases, however, it will only decide appeals of the decisions of the Competition Authority. Decisions of the Competition Court can only be appealed to the Federal Court, which will be the court of last resort.

Since – with the exception of merger control cases – decisions are directly taken by the Competition Court and there is no initial decision by the COMCO any longer, the procedure is reduced from three to only two steps.

This reform of the institution is widely accepted as appropriate and helpful to improve the efficiency and the legal basis of Swiss competition policy. There is, however, opposition coming from some of the interest groups which are represented in the COMCO and which will not have any further direct involvement in the Competition Authority if this part of the reform is enacted.

Improvement of the fight against hard core cartels

There is a desire to mitigate the negative impact of the high value of the Swiss currency. To address this problem the Swiss government proposes to

strengthen the ability to fight five cases of horizontal and vertical agreements, which under the existing cartel law (article 5, sections 3 and 4 CartA) are considered to be hard core cartels and therefore directly sanctionable.

Under the current CartA these hard core cartel cases are worded so as to lead only to presumptions that they eliminate effective competition, which presumption can be reversed if a justification on grounds of economic efficiency in a specific case can be established. It is mainly on the Competition Authority to establish in detail the negative impact on competition once the enterprise concerned brings forward arguments against the stated presumption.

Under the proposed reform these hard core practices shall be clearly prohibited and only be permitted if justified in the particular case on grounds of efficiency. However, instead of requiring the Competition Authority to establish the negative impact on competition, it will in practice be on the enterprises to prove the justification on grounds of efficiency in their particular case. This causes a shift of the focus of the relevant issues and of the main burden of proof.

The Competition Authority shall, however, help the enterprises prepare their proof, e.g. if they do have not sufficient access to the relevant market data.

In addition, it is planned to further define what constitutes legally allowable grounds which would be accepted as sufficient to lead to an exemption of the stated prohibition. This part of the reform is more controversial. For example, it is argued that in the case of the vertical agreements it would rather be justified to make the law more tolerant instead of tightening it, as now proposed.

Improvement of the opposition procedure

Under the existing CartA it is possible for enterprises to submit their contracts, or parts thereof, to the competition authorities for evaluation if they are not sure whether they comply with the CartA. This procedure, which is intended to help the enterprises avoid sanctions by having their behaviour checked in advance has, however, for several reasons rarely been used.

The proposed reform will institute a speedier review process by the Competition Authority and extend the grace period during which time the enterprises can correct their agreements or behaviours without being sanctioned. It is expected that this reform will result in more frequent use of the review procedure and therefore there will be

more predictability for the enterprises as to their compliance with the CartA.

Legal basis for the compliance defence

Obviously with the intent to reduce the threat of severe sanctions, in particular on international groups of companies, a motion was lodged in the Swiss Parliament to formally include a compliance defence in the law. On the basis of this defence an enterprise should be able to avoid or at least reduce possible sanctions under the CartA, if it can prove that it has a compliance programme in place. This motion was connected with the proposal to include criminal sanctions against individuals within an enterprise which were violating the CartA. The stated motion obviously assumed that the possibility of the imposition of such individual sanctions would further help to reduce the sanctions on the enterprise for which the individual has acted.

It is now planned to accept the compliance defence (which does not exist under EU law) and to even refer to it in the CartA, but to set high standards for what constitutes a sufficient compliance programme. The direct sanctioning of individuals is, however, highly controversial and therefore not part of the proposed reform.

Improvement of private enforcement

Under the current CartA only people or enterprises directly affected in their business by the anticompetitive behaviour of another actor have a right to sue such other actor. This does not include affected end-consumers. This is one of the reasons why private enforcement of cartel law still plays a minor role in Switzerland.

In order to strengthen this tool it is proposed to extend the right to sue in a civil court under the CartA also to end-consumers and their representatives.

In addition, a better coordination of such private enforcement actions with the public enforcement actions is proposed by reducing the possible sanctions imposed by the Competition Authority under the CartA if in the same case, the enterprise concerned is also ordered by a civil court to pay damages.

Reform of the merger control

Finally, the federal government proposes to reform the merger control rules in the CartA. It proposes to shift the criteria of the merger control away from the pure analysis of whether the notified merger establishes or reinforces a dominant position of an enterprise in the relevant market, to a more

complex analysis of the impact of the merger on functioning competition by introducing the SIEC-test (Significant Impediment to Efficient Competition), which is already used in the EU and in the US.

It is furthermore proposed to simplify and to better coordinate the notification requirements in international merger cases, which are already controlled by the EU competition authorities, and to coordinate the deadlines and procedures of merger control with those in place within the EU.

Author:
Dr.iur. lic.oec. Martin Ammann LL.M., Partner
Meyerlustenberger Lachenal
Attorneys at Law
PO Box 1432
CH 8032 Zürich, Switzerland
Tel: +41 44 396 91 91
Fax: +41 44 396 91 92
Email: martin.ammann@mll-legal.com
Website: www.mll-legal.com