

Competition Law and Policy in Switzerland

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Introduction

Competition policy plays a key role in promoting consumer welfare and market opening. Lack of competition is a main reason for the high prices of many products and services on the Swiss market. Traditionally, Swiss competition policy has been relatively lenient and low profile, allowing a relatively uncompetitive internal market to remain unchallenged. The impact of competition policy on economic development has therefore been at best neutral. As the slow rate of growth becomes an issue, however, a more vigorous approach to competition has been identified as an important factor for improving growth prospects.

The 2003 reform of the Cartel Act strengthened Swiss competition law, in particular by introducing direct sanctions for the most serious infringements and a leniency programme, thus bringing it closer to that of the European Union and of many other OECD countries. The Swiss Competition Commission has been given considerable new powers to combat private restraints of competition.

Comco will have to enforce the new laws resolutely and step up action to promote regulatory reforms. In doing so, it is burdened by institutional arrangements and mechanisms that temper its full independence. The Swiss competition enforcers do not benefit from the networks of exchanges available to national competition authorities in EU member States. Matters are further complicated by a relative lack of resources.

Strengthening competition is a key for an effective internal market. The amendments to strengthen the Cartel Law and pending reform proposals signal determination on the part of the Confederation to tackle the problems. It is too early to say how effective they will be and the extent to which they will encourage a change in general attitudes, notably among the sub federal levels of government. ■

How has Switzerland improved its competition law?

Switzerland's first law on cartels, enacted in 1962, was lenient, suffering from a lack of decision making powers and procedural weaknesses. Before a 1985 revision, it permitted a range of arguments as alleged counterweights against the harm from a cartel. In 1995, a new competition law (and a law on the internal market) sought to lay the groundwork for a stronger competition policy. The objective of the 1995 Cartel Law is "to prevent the adverse economic or social consequences of cartels and other restrictions on competition, and to promote competition in the interests of the market economy based liberal principles". It conferred decision making powers on the Competition Commission (*Commission de la Concurrence*, or "Comco"), to forbid illicit restrictions on competition. But the 1995 law had weaknesses too, notably the fact that sanctions could not be imposed until the second offence.

A revised competition law was adopted in 2003, providing Comco with sharper tools. After a transition period, full application started in April 2005. The new law seeks to address the weaknesses and to align Swiss competition law closer to the EU (and broader OECD) framework, via:

- direct financial sanctions, ranging up to 10% of turnover (over three years);
- leniency, authorising reduction of or exemption from fines in exchange for informing authorities and co-operating with a cartel investigation;
- presumption of illegality for vertical agreements about prices and territories;
- permission for agreements among SMEs (subject to conditions);
- new investigation procedures;
- disclosure requirement for Comco members to declare their interests; and
- clearer application of the law to both public and private enterprises.

Swiss law about restrictive agreements is based on the principle of "abuse". By contrast, the laws of most OECD jurisdictions are based on the principle of prohibition. The "abuse" approach puts the burden of proof on Comco. Comco has prohibited eleven horizontal cartels and agreed to six "accords amiables", most of them of limited economic significance. It has prohibited few vertical restraints, although they lead to price differences between Switzerland and other countries. Recognising that vertical agreements raise issues about parallel imports and resale, in 2002 Comco announced a policy about vertical restraints which is close to that of the EU.

Swiss law about abuse of dominance is close to those of the EU. The 2003 revisions call for analysis of market relationships as well as market structure and set out a more specific definition of a dominant enterprise. It is not yet clear how effective these changes will be in practice. The number of decisions is small.

The Swiss regime about mergers is more permissive than that of many other OECD countries, targeting only mergers that may eliminate competition. Comco may allow a merger that creates a dominant position if it improves the conditions of competition in another market. Only one merger has been forbidden so far, although pre-notification of mergers has led some firms to abandon their merger plans, while others were subject to conditions.

Swiss consumer protection is less closely connected with competition issues than in many other jurisdictions. Comco has no direct responsibilities for consumer affairs, although a consumer representative sits on its board. Despite a range of legal and institutional structures, such as the Federal Consumer Bureau, the Federal Consumer Commission, the Price Surveillance Authority and consumer associations, consumer protection is evidently not a high priority. ■

Is enforcement strong enough?

The structure and staffing of the competition authority does not give it the authority and resources to use the tools at its disposal as effectively as it might.

Comco's structure is based on the Swiss *milice* tradition. Its members serve part-time. Of the fifteen members, six represent interest groups, including industry, retail, consumer, labour and agricultural associations. Members may also have positions on company boards, although they must declare their interests. The Federal Council nominates the members of Comco and designates the head of Comco's secretariat. The Comco secretariat has around 45 staff with civil servant status.

Comco's institutional structure is weak in international comparison. Reliance on a part time board with members who represent special interests has raised considerable controversy. The new sanctions and leniency provisions highlight the difficulties. Conflicts of interest may arise in deciding whether to impose sanctions affecting an enterprise whose representative is a member of Comco or about implementing the leniency programme through the denunciation of a company whose interests are represented by one of the associations represented on Comco. The procedure for disqualification if a case involves a member's personal interests would not resolve all such conflicts. The Federal government sought to reduce the number of members and to remove special interest representatives, but these changes were abandoned in the face of strong resistance, in order to assure passage of the other amendments to the Cartel Law.

The link between Comco's secretariat and the Ministry of economy remains close, despite formal separation. The link may help with competition advocacy, but it obscures the independent view of the competition authorities. Procedures do not distinguish Comco's activities clearly from those of its secretariat. Confusion between the roles of investigation and judgement may raise legal concerns under the European Convention on Human Rights and is not in line with best practice.

Information about the actions and policies of the competition authorities is readily available. Comco's decisions, and those of the Price Surveillance Authority, are published in a regular review, and their Internet sites are well presented. Comco put significant effort into communicating the implications of the 2003 Cartel Law revision to enterprises.

The methods of investigation are relatively weak, especially for hard core cartels. The law is unclear on the scope of the tools that are available. Before 2003 amendments, the Comco secretariat often proposed a friendly

settlement (*accord à l'amiable*), since direct financial sanctions were not yet possible. The direct sanctions introduced with 2003 revision are applied administratively. These fines may be up to 10% of the firm's turnover of the past three years. The new leniency programme, inspired by the practice of other OECD countries, permits reducing or eliminating the fine if a company collaborates with Comco to uncover a cartel. It was the subject of considerable controversy, because this type of arrangement is not in the Swiss judicial tradition.

The competition authorities suffer from relative international isolation. To be sure, they engage in significant international collaboration, notably within the OECD and the International Competition Network. But no formal agreements are in place for co-operation with other competition authorities over cases with an international reach.

Resources are low in international comparison. Constraints could limit the scope for making full use of the 2003 amendments. So far, Comco has issued few decisions about cartels and abuse of dominance. A planned increase in staff to deal with the expected greater workload has not fully materialised. ■

What are the limits of competition policy?

The application of competition policies is limited by legal and regulatory regimes at the federal level. Comco may also find it difficult to challenge cantonal provisions that segment and close up the internal market, such as restrictive regulations on prices and market entry and monopoly rights and concessions held by publicly owned local enterprises or by the cantonal and municipal authorities themselves.

The Cartel Law provides for four types of general exemption:

- Laws may take precedence over the Cartel Act if they establish an official market or price system or entrust certain enterprises with the performance of public interest tasks, granting them special rights. In practice this has meant partial exemption from the Cartel Law for agriculture, healthcare and network industries. But a recent court decision about electricity concluded that a general provision in the sector law does not preclude application of the Cartel Law.
- Agreements significantly affecting competition may be declared lawful if they are justified on grounds of economic efficiency. Comco has issued four communications to date about general or sector-specific forms of co-operation that are not considered to be violations.
- Abuses of dominant position may be deemed lawful if they are justified for legitimate business reasons. This principle is set out in the Federal message that accompanied the Law, not in the text itself. No abuse has yet been found to be justified.
- Exceptional authorisations can be granted by the Federal Council, on the grounds of compelling public interests. They must be of limited duration and may be granted conditionally. There have only been two requests for this authorisation; one was denied and the other was withdrawn.

Competition law and principles can help to move reform forward in infrastructure sectors. Relatively weak in some areas, they are responsible for a notable success in opening the electricity market and some successes in telecommunications, forcing an improvement in access conditions for telecoms networks.

Electric power reform proposals that broadly follow EU guidance about electricity market opening are now under discussion, after previous reforms failed to win the popular vote in 2002. Pending enactment of regulated third party access and establishment of independent system operation and independent regulation, Comco has been active in this sector. Its decisions have set conditions for establishment of a system operator and found that a refusal to allow third party access was an abuse of dominance. In gas, though, reform plans were shelved in the wake of the unsuccessful 2002 referendum on electricity reform. Comco has not launched any enquiry into potential abuse of market power in this sector that is characterised by dominant or monopoly structures for imports and internal supply.

In financial services, a key competition issue is the regulatory framework. Fragmenting responsibilities, with different supervisors for different kinds of institutions, could distort competition. Publicly owned cantonal banks benefit from public guarantees. Fire insurance is typically a cantonal monopoly. Comco's investigation showed that cantonal monopolies charge lower premiums than private insurers, evidently because the cantonal monopolies have lower marketing and do not always have to calculate the full costs for their capital at risk.

Swiss prices for health care are high, and reforms are under debate. Comco has proposed to encourage price competition for ambulatory care and hospital services by abolishing the obligation to contract. Comco recommended adopting the patent law principle of international exhaustion in order to support parallel imports of pharmaceuticals and other patented products, but the Federal Council did not follow that recommendation. ■

**How does
competition
advocacy promote
reform**

One of Comco's missions is to promote competition, through recommendations to government, opinions on draft Federal legislation and expert advice to other authorities. Comco has made about a dozen recommendations, mostly to the Federal Council; however, most have not been taken up. Comco's opinions have related largely to telecommunications, energy and healthcare. Comco is involved in working groups on the reform of important laws, such as the revision of the Internal Market Law.

The creation of an internal Swiss market was a founding principle of the Swiss Confederation, but the market remains extremely fragmented. The cantons have extensive powers to intervene in markets. They are involved in the supply and pricing of public services such as water, electricity and regional transport, often by owning or operating the local public utilities. Canton regulations particularly affect professional and other services and the construction industry.

The 1995 Law on the Internal Market (*loi sur le marché intérieur* – LMI) seeks to eliminate restrictions on market access introduced by cantons and communes affecting the exercise of a profession on the whole territory of Switzerland. The LMI is a framework law, which defines general principles to be observed and an approach which rests on mutual recognition. The LMI has not been very effective. Decisions by the Federal Tribunal treat federalism as more important than the internal market, excluding the right of establishment from the scope of the law. It is possible to appeal against abuses, but few actions have been brought to court because of the length and cost of the procedure. Comco is responsible for monitoring compliance. Comco can address recommendations to the cantons or municipalities, but it cannot issue binding decisions about application of the LMI.

Reform of the LMI was due. Proposed changes included extending rights of market access according to the rules of the place of origin, restricting the exceptions and authorising Comco to challenge decisions. One motivation for reform was put Swiss citizens in the same position as EU citizens, who can take advantage of the Swiss/EU agreement on the free movement of people, including mutual recognition of diplomas. The reform will help to apply the *Cassis de Dijon* principle for goods and services circulating within Switzerland. Parliament adopted reform legislation on 16 December 2005. ■

How might Switzerland strengthen competition policy?

- ***Ensure that Competition Commission members are economically and politically independent.***

The independence of Comco is not now guaranteed, because of the inherent potential for conflict where members can include representatives of interest groups and corporate directors. Sanctions and the leniency programme have compounded the problem. Disqualification procedures and a register of members' interests are only partial solutions. A clearer separation between the Comco Secretariat and the ministry would also ensure greater clarity.

- ***Draw up rules of procedure specific to the law on cartels.***

The general provisions of administrative law are not geared to the specific features of competition law. To ensure that the law on cartels remains effective, it needs its own rules of procedure.

- ***Increase the competition authorities' resources.***

Resources of the competition authorities are limited in relation to their statutory tasks, including monitoring compliance with the LMI. A substantial increase in Secretariat resources would be crucial in enabling Comco to assume the powers given to it by Parliament. It would make it possible to intensify and extend investigations, while making procedures as short as possible.

- ***Develop international cooperation.***

Many anticompetitive practices and many mergers have an international dimension. The relative isolation of the Swiss authorities has increased since the creation of the European Competition Network. The effectiveness of

Comco's activities should be strengthened through international competition agreements.

- **Replace the principle of preventing abuse by that of prohibiting cartels.**

Relying on the principle of "abuse" tends to slow down Comco's investigation and decision-making. The introduction of a prohibition system would send a clear signal of a change of paradigm about cartels.

- **Strengthen competition in regulated markets via increased co-operation between Comco and sectoral regulatory authorities...**

Comco is now consulted in advance about whether a firm has a dominant position. Systematic bilateral consultations about cases and regular informal consultations could improve the overall coherence of competition policy.

- **Reconsider the roles of price monitoring and consumer protection.**

If some of the Price Monitoring Office's activities are deemed necessary, consideration should be given to the appropriateness of the separation between that office and Comco and the most effective solution in a context of limited resources. The organisation of consumer protection should also be strengthened and the implications of possible integration into Comco should be examined.

- **Ensure an ambitious reform of the Internal Market Act.**

The creation of a genuine single market in Switzerland will stimulate competition in sectors protected by cantonal barriers. This means getting the cantons to realise that it is in their medium- and long-term interest to create such a market even if it means risking short-term disaffection fuelled by the loss of situation rents.

- **Continue to increase competition in public procurement.**

The opening up of public procurement has not gone far enough, mostly because of differences in rules, thresholds, awards and appeals that affect the transparency required for competition to be truly effective. Efforts should continue to enforce existing regulations more effectively and to limit the possibilities for splitting up public procurement contracts so as to avoid competitive tendering. The legal protection available through appeals against non-competitive awards should also be improved.

- **Accelerate and strengthen regulatory reforms targeting sheltered sectors.**

Reforms could be more ambitious and could be accelerated in many areas, such as healthcare, agriculture and infrastructure (especially the gas, electricity and transport sectors). This could be done through consulting with Comco in advance when planning such reforms, as well as through closer collaboration with sectoral authorities. ■

**For further
information**

For further information on the OECD's work on competition law and policy, please visit our Web site at: www.oecd.org/competition or contact us at: dafcomp.contact@oecd.org



For further reading

- OECD (2006), **OECD Reviews of Regulatory Reform: Switzerland: Seizing the Opportunities for Growth**, ISBN 92-64-02247-3, € 45, 184 p.
- OECD (2006), **OECD Economic Surveys: Switzerland**, ISBN 92-64-03639-3, € 45, 154 p.
- For other publications on Switzerland, see www.oecd.org/switzerland.

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