New Developments in Swiss Competition Law and Foreign Undertakings

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Introduction

Various recently enacted and currently pending new developments in Swiss competition law have a significant impact on the scope of application of Swiss competition law on transactions, agreements and concerted practices outside Switzerland and on sanctions that may be imposed by the Swiss competition authorities against non-Swiss undertakings. The following outlines the current situation, the new developments, their impact on non-Swiss undertakings and suggests measures to be taken by such undertakings to ensure compliance with Swiss competition law.

Development of Cartel Law in Switzerland

Constitutional Basis

The Swiss Federal Constitution (*Bundesverfassung der Schweizerischen Eidgenossenschaft*) of 18 April 1999[1] guarantees free competition.[2] The Government must, therefore, in all its acts and actions, comply with the principles of free trade and commerce. Private and governmental interference with such concept of free trade and commerce must remain an exception. A free and competition-orientated economy is the rule, which may only be departed from if based on an exempting provision of the Constitution.

1 Systematic Collection of Swiss Federal Law 101.

2 Constitution, Article 27, Paragraph 1; Article 96; Article 97, Paragraph 2 and Article 122.

First Cases before Swiss Federal Supreme Court

Two cases before the Swiss Federal Supreme Court particularly influenced the development of a body of cartel law in Switzerland. The first was the boycott of a baker in the year 1896. In this early case, after leaving the bakers' association, which had the purpose of a cartel, *inter alia*, fixing prices, a baker, Vögtlin, sold his bread at a lower price than the statutes of the bakers' association prescribed. The bakers' association asked its members and the other bakers' associations in Switzerland, as well as the flour dealers, not to make any deliveries to Vögtlin any more. Such demand was combined with the threat that everybody who did not comply with the boycott would be boycotted himself. Vögtlin went to court to have the question tried as to whether the boycott of a businessman was an illegal action. The Swiss Federal Supreme Court held that there was a personal right of every person to exercise his business and that no one should have to suffer interferences from third parties with his trade. The baker was awarded damages.[3]

The second case took place more than sixty years later in 1960 and dealt again with a boycott. This time, a carpenters' workshop, Widow Alfred Giesbrecht & Sons, asked to be supplied by a wholesaler. The quantities ordered by this workshop exceeded the quantities ordered by other carpenters' workshops that were supplied by the wholesaler, but the wholesaler refused to supply the workshop. The Swiss Federal Supreme Court held that a person being boycotted had a fundamental right to have his personality respected in the course of trade. This meant that a boycott was basically unlawful. However, the court went on to hold that the person actively boycotting had fundamental personal rights, too. It concluded that the rights of the person being boycotted and the rights of the person actively boycotting had to be weighed up against each other.[4]

Such consideration of rights and interests involved in a case, as well as of the consequences and possible grounds of justification, is still a fundamental principle of Swiss competition law, as opposed to the *a priori* prohibition. Hence, as a rule, cartels or agreements are prohibited as such, but only their harmful effects on competition.

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3 Swiss Federal Supreme Court 22 176.

4 Swiss Federal Supreme Court 86 II 366.

Development of Cartel Act

Three Cartel Acts have been enacted in Switzerland: in 1962, 1985 and 1996. In spite of the two above cases of 1896 and 1960, which already dealt with competition issues, Switzerland cannot be said to have an old competition law tradition. Its first Cartel Act was enacted at a time when other jurisdictions had had Cartel Acts for three-quarters of a century.[5] In addition to their belated enactment, the regulations of the first two Cartel Acts of 1962 and 1985 were weak and inefficient.

The weakness of the two Cartel Acts of 1962 and 1985 was partly due to the fact that they left the responsibility to initiate proceedings (and the considerable procedural risk resulting from such private claims) mostly to individual competitors.[6] Furthermore, it was very difficult for undertakings to foresee the possible outcome of litigation. Whether a cartel was illegal depended on an assessment of the overall impact of the cartel. Hence, a cartel harmful to the market could, for example, be justified for non-commercial reasons. These Cartel Acts neither provided for adequate protection against the misuse of market power by an undertaking in a dominant position, nor granted the necessary powers for the control of concentrations of undertakings. There was no duty of notification prior to a concentration of undertakings and the Cartel Commission (*Kartellkommission*), which is today the Competition Commission (*Wettbewerbskommission*), lacked the power to order the winding up of a merger. Moreover, the Cartel Commission had no power to impose direct fines on undertakings, not even in the case of hardcore restrictions.[7] The effects of this basically cartel-friendly environment are still felt in the Swiss market.

Cartel Act 1996

Differences between Cartel Act 1985 and Cartel Act 1996

The Cartel Act of 1996 is the Act currently in force, which was recently partially revised. It was intended to make up some of the

5 For example, the United States Sherman Act of 1890.

6 Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 67, note 124.

7 Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 142, note 256; Jürg Borer, *Kommentar zum schweizerischen Kartellgesetz* (Zurich 1998) Article 50, note 3; David F. Känzig, *Introduction to the New Swiss Act on Cartels* (Basel, 1997) at p. 7.

deficiencies of the Cartel Acts of 1962 and 1985. Key new provisions were the imposition of a notification obligation prior to the concentration of undertakings, together with the granting of the power to the Competition Commission to wind up such concentrations, if necessary. Furthermore, it set up rules to determine anti-competitive behavior, thereby making it easier to assess the possible outcome of litigation. An important new rule that has been introduced states that the Competition Commission is entitled to open an investigation *ex officio*, thereby making the policing of competition a duty of the Competition Commission. As in European competition law, the Cartel Act distinguishes between the three categories of:

(1) Agreements and concerted practices;
(2) Undertakings with a position of market dominance; and
(3) Concentrations.

What Did Not Change

Not everything has changed, however, with the enactment of the new Cartel Act of 1996. A number of provisions in the Act were still rather different from the competition law rules of other major jurisdictions. The most important difference was that the Competition Commission could not impose fines on an undertaking, unless the undertaking infringed an enforceable order against it prohibiting specific behavior or unless the undertaking breached a prior agreement with the Competition Commission. It is understood that the lack of power of the Competition Commission to impose fines on undertakings without prior warning greatly limited the Competition Commission's effectiveness. Furthermore, both its enforcement powers and enforcement proceedings were not sufficiently clearly stipulated in the Cartel Act, thereby again limiting the powers of the Competition Commission. Also missing was a leniency rule in case an undertaking or a responsible manager was cooperating with the Competition Commission.[8]

Agreements and Concerted Practices

According to Article 5 of the Cartel Act, anti-competitive agreements, including concerted practices,[9] which substantially restrain

8 Message of the Federal Council to Parliament of 7 November 2001 on the revised Cartel Act, at pp. 2023 and 2025.

9 Cartel Act, Article 4, Paragraph 1.

competition in a market for specific goods or services, and which cannot be justified on grounds of economic efficiency, as well as agreements leading to the elimination of effective competition, are unlawful. The Competition Commission issued notices (*Bekanntmachungen*) to clarify the criteria for its assessment of agreements.[10]

Agreements that restrain competition may be justified by economic efficiency if:

(1) They are necessary to reduce production or distribution costs, to improve products or the manufacturing process, to promote research or to spread technical or professional know-how; and
(2) Cumulatively, they do not enable the parties to an agreement to eliminate effective competition.

The latter means that the elimination of effective competition is unlawful and cannot be justified in any case by the reason of economic efficiency.[11]

According to Article 5, Paragraph 3 of the Cartel Act, price fixing agreements, agreements limiting production, supply or purchase quantities and agreements on the sharing of markets or customer groups are presumed to eliminate effective competition, provided that such agreements are entered into by undertakings that are actual or potential competitors, that is, they are horizontal agreements. In its Notice on the Qualification of Vertical Agreements of 18 February 2002, the Competition Commission set out similar presumptions for vertical agreements. These presumptions are not a black list in the sense of the black list in a block exemption of the European Union (EU) because it is still possible to justify all of these presumably harmful agreements. However, it will be difficult to establish that these presumably harmful agreements are justified on grounds of economic efficiency.

Article 6 of the Competition Act gives the Competition Commission the power to issue ordinances and notices of a general nature on the requirements under which particular types of agreements restricting competition may generally be considered to be justified on grounds

10 For example, the Notice on the Qualification of Vertical Agreements of 18 February 2002 and the Notice on the Qualification of Vertical Agreements in the Field of Automobile Trade of 21 October 2002.

11 Message of the Federal Council to Parliament of 23 November 1994 on the actual Cartel Act, at p. 561.

of economic efficiency. According to this Article, the following types of agreements may particularly fall into this category:

(1) Agreements concerning cooperation in research and development;
(2) Agreements concerning specialization and rationalization;
(3) Agreements concerning the exclusive purchase or sale of particular goods or services; and
(4) Agreements concerning the exclusive licensing of intellectual property rights.

Ordinances and notices of a general nature may also designate particular forms of cooperation in certain industry sectors as being generally justified agreements on competition. The Competition Commission has published two important notices: the Notice on the Qualification of Vertical Agreements of 18 February 2002 and the Notice on the Qualification of Vertical Agreements in the Field of Automobile Trade of 21 October 2002, which are both influenced by the respective regulations in the EU and give some guidance on the practice of the Competition Commission and on how to interpret the Cartel Act.

The Notice on the Qualification of Vertical Agreements has the purpose of clarifying the conditions under which a vertical agreement is considered to significantly restrain competition. The Notice particularly states which types of vertical restraints are considered by the Competition Commission to be significant, regardless of the market share of the undertakings involved:

(1) Price fixing;
(2) Limitation on production and market sharing;
(3) Certain limitations in selective distribution systems;
(4) Limitations on the distribution of spare parts; and
(5) Non-competition clauses for a period of more than five years or for more than one year after termination of the vertical agreement.

It particularly includes agreements of undertakings which try to exclude the Swiss market from foreign markets by, for example, prohibiting parallel imports. Other restraints on competition are deemed harmless if the undertakings concerned do not exceed a market share of ten per cent. Again, the Notice explicitly stipulates that even clauses mentioned as prohibited can be justified, for example, because they are necessary for an efficient distribution system. Based

on the Notice on the Qualification of Vertical Agreements, the Competition Commission has opened a new field of activity and initiated numerous preliminary investigation procedures, which have partly been followed up by investigation procedures.

The Notice on the Qualification of Vertical Agreements in the Field of Automobile Trade entered into force on 1 November 2002 and explicitly refers to EC Regulation 1400/2002 of 31 July 2002. Among other things, it has the purpose of preventing the exclusion of the Swiss market and bringing down prices.

Unlawful Behavior of Dominant Undertakings

Pursuant to Article 7 of the Cartel Act, dominant undertakings are deemed to be acting in an unlawful manner whenever they, through the misuse of their market position, prevent other undertakings from entering into or exercising competition, or act to the detriment of other market participants. Such types of behavior include, in particular:

(1) The refusal to enter into business relationships;
(2) The discrimination of commercial partners with regard to prices or other business conditions;
(3) The imposition of unreasonable prices or other unreasonable business conditions;
(4) The under-cutting of prices or other business conditions aimed at particular competitors;
(5) The limitation of production, sales or technical developments; and
(6) Rendering contracts conditional upon the contracting party accepting or providing additional goods or services (tying).

However, not every act of a dominant undertaking that may result in a restraint of effective competition is unlawful under the Cartel Act. An undertaking may justify particular behavior on the ground of legitimate business reasons.[12] Contrary to Article 5, Paragraph 3 of the Cartel Act, Article 7, Paragraph 2 of the Act does not contain a presumption that such behavior be considered a misuse of market power, but contains only examples of the misuse of market power. Each type of behavior or act must be examined individually, and it

12 Message of the Federal Council of 23 November 1994, at p. 569.

must be established that such behavior or act results in an abuse of market power pursuant to the general rule of Article 7, Paragraph 1.[13]

Dominant undertakings are basically free to enter into and to shape commercial relationships with customers or suppliers as they wish. Freedom of contract (part of the constitutionally protected principles of free trade and commerce) is still an important legal principle in Switzerland. If dominance is established, the undertaking will be subject to the test under Article 7, Paragraphs 1 and 2 of the Cartel Act, which rules that there must be justifiable reasons for the unequal treatment of business partners. The particular characteristics of every case and of each business partner must be taken into account. However, until now, there have been few cases in Switzerland in which a dominant position of an undertaking according to Article 7 was the decisive issue.

Exceptional Authorization on Grounds of Public Interest

Agreements affecting competition and practices of dominant undertakings that have been declared unlawful by the competent authority may, upon the application of the parties involved, be authorized by the Swiss Federal Council if, in exceptional cases, they are necessary for the safeguarding of overriding public interests.[14] The granting of such permission by the Federal Council has remained the exception, but did occur in the case of a price-fixing arrangement on the book market in order to safeguard the variety of publications.

Concentration of Undertakings

Concentration agreements, as defined under the Cartel Act, include the merger of previously independent undertakings, as well as various forms of agreements or understandings based on what control over one or several undertakings or parts thereof is acquired. Concentration agreements pursuant to Article 4 of the Cartel Act include, in particular, various forms of joint ventures.[15] The Federal Council

13 Message of the Federal Council of 23 November 1994, at p. 570; David F. Känzig, *Introduction to the New Swiss Act on Cartels* (Basel, 1997) at p. 11; Jürg Borer, *Kommentar zum schweizerischen Kartellgesetz* (Zurich, 1998) Article 7, note 4.

14 Cartel Act, Article 8.

15 Ducrey and Drolshammer, *Kommentar zum schweizerischen Kartellgesetz*, Eric Homburger et al. (eds.), (Zurich 1997) Article 4, note 123; Jürg Borer, *Kommentar zum schweizerischen Kartellgesetz* (Zurich, 1998) Article 4, note 39.

issued a Regulation on the Control of the Concentration of Undertakings of 17 June 1996.[16] A notification form issued by the Competition Commission gives further guidance on the matter. Concentration agreements must be notified to the Competition Commission if they meet the thresholds of Article 9 of the Cartel Act.

If the following thresholds are reached by the undertakings concerned in the year immediately preceding the concentration, the concentration must be notified to the Competition Commission prior to its consummation:[17]

(1) The general threshold is met if:
   (a) the undertakings concerned had an aggregate minimum turnover of SFr 2-billion or a minimum turnover attributable to Switzerland of SFr 500-million; and
   (b) at least two of the undertakings concerned each had a minimum turnover in Switzerland of SFr 100-million.

(2) For undertakings whose business totally or partially consists of the publication, production or distribution of newspapers or of the organization of radio and television programs, the actual turnover achieved in these sectors, multiplied by a factor of twenty, was relevant. This particular calculation scheme for undertakings active in the media sector has been abolished; and

(3) For insurance companies, turnover is replaced by annual gross premium receipts and for banks it was replaced by ten per cent of their total on-balance sheet assets — the portion of total assets of banks attributable to Switzerland was calculated on the basis of the ratio between amounts receivable from transactions with persons resident in Switzerland (banks and customers) and the total amount of such receivables.

Notification is mandatory, irrespective of the above thresholds, whenever an undertaking is involved in respect of which it has been ruled that such undertaking has a dominant position in a particular market in Switzerland, provided that the concentration has an impact on that particular market or on one that is adjacent, upstream or downstream.

For the decision on the prohibition of a concentration or on the granting of permission upon notification, the Competition Commission will take into consideration whether the concentration will lead

16 Systematic Collection of Swiss Federal Law 251.4.

17 Cartel Act, Article 9.

to the strengthening of a dominant position, which may lead to the elimination of effective competition in the relevant markets, particularly in those markets with high barriers to entry, and which does not lead to an improvement of the competitive environment in other markets, the effect of which prevails over the disadvantages associated with the creation or the strengthening of a dominant position. Hence, the assessment will largely depend on the assessment of the relevant markets and of the positions of the undertakings in such markets.[18]

Notification and Investigation Procedures for Concentrations of Undertakings

Upon notification of a planned concentration of undertakings according to Article 9 of the Cartel Act, the Competition Commission must decide whether a preliminary investigation shall be carried out and must inform the parties concerned about such decision within one month from the date of the (complete) notification.[19] If no communication is made before this deadline, the concentration may be consummated without condition.[20]

If the Competition Commission, within the one-month period, decides to conduct a formal investigation, the Competition Commission's secretariat must publish the substance of the contents of the notification and set a term within which third parties may submit their comments on the notified concentration.[21] The Competition Commission must carry out the investigation within a period of four months, provided that the parties involved are not obstructing proceedings. Should this be the case, the period may be extended. During the investigation procedure, the effects of the concentration agreement concerned are suspended and the concentration may not be closed by the parties, unless the parties concerned were granted approval for the consummation of the concentration before the expiration of this period.[22]

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18 David F. Känzig, *Introduction to the New Swiss Act on Cartels* (Basel, 1997) at p. 16.
19 Cartel Act, Article 32, Paragraph 1.
20 Cartel Act, Article 32, Paragraph 1.
21 Cartel Act, Article 33, Paragraph 1.
22 Cartel Act, Article 34.

If the Competition Commission does not issue a decision within the four-month period or fails to issue a decision upon an extension of such term, the concentration is deemed to be admissible and may be consummated.[23]

Sanctions

If a concentration of undertakings is consummated without prior notification in spite of the fact that the thresholds are met, the investigation procedure is commenced *ex officio*. The time periods start to run as soon as the authority is in possession of the information to be included in a notification.

Should a consummated concentration be prohibited and no exceptional authorization be applied for or granted for the concentration, the undertakings involved are obliged to carry out all measures necessary to reinstate effective competition. The Competition Commission can require the undertakings involved to make a binding proposal as to how effective competition shall be reinstated, and will fix a deadline for that purpose. If the undertakings involved make no proposals, irrespective of a request from the Competition Commission, or if such proposals are not approved by the Competition Commission, the Competition Commission can order:

(1) The separation of the undertakings or assets involved in the concentration;
(2) Cessation of the controlling interest; and
(3) Other measures adequate for reinstating effective competition.[24]

The Competition Commission can revoke an authorization or decide to launch an investigation into a concentration despite the expiration of the deadline if:

(1) The undertakings involved have provided false information;
(2) The authorization has been obtained fraudulently; or
(3) The undertakings involved seriously infringe a condition imposed in an authorization.

23 Cartel Act, Article 34, Paragraph 1.
24 Cartel Act, Article 37, Paragraph 4.

In addition, the parties may be subject to administrative sanctions and the individuals responsible may be fined personally.[25] A complete winding up of a concentration of undertakings has hitherto never been ordered.

Enforcement of Cartel Act of 1996

Fines

Before the revision of the Cartel Act in 2004, the Competition Commission was not entitled to directly issue fines against undertakings found in breach of Swiss competition law, except in the case of a breach of the notification obligations and other obligations in connection with concentrations of undertakings. Only once a decision had been rendered against an undertaking prohibiting specific behavior and the undertaking subsequently infringed such decision (or an agreement reached with the Competition Commission), could the undertaking be fined. Hence, the first breach of competition law was "free" in Switzerland. There were, however, civil, administrative and, in exceptional cases, even penal sanctions for breach of the Cartel Act. The main body enforcing the Cartel Act is the Competition Commission.

Competition Commission and Its Secretariat

The Competition Commission is an independent body of the Federal Administration and attached to the Federal Department of Economic Affairs for purely administrative reasons. The Competition Commission (a non-professional body) is elected by the Federal Council (the executive government of Switzerland), which also designates the three members of the executive committee. The Competition Commission consists of between eleven and fifteen members, the majority of which must be independent experts.

A (professional) secretariat supports the Competition Commission, preparing the various issues pending, conducting investigations and issuing procedural instructions, together with a member of the

25 Jürg Borer, *Kommentar zum schweizerischen Kartellgesetz* (Zurich, 1998) Article 50, note 4 and Article 54, note 3; Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 391, note 701.

executive committee.[26] It submits applications to the Competition Commission and executes its decisions. It deals directly with all parties involved, with third parties and with other authorities.

The Competition Commission can issue binding decisions and rulings, unless another authority has explicit competence, for example, for certain issues concerning banks, the Swiss Federal Banking Commission. It issues recommendations pursuant to Article 45 of the Cartel Act, opinions to political authorities, according to Article 46 of the Cartel Act and expert opinions pursuant to Article 47 of the Cartel Act. The Competition Commission further publishes its decisions and informs the public on its activities according to Articles 48 and 49 of the Cartel Act.

Civil Enforcement Proceedings and Sanctions

In Switzerland, procedural rules are, for the most part, within the competence of the Cantons. Hence, civil procedures will depend on the respective cantonal rules. However, a recently enacted Federal Act on the Forum of Jurisdiction of 24 March 2000[27] governs the place of venue among the cantons. Furthermore, Article 14 of the Cartel Act states that the Cantons must designate a court that will decide, as a single Cantonal body for the territory of each Canton, claims based on restraints on competition. Such court must also assess other claims under civil law if they are lodged together with a competition law claim and if they are based on the same facts. According to Article 15 of the Cartel Act, the civil courts decide on the admissibility of a restraint on competition. However, in order to assess the question of whether an illegal restraint of competition has taken place, the civil courts are under an obligation to submit the matter to the Competition Commission for its opinion. Such opinions of the Competition Commission are not strictly binding on the court although, in practice, the opinion will most often be followed.

A person who is prevented from entering into competition or competing as a result of unlawful restraints on competition is entitled to:

(1) Have such restraints removed or suppressed;
(2) Reparation for damage and moral wrong in accordance with the Swiss Code of Obligations; and

26 Cartel Act, Articles 22 and 23.

27 Systematic Collection of Swiss Federal Law 272.

(3) The return of unlawfully earned profits in accordance with the provisions governing agency of necessity, which corresponds to a constructive trust.[28]

The refusal to enter into business relationships, as well as discriminatory measures, constitute a restraint on competition. These rights may also be claimed by persons who, while a restraint on competition has been declared lawful, have suffered a restraint that is greater than what is required for the enforcement of such (lawful) restriction. A party suffering damage by reason of an illegal restraint of competition can furthermore apply for injunctive relief based on Article 17 of the Cartel Act.

In order to enforce claims for removal or suppression, the court may, upon the application of the claimants, order, in particular, that:

(1) Contracts be partly or completely declared invalid; and/or
(2) The person who is the cause of the restraint on competition conclude contracts with the injured party that are on market conditions or which are customary in the respective segment of the industry.[29]

Such orders are enforceable decisions.

Administrative Enforcement Proceedings and Sanctions

Upon application of the secretariat, the Competition Commission can issue decisions on measures to be taken against an infringer or approve an amicable settlement between the Competition Authorities and an infringer.[30] Such decisions of the Competition Commission may be taken on appeal to the Appellate Commission in Competition Matters,[31] the decisions of which may again be challenged by recourse, in administrative law matters, to the Swiss Federal Supreme Court.

If the Competition Commission has decided that a restraint on competition is unlawful, the parties concerned may alternatively apply within thirty days to the Federal Council for exceptional authorization on grounds of public interest. If such an application is filed,

28 Cartel Act, Article 12.
29 Cartel Act, Article 13.
30 Cartel Act, Article 30.
31 Cartel Act, Article 44.

the period for the submission of an appeal to the Appellate Commission in Competition Matters only begins to run once the Federal Council has rendered its decision. The application for exceptional authorization by the Federal Council may also be made within thirty days from the date upon which a decision of the Appellate Commission in Competition Matters or of the Swiss Federal Supreme Court, as a result of an administrative appeal, becomes enforceable.

The following parties have legal standing in investigations into restraints on competition:

(1) Persons who are obstructed from entering into or exercising competition as a result of a restraint on competition;
(2) Professional and economic associations which, in accordance with their status, are empowered to safeguard the interests of their members, provided that members of the association or of a subordinate association may also take part in the investigation; and
(3) Organizations of national or regional importance which, in accordance with their by-laws, are devoted to the protection of consumers.[32]

In the case of an infringement of an enforceable order of the Competition Commission, monetary sanctions could be imposed on the defaulting party up to a maximum amount of three times the profit that may have been earned as a result of such default. If such profit could not be determined or estimated, the fine could amount to up to ten per cent of the turnover in Switzerland in the last business year.[33]

Direct sanctions apply for infringements in connection with concentrations of undertakings. A party may be liable to a fine of up to SFr 1-million if:

(1) He has completed a concentration of undertakings, which is subject to notification, without notifying it to the Competition Commission;
(2) He has completed a concentration of undertakings irrespective of an interim prohibition;
(3) He has completed a concentration of undertakings in contravention of any of the terms and conditions imposed by the Competition Commission in issuing the permission; or

32 Cartel Act, Article 43.
33 Cartel Act, Article 50.

(4) He does not comply with an order for reinstating effective competition.

In cases of repeated infringements of the conditions set forth in a permission, the fine may be up to ten per cent of the respective party's turnover in Switzerland during the last business year.[34]

Penal Enforcement Proceedings and Sanctions

Individuals who intentionally breach any of the provisions of an amicable agreement or of an enforceable order issued by the Competition Commission or by appellate institutions are subject to a fine of up to SFr 100,000 in accordance with Article 54 of the Cartel Act. Other violations may be sanctioned by a fine of up to SFr 20,000. The Federal Law on Administrative Penal Law of 22 March 1974[35] applies to the prosecution of criminal acts. The prosecuting authority is the Competition Commission's secretariat in consultation with a member of the executive committee. The sentencing authority is the Competition Commission.

Background to Changes to Revision of 2004

International Developments

The efforts to fight anti-competitive business practices have been considerably intensified on the international level. An important example is the recommendation of the Organization for Economic Cooperation and Development (OECD) on the fight against particularly harmful cartels issued in 1998. In this recommendation, the nations are asked, among other things, to take efficient measures against hard cartels and to provide for effective sanctions and procedures. There are two main tendencies in the new developments of competition law. On the one hand, several countries have introduced direct sanctions and/or have increased their existing sanctions. On the other hand, leniency rules have been introduced in order to facilitate the enforcement of competition law.

34 Cartel Act, Article 51.

35 Systematic Collection of Swiss Federal Law 313.0.

Developments in European Community, Germany and United Kingdom

In the EU, direct sanctions are nothing new. However, recent decisions of the European Commission and of the European courts indicate that a more robust approach is being taken against cartels. In 1996, the European Commission issued provisions on a leniency program that allows the reduction or annulment of fines if undertakings are cooperating.

German competition law already recognized direct fines. Furthermore, Germany recently introduced leniency rules for members of hardcore cartel restrictions, mitigating the fines if such undertakings denounce the cartel.

In the United Kingdom, the new Competition Act of 1998 entered into force in 2000. As in the EU and Germany, it provides for direct sanctions and for leniency rules, though these are more closely modeled on the United States system and automatically and entirely exempt any undertaking denouncing an anti-competitive restriction.

Switzerland and International Developments

The changes made in the revised Cartel Act must be seen in this international competition law context. Switzerland is a small country surrounded by the EU. Due to the international implications of competition law issues, it is not reasonable and not possible to remain apart in such fundamental and practical aspects of competition law. On the one hand, many undertakings that must comply with Swiss competition law also must comply with the competition laws of other jurisdictions. The revision of the Cartel Act helps to reduce the expenses of undertakings by the fact that agreements do not need to be drafted in a totally different way.

On the other hand, the Swiss economy is likely to benefit indirectly from the changes to the revision of the Cartel Act, which is approximating the Swiss system to foreign systems by trying to prevent cases such as the recent case of *Hoffmann-La Roche* from happening again. Arguably, Swiss competition law played a certain role in the *Hoffmann-La Roche* case, as Swiss managers, until quite recently, were not fully aware of their competition law responsibilities and of the risks involved. This was, to a certain extent, also due to the absence of corresponding rules under Swiss competition law. The changes made to the revised Cartel Act considerably enhance the general awareness of the new competition law issues.

Hoffmann-La Roche Case

The European Commission issued fines against eight companies in a total amount of €855.22-million for participating in eight distinct market-sharing and price-fixing cartels affecting vitamin products. The different cartels each had a specific number of participants, as well as a specific duration, and were all operated between 1989 and 1999. Because the Swiss-based company, Hoffmann-La Roche, was an instigator and participated in all of the cartels, it was given the highest fine of €462-million. As Competition Commissioner, Mario Monty, said:

> "This is the most damaging series of cartels the Commission has ever investigated due to the sheer range of vitamins covered which are found in a multitude of products from cereals, biscuits and drinks to animal feed, pharmaceuticals and cosmetics."[36]

The companies' collusive behavior enabled them to charge higher prices than if the full forces of competition had been at play, damaging consumers and allowing the companies to make illicit profits. The prime mover and main beneficiary of these agreements was Hoffmann-La Roche, the largest vitamin producer in the world, with a market share of some fifty per cent of the overall market. The engagement of Hoffmann-La Roche was on a high scale, as its full range of vitamin products was covered by the agreements. The involvement of some of its most senior executives was taken as an indication that the agreements were part of a strategic plan conceived at the highest levels of the undertaking.

Although EU-based BASF had a paramount role in following Hoffmann-La Roche, one of the problems of Hoffmann-La Roche might well have been that, as mentioned above, there was no sufficient awareness of competition law issues at that time in Switzerland. There tended to be, at times, almost a stubborn attitude, up to the highest levels of Swiss managers, that foreign competition law rules did not apply to Swiss undertakings. The case of *Hoffmann-La Roche* has awoken the Swiss economy, as well as Swiss politicians and the general public, and become one of the main arguments for advocates of a far-reaching reform of the only recently revised Cartel Act.

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36 *See* the website of the European Union at http://europa.eu.int.

Proceedings

Another reason for the proposed changes to the Cartel Act were the difficulties that the Competition Commission encountered in enforcement proceedings. After the entering into force of the Cartel Act, various open issues still had to be decided by judicial bodies. Several orders of the Competition Commission were annulled by the Appellate Commission for Competition Matters due to procedural faults. One of the problems for the Competition Commission was that the relationship between the procedural provisions of the Cartel Act and the provisions of other Acts referred to in the Cartel Act was not clear. As efficient proceedings and effective investigation powers are a key condition for the application of the Cartel Act, the need to render these provisions efficient and practical became a further reason for an early revision of the Cartel Act.

Changes Made

Overview

The main objective of the partial revision of the Cartel Act, which entered into force on 1 April 2004, was the introduction of direct sanctions for major infringements of the Cartel Act. For reasons based on the Swiss Constitution, there are now no direct sanctions for all violations of the Cartel Act, but only for hardcore restrictions, such as agreements on prices and territories, and for the abuse of a position of market dominance. The deterrent effect of the Cartel Act is thereby considerably enhanced. In order to ensure legal certainty, undertakings have the possibility to notify potential anti-competitive agreements and behavior in advance to the Competition Commission. Having notified an agreement or specific behavior, an undertaking will not be fined for it.

Furthermore, the Competition Commission can partially or totally refrain from imposing fines on undertakings if they cooperate in the discovery or abolition of a restriction on competition. Through such a leniency rule, the risk for undertakings is substantially enhanced in that anti-competitive behavior will be detected, solidarity between the parties to an agreement is weakened and investigations by the Competition Commission are facilitated.

Restrictions on competition by forbidding parallel imports, possibly based on patent rights, may be qualified under the revised Cartel Act as an abusive foreclosure of the Swiss market against the European Economic Area (EEA). The thresholds for concentrations of undertakings have partially been revised. The multiplication factor of twenty for media undertakings has been abolished. Furthermore, the threshold for insurance companies is no longer based on their turnover, but on their yearly gross premium income, whereas the thresholds for banks and other financial intermediaries are based on their yearly gross proceeds.

The investigation procedure and the investigation powers of the Competition Commission have been set on a new legal basis. The Act on Administrative Penal Law of 22 March 1974[37] is declared to be applicable. This may lead to the Competition Commission conducting more searches of offices and homes ("dawn raids"). Transitory rules state that no fines will be imposed on undertakings for existing restrictions that are notified to the Competition Commission within one year after the entering into force of the revised Cartel Act.

Further changes include a clarification of the definition of market dominance, a provision indicating that an ordinance or a notice with special rules for small and medium-sized undertakings may be issued by the Competition Commission or by the Federal Council, respectively, as well as certain clarifications and a reference to the Swiss-European agreement on air traffic.

Direct Fines

As discussed above, under the previous law, the first infringement of the Cartel Act was "for free". Even in cases of hardcore restrictions, undertakings were not fined directly, but only if they contravened a mutual agreement with the Competition Commission or if they violated an order issued by the Competition Commission stating that they were infringing competition law and must stop such behavior.

The efficiency of any competition law depends, among other things, on its deterrent effect. Since the revision of the Cartel Act, such deterrent effect is enhanced by the threat of direct sanctions. The underlying reasoning is that anti-competitive behavior must not be profitable, and that sanctions must be imposed without prior

37 Systematic Collection of Swiss Federal Law 313.0.

warning in order to render the balance for undertakings involved in anti-competitive behavior negative.

Under the revised Article 49a, Paragraph 1 of the Cartel Act, direct fines may be imposed for hardcore restrictions in horizontal agreements.[38] All agreements between competitors on prices, output, purchase and supply quantities or the portioning of territories or customer groups are sanctioned with direct fines. It is yet unclear whether the hardcore restrictions according to Article 5, Paragraph 3 of the Cartel Act are subject to direct fines only if they eliminate effective competition or also if they merely restrict effective competition. Members of the Competition Authorities are of the opinion that direct fines can be imposed in both cases.[39] However, the ambit of this will be determined by the practice of the Competition Commission and the courts.

Secondly, direct fines may also be imposed for hardcore restrictions in vertical agreements, that is, restrictions on fixed or minimum resale prices and restrictions in distribution agreements on the allocation of territories as far as sales by other distributors in such territories are prohibited. According to Article 5, Paragraph 1 of the Cartel Act, whether hardcore restrictions in horizontal agreements are subject to direct fines only if they eliminate effective competition or also if they merely restrict effective competition is also discussed with respect to hardcore restrictions in vertical agreements. Thirdly, direct fines may be imposed for the abuse of a dominant position by undertakings.

Pursuant to the revised Article 49a, Paragraph 1 of the Cartel Act, the fines imposed on undertakings amount to up to ten per cent of the turnover in Switzerland of the last three years, accumulatively. This is less than in the EU, but should be high enough to deter undertakings from anti-competitive behavior. The amount of the fine must be determined based on the duration and on the extent of the anti-competitive behavior. The proceeds that an undertaking has made through anti-competitive behavior must be taken into consideration. The Competition Commission may also take into consideration subjective elements on the part of the infringer that may have a mitigating or enhancing effect on the amount of the fine.

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38 A number of agreements are presumed to constitute hardcore restrictions according to the Cartel Act, Article 5, Paragraph 3.

39 Patrick Krauskopf and Dorothea Senn, "Die Teilrevision des Kartellrechts — wettbewerbspolitische Quantensprünge", in SIC 1/2003, at p. 9.

Notification of Anti-Competitive Behavior

Under the revised Article 49a of the Cartel Act, undertakings that are uncertain whether behavior is anti-competitive may notify such behavior to the Competition Commission. If such notification is made before the potential anti-competitive behavior has had any effect, the notification ensures that no fines will be imposed by the Competition Commission. Only if the Competition Commission initiates an investigation and the undertakings involved do not cease the potentially anti-competitive behavior may fines still be imposed. Hence, undertakings do not need to bear the risk of a mistaken assessment of the legal or market situation. Potential uncertainty caused by the partial revision of the Cartel Act is thereby reduced, at least as to its most drastic effects. In order to keep administrative expenses low, a special notification form has been drafted. Furthermore, according to the Message of the Federal Council to Parliament (*Botschaft*), the Competition Commission issues instruments that enable undertakings to assess on their own whether behavior is violating the Cartel Act.[40]

Leniency Rule

Undertakings seem to refine their methods in order not to be caught by the Competition Commission. In addition to such a general tendency, the danger of being fined may directly cause undertakings to take further efforts to hide anti-competitive behavior. Consequently, the prosecution of anti-competitive behavior may have become more difficult for the Competition Commission. The introduction of a leniency rule in the revised Cartel Act, however, helps the Competition Commission to overcome these obstacles.

Under the leniency rule, the Competition Commission can partially or totally refrain from imposing a fine on an undertaking that is contributing to the discovery and/or the clearance of anti-competitive behavior. Three main advantages of the leniency rule were named in the discussions leading to the introduction of this rule, which is a novelty to the Swiss legal system:

(1) Members of an anti-competitive agreement that are willing to terminate or leave the agreement are given an incentive to leave and to notify the agreement — the possibility to cooperate with

40 Message of the Federal Council of 7 November 2001, at p. 2039.

the Competition Commission seems particularly attractive where the Competition Commission is already aware of potential violations of the Cartel Act in a specific market;

(2) Through the aforementioned incentive to cooperate with the Competition Commission, the loyalty between the members of anti-competitive agreements is weakened, causing mutual distrust and rendering the building up and maintenance of hard-core restrictions more difficult; and

(3) The cooperation of a member of an anti-competitive agreement facilitates the enforcement of the Cartel Act — not only may it lead to the discovery of anti-competitive restrictions that otherwise never would have been discovered, but also fact finding becomes considerably easier as pieces of information are given by primary sources, while otherwise they would be hard to find.

The leniency rule of the Cartel Act is flexible and not automatic. Not only the initial denunciation of an anti-competitive agreement, but also the cooperation of an undertaking in the fact finding, will potentially mitigate sanctions. However, it is important to note that self-denunciation does not necessarily free an undertaking from the entire fine, as the Competition Commission has a wide discretion to determine the relief granted.

Parallel Imports

According to Swiss law, it is possible to prevent parallel imports based on Swiss patent rights, but not based on trademark rights. The Swiss Federal Supreme Court held, in its famous *Kodak* decision,[41] that national exhaustion (not international exhaustion) is applicable to patent rights. The rights emanating from a Swiss patent are only exhausted if the patent protected goods were first put on the Swiss market by the proprietor of the patent or with his consent. If the goods protected were put on a foreign market by the holder of the Swiss patent, the Swiss patent rights are not exhausted and the patent can be used to stop any parallel imports of such goods. Based on this leading case, proprietors of patents are able to prevent the importation of patent protected goods.

However, the Swiss Federal Supreme Court stated in the *Kodak* case that such a monopoly on importation grants the patent proprietor

41 Swiss Federal Supreme Court 126 III 129.

an excessive right, as he himself puts the patent-protected product on a foreign market under circumstances that are similar to the conditions on the Swiss market. This substantially curtails the patent right, although the actual effects of this statement are unclear. The revised Article 3, Paragraph 2 of the Cartel Act now states that the restriction of imports that are based on intellectual property rights are subject to an assessment under the Cartel Act. Thereby, restrictions of parallel imports of patented goods may be unlawful to the extent that they restrict competition in a way prohibited by the Cartel Act.

Thresholds

Some changes were made to the thresholds for the notification of concentrations of undertakings in the revised Article 9 of the Cartel Act. The special threshold for undertakings active in the media sector was deleted without replacement. Further changes concern the method of calculating the thresholds for banks and other financial intermediaries. Under the revised Cartel Act, the calculation of the thresholds will no longer be based on the on-balance sheet assets but on their yearly gross proceeds.

Investigation Measures

The revised Article 42 of the Cartel Act clarifies the situation with regard to investigation measures by referring to the respective provisions of two Acts that are applicable analogously. These amendments substantially enhance the actual powers and the efficiency of the Competition Commission. Although, in theory, the Competition Commission already had the necessary powers for investigation measures, such as searching of homes and seizing of documents, it hardly made any use of them.

Revised Article 42, Paragraph 2 of the Cartel Act provides for a new legal basis for investigation measures by referring to Articles 45 to 50 of the Act on Administrative Penal Law of 22 March 1974.[42] Before the revision, investigation matters and the procedure before the Competition Commission in general was a constant source of uncertainty. By referring to a clear legal basis, such uncertainty should be remedied. It is widely expected that the Competition

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Commission will make frequent use of its power to search private homes and offices. This would also reflect the general tendency in Swiss competition law to adapt to and, to a certain extent, copy European competition law. Revised Article 42, Paragraph 1 of the Cartel Act refers to Article 64 of the Act on Federal Civil Procedure of 4 December 1947,[43] which is applicable analogously with regard to the procedure of questioning witnesses and on their duty to provide evidence.

Transitory Provision

The transitory provision of the revised Cartel Act provides a possibility of notifying anti-competitive restrictions within one year of the entering into force of the revised Act. Hence, existing anti-competitive restrictions can be notified and will not lead to fines, unless the behavior continues after an investigation has been initiated.

Application of Cartel Act to Non-Swiss Undertakings

Extraterritorial Application of Competition Law

Non-Swiss undertakings can be held to infringe Swiss competition law. This is contrary to EU law, in which there is no explicit provision, and under which the European Court of Justice (ECJ) has not yet clearly ruled on the scope of a possible effects doctrine.[44] In Switzerland, Article 2, Paragraph 2 of the Cartel Act explicitly states that the law applies to matters which have an effect within Switzerland even if they originate abroad. The question is, however, what exactly the conditions are for the applicability of Article 2, Paragraph 2 of the Cartel Act.

As to potential objections based on international law, it is widely accepted that the effects theory is part of the fundamental principle of territoriality that grants to every country the right of sovereignty over its territory.[45]

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43 Systematic Collection of Swiss Federal Law 273.

44 Case 114/85, *A Ahlström Oy* v. *Commission* [1988] ECR 5193 (Wood Pulp); Richard Whish, *Competition Law*, 4th ed. (Bath, 2001) at p. 400.

45 Rolf H. Weber, *Schweizerisches Immaterial- und Wettbewerbsrecht*, Roland von Büren and Lucas David (eds.) (Basel, 2000) at p. 42.

Effects Doctrine in Switzerland and Non-Merger Cases

Based on the effects doctrine as per Article 2, Paragraph 2 of the Cartel Act, the Cartel Act applies to cases where the restriction on competition is committed by undertakings having their domicile abroad if it has an effect in Switzerland,[46] for example, where undertakings having their corporate domiciles in Germany agree upon resale prices for Switzerland. This rule goes back to the practice of the Swiss Federal Supreme Court, dating from as early as 1967. In its decision of 1967, the Swiss Federal Supreme Court held that the law must apply to restrictions on competition wherever they originate as soon as they have a direct effect upon competition within Swiss territory (*les entraves à la concurrence d'où qu'elles viennent, dès qu'elles ont un effet direct sur le jeu de la concurrence à l'intérieur du territoire suisse*).[47] Today, there are two main opinions on the conditions for applicability of Article 2, Paragraph 2 of the Cartel Act. One group of scholars[48] advocates two main conditions which should lead to the applicability of the Cartel Act:

(1) If the geographic market affected comprises Swiss territory and undertakings active in Switzerland are injured by restrictions on competition on this market, such restrictions are held to have an effect in Switzerland; and
(2) If the legal object protected by the Cartel Act is violated.

According to its Article 1, the purpose of the Cartel Act is to protect competition in the interests of a free and market-orientated economy. Accordingly, it protects, in the first place, undertakings that compete on the Swiss market and, in the second place, undertakings that, based in Switzerland, are part of the competition on foreign markets (export undertakings). The abovementioned group of scholars argues that, consequently, the Cartel Act is applicable as soon as the economic freedom of undertakings active in Switzerland is restricted by any restriction wherever it originates, regardless of how serious its effects are.

However, a different group of scholars does not adhere to this doctrine, but is of the opinion that a restriction on competition must have

46 Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 120, note 227.
47 Swiss Federal Supreme Court 93 II 196.
48 Pierre-Alain Killias, *Commentaire Romand, Droit de la Concurrence* (Bâle, 2002) at p. 118, note 63.

an appreciable effect on the Swiss market because otherwise the applicability of the Cartel Act would be exorbitant.[49] In support of their position, this group can point to the fact that the two above criteria are not expressly mentioned in the Message[50] of the Federal Council to Parliament.

Although the objective of the said criterion that a restriction must have an appreciable effect in Switzerland is legitimate, it is not founded on the law. The appreciability of a restriction is an issue concerning the substantial provisions of the Cartel Act and not the provisions on the applicability of the Cartel Act.[51] Therefore, any restriction having an effect in Switzerland is caught by Article 2 of the Cartel Act. The question of the appreciable effect of a restriction on competition must be analyzed in a second step under the substantial provisions of the Cartel Act, determining whether such restriction violates the Cartel Act.

The Cartel Act may also apply to export cartels of Swiss undertakings. Exporting cartels of Swiss undertakings have an effect in Switzerland if the undertakings participating in them make illicit profits that enable them to perpetuate inefficient structures on the Swiss market.[52]

A prohibition of exports into Switzerland from the EEA was held several times by the Competition Commission to be caught by Article 2, Paragraph 2 of the Cartel Act and to infringe Swiss competition law. This has also been stated in the recent Notice on Vertical Agreements in the Field of Automobile Trade issued by the Competition Commission on 21 October 2002. Considering the above interpretation given to Article 2, Paragraph 2 of the Cartel Act, this is not surprising. However, it was a rather new phenomenon for Switzerland to see undertakings and their distributors in the EU being forced to provide the Competition Commission in Switzerland with information on their distribution agreements within the EU. Because Switzerland is not part of the EEA, the undertakings operating from the EEA are

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49 Eric Homburger, *Kommentar zum schweizerischen Kartellgesetz*, Eric Homburger et al. (eds.) (Zurich, 1996) Article 1, note 36; Weber, *Schweizerisches Immaterial- und Wettbewerbsrecht*, Roland von Büren and Lucas David (eds.) (Basel, 2000) at p. 42.

50 Message of the Federal Council of 23 November 1994, at p. 536.

51 Jürg Borer, *Kommentar zum schweizerischen Kartellgesetz* (Zurich, 1998) Article 2, note 21; Pierre-Alain Killias, *Commentaire Romand, Droit de la Concurrence* (Bâle, 2002) at p. 118, note 68.

52 Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 121, note 228.

allowed under EU law to prohibit parallel exports into Switzerland. It was, therefore, based on the Cartel Act alone that they were forced to permit such imports into Switzerland, as happened in the cases of *Volkswagen* and *Citroën*.[53]

Effects Theory with Regard to Merger Cases

Pursuant to Article 9 of the Cartel Act, concentrations of undertakings must be notified to the Competition Commission prior to their consummation, provided that, in the year immediately preceding the concentration, the undertakings involved reached certain thresholds. Furthermore, there is a duty to make a notification, notwithstanding the thresholds, if an undertaking that has been held to have a dominant position in a particular market in Switzerland is involved in a concentration, and if the concentration has an impact on this market or on a market that is adjacent, upstream or downstream. The same dispute as with regard to non-merger cases exists as to whether an appreciable effect in Switzerland is required. However, there are some differences.

As in non-merger cases, there is no requirement of appreciable effect in Switzerland by law. However, the threshold requesting turnover in Switzerland of SFr 500-million is intended to guarantee that there is an appreciable effect in Switzerland.

Under the former thresholds, banks, in particular, could easily fall within Swiss notification thresholds (and thereby, under the Swiss notification obligations) if they had on-balance sheet open positions by year end with Swiss counterparts, such as UBS AG and Credit Suisse. Depending on the chances of interbank business, a bank involved in a concentration without any connection to Switzerland can become subject to notification obligations without having any establishment or substantial business in Switzerland. This not very convincing solution is changed under the revised Cartel Act, which

53 Order of the Competition Commission of 8 May 2000 regarding the investigation pursuant to Article 27 of the Cartel Act on (allegedly) illicit restrictions on competition in the sense of Article 5 of the Cartel Act, published in *Recht und Politik des Wettbewerbs*, RPW/DPC 2000/2, at pp. 196 *et seq.*; Order (amicable agreement) of the Competition Commission of 19 August 2002 regarding the investigation pursuant to Article 27 of the Cartel Act on the distribution system of Citroën according to Article 5 of the Cartel Act, published in *Recht und Politik des Wettbewerbs*, RPW/DPC 2002/3, at pp. 455 *et seq.*

provides that the generally applicable turnovers are replaced by the gross annual revenues if they are subject to the accounting rules as per the Federal Banking Act of 8 November 1934.

Enforcement

Enforcement of the Cartel Act against undertakings based in foreign countries poses no special problems as long as these undertakings have branches in Switzerland. If they do not have any establishment in Switzerland, they may still have business relationships with counterparts in Switzerland, and assets resulting from such business relationships may be seized according to Articles 271 *et seq.* of the Swiss Bankruptcy Act.[54] Enforcement may become difficult if a company has no establishment in Switzerland and is not active on the Swiss market, but is, for example, through its distribution system in the EEA, infringing Swiss competition law by sealing off the Swiss market. The enforcement problems encountered are similar to those encountered by other competition enforcement agencies.

Conclusions

The revision of the Cartel Act should have a major impact on Swiss undertakings and, because of the effects doctrine in Swiss competition law, also on foreign undertakings doing business with Swiss counterparts. All too often, overseas investors or entrepreneurs do not take into consideration that Switzerland is not part of the EEA, but a separate jurisdiction, the laws of which may deviate from EU law.

Therefore, undertakings should conduct a full competition compliance review of their current agreements with Swiss counterparts, of concerted practices and of their own and their counterparts' positions on the relevant Swiss market. Undertakings must take a decision on whether to terminate or to notify existing agreements within the transitory period of one year. If new agreements are negotiated, undertakings may consider notifying the agreements to the Swiss Competition Commission, thereby avoiding the risk of fines. Finally, to reduce the risk of direct sanctions against undertakings, they

54 Roger Zäch, *Schweizerisches Kartellrecht* (Bern, 1999) at p. 123, note 231.

should initiate (or adapt their existing) competition law compliance programs with their managers and employees and document their efforts to ensure compliance of their undertakings with Swiss competition law.