

Competition - Switzerland

Competition Act Evaluated

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On January 14 2009 the Swiss Federal Government was presented with a Synthesis Report issued by the Taskforce Cartel Act, a panel formed during Winter 2006/2007 by the Head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the Cartel Act. The task force stated that the act and the legal instruments that were introduced upon its last revision in 2003 (ie, the leniency programme, raid and opposition proceedings, direct penalties) have demonstrated their ability to serve their purposes. However, according to the taskforce, further modifications are necessary to improve the efficiency of the Competition Commission and its secretariat, international cooperation, and enhanced control of mergers and vertical restraints. Complementary recommendations concern procedure, civil law and penalties.

The act was significantly amended in 2003. Amongst other things, the amendment provided for a system of non-mandatory preliminary notification of potentially unlawful agreements and practices, empowered the commission to impose direct administrative fines on undertakings participating in a hardcore cartel or abusing their dominant position, and empowered the commission to reduce or omit fines where cooperation from hardcore cartel members had lead to the cartel's discovery or suppression (ie, the leniency programme). The amendment also sought to ease the burden of proof on the commission by introducing specific presumptions concerning vertical restraints.

Article 59a requires the Federal Council to evaluate the efficiency and conformity of any proposed measure under the act before submitting a report and recommendation to Parliament in relation to such measure. After five years of application, the effectiveness of the system of the revised act has been assessed through an evaluation procedure conducted by the Taskforce Cartel Act under the lead of the director of the secretariat of the commission. The taskforce issued a synthesis report, based on 15 reports and studies, formulating a series of recommendations. The main observation of the evaluation is that the underlying concept of the act as introduced in 1995 and revised in 2003 should be maintained. Globally, it is not necessary to amend the instruments added in 2003. The following improvements are considered to be priorities:

- Competition authorities must be fully independent of political influences and business, and their decision-making members must be professionals;
- The commission and its secretariat must merge into a single entity;
- Switzerland must conclude cooperation agreements with its main trading partners allowing for formal exchange of confidential information between competition authorities. Moreover, it is necessary to amend Swiss formal law in order to enable the competition authorities to cooperate under certain conditions with their counterparts.
- Switzerland must harmonize its merger control regime with the corresponding EU regulations, including the Significant Impediment of Effective Competition test, efficiency defence and dynamic consumer welfare standards.
- Regarding the restrictions on vertical agreements, Switzerland must abandon the legal presumption of illicit conduct. However, the act should retain the availability of direct penalties in case of minimum or fixed-price setting, and restrictions with respect to territorial agreements.
- Once this revision is completed, the civil aspects of antitrust law, the civil and administrative procedure and the system of sanctions should be further evaluated. It would also be worthwhile to enhance the implementation of the act.

Based on these recommendations, on March 25 2009 the Federal Council submitted a

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report to Parliament. In substance, the Federal Council proposed to maintain the current design of the act on the basis on its three pillars (ie, the prohibition of harmful cartel agreements, the fight against abuse of dominant position and merger control) and the new instruments introduced in 2003. Pointing to certain shortcomings of the act, the council instructed the Federal Department of Economic Affairs to submit concrete proposals by Spring 2010 with a view to adjusting the act. These proposals shall include measures to strengthen the commission as an independent authority, adapt the control of mergers, introduce a differential treatment of vertical agreements and expedite the proceedings. The Federal Department of Economic Affairs is also expected to consider in detail other improvements suggested by the task force and to propose, where appropriate, their implementation. The department is likely to carry out investigations to enable the Federal Council to determine, particularly in view of its European policy, the desirability of negotiations on a cooperation agreement with the European Union on the formal exchange of confidential information between competition authorities.

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