

## Competition - Switzerland

### Federal Council consults on revision of Competition Act

Contributed by **Tavernier Tschanz**

September 30 2010

On June 30 2010 the Federal Council opened a public consultation, which is to remain open until November 19 2010, regarding the partial review of the Competition Act. The main aim of the review is to make material and institutional improvements to the law.<sup>(1)</sup>

On January 14 2009 the council was presented with a synthesis report issued by Taskforce Cartel Act – a panel of experts which was formed in late 2006 by the head of the Federal Department of Economic Affairs (FDEA) to evaluate the ongoing effects and functioning of the act.<sup>(2)</sup> Article 59(a) of the act requires the 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.

The council reported on March 25 2009 that it intended to retain the underlying concepts of the act, as introduced in 1995 and revised in 2003, as well as certain instruments which were added in 2003 regarding direct penalties, the leniency regime, dawn raids and opposition proceedings. However, it acknowledged gaps in the text and asked the FDEA to put forward proposals for the amendment of the act. On June 30 2010 the council noted the proposals and opened the public consultation.

One of the main aims of the reform is to strengthen the rule of law by improving the implementing institutions. Cases are prepared, investigated and processed by the Secretariat of the Competition Commission and decided by the commission. The commission is made up of 12 members who have been nominated by the council, the majority being independent experts (ie, law and economics professors). Representatives of business associations and consumer organisations fill the other seats. The taskforce raised issues related to:

- the size of the commission and the non-professional status of some of its members;
- the distribution of power between the commission and its secretariat; and
- the independence of the commission (since some of its members represent lobbies).

As a result, an independent competition authority is to be created. Its role will be to conduct investigations and, where relevant, to refer matters to a newly created first instance court – the Federal Competition Court – that will have the power to decide on cases. The new court will be composed of ordinary judges and specialised deputy judges, in a similar way to the Federal Patent Court. These judges must be completely independent of economic or political lobbies.

The partial revision also includes certain material recommendations aimed at enhancing competition in the general economic interest:

- The objection procedure should be improved and, in particular, accelerated. This procedure allows undertakings to benefit from a degree of legal certainty in the event of questionable behaviour with regard to cartel rules.
- The treatment of vertical agreements should be improved. The legal presumption of illicit practice in cases of minimum or fixed price setting or allocation of absolute territorial protection (as set forth in Article 5(4) of the Competition Act) should be abandoned. A case-by-case analysis would prevent market foreclosure, without impeding the implementation of economically legitimate distribution agreements. However, the act should retain the possibility of imposing direct penalties in cases in which it is established that minimum or fixed prices have been set, and where territories have been allocated in a manner that prohibits passive sales.
- Merger control should be strengthened and simplified. On the one hand, the criteria to assess mergers should be strengthened to avoid harmful market concentrations.

### Authors

**Silvio Venturi**



**Pascal G Favre**



On the other hand, there should be an administrative simplification to reduce multiple examinations of international concentrations. Pursuant to Article 10 of the Competition Act, the commission may prohibit a concentration, or authorise it subject to conditions and obligations, if the investigation indicates that the concentration creates or strengthens a dominant position and is liable to eliminate effective competition, while not improving the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed. In a 2007 decision, the Supreme Court held that the first two of these conditions were cumulative. In light of the taskforce's synthesis report, the council considers that compared to other countries, the Swiss system (which prohibits only concentrations that could eliminate effective competition), shows certain deficiencies and provides a relatively weak arsenal with which to enhance competition. According to the council, the risk remains that concentrations which could have a strong negative effect on competition might be approved. It thus recommends reducing the administrative workload with respect to transnational concentrations and the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (ie, introduction of the significant impediment to effective competition test, or the removal of the condition of elimination of effective competition).

- A legal basis for cooperation between Swiss and foreign competition authorities should be created, as many infringements to competition law have an international scope.
- Regarding civil proceedings against breaches of antitrust law, end customers should be entitled to bring cases to justice in order to obtain damages for cartel behaviour.

For further information on this topic please contact [Silvio Venturi](mailto:venturi@tavernierschanz.com) or [Pascal Favre](mailto:favre@tavernierschanz.com) at *Tavernier Tschanz* by telephone (+41 22 704 3700), fax (+41 22 704 3777) or email ([venturi@tavernierschanz.com](mailto:venturi@tavernierschanz.com) or [favre@tavernierschanz.com](mailto:favre@tavernierschanz.com)).

## Endnotes

(1) The text of the draft amendments is available in French at:  
<http://www.weko.admin.ch/aktuell/01024/index.html?lang=fr>.

(2) The text of the synthesis report is available in French at:  
<http://www.weko.admin.ch/dokumentation/00216/index.html?lang=fr>.

The materials contained on this website are for general information purposes only and are subject to the [disclaimer](#).

ILO is a premium online legal update service for major companies and law firms worldwide. In-house corporate counsel and other users of legal services, as well as law firm partners, qualify for a free subscription. Register at [www.iloinfo.com](http://www.iloinfo.com).



Official Online Media Partner to the International Bar Association  
An International Online Media Partner to the Association of Corporate Counsel  
European Online Media Partner to the European Company Lawyers Association

© Copyright 1997-2010 Globe Business Publishing Ltd