

**UNLAWFUL AGREEMENTS, DECISIONS  
AND CONCERTED PRACTICES AND ABUSES  
OF DOMINANT POSITION UNDER THE NEW  
SWISS LAW OF COMPETITION**

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The new *Federal Act of October 6, 1995 on cartels and other restraints on competition* (the "New Act") entered into force on July 1, 1996. It is part of the "comprehensive program for reinvigorating the market economy in Switzerland" established by the Federal Council.

The New Act is not merely a revised version of the old *Federal Act of December 20, 1985 on cartels and similar organisations* (the "Old Act"); it is the product of a thorough overhaul of the bases underlying Swiss competition law. The Old Act was designed above all for private businesspersons, giving them a means to bring a suit against restrictions on competition resulting from actions carried out by cartels and similar organisations. This approach, essentially civil in nature, proved inadequate for the promotion of the objectives set by the legislature because of the drawbacks of civil litigation and the financial risk run by plaintiffs. As in other countries, regulatory investigations, conducted by the Federal Cartel Commission, were the primary vehicle for market supervision. This monitoring could not, however, be exercised under the most effective conditions: first, the Cartel Commission's power was limited to an advisory function; it had no power, for example, to order the break-up of undertakings or the grouping of assets. Also, the legal regime was limited to the review of cartel practices; there were no rules designed to prevent concentrations, and the conduct of undertakings holding a dominant position could not be

satisfactorily controlled. Finally, the law was geared more to general market supervision than to the individual conduct of undertakings: businesses were not subject to behaviour governing rules and the Cartel Commission was (thus) required to assess restrictions on competition based on considerations of economic and social policy, considerations extrinsic to competition itself. The New Act makes a major change in the system by reinforcing the regulatory powers of control, specifically by granting real decision-making power to the new Competition Commission (the "Commission") and enabling it to judge undertakings' practices primarily on the basis of their effects on competition itself.

After reviewing the scope of the Act (Section I), we will describe the essential features of the new rules. These rules – intended to be "Euro-compatible" – focus on three major areas: anti-competitive agreements and practices (Section II), abuses of a dominant position (Section III) and control of concentrations. This last subject will be examined by the authors in a next issue of the *International Business Law Journal*. We will conclude this article with an overview of the procedure (Section IV), the applicable sanctions (Section V) and the relationship between the New Act and Community law (Section VI). In Articles 12 to 17 the New Act has retained provisions concerning civil procedure; as these provisions have only played a secondary role in the past, we will not discuss them.

## **I. The scope of the New Act**

To which extent the New Act may be applied depends on criteria relating to the nature of the parties involved, their conduct, location and temporal considerations.

1. The New Act applies to *all undertakings*, i.e. all economic units participating independently in economic activity, whether it be linked to supply or demand (Art. 2 (1), New Act). The term "undertaking" must be construed broadly, as its definition is more economic than legal in nature: it covers the widest possible range of forms in which economic players may operate and encompasses both private and public undertakings. It should also extend to individuals if they play an economic role, such as patent licensors and independent commercial agents. Associations acting as economic operators (e.g., associations of undertakings) and public authorities acting as private operators should also fall within the definition of "undertakings" within the meaning of the act, whether or not they are legal entities. The authorities responsible for enforcing the law must determine the still-unclear limits of the notion of "undertaking". By contrast, it is accepted that the act applies to neither consumers nor workers, as they are not "undertakings". Agreements and decisions relating solely to employment relationships are not therefore subject to the Act.

The Act applies to *all areas of economic activity*; no market for property, whether tangible or intangible, or services is, as a rule, exempt. Article 3 of the New Act does, however, lay down certain limits:

- Paragraph 1 exempts *official marketor pricing regimes* and the provisions governing *special rights* granted to certain undertakings. This provision incorporates the substance of Article 3 (1) of the Old Act. The exemption is, however, limited in scope; as the wording of the act indicates, it applies only to public law provisions "excluding" certain goods or services from competition. Individual exceptions may not therefore remove an entire area of activity from the ambit of the New Act. Thus, all economic sectors, including regulated sectors, are as a rule subject to the New Act, unless the New Act is inconsistent with official regimes or provisions governing special rights.
  
  - Paragraph 2 exempts *intellectual property* in the following terms: "the act does not apply to effects on competition resulting solely from intellectual property law." This exception does not mean that the legislature wished to render competition law wholly inapplicable to all restrictions that an intellectual property holder might impose on his contracting partners. The use of the term "solely" shows that the legislature intended to exempt from the New Act only those restrictions that are closely linked to the rights specifically reserved by law for the intellectual property holder. Case law handed down by the Court of Justice of the European Communities should be looked to for guidance in this area.
1. The New Act applies only where a restriction on competition results from participation in an *agreement*, from an *abuse of a dominant position* on the market or from participation in a *concentration* (Art. 2 (1), New Act). All other restrictions are governed by other provisions, notably those of the Federal Act of December 19, 1986 prohibiting unfair competition.
  
  2. The Act applies to restrictions on competition and concentrations, which *also have an effect* on the Swiss market (Art. 2 (2), New Act). It does not matter where the restrictions or concentrations came into being (e.g., the place where an agreement was signed) or where an undertaking has its registered office. An undertaking may be subject simultaneously to both Swiss and foreign competition law, in particular to Community law. In the interest of greater legal certainty, the New Act should be construed to the greatest extent possible in light of equivalent notions under Community law.
  
  3. The New Act entered into force on *July 1, 1996*. With respect to unlawful agreements, it applies to (i) factual situations arising after its entry into force, (ii) proceedings brought after its entry into force, and (iii) proceedings pending as at July 1, 1996. These proceedings will be stayed for a six-month period commencing on the Act's entry into force (Art. 62 (1), New Act). This period is intended to enable undertakings to comply with the new rules, not to grant interim clearance of unlawful agreements, decisions and concerted practices. By contrast, the New Act does not apply to final judgements and recommendations rendered under the Old Act (Art. 62 (3), New Act).

## **II Unlawful agreements**

A restriction on competition is prohibited under the new rules if it results from an agreement that is unlawful within the meaning of Article 5 (1) of the New Act. Agreements are unlawful if they (i) have an appreciable effect on competition without being justified on grounds of economic efficiency or (ii) eliminate effective competition. The applicable rules therefore depend on whether the agreement merely restricts competition or eliminates it entirely. We will also point out that the new law does not generally deem all agreements, decisions and concerted practices restricting competition to be unlawful, unlike Article 85 of the Treaty of Rome (the "Treaty").

## 1. The Notion of "Agreement"

1. The notion of agreement covers *not only agreements per se or understandings but also concerted practices* between undertakings (Art. 4 (1), New Act). The distinction, often difficult to make in practice, has no real legal significance: all are unlawful agreements within the meaning of the act.
- The Act does not define the term *agreement*. The notion covers first of all contracts as defined in Article 1 of the Swiss Code of Obligations ("CO"), i.e. a manifested exchange of mutual, concordant assent which is binding on the parties. It does not matter what form the contract takes (an oral agreement, general terms and conditions). The notion also covers contracts that are not binding on the parties (e.g., a "gentlemen's agreement"). The important point is that there is a meeting of the parties' minds to adopt a particular conduct on the market.
  - Nor does the Act define the term *concerted practice*. Such a practice may exist even in the absence of an agreement, since a concerted practice does not require there to have been an exchange of mutual, concordant assent between the undertakings. Here, the impediment to competition arises from joint action or parallel behaviour (e.g. price alignment). There must, however, be evidence of "concerted action", i.e. a form of collusion or practical, conscious and intended co-ordination between the undertakings. Competition is distorted when the undertakings in question cease to formulate independently the policies they intend to follow in the market. By contrast, joint action produced by the normal workings of competition or by one party's alignment of his conduct with that of a competitor, solely as a result of monitoring the market, is not a concerted practice. This kind of conduct is found frequently in oligopolist markets.

The notion of agreement should also encompass *decisions by associations of undertakings*. If it does not, undertakings could simply enter into agreements through an association (or associations) in order to circumvent the law. This is, however, an issue to be resolved and elucidated by the authorities responsible for enforcing the law. Be that as it may, it is generally accepted that a mere *recommendation* may constitute a concerted practice if it is the manifestation of the association's intent to co-ordinate the conduct of its members and if the members do in fact abide by it.

1. The notion of agreement covers both *horizontal and vertical understandings*, i.e. agreements and

concerted practices between undertakings occupying identical or different levels in the economic order (Art. 4 (1), New Act). The law therefore adopts the premise that vertical and horizontal agreements must be treated in the same fashion. This is, however, a general rule, subject to significant exceptions. The system is based on certain presumptions and secondary legislation laying down a favourable regime for vertical agreements generally and certain categories of horizontal agreements.

2. The Act does not specify whether anti-competitive agreements or practices may also exist between undertakings forming a *single economic unit*. The regulatory authorities responsible for enforcing the law will have to elaborate on this point. The general answer under Community law is that an anti-competitive agreement or practice does not exist in these circumstances if the subsidiary does not enjoy real independence in the market, provided that the agreement or practice does not affect third parties.

## 1. Agreements Restricting Competition

Agreements that restrict (but do not eliminate) competition are unlawful only if they have an appreciable effect on competition and are not justified on grounds of economic efficiency.

### 1. Appreciable Effect

Most agreements have an impact on competition in that they generally limit the parties' freedom to make certain commercial decisions independently. Thus, the legislature limited its prohibition to agreements giving rise to *appreciable restrictions* on competition; the restrictive effect on competition must therefore be significant.

In establishing the seriousness of the adverse effect on competition, a comparison must be made between competitive conditions with and without the allegedly unlawful agreement and the conclusion must be reached that the agreement has appreciable, deleterious effects (direct or indirect, actual or potential) on trade. It is not necessary for the majority of elements of competition to be eliminated. The seriousness of the adverse effect will depend on the elements affected in light of the characteristics of the relevant market. The comparison must be made in the context in which the agreement will be implemented. The relevant market must therefore be defined taking into consideration all of its features (barriers to entry, number and size of competitors, quantity of products in question, etc.). As the seriousness of the harm is measured in *qualitative*, rather than quantitative terms, the geographic market may be very limited in size. There is no requirement that the restriction be felt throughout Switzerland or in a significant part of it.

The Act does not specify whether the agreement must in fact lead to an applicable restriction on competition before it may be found unlawful or whether it must merely have as *its object* the creation of such a restriction, as is the case under Community law (Art. 85 (1) of the Treaty). On first reading, Article 5 (1) of the New Act would appear to require an anti-competitive effect. It should, however, be concluded that an agreement may be found unlawful on the basis of its terms alone if it is phrased in a way clearly showing that it is designed to distort the normal workings of competition. The distinction is less important under Swiss law than Community law. As agreements do not have to be notified before-hand to the authorities (see Section IV/2, below), they will as a general rule have already produced their effects by the time they are brought to the Commission's attention.

## 2. Unjustified Adverse Effect

Agreements restricting competition may be justified on *grounds of economic efficiency*, even if they have a significant effect on competition Art. 5 (1), New Act). In certain cases, harm to competition may be accepted if the resulting adverse effects are offset by economic benefits.

1. Agreements are permissible if they yield a certain result: agreements necessary to (i) cut production or distribution costs, (ii) improve products or manufacturing processes, (iii) promote research or the dissemination of technical or business expertise, or (iv) exploit resources more rationally, are "deemed" *justified* (Art. 5 (2), New Act). The legislature considers the objective benefits produced by such agreements (benefits which are not necessarily the same as the benefits to the parties – outweigh the drawbacks engendered by the restrictions on competition – a "positive balance").

The rule only applies, however, if both of *two additional conditions* are met. First, the agreements in question (and the restrictions they impose) must be necessary, and not merely useful, in meeting the objectives set. Second, these agreements must not "in any way" enable the undertakings in question to eliminate effective competition. This risk will usually be significant if the undertakings' market shares are substantial.

2. The law authorises the Federal Council, acting through *ordinances*, and the Commission, acting through *communications*, to establish terms under which certain agreements are "as a general rule" justified on grounds of economic efficiency (Art. 6, New Act). No specific regulation has yet been adopted. The Act states that the following agreements in particular must be covered by such regulations: co-operation agreements for research and development, specialisation and rationalisation agreements, agreements for the granting of exclusive rights for the purchase or sale of certain goods and services, exclusive license agreements for intellectual property rights, and specific forms of co-operation unique to certain areas of the economy.

## 1. Agreements Eliminating Competition

Agreements eliminating competition are *per se* unlawful. They may not be justified on grounds of economic efficiency.

1. Agreements eliminating competition must be understood to mean *horizontal agreements* between actual or potential competitors that vitiate all relevant factors on which competition is based in a given market. Not only must current competitive conditions be taken into account, but also the changes expected to occur as a result of the agreement.

The primary example of this type of agreement is the binding cartel (*cartel rigide or harte Kartelle*). The law *presumes* that these cartels eliminate all competition. The following is an exhaustive list of agreements falling within this category: direct or indirect price-fixing agreements, agreements governing the quantity of goods or services to be produced, purchased or supplied, and agreements to divide up a market along geographic lines (*market sharing*) or personal lines (*allocation of customers*) (Art. 5 (3), New Act). The law is based on the concept that all competition is eliminated, for example by a price-fixing agreement, even if competition based on other factors, e.g. quality, remains. Each factor of competition is considered important in this connection, whatever the market may be.

2. The presumption of unlawfulness has particular importance from the *procedural* perspective. When reviewing a binding cartel – and this is an original approach taken by the new rules – the Commission need not conduct an in-depth analysis of the market, but may limit its inquiry to establishing the facts underlying the presumption. Of course, the presumption of unlawfulness may be rebutted: the undertakings in question may prove that an alleged binding cartel does not eliminate all competition despite the elimination of the element of competition in issue. If they are able to prove this, they may attempt to establish that the cartel is justified on grounds of economic efficiency.

## 1. Exceptional Grounds of Justification

Article 8 of the New Act is novel, as compared in particular with Community law, in that it provides that agreements that are unlawful in light of their effects on competition (including the binding cartels referred to in Article 5 (3) of the New Act) may still be permitted by the Federal Council if "by way of exception, they are necessary to safeguard *overriding public interests*". Thus, the first requirement is that an over-riding public interest (not just any public interest) be served. Next, the permitted restriction must be *necessary* (not merely useful) in safeguarding that interest. The Federal Council's assessment will be first and foremost political in nature and based on factors unrelated to competition itself (economic policy in particular).

Since this authorisation is exceptional in nature, it may be granted only for a limited period of time, although it may be extended if the conditions prevailing at the time it was originally granted remain in effect. It may also be granted subject to conditions and obligations (Art. 31 (3) and (4), New Act).

## **I. Abuses of dominant position**

Article 7 of the New Act prohibits the abuse of a dominant position held by one or more undertakings. Like Community law, the New Act does not prohibit an undertaking from holding a dominant position on a market but does bar such an undertaking from abusing that position, since in the legislature's view the undertaking's market power carries with it special obligations.

### **1. The Notions of "Dominant Position" and "Abuse"**

The New Act defines the notions of "dominant position" and "abuse" by way of examples.

1. Pursuant to Article 4 (2) of the New Act, one or more undertakings enjoy a *dominant position* if they are able on either the supply or demand side "to act in a manner essentially independent of other market participants", "participants" meaning not only competitors but also suppliers or customers. This definition, which is more economic than legal in nature, matches that developed by the Court of Justice of the European Communities.

A dominant position is usually created by a combination of *several factors*. Market share is the most significant, but others must also be taken into consideration, such as the structure of the undertaking (e.g., its distribution networks and technological advantage), the degree of its independence from its partners, its behaviour on the market, the lack of potential competition (e.g., due to the magnitude of the financial or technical resources which competitors or new producers would have to deploy), the availability of alternative products and, generally, the structure of the market.

A dominant position can only exist with regard to a *given market*. The relevant market must therefore first be defined, then a determination made as to whether the undertaking in question holds a dominant position thereon. The law does not specify how the market is to be defined. In the Commission's view, the market must be defined, as under Community law, by reference to the goods (or services) in question and to geographic considerations: (i) products belonging to a given market are those which are interchangeable or largely so; if they are not, they do not compete with each other. Whether or not products may be substituted for each other depends on their characteristics, use and price. (ii) The geographic market is the territory where the undertaking is

active and conditions of competition are sufficiently uniform.

In light of Switzerland's small size and the very high degree of concentration in its economy, Article 7 of the New Act should become one of the most important provisions of the new law.

13. Article 7 (1) of the New Act provides that undertakings that "*abuse their [dominant] position* and thereby prevent other undertakings from becoming competitors or maintaining competition or place business partners at a disadvantage" engage in unlawful practices. The statute covers all protectionism (e.g., the creation of barriers to entry to, or disengagement from, a market or impediments to the exercise of competition on the market; practices designed to eliminate competitors or increase their costs) or exploitative

practices. As the determination is based on objective factors, it is not necessary for the undertaking to have engaged in wrongdoing. It must be kept in mind that the practice in question is not *per se* an abuse. If it were, any impediment to competition, such as any low price bid for example, would be prohibited and that is not the case. Only those impediments to competition and exploitative practices that are not justified on objective grounds judged in light of the facts and circumstances of the case, should be prohibited. The law gives no indication of the possible justification for practices by undertakings.

## 1. Examples of Abuse

Article 7 (2) of the New Act lists *specific cases* in which practices by a dominant undertaking "[a]re in particular deemed unlawful". This wording implies that (at least) the practices described are unlawful. That, however, is not the case. Most of the listed practices are commonly engaged in by undertakings and must be prohibited only when they constitute abuses within the meaning of Article 7 (1) of the New Act in light of the facts and circumstances of the case. Article 86, second paragraph, of the Treaty, from which the Swiss legislature drew its examples, is more precise, stating that the practices referred to simply "may" constitute abuse. The New Act gives the following examples:

- *Refusal to deal (New Act 7 II/a)*. The Treaty does not refer expressly to this "unlawful practice". The practice would at first sight appear to impose a general obligation to contract on an undertaking in a dominant position. This interpretation must, however, be rejected, as an undertaking holding a dominant position must, as a rule, be free to choose the parties with whom it contracts. It is only where no objective grounds exist for the refusal to contract that it may constitute an abuse, for example where a dominant undertaking refuses to deal with one of its current customers (unjustified termination of the contractual relationship, retaliatory measure) or where the customer "has no choice" because he must obtain the goods or services from the undertaking in a dominant position if he wishes to enter the market. This latter case is of particular

relevance to entities holding exclusive rights. A refusal to buy (as opposed to a refusal to sell) by an undertaking in a dominant position may also constitute an abuse, although this situation is encountered more rarely in practice.

- *Discriminatory treatment of trading partners with respect to prices or other sales terms (New Act 7 II/b)*. This is a burdensome restriction for the undertaking in a dominant position for it imposes a significant limitation on its freedom to negotiate with those of its trading partners who occupy similar situations. The prohibition on unequal treatment applies if the affected partners are placed at a competitive disadvantage and the unequal treatment is not justified on objective grounds. Thus, differing delivery dates, warranty terms or price terms may be prohibited. Unequal treatment may be justified for any number of reasons, often relating to the sales strategy followed by the undertaking in a dominant position or to the consideration provided by its trading partners.
- *The imposition of unfair prices or other inequitable conditions (New Act 7 II/c)*. Here the abuse is not measured by comparing the treatment of various trading partners of the undertaking in a dominant position but results from the conditions imposed by that undertaking on one, some or all of them. To determine whether the prices or conditions are unfair, a comparison is made with standard practice under normal competitive conditions in the market in question or, failing which, reference is made to the economic value of the products or services. Conditions are unfair if they are patently unjust in light of the facts and circumstances of the case, including in particular the seriousness of the infringement on the trading partner's freedom. This may involve unjust conditions imposed on the trading partners or unjust benefits exacted by the undertaking from its partners. In all cases, there must be exploitation on the part of the dominant undertaking of its disproportionate bargaining power.
- *Underbidding on prices or other terms and conditions of sale aimed at a specific competitor (New Act 7 II/d)*. This provision is designed to prohibit practices by an undertaking in a dominant position aimed at eliminating specific competitors from the market. According to the Federal Council's Message of November 23, 1994 concerning the Federal Act on cartels and other restraints on competition, this kind of practice must be found wherever the undertaking "systematically submits bids lower than those of a weaker competitor for whom there is no prospect of a rapid improvement in profits." Prices, which cannot be justified objectively, may be one sign of such a strategy. This may of course involve very low prices offered to a customer of a competitor. It may also involve excessively high prices paid to limit supply sources. In all cases, the practice is designed to restrict competition in order to enable the undertaking in a dominant position to act with greater market freedom at a later date.
- *Limitation on production, outlets or technical development (New Act 7 II/e)*. This provision covers the situation wherein an undertaking enjoying a dominant position, either alone or in conjunction with other undertakings, restricts market access in a way that is not the result of normal developments in the market. The limitation, which may relate to any market factor (products, quantities, regions, operators), is designed to enable the dominant undertaking to act over time

with even greater freedom on the relevant market or, at the very least, to maintain its position. The dominant undertaking could thus refuse to sell components for one of its products, in order to bar its competitors' access to the market for the product.

- *Making the conclusion of contracts conditional on agreement by the other contracting parties to accept or supply additional goods or services (New Act 7 II/f).* This provision forbids a dominant undertaking to subject the conclusion of the basic transaction to the conclusion of related transactions ("tied" transactions) unless there is an objective relationship between the two transactions, for example where the tied goods or services are essential to the main goods or services. The most commonly encountered example is that of an obligation imposed on the buyer of a product to look to the dominant supplier for maintenance services. In general, this sort of obligation cannot be justified unless, for example, the product in question is hazardous and the maintenance obligation is thus justified by safety concerns.

## 1. Exceptional Grounds of Justification

Article 8 of the New Act, stating that unlawful agreements may be permitted by the Federal Council if "by way of exception, they are necessary to safeguard *overriding public interest*", also applies to abuses of dominant position (see Section II/4 above). It is worth noting that an abuse of dominant position may never be "exempted" under Community law.

## IV. Procedure

### 1. Authorities Responsible for Enforcing the Law

Several governmental authorities, each bound by an obligation to maintain the confidentiality of matters falling within its official duties (Art. 25 (1), New Act), are responsible for enforcing the law.

13. The *Federal Competition Commission*, which has replaced the old Federal Cartel Commission, is the authority with primary responsibility for enforcing the new law. It now has real decision-making power and general jurisdiction: it may take any decision, which is not set aside by law for another authority (Art. 18 (3), New Act). Its duties include *inter alia*: to approve settlement agreements with undertakings (Art. 30, New Act); to receive notification of concentrations and render the necessary decisions (Arts. 32 *et seq.*, New Act); to serve notices, render opinions and make recommendations to the political authorities (Arts. 45-47, New Act).
14. The *Commission's Secretariat* is not *per se* an independent authority because it is subordinate to

the Commission. Be that as it may, the law grants the Secretariat major powers of its own, since in particular it is in charge of the preliminary investigation and the examination of the case. In addition to these fundamental duties, the Secretariat prepares the cases lying within the Commission's jurisdiction, makes decisions on procedural questions, submits proposals to the Commission and executes the Commission's decisions (Art. 23, New Act). The Secretariat is the body dealing directly with the undertakings concerned, third parties and the authorities. It may propose settlement agreements to undertakings (Art. 29, New Act).

15. The *Appeals Commission* "for competition issues" is an administrative authority created by the New Act. Any decision taken by the Commission Secretariat or the Commission itself may be referred to the Appeals Commission (Art. 44, New Act). The Appeals Commission is the first level of appeal for questions of administrative law.

16. *Other authorities* entrusted with powers and duties by the Act are the following:

- The *Federal Court* is the supreme judicial authority in Switzerland. The Appeals Commission's decisions may be appealed to the Federal Court under the administrative law appellate procedure.
- The *Federal Council* is the chief executive authority in Switzerland. The New Act entrusts it with a very specific duty: to grant exceptional clearances based on overriding public interests. These clearances, which depend above all on political considerations, legitimate restrictions on competition found to be unlawful by the Commission (Arts. 8, 31, New Act).
- The *ordinary courts* have jurisdiction to try actions based on the civil law provisions of the New Act. The civil cause of action will probably not be asserted any more frequently than under the old law. It should be noted that the New Act requires the civil courts to refer disputed restrictions on competition to the Commission for its opinion on their lawfulness.

## 1. The Administrative Procedure

The procedure is governed by the Federal Act of December 20, 1968 on administrative procedure ("AP"), subject, however, to specific modifications introduced by the New Act.

13. Agreements restricting competition need not be notified to the Commission, unlike the case under Community law. The parties to the agreement may, however, make such a notification, thereby triggering the opening by the Secretariat of a *preliminary investigation*, marking the commencement of the administrative procedure. A preliminary investigation may also be conducted on the authorities' own initiative or pursuant to a complaint by a third party (Art. 26 (1),

New Act). The mere opening of a preliminary investigation does not give the concerned parties the right to inspect the case file. The main purpose of the preliminary investigation is to gather the information necessary for the Secretariat to conduct an initial examination and specifically to determine whether the restriction in question has an appreciable effect on competition.

14. If the preliminary investigation uncovers evidence of an unlawful restriction, the Secretariat may open an *investigation*, acting in accord with one of the officers of the Commission. It must also open an investigation if asked to do so by the Commission or the Department of the National Economy (Art. 27 (1), New Act). When an investigation is opened, an official announcement is published setting forth the object of the investigation and the parties concerned by it (Art. 28, New Act). In all cases the "parties concerned" are the undertakings party to the agreement in issue or the undertaking having engaged in an abuse of its dominant position. Certain third parties may take part in the procedure provided that they make themselves known within thirty days from publication of the announcement opening the investigation (Art. 28, New Act). These third parties include current or potential competitors affected by an agreement restricting competition and also certain organisations and associations (Art. 43, New Act). The third party participants may be recognised as parties to the proceedings under the terms laid down in Articles 6 and 48 of the AP. If they are so recognised, they may exercise all the rights of parties, i.e. most importantly the right to participate in the investigation, the right to inspect the case file (Art. 26, AP), subject, however, to the protection of significant interests of the parties (Art. 27 (1b), AP), the right to be heard (Art. 28, AP) and the right to appeal.

The parties and third parties concerned are obliged to furnish all relevant information and produce all necessary documents (Art. 40, New Act). The competition authorities may question third parties as witnesses and may order the parties to the investigation to submit statements. They may order searches and seizure of evidence (Art. 42, New Act). Moreover, the procedure is governed by the Federal Act on administrative procedure (see art. 39, New Act); thus, traditional investigative measures may be taken. The Secretariat establishes the facts and administers the evidence (Art. 12, AP). It should be pointed out that Switzerland is not party to any international treaty on mutual assistance in administrative matters.

15. The investigation terminates with a *decision* by the Commission. That decision may be approval of a settlement agreement. These agreements are proposed by the Secretariat and cover the actions necessary to eliminate the restriction on competition (Art. 29, New

Act). The participants in the investigation may submit written comments on invitation from Secretariat. If no settlement agreement is reached, the Commission issues a decision that is binding on the undertakings concerned (Art. 29, New Act) and is based on a report prepared for it by the Secretariat. If the Commission deems it appropriate, it may ask the Secretariat to take additional measures needed for the investigation (Art. 30 (2), second sentence, New Act). The Commission may publish its decisions (though it must respect the rules of commercial confidentiality).

## 1. Avenues of Appeal

The parties and third-party participants within the meaning of Articles 28 and 43 of the New Act, may lodge an appeal with the *Appeals Commission* against any decision by the Commission or Secretariat (see Art. 48, AP). These appeals are subject to the ordinary rules of administrative procedure. Decisions by the Appeals Commission may in turn be appealed to the *Federal Court* through the administrative law appellate procedure.

## 2. Exceptional Clearances

A clearance requested by the undertakings concerned based on exceptional grounds (Art. 8, New Act) cannot be granted until the Commission has ruled that the agreement or the practice by a dominant undertaking is unlawful (Art. 31, New Act). An application for clearance must be submitted to the Federal Council within thirty days following the Commission's decision; the applicant is not required to have exhausted all avenues of appeal. An application for exceptional clearance may also be submitted within thirty days following the entry into force of the decision by the Appeals Commission or the Federal Court.

## V. Sanctions

One of the singularities of the new law is that it does not impose either administrative or criminal sanctions on unlawful agreements or abuses of dominant position *per se*. Sanctions are imposed only on the failure to comply with settlement agreements, administrative decisions or orders issued during an investigation. In other words, the only punishable action is the failure to abide by administrative measures designed to eliminate the restrictions on competition, and then only once the authority has acted. Administrative sanctions are imposed on undertakings and criminal sanctions on the persons responsible; both types of sanctions may be imposed in a given case.

13. Where there has been a failure to comply with a settlement agreement, a final decision by the regulatory authorities responsible for enforcing the New Act or a decision rendered by an appellate administrative or judicial authority, an *administrative fine* may be levied on the undertaking in an amount ranging up to three times the gain it realised by its non-compliance. If the gain cannot be calculated, the fine may be as high as 10 % of the most recent annual turnover achieved in Switzerland by the undertaking in question (Art. 50, New Act). The fine may not, however, exceed CHF 100,000 if the failure to comply relates to the obligation to forward information to the authorities or produce documents (Art. 53, New Act). The law merely sets maximum limits on the fine; the actual amount will depend on the facts and circumstances of the case.

14. Persons acting on behalf of undertakings and responsible for the non-respect of settlement agreements or administrative decisions, including those rendered by appellate bodies, are subject to *criminal fines* as high as CHF 100,000 (Art. 54, New Act). As a general rule, the criminal action is subject to a five-year statute of limitations (Art. 56 (1), New Act). The fine may not, however, exceed CHF 20,000 if the decisions in question relate to the obligation to forward information to the authorities (Art. 55, New Act); in this case, the limitation period is two years (Art. 56 (2), New Act). In all cases, to be held liable the person responsible must hold decision-making power within the undertaking and must have acted intentionally.

## V. Swiss law and community law

### 1. The New Act and Community Law

The new Swiss rules are close to Community law. A summary comparison shows:

13. *Abuse of dominant position and unlawful agreements.* Article 7 of the New Act, governing abuses of dominant position, restates the substance of Article 86 of the Treaty. In practice, the Swiss standard should not give rise to significant differences in interpretation.

Article 5 of the New Act, governing unlawful agreements, also restates the substance of Article 85 of the Treaty. The "exemption" mechanism does, however, differ. Community law lays down a general rule prohibiting anti-competitive agreements, decisions and concerted practices (Art. 85 (1) of the Treaty) and then qualifies this prohibition through a series of individual or block exemptions. By contrast, Swiss law, based on a prohibition aimed solely at abuses, turns the system around and generally recognises the lawfulness of agreements, decisions and concerted practices but then qualifies this recognition by prohibiting abuses. The approach taken by the new law corresponds to an idea (still) highly esteemed in Swiss competition law, i.e. that a restriction is in itself lawful and that only abuses are to be prohibited. As stated in Article 1 of the New Act, the goal is solely "to prevent the adverse consequences" of harm to competition. In perpetuating this idea, the New Act respects the constitutional mandate entrusted to the legislature (Art. 31 *bis* (3) (d) of the Federal Constitution). This difference in mechanism grows indistinct though if we compare Article 5 (3) of the New Act with Article 85 of the Treaty; the presumption established by Article 5 (3) of the New Act is close to a prohibition-based regime.

That said, the agreements, decisions and concerted practices that will in the final analysis be allowed or prohibited in practice should not differ widely, regardless of whether one applies the "prohibition-of-abuses" rule laid down in Article 5 of the New Act or the "prohibition-of-anti-competitive-agreements" rule laid down in Article 85 (1) of the Treaty. The

mechanism would, however, appear more cumbersome under Community law, where the tendency is, initially and prior to any real economic analysis, to consider any restriction to be a violation of Article 85 (1) of the Treaty and then subsequently to allow the restriction pursuant to Article 85 (3) of the Treaty.

14. *Procedure.* The main difference lies in the fact that agreements restricting competition do not have to be notified to the Competition Commission. This follows directly from the fact that agreements are considered *prima facie* lawful.
15. *Fines.* This is the point which foreign observers will probably find most surprising in the new regime, for it does not punish abuses, resulting either from agreements or dominant positions, committed before the authorities' intervention. Undertakings need only undo the restriction on competition after the Commission has taken action in the case in order to escape having to pay any fine (even though, for example, a dominant undertaking may have abused its position repeatedly over many years). Moreover, if undertakings continue the restrictions in force despite the Commission's intervention, the "duration" of the violation will in general be minimal, as it will be measured by the time period between the date the Commission intervenes and the date the fine is imposed. Given these rules, the preventive effect of the new law might well be doubted, if one considers that, from the European Community's experience, such a preventive effect results from the heavy administrative fines that may be levied. Under the regime set up by the new law, the economic risk run by undertakings in violating the rules will often appear to be minimal.

## **1. Direct Application of Article 85 of the Treaty by a Swiss Court?**

This issue arises most significantly in connection with contracts that are governed by Swiss law and would be void under Article 85 of the Treaty. The Swiss court cannot of course apply this provision "directly". Two "indirect" courses of action could be adopted:

13. First, Article 85 of the Treaty could serve as grounds for avoiding the contract pursuant to Article 20, CO, which does apply to it. Under Article 20, CO, a contract is void if it is "unlawful". To date however, the Federal Court has held that a violation of foreign law does not invalidate a contract governed by Swiss law.
14. In an international context, *Article 19 of the Federal Act on private international law* ("APIL") allows the courts to "take into consideration" mandatory provisions of foreign law "whenever legitimate and clearly overriding interests in light of the Swiss conception of law so require", even when the contract is governed by Swiss law. Although it is acknowledged that Article 19 of the APIL also covers foreign public law, there is disagreement as to whether it authorises a Swiss court to take account of Article 85 of the Treaty. Article 19 of the APIL does not by its terms bar the courts from considering Article 85 of the Treaty. Yet the Federal Court has never invalidated a

contract on the basis of a mandatory rule of foreign law.

The issue has taken on lesser importance with the entry into force of the new law. If the contract is governed by Swiss law, an undertaking may now argue that the agreement is void on grounds similar to those set forth in Article 85 of the Treaty. It may then be declared void pursuant to Article 13 (a) of the New Act.

## **1. The Free Trade Agreement of 1972**

Switzerland and the Community concluded a free trade agreement (the "Agreement") that entered into force on January 1, 1973. The Agreement states that anti-competitive agreements and practices and abuses of dominant position are incompatible with it to the extent that they

may affect trade between Switzerland and the Community. Article 23 of the Agreement does not, however, speak of a "prohibition" and cannot therefore be violated. It merely leaves it to the parties to take all "appropriate measures" after meeting through the Joint Committee responsible for enforcement of the Agreement. The Agreement does not therefore lay down any directly applicable competition rule and must be viewed above all as providing a diplomatic means for resolving disputes.

Articles 58 and 59 of the New Act set up a mechanism allowing for enforcement of international agreements which do not contain directly applicable rules. In the Federal Council's view, the new provisions "should make it possible to eliminate restrictions on competition created in Switzerland but having their effects abroad, whenever these effects contravene competition law provisions of international treaties and it is foreseeable that one of the parties to the agreement will take retaliatory measures". In cases affecting international agreements the Department of the National Economy may instruct the Secretariat of the Commission to conduct a preliminary investigation (Art 58 (1), New Act). If the restriction in question contravenes the agreement, the political authorities must propose an arrangement designed to suppress the infraction. If an arrangement cannot be reached, the political authorities must take the measures necessary to eliminate the restriction (Art. 59, New Act).

## **Conclusion**

The new rules governing anti-competitive agreements and abuses of dominant position will not produce fundamental changes in the conduct of Swiss undertakings already engaged in significant business in the Community. In general, they are already experienced in the rules of Community law, on occasion having paid dearly to learn them. Thus, it is above all small and medium-sized businesses that will have to

master the new rules. The challenge will also be great for lawyers, who are little used to the rules of competition law and its direct effects on undertakings' dealings with each other. In fact, Swiss businesses active on the Community market have up to now relied primarily on foreign lawyers.

By contrast, the new rules will make a substantial contribution to the functioning of the domestic market. First, they should provide an effective weapon against cartels for they finally give the administrative authorities the means to take action. They should also have a significant impact on the Swiss market given the high rate of formation of cartels in the economy, thereby contributing to the "reinvigoration of the market economy in Switzerland" desired by the Federal Council. Finally, the new regime is an important factor for integration into the European Union, as seen as a single economic market, even though many barriers to the free movement of goods remain.