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# Is the Europeanization of Swiss Competition Law Reaching a Limit?

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# Starting Point

- Switzerland was by tradition a classic cartel country with extensive horizontal and vertical market regulations. Aim: preservation of “village culture” (“*Dorfkultur*”).
- 1992: EEA-membership rejected in referendum (50.3%; 18 cantons).
- Federal Council launches “revitalization program”.
- In 1995, Single Market Act (BGBM) and a modern Cartel Act (CartA) are enacted:
  - i. Anti-competitive agreements.
  - ii. Abuses of dominance.
  - iii. Merger control.



# Article 5: Quasi Cartel Prohibition

## - Art. 5 Unlawful agreements affecting competition

<sup>1</sup> Agreements that significantly restrict competition in a market for specific goods or services and are not justified on grounds of economic efficiency, and all agreements that eliminate effective competition are unlawful.

<sup>2</sup> Agreements affecting competition are deemed to be justified on grounds of economic efficiency if:

- a. they are necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
- b. they will under no circumstances enable the parties involved to eliminate effective competition.

<sup>3</sup> The following agreements between actual or potential competitors are presumed to lead to the elimination of effective competition:

- a. agreements to directly or indirectly fix prices;
- b. agreements to limit the quantities of goods or services to be produced, purchased or supplied;
- c. agreements to allocate markets geographically or according to trading partners.

But: no direct fining power. President (ret.) Roland von Büren: “*The first murder is free.*”



# 2003 Reform Part 1

1. Introduction of direct sanctions for serious restrictions of competition:
  - Up to 10% of the turnover generated in Switzerland in the preceding 3FY.
  - Change of mind following the fining of the Europe-wide *Vitamins* cartel by the EU Commission.
  - Ringleader Hoffmann LaRoche (CH) had to pay almost ½ of the fine of EUR 855 million imposed by the EU Commission.
  - Switzerland, whose consumers were also harmed, was left empty-handed.



# 2003 Reform Part 2

## 2. Addition of a new paragraph 4 to the quasi-ban on cartels in Article 5 CartA:

<sup>4</sup> The elimination of effective competition is also presumed in the case of agreements between undertakings at different levels of the production and distribution chain regarding **fixed or minimum prices**, and in the case of agreements contained in **distribution contracts regarding the allocation of territories** to the extent that sales by other distributors into these territories are not permitted.<sup>11</sup>



Preventing attempts at market **foreclosure** defined as a **primary objective** of competition policy; See Dispatch of 2003 Reform: “The demand that a possible foreclosure of Swiss markets through vertical agreements by internationally active companies should not be accepted is justified insofar as the effect of Switzerland's liberal trade and economic policy could otherwise be undermined.”



# 2014: Cooperation Agreement CH-EU



- 1 December 2014 entry into force of the Agreement CH-EU on cooperation in the application of competition law.
- Possibility of COMCO and DG COMP to communicate and coordinate enforcement and exchange information.
- See recent example in the fragrance industry.



# 2012 Failed Revision Attempt



Switch from an administrative to a prosecutorial enforcement model.



Strengthening of private follow-on damages actions.



Introduction of the SIEC-test.

- In 2011, the Federal Administrative Court took up its work in St. Gallen.
- ECHR-compliant: Full judicial control on all points of facts and law; no deference to COMCO (ECtHR *Menarini*).
- Appeal on all points of law to the Supreme Court possible.



# 2013-2015: Developments in Case Law – FAC

- **Elmex**: vertical passive sales bans aimed at foreclosing Swiss market constitute hardcore agreements.

- 5-judge panel FAC.

**19 December 2013**

- **BMW**: confirms *Elmex*.

- 5-judge panel FAC.

**13 November 2015**

**23 September 2014**

- **Building Fittings**: proof of effects required in every case.

- 3-judge panel FAC.

**17 December 2015**

- **Altimum**: follows *Building Fittings*.
- 5-judge panel FAC.





# 2016-2018: FSC Develops Standing Case Law

28 June 2016: APPEALS DISMISSED IN *ELMEX*

- Art. 5 (1) CartA requires significant effects: qualitative (object) or quantitative (effect).
- Weighty qualitative elements hardly require quantitative elements, and *vice versa*.

24 October 2017: APPEALS DISMISSED IN *BMW*

- FSC confirms *Elmex* case law.

9 October 2017: COMCO'S APPEALS UPHeld IN *BUILDING FITTINGS*

- FSC confirms *Elmex* case law.

2018: COMCO'S APPEAL UPHeld IN *ALTIMUM*

- FSC confirms *Elmex* case law.



# Political Developments post-*Elmex*

- Competition lawyers launch campaign in media and academic publications claiming unconstitutionality of the Supreme Court's standing case law due to (rebuttable!) presumption that hardcore agreements have significant effects on competition.

-  **Art. 96 Competition policy**

<sup>1</sup> The Confederation shall legislate against the **damaging effects** in economic or social terms of cartels and other restraints on competition.

- Unholy alliance with construction industry unhappy about enforcement of CartA against bid rigging.



# Political Developments post-*Elmex*

## 1996 Dispatch to the draft Constitution:

The norm “obliges the federal legislature to enact regulations against economically or socially harmful effects of restrictions on competition [and] **does not comment on the means** of cartel policy.”

“The scope of the cartel legislature is considerable; under certain circumstances, it may also partially use the **means of prohibiting cartels**. However, [the norm] does [...] not allow for a general prohibition of competition agreements as such.”



# Prevailing Constitutional View

Seasoned competition law practitioner Reto Jacobs (with reference to the unanimous constitutional doctrine):

**“According to today’s prevailing opinion**, the legislature may also use prohibitions [...]. Permissible are, among other things, selective prohibitions, prohibitions with a possibility of justification or a reservation of permission, as well as presumptions of prohibition. Both ‘*ex ante* prohibitions’ and ‘*ex post* prohibitions’ are possible, whereby the latter only develop their effect following an investigation procedure. [...] The thesis, which is sometimes **put forward in older literature, according to which the constitution only allows ‘ex post prohibitions’ [...] cannot be followed”**.

**“The instruments of the current CartA (selective prohibitions, statutory presumptions) are not objectionable from a constitutional perspective.”**



# Excursion: Grisons Bid Rigging Cartel



- 2004-2010: 12 construction companies coordinated their bids for cantonal and municipal road construction work.
- Regular meetings to determine bid prices, award recipients, and quotas.
- 70-80% of the total value of cantonal and municipal road construction projects in northern and southern Grisons: Total value of at least CHF 190m (c. EUR 180m).
- Fines of CHF 11m (c. EUR 10m).



# 2021: Partial Revision CartA

- Construction industry successfully lobbies several politicians to submit parliamentary initiatives (“motions”) to amend CartA.
- Government requests rejection, defeated in both parliament chambers.
- 24 November 2021: government launches consultation process.



Modernisation of  
merger control.



Strengthening of  
private actions.



Procedural  
improvements.

- Draft to implement parliamentary Motions, *i.a.*, **Motion *Français***.



# Motion *Français*

- Purported aim: to make the CartA more effective and to reduce the “legal uncertainty” allegedly created by the *Elmex* case law.
- Article 5 CartA needs to be “clarified” so that in the future COMCO must carry out a **full qualitative and quantitative market analysis for hardcore agreements without exception.**
- False contention: The practice of presuming that hardcore agreements significantly restrict competition (N.B.: which can still – as a matter of principle – be justified!) violates the law on public procurement by rendering consortia impossible.

→ Government proposes open wording: strong qualitative elements weigh up less qualitative elements and *vice versa*. No market share thresholds.



# Submission of Studienvereinigung Schweiz

- Opinion demands an even stricter intervention test for COMCO for horizontal and vertical hard-core agreements (reminiscent of arguments in EU *Luxemburg Brewers* cartel case):
  - Requirement of “clear proof” of quantitative and qualitative effects:
    - Quantitative: high market share of the undertakings concerned and degree of compliance with the agreement.
    - Qualitative: analysis of importance of the affected competition parameter.
    - Effect: Proof of a concrete and significant effect on competition.
- Claim that this change is necessary to bring competition law in line with the Swiss constitution as well as EU competition law where, allegedly, hardcore by-object restrictions must be examined for their effects.





# Submission of Studienvereinigung Schweiz

[https://www.studienvereinigung.de/sites/default/files/2022-05/20220311%20StudV\\_Arbeitsgruppe%20Schweiz\\_Stellungnahme%20zur%20KG-RevisionCH%202022%20%28Final%29.pdf](https://www.studienvereinigung.de/sites/default/files/2022-05/20220311%20StudV_Arbeitsgruppe%20Schweiz_Stellungnahme%20zur%20KG-RevisionCH%202022%20%28Final%29.pdf)



# Submission of Studienvereinigung Schweiz

Crucial points overlooked in the submission:

- *Elmex* and *BMW* are the Swiss equivalent of the ECJ's 1966 landmark decision on parallel imports in the *Grundig/Consten* case.
- Switzerland partially participates in the EU or EEA internal market. See EU Council conclusions of 19 February 2019:

“The Council reaffirms that, by participating in parts of the EU's internal market and policies, Switzerland is not only engaging in bilateral relations but is also becoming a participant in a common economic area”.

→ As in EU and EEA law, competition law has a **dual objective** in Switzerland: to protect competition *and* to protect the functioning of the internal market.



# Impact of Motion *Français* à la Studienvereinigung

- i. Weakening of competition law enforcement.
  - Certain hard-core cartels could no longer be prohibited. Customers, consumers, and the public sector would finance the cartel pensions.
- ii. Increased legal uncertainty.
  - *Ex ante* assessment of any form of cooperation would entail the need to consult with lawyers and economists.
- iii. Contradiction with other revision proposals; more lengthy, expensive procedures.
  - Demands to accelerate proceedings clash with extensive effects analysis.
- iv. Contradiction to the Fair Price Initiative.
  - Aim to open Swiss markets through the introduction of relative market dominance abuse thwarted through weakened enforcement.



# Impact of Motion *Français* à la Studienvereinigung

- v. Contradiction with EU law and, thus, endangerment of “Stabilex”.
  - Voluntary and unilateral adaption of Swiss law to EU law to prevent further unfriendly measures by the EU following the failure of the planned framework agreement. Thwarted in the area of competition law.
- vi. Incompatibility with the Switzerland-EU cooperation agreement.
- vii. Contradiction with OECD best practices.
- viii. Underenforcement in Switzerland would not remain without consequences.
  - The EU Commission would likely fill the gap. *cf. Pre-Insulated Pipe, Elevators and Escalators, Vitamins, Dyestuffs* cartels. Swiss consumers would have the damages; EU would receive the fines.



# Institutional Revision?

- Construction, automotive, pharma associations, and Studienvereinigung Schweiz revive failed 2012 institutional revision.
- Claim that administrative enforcement model violates rule of law.
- No mention of European Court of Human Rights judgment in *Menarini*.
- No analysis of European experiences with prosecutorial enforcement model (Austria, Denmark, Finland, Ireland, Sweden).
- Government has appointed a panel of experts to evaluate calls for an institutional revision.
- Report expected Q4 2023.
- Switch to a prosecutorial model would weaken enforcement of CartA.

