



Switzerland ❖

– Markus Langenegger†

Switzerland is located in Central Europe, east of France and north of Italy. Switzerland is a multi-ethnic, multilingual and multi-confessional nation. It has been a Federal State since 1848 and has a federal structure with three different political levels: the Confederation, the Cantons (states) and the Communes (districts).

Economy¹

Switzerland is a peaceful, prosperous, and modern market economy with low unemployment, a highly skilled labour force, and a per capita GDP among the highest in the world. Switzerland's economy benefits from a highly developed service sector, led by financial services, and a manufacturing industry that specialises in high-technology, knowledge-based production. Its economic and political stability, transparent legal system, exceptional infrastructure, efficient capital markets, and low corporate tax rates also make Switzerland one of the world's most competitive economies.

The Swiss have brought their economic practices largely into conformity with the EU's,² to enhance their international competitiveness, but some trade protectionism remains, particularly for its small agricultural sector. The fate of the Swiss economy is tightly linked to that of its neighbours in the euro zone, which purchases half of all Swiss exports.

Competition Evolution and Environment

The first Act on cartels (CartA) was adopted in 1962. This act created the Cartel Commission, which had only monitoring power but no decision making power.

The Cartel Commission had the ability to conduct investigations against cartels with harmful economic or social outcomes, and to release non-binding recommendations.

The CartA of 1962 was revised in 1985. The main reform was that the Cartel Commission could ask the Federal

PROFILE

Population:	7.65 million*
GDP (Current US\$):	340.5 billion (PPP)*
Per Capita Income:	43,400 (PPP)*
Surface Area:	41,277 sq km*
Life Expectancy:	81.2 years*
Literacy (%):	99 (of ages 15 and above)*
HDI Rank:	11*

Sources:

- CIA The World Factbook (2011)
- United Nations Development Program

(*) For the year 2011

Department of Economic Affairs to enforce its recommendations in cases of non-compliance. This reinforced the power of the Cartel Commission, but did not provide effective protection of competition. Moreover, there was no merger control in Switzerland at the time.

In 1992 the Swiss refused to join the European Economic Area (EEA). Furthermore, various studies had revealed that Switzerland had lost most of its competitive edge due to a lack of effective competition. On these grounds, the government presented a programme to revive the Swiss economy.

In this context the CartA of 1985 was revised. The substantive provisions for assessing restraints on competition were more or less aligned to EU competition law. The new law brought important changes: The Cartel Commission became the Competition Commission (COMCO) and was given the following powers:

- Decide and decree on proposals of the Secretariat, whenever competition is hindered in an unlawful way;
- Scope of competence: unlawful agreements, abuse of a dominant position and merger control; and
- Address recommendations and opinions to political authorities.

❖ Original paper written (2006-07) & updated (July 2012).

While the competition rules in the revised Cartel Act were up to date, the effectiveness of the law was weak because only non-compliance with legally enforceable decisions of the COMCO could be fined. In other words, the initial violation of the act was free of any fine.

This shortcoming turned out to be particularly frustrating in the well-known global vitamins cartel and helped to trigger further reform efforts in Switzerland. While the cartel members were sanctioned with substantial fines in the US and in the EU, the COMCO was only able to issue a decision confirming that the vitamins cartel had infringed competition law, despite the fact that the leading cartel member was a Swiss firm established in Switzerland. As a result, the Federal Council (executive body of the Swiss government) initiated a partial revision of the 1995 Cartel Act in early 2000.

Competition Law and Policy

One of the main objectives of the revision, therefore, concerned the introduction of fines up to 10 percent of turnover generated in Switzerland in the previous three years for hard core cartels and abuse of dominant position. This was accompanied by several other measures all intended to improve the preventive effect of the law and to bring Swiss competition law more in line with the EU framework. In addition to direct sanctions, the main reforms also included the introduction of:

- a leniency programme;
- new investigation techniques, in particular dawn raids;
- a clearer application of the law to both public and private enterprises; and
- a provision on vertical agreements (price fixing and market allocation)

The revised competition law came into force in 2004. The existing Ordinance on merger control was also amended following the revision of the Act. The experience since 2004 has shown that the new investigation techniques together with the leniency programme are powerful tools for uncovering cartels and other unlawful behaviour.

Institutions and its Competencies

The Swiss competition authorities consist of the Competition Commission (COMCO) and its Secretariat. The COMCO is the decision-making section and the Secretariat is the investigative arm.

The COMCO consists of 12 members who are appointed by the Federal Council. Membership is a non-occupational public service activity. The COMCO decides and decrees on proposals of the Secretariat. The Secretariat, with its 60 lawyers and economists, leads the investigations and prepares draft decisions for the COMCO. The COMCO is an independent body, although administratively attached to the Federal Department of Economic Affairs.

Scope of Competition Law and Sector Regulation

The CartA does not contain a list of sector exclusions.

However, the law is not applicable to effects on competition which result exclusively from laws governing intellectual property and there is a precedence of legal provisions that do not allow for competition in certain markets, such as

- provisions which establish an official market or price system or
- provisions which grant special rights to enterprises performing public services.

The CartA is therefore based on the idea that an official market organisation only exists if it was the legislator's intention to exclude competition in a specific area. In such cases, the COMCO has to clarify whether or not these provisions still allow for (some) competition. As long as this is the case, the CartA applies. The following list contains sectors which are more or less affected by exclusions of competition law:

- Agriculture
- Pharmaceuticals
- Health care
- Railway transportation
- Radio and TV broadcasting
- Electricity & gas supply
- Water supply
- Postal services

Usually, sectors, which are (partly) liberalised, are regulated by specialised authorities:

Telecommunications: This sector is regulated by the Federal Communications Commission (ComCom) since 1997. The Commission is independent of the administrative authorities and has its own secretariat. The Commission instructs the Federal Office of Communications (OFCOM) to prepare its business and implement its decisions.

The main activities of the ComCom are listed below:

- Granting licenses for the use of radio communication frequencies;
- Awarding of universal service licenses;
- Laying down the access conditions (unbundling, interconnection, leased lines, etc.) when service providers fail to reach an agreement;
- Approval of national numbering plans; and
- Taking decisions about supervisory measures and administrative sanctions

Postal services: The regulatory authority PostReg monitors postal services, exercises market supervision and facilitates effective competition as part of the process of gradual market opening.

- PostReg assures the quality control of the incumbent's (Swiss Post) services.
- It grants licenses to market entrants and monitors compliance with standard sector working conditions.
- PostReg assures fair competition in the newly opened postal markets. It has to verify that Swiss Post does not cross-subsidise competitive services using revenues derived from monopolised services.

Electricity: When the new Swiss Federal Electricity Supply Act entered into force in 2008, the Federal Electricity Commission (ElCom) was formally entrusted with the task of supervising the liberalisation of Switzerland's electricity market. ElCom is responsible for monitoring compliance with the Swiss Federal Electricity Act and the Swiss Federal Energy Act, taking all necessary related decisions and pronouncing rulings where required. ElCom monitors electricity prices and rules as a judicial authority on disputes relating to network access and payment of cost-covering feed-in of electricity produced from renewable energy. It also monitors electricity supply security and regulates issues relating to international electricity transmission and trading.

Other relevant Laws

In addition to the CartA that directly deals with competition, other laws have been introduced in order to promote a competitive market economy. For instance:

The Federal Act on Price-Monitoring (1985) applies primarily to prices set by undertakings in a dominant position (private or public). It establishes the role of a Price Supervisor, whose task is to prevent price increases or the maintenance of abusive prices. The Office of the Price Supervisor focuses mainly on prices set by the national, a local or cantonal government and public-sector undertakings (see above; i.e. a part of medication prices, gas, electricity, water, some postal services, public transportation, notary fees, public fees in general, etc.).

If possible, measures to eliminate or prevent abuse are taken with the consent of the interested parties, but the Price Supervisor can also decree prices. If it is not clear whether or not an undertaking holds a dominant position, the Price Supervisor must obtain the expert advice of COMCO first. Undertakings that breach a settlement or fail to comply with decreed prices may be fined up to CHF 100,000.

The Federal Act on Unfair Competition (1986) aims to guarantee fair competition regarding misleading or deceptive business practices.

The Federal Act on the Internal Market (1995) guarantees free and non-discriminatory access to the whole Swiss market to any person established in Switzerland. This act is also administered by the COMCO. The law aims:

- to facilitate professional mobility and economic Exchanges within Switzerland;
- to support efforts of the cantons aiming at harmonising provisions that regulate market admission;
- to increase the competitiveness of the Swiss economy; and
- to reinforce the economic cohesion of Switzerland.

The Federal Act on Technical Barriers to Trade (1995) aims at preventing, eliminating or reducing technical

barriers to trade that obstruct trade between Switzerland and other countries.

The Federal Act on Public Procurement (1994) aims to

- regulate and transparently organise procedures for the award of public contracts;
- strengthen competition between tenderers;
- ensure non-discrimination between tenderers; and
- promote the efficient use of public funds.

Consumer Protection

In Switzerland, there is no special law on consumer protection. Different legal regulations protect consumers against misleading practices and health and security dangers (e.g. Federal Act on Unfair Competition, see above). Violations of most of these laws can be sued in civil courts.

Furthermore, the Swiss Government has created two institutions to provide advice on consumer protection policy: the Federal Office of Consumer Affairs and the Federal Commission of Consumer Affairs.

The former is a permanent administrative body, the latter a non-permanent advisory body of scientific experts and representatives of consumer associations, business associations and trade unions. Moreover, the above-mentioned Price Supervisor also looks after consumers' interests.

In addition, there are some important consumer protection associations. These organisations represent consumers' interests, particularly in the legislative procedure. Besides, they conduct product tests and provide information on consumer protection issues.

Concluding Observations and Future Scenario

Switzerland has a consolidated competition regime: The COMCO investigates a steady stream of cartel, merger and abuse of dominance cases. Since the revised competition law (CartA) came into force in 2004, the COMCO regularly fines dominant undertakings and cartel members.

There are two main issues that will affect COMCO's work in near future: First, the Federal Council intends to revise the Cartel Act to make it stricter, by defining horizontal and vertical agreements on prices, quantities and territories unlawful unless suitable justification is provided. This will simplify procedures for the competition authority. In addition, the government proposes to reduce the size of the competition authority's decision-making section and will make it a competition court. Besides, the revision aims to modernise merger control by introducing a 'significant impediment of effective competition' (SIEC)/ 'substantial lessening of competition' (SLC) test instead of the current dominance test. Lastly, civil enforcement of competition law will be strengthened by allowing end consumers to take civil action.

Second, Switzerland and the EU are negotiating an agreement aimed at closer cooperation between the Swiss and European competition authorities. The planned bilateral agreement should ensure that the provisions of

cartel law are applied more effectively by both sides. The instrument should also regulate the possibility of the exchange of confidential information. The agreement was signed in 2013.

Box 97.1: Bid rigging – a priority of COMCO

Public procurement amounts to approximately 7.5 percent of GDP in Switzerland. Thus, the potential damage of bid rigging is high. Moreover, several bidding cartels were uncovered in Switzerland in the previous years. On these grounds, bid rigging has been a top priority of the COMCO in these years. In order to better fight this type of unlawful agreement, the COMCO has started a long-term project. The project is based on the pillars (1) prevention and information, (2) detection and (3) prosecution.

The first pillar aims to raise the awareness of procurement officials, companies and other interested parties. In this context, the COMCO has held meetings with regional governments and their procurement offices and has organised workshops and training courses on competition policy aspects of the procurement process.

In order to detect bidding cartels, the COMCO has started to analyse procurement data provided voluntarily by regional procurement authorities. The goal of this analysis is to examine whether suspect patterns in the price data, which might be evidence for bid rigging, can be detected.

The pillar prosecution consists of prosecution, break-up and punishment of bidding cartels. Below is a summary of COMCO's latest decisions regarding bid rigging.

In 2009, the COMCO for the first time sanctioned members of a bidding cartel: eight electrical companies were found to have engaged in bid rigging by regularly exchanging information on their tenders for both public and private contracts. The relevant evidence was gathered in the course of a dawn raid, triggered by a whistleblower. The companies were fined with a total of CHF1.24mn.

In December 2011, the COMCO fined 17 construction companies for having engaged in unlawful agreements on prices and market allocation. The investigation, which began with dawn-raids, showed that the involved companies had rigged bids for at least 100 projects between 2006 and 2009. The total fines amounted to approximately CHF 4mn. Several companies applied for leniency. This decision was appealed by some of the companies.

Endnotes

- 1 CIA The World Factbook
- 2 Switzerland is neither member of the EU nor of the European Economic Area (EEA)

† *Markus Langenegger* is an economist at the Secretariat of the Swiss Competition Commission since 2007.