Reform proposal of the Swiss Cartel Act: a step backwards for the Swiss competition law framework?

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Abstract

I. In 2023, the Swiss Federal Council adopted a Message on a partial revision of the Federal Act on Cartels and other Restraints of Competition (Cartel Act).[1] Different modifications were proposed, among which modernisation of the merger control procedure, the strengthening of private enforcement, certain procedural revisions (regarding, for instance, the introduction of regulatory time limits for competition proceedings) and various modifications following parliamentary motions. One of these (*motion Francais*) explicitly aimed to modify Article 5 of the Cartel Act, and to restore the legal situation existing prior to the *Gaba* decision of the Swiss Federal Supreme Court[2] concerning assessment of quantitative and qualitative criteria when interpreting the significance of hardcore agreements. That judgement had previously put Swiss law in line with EU law and other international enforcement standards, in relation to the strict approach to be adopted against hardcore agreements (e.g, concerning price-fixing, market allocation, bid-rigging etc)[3].

II. As a market economy, Switzerland needs competition law in order to avoid that private actors unlawfully restrict competition. The way competition law applies is basically framed by a political choice. In this context, the expanded use of economic analysis in competition law has definitely been one of the most relevant and positive developments in recent decades, since it has led to an increase in the accuracy and robustness of decisions by antitrust enforcers. Economic analysis has in fact contributed to a more solid understanding of competition

[1] SR 251.
[2] BGE 143 II 297.
[3] Under the 2016 *Gaba* ruling, the Federal Supreme Court had clarified how agreements that are presumed to lead to the elimination of effective competition should be interpreted. This interpretation, which is closer to the vision of the legislator in the 1995 Swiss competition law reform and which confirmed the practice of the Swiss Competition Commission (ComCo), overruled the ruling made in a previous case (*Book price fixing*). The five types of hardcore cartels described in Article 5(3) and (4) Cartel Act (i.e, price fixing, allocating markets, limiting outputs, setting fixed or minimum resale prices, and limiting imports/exports) usually significantly restrict competition in cases in which the presumption of elimination of effective competition is rebutted. For the Swiss Federal Supreme Court, these five types of agreements significantly would restrict competition from a qualitative point of view because of their object, while the quantitative significance should be presumed once the qualitative criterion is met as a consequence of the nature of the agreement.

dynamics and has ensured greater consistency in the enforcement of the law. Yet, the unlawfulness of hard-core agreements, normally amounting to restrictions of competition by object, must also be accepted and acknowledged.

III. If the proposed (*Motion Francais*)[4] reform is eventually adopted, Swiss competition law enforcers will be entitled to prohibit certain anticompetitive agreements – including the most pernicious horizontal and vertical hardcore restrictions – only after having explored and applied both qualitative (theoretically based) and quantitative (on the precise quantification of the effects) criteria in their evaluation. However, the suggested modification raises various criticisms and concerns, which need to be discussed in detail. Indeed, the economic analysis of collusion has traditionally highlighted that hard-core agreements cannot exist without a deadweight loss, which is characterised by a loss of total welfare due to inefficient resource allocation. Under this standpoint, it does not seem reasonable to require competition enforcers to systematically demonstrate significant effects on competition in both qualitative and quantitative terms: qualitative evidence of collusion should be sufficient in order to demonstrate the existence of a deadweight loss. The described reform, in practice, would lead to detrimental consequences for the whole Swiss economy and consumers, due to the increased difficulty envisaged in fighting hardcore restrictions. That is why, while a limited number of actors (e.g, lawyers and economists) would probably welcome such a development in Swiss competition law, it would nevertheless be detrimental to the vast majority of Swiss undertakings and consumers. Even the Swiss competition authority may find itself in a more difficult position, from an administrative perspective. As proceedings against hardcore cartels would require additional investigative means, these means could no longer be used to explore and oppose other existing restrictions. Accordingly, the authority would have to consciously select which competition restrictions it wishes to tackle.

IV. In light of the above considerations, and in order to fully understand the scope of the reform - which as of today is still under discussion[5], a number of steps must be taken. First, it seems essential to review the legal treatment of hardcore restrictions in the Swiss legal framework under old and current legislation, and under the new proposed reform. Secondly, it is necessary to develop a clear overview of the harm normally deriving from the implementation of collusive practices, with specific attention to horizontal cartels. It is similarly useful to develop a comparative perspective in the treatment of hard-core restraints, taking into consideration other competition law frameworks and the recommendations on the matter deriving from the OECD (Organization for Economic Cooperation and Development). In fact, the suggested amendment to Swiss legislation (at least in the terms of the cited *Motion Francais*) would do nothing but to create an important gap with the majority of the existing competition law systems, which could hardly be justified.

[4] More in detail, Council of States member Olivier Français had submitted Motion 18.4282 in December 2018 to amend the Swiss Cartel Act, in order to step away from the cited *Gaba* ruling of the Swiss Federal Supreme Court and to re-establish the legal situation regarding quantitative criteria in force before this judgment.

[5] As of December 2024, the *Motion Francais,* which covers just one area of the proposed competition law reform, has been rejected by the Council of States (upper house of the Swiss Parliament, representing the cantons); it now needs to be voted by the second chamber of the Swiss Parliament, i.e. the National Council (lower house of the Parliament, representing the Swiss people).