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Switzerland: The proposed Article 5(1) *bis* of the Cartel Act –An unnecessary distraction to weaken a fundamental law

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ABSTRACT

This contribution discusses the criticism and concerns raised by the proposed modification of Article 5 of the Swiss Federal Act on Cartels and other Restraints of Competition, which prohibits unlawful agreements affecting competition. This reform was proposed by the Swiss Federal Council on 24 May 2023. Should the reform be adopted, Swiss competition law enforcers would only be able to prohibit anticompetitive agreements after having proved—based on qualitative and quantitative criteria—that these agreements significantly restrict competition. This rule would also apply to the most pernicious horizontal and vertical hardcore restrictions and would significantly weaken the enforcement of competition law in Switzerland.

Cette contribution examine les critiques et les préoccupations soulevées par la proposition de modification de l'article 5 de la Loi fédérale sur les cartels et autres restrictions à la concurrence, qui interdit les accords illicites. Cette réforme a été proposée par le Conseil fédéral le 24 mai 2023. Si elle est adoptée, les autorités chargées de l'application du droit de la concurrence en Suisse ne pourront interdire les accords affectant la concurrence qu'après avoir prouvé – sur la base de critères qualitatifs et quantitatifs – que ces accords restreignent la concurrence de manière notable. Cette règle s'appliquerait également aux restrictions horizontales et verticales qualifiées et aurait pour effet d'affaiblir considérablement l'application du droit de la concurrence en Suisse.

I. Introduction

1. On 24 May 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, hereafter CartA).[1] Various modifications are proposed, among which modernisation of the merger control procedure, strengthening of private enforcement, certain procedural revisions (regarding, inter alia, introducing regulatory time limits for competition proceedings) and a number of modifications following parliamentary motions. One of these motions explicitly aimed to modify Article 5 CartA and to de facto restore the legal situation prior to the *Gaba* decision of the Swiss Federal Supreme Court[2] concerning the assessment of quantitative and qualitative criteria when interpreting the significance of hardcore agreements.

2. If the reform is adopted, competition law enforcers will only be able to prohibit certain anticompetitive agreements—including the most pernicious horizontal and vertical hardcore restrictions—after having explored and applied both qualitative and quantitative criteria in their assessments. This proposed modification raises a number of criticisms and concerns, which are discussed in detail in the following sections.

* The authors sincerely thank Mr Utsav Bahl, an economics student at Williams College (MA), for his research and help in preparing the economics part of this paper.

1 SR 251.

2 BGE 143 II 297.

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3. This paper is structured as follows. Section II explores the legal treatment of hardcore restrictions in the Swiss legal framework under old and current legislation and under the new proposed reform. Section III develops an overview of the harm that generally derives from the implementation of collusive practices, with a specific focus on horizontal cartels. Section IV presents a comparative perspective in the treatment of hardcore restraints, taking into particular account the EU, U.S. and UK competition law systems, as well as the OECD's recommendations. Section V raises a number of structural criticisms of the proposed competition law reform, and Section VI concludes.

II. The assessment of agreements affecting competition in Switzerland in the past and the present, and under the proposed amendment

1. From law in the books...

4. The first Swiss Federal Act on Cartels and Similar Organisations was adopted in 1962.[3] It was built on the "abuse principle," according to which the law cannot prohibit cartels and similar organisations—which were therefore tolerated and even considered positively—but only combat their abuses.[4] To assess cartels and similar organisations, the Cartel Commission—the administrative competition authority under both the CartA 1962 and the CartA 1985,[5] which was replaced in 1995 by the Competition Commission (Comco) in the CartA[6]—developed the "balance method" (*Saldomethode*), which pursued the aim of achieving arbitrarily chosen general economic objectives rather than protecting the market.[7] When the CartA 1985 replaced the CartA 1962, the abuse principle was maintained and the balance method was formalised in Article 29 CartA 1985.[8]

5. Under the balance method, the Cartel Commission analysed restrictions on competition by taking into account both their negative and positive effects, irrespective of whether these effects were intrinsic or external to the competition process.[9] One important drawback of this method, however, was that it created legal uncertainty for the undertakings concerned: the plurality of factors that the authority could consider did not allow companies to ascertain whether practices affecting competition would be considered unlawful or not, and neither to adapt their practices accordingly. The instrument was too broad and legally too diffuse to constitute an effective and satisfactory competition policy. It was not possible for authorities to compare parameters that could be so diverse.[10]

6. With the adoption in 1995 of the current Cartel Act, the method of assessment changed in a fundamental way. The balance method was abandoned and replaced with the concept of efficiency, which brought both flexibility and legal certainty.[11] The focus of the law is no longer to exclusively safeguard society from harmful economic or social consequences deriving from conduct hindering competition but to protect competition as such, as it is evident in Article 1 CartA, the purpose of which "*is to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so,* to promote competition *in the interests of a liberal market economy*."[12] After the possibility for the Comco to sanction directly hardcore restrictions of competition was inserted in the CartA in 2003 (new Art. 49a), it can be stated that, since the entry into force of this article on 1 April 2004, the CartA set aside the abuse principle and applies instead the

3 Federal Act on Cartels and Similar Organisations of 20 December 1962 (Cartel Act 1962, CartA 1962). On the history of Swiss competition legislation, *see* A. Kley, Vor. Art. 1, in *KG: Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen: Kommentar*, R. Zäch et al. (eds.), Dike Verlag, Zurich/St Gallen, 2018, at 41. *See also* A. Heinemann, P. Këllezi and D. Mamane, Andreas Heinemann: Keeping competition policy up to date, *Concurrences* No. 2-2022, art. No. 106119, https://www.concurrences.com/en/review/numeros/no-2-2022/interview/andreas-heinemann-keeping-competition-policy-up-to-date.

4 Federal Council, Message du Conseil fédéral à l'Assemblée fédérale à l'appui d'un projet de loi sur les cartels et les organisations analogues du 18 septembre 1961, FF 1961 II 549, 550, 558 (Message LCart 1962).

5 Federal Act on Cartels and Similar Organisations of 20 December 1985 (Cartel Act 1985, CartA 1985).

6 Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (Cartel Act, CartA), SR 251.

7 On this method, *see* W. Schluep, *Wirksamer Wettbewerb: Schlüsselbegriff des neuen schweizerischen Wettbewerbsrechts*, H. Huber, Berne, 1987, at 69.

8 The CartA 1985 also gave more importance to the Cartel Commission, which was given competence—when it concluded that a cartel or analogous organisation had harmful economic or social consequences—to recommend to the parties to amend or annul certain clauses in the cartel or to refrain from certain market behaviour; *see* Article 32(1) CartA 1985. Such powers only existed to a very limited extent under the CartA 1962; *see* Article 20(2) CartA 1962.

9 Federal Council, Message concernant la loi fédérale sur les cartels et autres restrictions de la concurrence du 23 novembre 1994, FF 1995 I 472, 482 (Message LCart 1995).

10 Ibid. at 517.

11 Ibid. Article 5(2) CartA was adopted, which limits the possibility of justifying agreements affecting competition to cases where the agreement is needed 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 the agreement does not enable the parties to eliminate effective competition; *see* R. Zäch, *Schweizerisches Kartellrecht*, 2nd ed., Stämpfli Verlag, Berne, 2005, No 335.

12 Emphasis added. *See* BGE 134 III 438, 2.2. *See also* M. Baldi, Zur Konzeption des Entwurfs für ein neues Kartellgesetz, in *Das neue schweizerische Kartellgesetz*, R. Zäch and P. Zweifel (eds.), Schulthess Polygraph., Zurich 1995, at 260; V. Martenet, Art. 96, in *Commentaire romand: Constitution fédérale : Art. 81 Cst.-dispositions finales*, V. Martenet and J. Dubey (eds.), Helbing & Lichtenhahn, Basel, 2021, N 27.

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prohibition principle:[13] altogether, agreements that have harmful economic or social effects are now prohibited *ex lege*—even in the absence of any decision by the Comco—and void *ex tunc* from the moment of their conclusion.[14] These *ex tunc* unlawful agreements can be directly sanctioned by the Comco.[15]

7. This change of paradigm is reflected in Article 5 CartA, which provides that agreements that significantly restrict competition and agreements that eliminate effective competition are unlawful.[16] The revision that led to the adoption of the CartA was also intended to facilitate reviewing this last sort of agreements.[17] Article 5(3) CartA therefore provides a list of agreements that are presumed to lead to the elimination of effective competition (so-called hardcore cartels). This presumption exists for horizontal agreements that fix prices, limit outputs or allocate markets (Art. 5(3) CartA), for vertical agreements that establish fixed or minimum retail prices and—in the case of distribution contracts regarding allocation of territories—that restrict sales by other distributors into these particular territories (Art. 5(4) CartA).[18]

8. The presumption of elimination of effective competition can be rebutted, however, if the parties to the agreement prove that sufficient internal and external competition remains despite the agreement.[19] This means that effective competition is eliminated only if both internal (between the parties to the agreement) and external (between the parties to the agreement and other competitors) competition disappears.[20] If the presumption is rebutted, the Message from the Federal Council that accompanied the proposal of the CartA 1995 (Message CartA 1995) specified that it was necessary to determine whether the agreement significantly affects competition according to Article 5(1) CartA. However, it also indicated that this would usually be the case.[21] The Comco would then need to establish whether effective external competition still existed. The Federal Council imagined that this would be the case, for instance, when allocating production in specialisation agreements between small and medium-sized enterprises (SMEs), while parties to an agreement on price, quantity or geographical distribution, by contrast, would naturally tend to exclude external competition as far as possible. Therefore, in the case of success over a long period—and without the objective of improving efficiency—it would be difficult for the parties to prove the existence or maintenance of effective competition in a given market.[22]

2. ...to law in action...

9. The Message CartA 1995 seemed to assume that it would be hard for parties to a hardcore cartel to prove that sufficient external competition still exists if the presumption of elimination of effective competition is rebutted. In practice, however, the Federal Supreme Court first took a rather permissive approach regarding the assessment of these types of agreements.[23] In the *Book price fixing* case (*Buchpreisbindung*)[24] in 2002, the Court ruled that when the presumption of elimination of effective competition (Art. 5 (3) or (4) CartA) is rebutted because sufficient internal or external competition[25] remains, the agreement only significantly restricts competition according to Article 5(1) CartA if the goods concerned have a substantial market share.[26] In other words, when the presumption was rebutted, the Comco needed to prove both the qualitative and quantitative significance of the agreement which fell under the presumption according to Article 5(3) or (4) CartA.[27]

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13 Same opinion: A. Heinemann, Nach Art. 1, in Zäch et al. (eds.) (n. 3), No 75–93; R. Zäch and R. Heizmann, *Schweizerisches Kartellrecht*, 3rd ed., Stämpfli, Berne 2023. If it were unclear whether the prohibition principle could be adopted in the law instead of the abuse principle under Article 34 *bis*(2) Federal Constitution of 1874 (the majority of doctrine was in favour of this view from the middle of the 1980s onwards), the adoption of the Federal Constitution of 1999 and its new Article 96 answered the question positively. The Constitution now protects free competition, which means that cartels are generally prohibited. On this evolution, *see* Kley (n. 3). *See also* A. Heinemann, Konzeptionelle Grundlagen des Schweizer und EG-Kartellrechts im Vergleich, in *Methodische und konzeptionelle Grundlagen des Schweizer Kartellrechts im europäischen Kontext: Symposium zum 70. Geburtstag von Prof. Dr. Roger Zäch*, R. H. Weber, A. Heinemann and H. Vogt (eds.), Stämpfli, Berne 2009, pp. 43–73, at 67.

14 According to Article 5(1) CartA, agreements that have harmful economic or social effects are "*illicite*" (French) or "*illeciti*" (Italian). The terms "*illicite*" and "*contrari*[o] *alle leggi*" (which can be seen as a synonym of "*illecito*") are also used to describe a situation in which a contract is null and void *ex tunc* under Article 20 Swiss Code of Obligations (SCO, RS 220). The German version of the CartA, by contrast, qualifies agreements that have harmful economic or social effects as "*unzulässig*," which can be translated in different ways, such as "inadmissible," "improper" or "illegal," while Article 20 SCO uses the term "*widerrechtlich*," which means "illegal" or "unlawful" and is therefore closer to "*illicite*" or "*contrario alle leggi.*" The French and Italian versions of Article 5 CartA, which better describe the intention of the legislator and in particular the fact that it chose to apply the prohibition principle in the CartA, must therefore be preferred to the German one.

15 On the difference between the abuse principle and the prohibition principle, *see* A. Heinemann, Marktwirtschaft und Wettbewerbsordnung: Der Zweck des Kartellrechts, *Revue de droit suisse*, Vol. 135, No. 5, 2016, pp. 431–455, at 442–443.

16 By contrast, under the CartA 1962 and CartA 1985, only anticompetitive measures taken by cartels and similar organisations could be unlawful (Art. 4(1) CartA 1962; Art. 6(1). 1 CartA 1985) but not the cartels and similar organisations themselves.

17 Federal Council, Message LCart 1995 (n. 9) at 552, 560.

18 While the project of the Federal Council only foresaw rebuttable presumptions for hardcore horizontal agreements, presumptions regarding vertical ones were added by the Parliament.

19 Federal Council, Message LCart 1995 (n. 9) at 561.

20 Ibid. at 553.

21 Ibid. at 561: "*Si la présomption est réfutée, il faut déterminer si l'accord affecte de façon notable la concurrence. C'est en général le cas.*"

22 Ibid. at 562.

23 V. Martenet and A. Heinemann, *Droit de la concurrence*, 2nd ed., Schulthess Verlag, Zurich 2021, at 94.

24 BGE 129 II 18.

25 On these concepts, *see* BGE 129 II 18, 8.3.2. *See also* M. Amstutz, B. Carron and M. Reinert, Art. 5 LCart, in *Commentaire romand : Droit de la concurrence*, V. Martenet, C. Bovet and P. Tercier (eds.), 2nd ed., Helbing & Lichtenhahn, Basel, 2013, No 214.

26 BGE 129 II 18, 5.2.2.

27 For V. Martenet and A. Heinemann, however, there was no need to impose excessive requirements on these conditions (*Droit de la concurrence*, 1st ed., Schulthess, Zurich, 2012, at 89, quoting the Message CartA 1995 (n. 9) at 561 and Comco, Decision of 18 October 2010, *Baubeschläge für Fenster und Fenstertüren*, DPC 2010/4, 717, No 313). By contrast, Amstutz, Carron and Reinert (n. 25) were of the opinion that when the presumption of elimination of effective competition was rebutted, the qualitative and qualitative significance of the agreement needed to be assessed according to the general rules in Article 5(1) CartA.

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10. This view changed in 2016 when, in the previously mentioned *Gaba* case,[28] the Federal Supreme Court 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 1995 and which confirmed the practice of the Comco, overruled the ruling made in the *Book price fixing* case.[29] The five types of hardcore cartels described in Article 5(3) and (4) CartA usually significantly restrict competition according to paragraph 1 of the same article in cases in which the presumption of elimination of effective competition is rebutted.[30] For the Court, these five types of agreements significantly restrict competition from a qualitative point of view because of their object,[31] while the quantitative significance is to be presumed once the qualitative criterion is met as a consequence of the nature of the agreement.[32]

3. ...and to the 2023 amendment proposal

11. The *Gaba* judgment constituted a significant step forward. It clarified the application of the CartA to hardcore restrictions on competition in a way that corresponded both to the will of the legislator and to international enforcement standards.[33] However, more clarity and a CartA that corresponds to international enforcement standards were not necessarily welcome in all circles. Indeed, Council of States member (upper house of the Swiss Parliament) Olivier Français submitted Motion 18.4282 in December 2018 (hereafter *Motion Français*)—which was accepted by the Council of States in December 2020 and by the National Council (lower house of the Swiss Parliament) in June 2021—to amend the CartA in order to step away from the *Gaba* ruling by the Federal Supreme Court and to re-establish the legal situation regarding quantitative criteria that prevailed before this judgment.

12. Following the acceptance of the *Motion Français*, the Federal Council now proposes to insert a new paragraph 1*bis* in Article 5 CartA, which would provide that the assessment of the significance of the restriction is based on both qualitative and quantitative criteria.[34] This proposed change, which was especially supported by the Swiss Federation of Small and Medium Enterprises (SGV/USAM),[35] aims to oblige the competition authorities to systematically assess whether an agreement produces significant quantitative and qualitative effects in the market to qualify the agreement as unlawful. In other words, if the amendment is adopted, competition authorities will systematically need to prove that an agreement affecting competition has both a significant qualitative and quantitative effect in the market to prohibit it.[36] This will also be the case for hardcore cartels, where the presumption of elimination of effective competition (Art. 5(3) and (4) CartA) will be rebutted.

III. Economic analysis of collusion

13. Before delving into the criticalities connected to the proposed competition law reform, it seems appropriate to briefly explore the inefficiencies normally arising from collusive behaviour, with particular attention to the most dangerous form of collusion—i.e. cartels.

14. Hardcore cartels result in a loss of total welfare and usually provide their parties with market power regardless of the number of firms involved. Such agreements generate a reduction in total welfare by creating a deadweight loss to society and can lead to a loss of consumer welfare. The deadweight loss is characterised by a loss of total welfare due to inefficient resource allocation: when the price is set above the marginal cost, output is reduced and a gap is created between what the economy is actually producing and what it could potentially produce. While the sustainability and magnitude of harm from collusion are influenced by elements such as market structure (monopoly, monopolistic competition, oligopoly, perfect competition), barriers to entry, market transparency, frequency of interaction between undertakings and homogeneity of products, successful collusion produces harm in any market.

15. More specifically, collusion leads to rent-seeking, which refers to an inefficient utilisation of resources to sustain agreements. This inefficient utilisation of resources, which implies monitoring other firms or punishing defectors, leads to a societal loss beyond the deadweight loss caused by the reduced output described. Collusion can also hinder competition and result in market inefficiencies and a loss of consumer welfare. On the one hand, collusion typically deters innovation—thereby limiting dynamic efficiency—by allowing undertakings to maintain high profits without having to further innovate or reduce costs. On the other hand, collusion limits competition by creating barriers to entry and so facilitates the formation of oligopolies. Finally, collusion can deter entrance to

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28 BGE 143 II 297. *See also* Section I above.

29 A. Heinemann, Das *Gaba*-Urteil des Bundesgerichts: Ein Meilenstein des Kartellrechts, *Revue de droit suisse*, Vol. 137, No. 1, 2018, pp. 103–121.

30 BGE 143 II 297, 5.2.5, 5.6.

31 BGE 143 II 297, 5.2.4.

32 This interpretation was subsequently confirmed by the Federal Supreme Court in cases *BMW* (BGE 144 II 194) and *Altimum* (BGE 144 II 246). On the scope of this judgment in general, *see* Heinemann (n. 29). An exception to this rule remains for trivial cases (“*cas bagatelle*”); *see* Martenet and Heinemann (n. 23) at 94, who explain that an agreement fixing prices concluded by competitors representing together around 10% of the market share will be considered to significantly restrict competition.

33 Same opinion: A. Heinemann, Fortschritt und Rückschritt im schweizerischen Kartellrecht, *Revue de droit suisse*, Vol. 142, No. 1, 2023, pp. 43–66, at 48, 57.

34 As the proposed text states, “*L’appréciation du caractère notable de l’atteinte est effectuée sur la base de critères tant qualitatifs que quantitatifs.*”

35 Union suisse des arts et métiers (USAM), Schweizerischer Gewerbeverband (SVG), Unione svizzera delle arti e mestieri (USAM); Federal Council, Message concernant la révision partielle de la loi sur les cartels du 24 mai 2023, FF 2023 1463, 13 (Message LCart 2023).

36 Ibid, at 13.

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the market by creating artificial product differentiation or by flooding the market with cheap goods (also called "limit pricing"). All these effects widen the gap between potential productivity and actual productivity, thereby increasing deadweight loss.

16. One specific consequence of collusion is the "umbrella effect." This phenomenon takes its name from the fact that a hardcore cartel has an effect on the market as a whole: not only the prices of the parties in the cartel but also those of undertakings that are not parties increase. Because of the higher prices, the products of the undertakings that are not parties in the cartel become more attractive, which increases demand for them and in turn allows these companies to charge higher prices. Consequently, collusion by a few firms is likely to drive up prices industry-wide, and these distortions can spill over into substitutes for the colluding firms' products, including those in other markets.[37]

IV. A comparative perspective

17. The Swiss law reform not only underestimates the pernicious effects of hardcore collusive practices cited. One additional issue, indeed, concerns the fact that it would lead to a dangerous departure from the international standards on competition enforcement currently in force on a global scale.[38]

18. The highly detrimental impact of (horizontal or vertical) hardcore restrictions on competition and the related need to adopt a stricter enforcement approach can in fact be inferred from analysis of the positions adopted on the matter by leading organisations and competition authorities worldwide. The overall message is based on the recognition that such hardcore restrictions in the current globalised economy are significantly harmful to both consumers and market participants, and they generally create a deadweight loss to society as a whole. Accordingly, they do not prompt quantitative analysis of their effects in the marketplace.[39]

19. The following sections first explore the principles commonly promoted by the Organisation for Economic Co-operation and Development (OECD)—of which Switzerland is a member—before briefly delving into the trends in enforcement (including horizontal cartel prosecutions) existing in a number of selected countries.

1. The OECD

20. The OECD has a well-established tradition of promoting among its members an effective enforcement policy against hardcore restrictions. These have been interpreted in a variety of OECD policy documents as the most egregious violations of competition law due to the substantial economic harm they typically cause.[40]

21. It is not surprising, for instance, that prosecution of horizontal cartels—i.e. a form of hardcore restraints—has often been promoted as a priority policy objective for the organisation, as it emerges, inter alia, from the 2019 Recommendation of the OECD Council concerning effective action against hardcore cartels.[41] With this ad hoc legal instrument, which updated and replaced the previous 1998 Recommendation, the OECD aimed to further steer domestic reforms and enhance the effectiveness of cartel enforcement on the basis of commonly agreed standards. In this regard, appropriate and effective laws, adequate sanctions and robust procedures—ideally producing a substantial deterrent effect—have been seen as fundamental in the global fight against horizontal hardcore restrictions. Of utmost significance is a recommendation that "[a]*dherents make hard core cartels illegal regardless of the existence of proof of actual adverse effects on markets, and design their anti-cartel laws, policies and enforcement practices with a view to ensuring that they halt and deter hard core cartels and provide effective compensation for cartel victims, in accordance with their legal frameworks, institutional set up and procedural safeguards*."[42]

22. On the whole, these policy and advocacy efforts, which have materialised in the form of not only recommendations but also best practices and dialogues, have considerably contributed to encouraging OECD members to strengthen—rather than loosen or question—their enforcement practices against hardcore restraints, including their horizontal cartel detection systems.[43]

2. The European Union

23. With a very similar line of reasoning, the EU Commission and courts have traditionally treated horizontal and vertical hardcore restrictions, whether in the form of agreements or concerted practices (e.g. exchanges of competitively sensitive information),[44] as the most serious infringements of competition rules under Article 101(1) of the Treaty on the Functioning

37 R. Inderst, F. P. Maier-Rigaud and U. Schwalbe, Umbrella Effects, *Journal of Competition Law and Economics*, Vol. 10, No. 3, 2014, pp. 739–763; X. Vives, *Oligopoly Pricing: Old Ideas and New Tools*, MIT Press, Cambridge, 1999.

38 *See also* Heinemann (n. 33) at 58, for whom Switzerland risks nothing less than being isolated at the international level.

39 *See* Section III above.

40 *See*, for instance, OECD (1998), Recommendation of the Council concerning Effective Action against Hard Core Cartels, OECD/LEGAL/0294; OECD (2006), Policy Roundtables – Prosecuting Cartels without Direct Evidence, DAF/COMP/GF(2006)7; OECD (2019), Review of the 1998 OECD Recommendation concerning Effective Action against Hard Core Cartels.

41 OECD (2019), Recommendation of the Council concerning Effective Action against Hard Core Cartels, OECD/LEGAL/0452.

42 Ibid. at 5–6.

43 E.g. *see* OECD (2000), Reports – Hard Core Cartels; and OECD (2003), Hard Core Cartels – Recent Progress and Challenges Ahead.

44 *See* CJEC, 16 December 1975, *Suiker Unie and Others v. European Commission*, joined cases 40 to 48, 50, 54 to 56, 111, 113 and 114-73, EU:C:1975:174, para. 26.

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of the EU (TFEU).[45] The reason is that by coordinating their competitive behaviour and artificially influencing the relevant parameters of competition, firms involved in hardcore restraints ultimately generate harmful effects in the marketplace without any significant countervailing benefits. As is evidenced by the Commission, these include increased prices, reduced consumer choice, restricted or limited production and loss of market competitiveness.[46]

24. Unsurprisingly, such collusive practices are normally categorised as restrictions of competition by object. As was clearly stated by the CJEU in the *Cartes bancaires* case in the context of horizontal hardcore restraints, "*it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying Article 81(1) EC, to prove that they have actual effects on the market*." In the words of the Luxembourg judges, furthermore, "[e]*xperience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers*."[47] This overall stance has recently been reaffirmed by the CJEU in its *Super Bock* judgment, in the context of vertical hardcore restraints taking the form of resale price maintenance. Here too, the Court emphasised that such vertical restraints may have significant restrictive potential, eventually justifying their categorisation as restrictions by object.[48]

25. To determine whether hardcore restrictions constitute a restriction of competition by object, the content and objectives of an agreement and the economic and legal context of which it forms a part must be assessed.[49] However, the mere fact that a given agreement falls within the category of hardcore restrictions must be taken into account as an element in the legal context.[50] For this reason, due to the nature of these forms of anticompetitive collusion, the harm to competition is mostly self-evident, and competition enforcers will not have to prove and establish the actual effect of the restriction in any market.[51]

26. Needless to say, restrictions by object are not protected by the *de minimis* rule introduced in the Notice on Agreements of Minor Importance, according to which an anticompetitive agreement is normally prohibited only if its effect on competition is likely to be appreciable.[52] And while object restrictions can hypothetically benefit from an exemption under Article 101(3) TFEU, practice has demonstrated that cartel behaviour and other vertical hardcore restraints are unlikely to provide efficiency defences and satisfy the necessary cumulative criteria.[53]

27. In brief, the abovementioned reflections substantiate the reasoning behind the rigid enforcement policy against hardcore restrictions upheld in the European Union.[54]

3. The United States

28. Although there are some relevant divergences compared to the EU legal context, the relevance of effective enforcement policy against hardcore restraints also plainly emerges from the U.S. legal framework. This is unquestionable, especially in relation to the detection and prosecution of horizontal cartels—whether in the form of market allocations, output restrictions, bid rigging or price fixing—which is considered a primary law enforcement priority.[55]

29. These acts of horizontal collusion have been treated as "*the supreme evil of antitrust*"[56] due to the serious economic harm and adverse impact on the competitive process they produce, and they have consequently been deemed unreasonable and per se illegal. As such, in enforcing Section 1 of the Sherman Act (1890), there is no need to scrutinise their actual anticompetitive effects.[57] More specifically, under a per se enforcement approach, the authority merely focuses on analysing the conduct from a qualitative perspective without embarking on a meticulous quantitative evaluation of the precise harm to competition

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45 Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012, p. 47, Article 101. This prohibits "*all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market*."

46 E.g. Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, OJ C 298, 8.12.2006, p. 17.

47 CJEU, 11 September 2014, *Groupement des cartes bancaires v. European Commission*, case C-67/13 P, EU:C:2014:2204, para. 51.

48 CJEU, 29 June 2023, *Super Bock Bebidas SA, AN, BQ v. Autoridade da Concorrencia*, case C-211/22, EU:C:2023:529, para. 34.

49 Ibid., para. 35 and para. 78.

50 Ibid., para. 38. According to Pablo Ibañez Colomo, the judgment could be interpreted as a rejection of overly formalistic interpretations of vertical hardcore restraints, and as confirmation that any agreement needs to be assessed in its legal and economic context before categorising it as a restriction of competition by object—provided that looking at the context does not amount to a detailed assessment of the anticompetitive effects (*see* P. Ibañez Colomo, Case C-211/22, Super Bock: the Binon (formalistic) era is over, and vertical price-fixing is no longer the odd one out, *Chillin'Competition*, 3 July 2023, https://chillingcompetition.com/2023/07/03/case-c-211-22-super-bock-the-binon-formalistic-era-is-over-and-vertical-price-fixing-is-no-longer-the-odd-one-out).

51 R. Whish and D. Bailey, *Competition Law*, 10th ed., Oxford University Press, 2021, Chapter 13.

52 Communication from the Commission, Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), OJ C 291, 30.8.2014, p. 1. *See also* CJEU, 13 December 2012, *Expedia Inc. v. Autorité de la concurrence and others*, case C-226/11, EU:C:2012:795, paras. 35–37.

53 On this point, *see* N. Dunne, Characterizing Hard Core Cartels under Article 101 TFEU, *The Antitrust Bulletin*, Vol. 65, Issue 3, 2020, pp. 376–400.

54 For instance, in the period 2019–2023 (as of 21st September), the EU Commission adopted 21 cartel decisions and imposed fines amounting to €3,709 billion on firms mostly operating in the manufacturing, finance and environment sectors (*see* Eur. Comm., Cartel Statistics (2023)), https://competition-policy.ec.europa.eu/about/news/updated-cartels-cases-statistics-2022-07-12_en.

55 D. Broder, *US Antitrust Law and Enforcement*, 3rd ed., Oxford University Press, 2016, Chapter 3.

56 *Verizon Communications Inc. v. Law Office of Curtis V. Trinko*, 540 U.S. 398 (2004). *See also United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Sealy Inc.*, 388 U.S. 350 (1967).

57 *See* Section 1 of the Sherman Act (1890), according to which "[e]*very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal*." The other federal antitrust law relating to cartels is Section 5 of the Federal Trade Commission (FTC) Act, which prohibits "*unfair methods of competition*" and "*unfair or deceptive acts or practices*." In this regard, *see* 15 U.S.C., §§ 41–58. Notably, Sherman Act violations are also considered unlawful under Section 5 of the FTC Act. Nevertheless, this also applies to additional practices that do not present all the elements of a Sherman Act infringement. While only the DoJ can prosecute cartels criminally (under Section 1 of the Sherman Act), both the DoJ and the FTC can pursue civil antitrust investigations (under Section 1 and Section 5, respectively).

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deriving from the collusion. This fundamentally means that prosecution of hardcore horizontal agreements in the U.S. does not admit efficiency justifications and that it does not allow cartel participants to attempt to prove an alleged reasonableness of their collusive practice. Instead, and unlike the EU competition framework, cartels are even prosecuted as criminal offences under Section 1 of the Sherman Act by the U.S. Department of Justice (DoJ) and are punishable with both fines and imprisonment for individuals.

30. On the other hand, other (less serious) conscious commitments to a common scheme are scrutinised following a rule of reason, according to which the deciding authority has to carefully examine the defendant's competitive position, the relevant market structure, entry barriers, and then weigh the alleged anticompetitive effects against the pro-competitive justifications proffered.[58] A third possible approach, the so-called quick look review, incorporates elements of the rule of reason and of the per se rule. As an analytical compromise between the latter rules, the "quick look" review allows U.S. antitrust enforcers to rapidly scrutinise restraints that (though not amounting to per se restrictions) appear so likely to produce anticompetitive effects that it is superfluous to embark upon the rigorous analysis of the market and anticompetitive effects that are typically expected in a rule of reason framework.[59]

31. Overall, the U.S. enforcement approach—grounded on a per se rule against horizontal cartels—has been seen as both efficient and predictable in the light of its clarity and capacity to simplify the prosecution of the most pernicious competition law violations.[60] In the case of other serious restrictions, this approach is completed by the "quick look" review, which recognises that these forms of agreement do not need a full review to be declared illegal. Drawing a metaphor from the basketball language relating to passes, U.S. antitrust enforcers, depending on the competitive scenarios, will opt for a "look" (rule of reason), "quick-look" ("quick look" review) or "no-look" (per se) approach.

4. The United Kingdom

32. Finally, in developing a comparative perspective on competition enforcement against hardcore restrictions, the UK competition law system is undoubtedly worth a brief mention. It fundamentally mirrors the EU competition law framework by embracing the object-effect dichotomy in Chapter I of the UK Competition Act 1998,[61] devoted to horizontal and vertical collusive practices.[62] Nevertheless, and similarly to what has been established in the United States, cartel conduct in the UK also represents a criminal offence. In other words, horizontal hardcore restrictions—the most serious form of anticompetitive behaviour—are not only sanctioned as restrictions by object typically unable to benefit from exemptions and undeserving of a thorough quantitative analysis, but they also lead to criminal liability and potential imprisonment of the individuals responsible under the Enterprise Act 2002.[63] In this regard, both the UK Competition and Markets Authority and the Serious Fraud Office are entitled to investigate and prosecute criminal cartel offences, although only the UK criminal courts have the power to impose criminal sanctions on individuals.[64]

33. It is worth noting that as a consequence of the completion of the Brexit process and the end of the transition period, EU competition law has ceased to apply in the United Kingdom. Consequently, UK courts and competition law enforcers no longer apply the EU competition law framework and will not be bound by future EU law. Any future form of anticompetitive collusion impacting both EU and UK markets will have to be investigated separately. Nevertheless, it is expected that substantive competition laws in the UK will continue to largely mirror EU competition provisions. Likewise, it is envisaged that UK horizontal cartel activities will also continue to be treated as criminal offences, and that UK competition enforcers will persist in adopting a rigid (rather than looser) approach to hardcore restrictions, thus maintaining coherence and consistency with international enforcement standards.

V. Structural criticism of the proposed reform

34. Beyond disregarding or misinterpreting the findings of economic analysis and creating a possible departure from international enforcement standards, the *Motion Français* would make it more difficult for competition authorities to fight cartels: legal uncertainty would be increased and achieving some of the main goals of the proposed reform would be directly threatened.

58 *See Continental Television Inc. v. GTE Sylvania, Inc.*, 433 U.S. 26 (1977), and *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007). The *Leegin* decision of the Supreme Court, in particular, upheld the application of a rule of reason in the realm of vertical resale price maintenance (i.e. fixed and minimum prices), which in the past had been interpreted as per se antitrust violations.

59 *See FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986); *NCAA v. Board of Regents*, 468 U.S. 85 (1984); *Chicago Professional Sports Ltd. Partnership v. NBA*, 95 F.3d 593 (7th Cir. 1996); *Law v. NCAA*, 134 F.3d 1010 (10th Cir. 1998); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982).

60 *See*, inter alia, R. H. Bork, *The Antitrust Paradox*, Free Press, New York, 1978, at 269.

61 UK Competition Act (1998), Chapter I.

62 With specific reference to vertical hardcore restraints (the regulation of which similarly mirrors EU competition rules), *see* UK Competition and Markets Authority (CMA), Vertical Agreements Block Exemption Order, CMA Guidance, CMA 166, 12 July 2022.

63 UK Enterprise Act (2002), Part VI.

64 Ibid.

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35. According to its wording, the *Motion Français*—as a response to the *Gaba* judgment by the Federal Supreme Court[65]—would increase the efficiency of competition law legislation and reduce the uncertainties associated with its application. For its author, any form of collaboration between undertakings could now be challenged by the Comco on the grounds that it could affect competition, and certain agreements between undertakings that had previously been considered legal could be deemed unlawful. More specifically, working communities and consortia would no longer be authorised,[66] and hardcore agreements that are presumed to lead to the elimination of effective competition (Art. 5(3) and (4)) would be illegal per se.

36. Contrary to what is suggested, however, the main effects of the proposed amendment to the CartA would be to increase the uncertainty[67] and length of competition law proceedings (which the reform wants to reduce).[68] This would be linked to additional costs and work for competition authorities, but especially for parties in an alleged hardcore restriction. In addition, the possibility for victims of competition law infringements to make use of private enforcement would be limited.

37. However, before assessing the questions of legal certainty and of the length and costs of proceedings, it is important to underscore that, contrary to the fears of the motion's author, following the *Gaba* judgment, the CartA does not endanger the existence of retailer buying groups, working communities and consortia. First, agreements between the members of a retailer buying group usually do not qualify as agreements affecting competition under Article 4(1) CartA.[69] Second, working communities have always been considered to be compatible with the law.[70] And third, consortia are not assessed more strictly following the *Gaba* judgment.[71] Moreover, no agreement is deemed illegal per se under Swiss law,[72] as even hardcore restrictions can be justified on grounds of economic efficiency (Art. 5(2) CartA).

38. That said, it must be recalled that in order to clarify the practical application of the *Gaba* judgment and to improve legal certainty, the Comco adapted its Notice on the assessment of vertical agreements of 28 June 2010 in May 2017, which was replaced on 12 December 2022 by a new Notice on the assessment of vertical agreements ("CommVert").[73] Following the adoption, at the European level, of Regulation 2022/720[74] and of the Guidelines on vertical restraints,[75] the CommVert ensures that the same rules as those in force in the European Union are applied, as far as possible, in Switzerland in the field of vertical agreements. The aim is to avoid the isolation of the Swiss market and guarantee legal certainty.[76] Undertakings now know that the five types of agreements described as hardcore by the legislator are unlawful unless they are justified on grounds of economic efficiency. An amendment to Article 5 of the Cartel Act would entail a new change in practice and therefore a loss of legal certainty for undertakings, especially SMEs. Companies would hardly be able to judge in advance the extent to which an agreement would be harmful to the market.

39. An amendment to Article 5 CartA would also unnecessarily increase the complexity, length and costs of procedures against hardcore restrictions, and it would also complicate the use of private enforcement, which would be altogether detrimental to businesses, competition and the economy. Having to systematically assess both the qualitative and quantitative effects of such a restriction would indeed entail much extra work for the competition authorities (both administrative and judiciary), which would directly contradict the aim of the revision of the CartA to simplify and shorten procedures.[77]

40. Indirectly, this situation would also weaken the Comco's ability to fight the fact that Switzerland is often viewed as an "island of high prices." There would no longer be a presumption of significant qualitative and quantitative restriction of competition in cases of hardcore agreements that would foreclose the Swiss market, which could therefore be favoured under certain circumstances.[78] As such, the modification would also be in direct contradiction with the provision regulating relative market power, which aims precisely to fight the "island of high prices" that Switzerland constitutes by prohibiting certain forms of market foreclosure.[79] The need to prove both significant qualitative and quantitative effects on competition of the agreement, as previously mentioned, would also limit access to private enforcement remedies by the victims of competition law infringements, as they would have to prove these two elements in every case, even when a hardcore restriction is in play.[80]

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65 *See* Section II.2 above.

66 Same opinion: M. Strebel and F. Koch, Teilrevision des Schweizer Kartellrechts, *Schweizerische Zeitschrift für Kartellrecht* 1/2022, pp. 31–37, at 34.

67 For a detailed explanation, *see* S. Bangerter and B. Zirlick, Schweizer Kartellanten in Watte packen? *Schweizerische Zeitschrift für Kartellrecht* 1/2022, pp. 39–44, at 40.

68 Federal Council, Message LCart 2023 (n. 35) at 25, 45.

69 Comco Secretariat, *Einkaufskooperation*, RPW 2020/2, pp. 405–417, at 407.

70 *See* e.g. Comco, *Rapport annuel* 2020, RPW 2021/1, pp. 23–44, at 28.

71 Federal Council, Message LCart 2023 (n. 35) at 28.

72 *See* P. L. Krauskopf and O. Schaller, Art. 5 KG, in *Basler Kommentar: Kartellgesetz*, M. Amstutz and M. Reinert (eds.), 2nd ed., Stämpfli Verlag, Basel, 2013, No 447, 576.

73 FF 2022 3231.

74 Commission Regulation (EU) 2022/720 of 10 May 2022 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices, OJ L 134, 11.5.2022, p. 4.

75 OJ C 248, 30.6.2022, p. 1.

76 CommVert, VII.

77 The aim to shorten competition law procedures was required in Motion 16.4094 of 15 December 2016 (*Motion Fournier*), which was accepted by the State Council on 27 September 2017 and partly accepted by the National Council on 5 March 2018, to accelerate and simplify competition law judicial procedures.

78 Same opinion: Federal Council, Message LCart 2023 (n. 35), at 29, 56, 60.

79 Comco Secretariat, Note explicative et formulaire du Secrétariat de la COMCO : pouvoir de marché relatif du 6 décembre 2021–avec modifications du 22 août 2022, paras. 12, 26 and 32.

80 Same opinion: Federal Council, Message LCart 2023 (n. 35), at 57.

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41. Finally, because of its additional length and complexity, the parties to a procedure could incur higher costs. These supplementary costs would be lawyers' or economists' fees and administrative or judiciary fees.[81] This would be burdensome, especially for SMEs. In addition, the fact that procedures would take longer could have a direct negative influence on the daily activities of these undertakings.

VI. Conclusion

42. Being a market economy, Switzerland needs competition law to avoid private actors unlawfully restricting competition. How this competition law applies is framed by a political choice. The increased use of economic analysis in competition law has certainly been one of the most important and positive developments in recent decades as it has allowed an increase in the material correctness of decisions by competition authorities. Economic analysis has allowed a better understanding of the general context and ensured greater consistency in the application of the law. However, the unlawfulness of hardcore agreements, which normally constitute restrictions of competition by object, must also be acceptable (while naturally allowing the parties to these agreements to justify them on grounds of economic efficiency).

43. Economic analysis of collusion indeed underscores that hardcore agreements cannot exist without a deadweight loss. For this reason, it seems unreasonable to require competition authorities to demonstrate significant effects on competition in both qualitative and quantitative terms: qualitative evidence of collusion is sufficient to demonstrate deadweight loss, which in turn leads to a decrease in total welfare.[82]

44. In addition, following the *Gaba* judgment, Swiss law is now essentially in line with EU law and other international enforcement standards regarding the treatment of hardcore agreements.[83] The amendment to Swiss legislation as is required by the *Motion Français* would therefore do nothing but again create an important gap, which could hardly be justified. This gap, in turn, would have negative consequences for both the Swiss economy and consumers: as the Federal Council underscored in its Message 2023, the *Motion Français* would increase the difficulty in fighting hardcore restrictions.[84] The possible negative effects would be especially detrimental to SMEs. Large undertakings, by contrast, would probably suffer to a lesser degree from the increased uncertainty that the amended law would provoke, as they have the financial means necessary to support the higher lawyers' and economists' fees[85] and the administrative and judicial costs that would derive from the need for the authorities to systematically prove both qualitative and quantitative effects of every competitive restriction, including hardcore ones. The fact that umbrella associations like the Swiss Federation of Small and Medium Enterprises (SGV/USAM) continue to support policies that are detrimental not only to competition law but also to the vast majority of their members is therefore hard to understand. As for lawyers, they at least partly support the reform as it serves their own interests: a systematic discussion of the quantitative effects of an agreement would indeed allow them to charge higher fees.[86]

45. Altogether, to paraphrase the title of this contribution, the proposed Article 5(1) *bis* CartA seems an unnecessary distraction that will have no other effect than to weaken the competition law enforcement of hardcore cartels. While a limited number of actors would certainly welcome such an evolution of Swiss competition law, it would be detrimental to the vast majority of Swiss undertakings and also to Swiss consumers. As for the competition authorities, they would have to learn to work with this new paradigm and with a greater application than before of the principle of opportunity. As proceedings against hardcore cartels in particular would require additional means, these means could no longer be used to fight other existing restrictions. Accordingly, the authority would have to wisely choose which restrictions on competition it wishes to fight. ■

81 Same opinion: Federal Council, Message LCart 2023 (n. 35), at 56.

82 *See* Section III above. A quantitative analysis may be required in cases in which firms use predatory pricing in the short term. Such conduct may increase consumer welfare, but it drives out competition. *See* L. M. Khan, Amazon's Antitrust Paradox, *Yale Law Journal*, Vol. 126, No. 3, 2017, pp. 710–805.

83 In practice, however, Swiss law appears to be still more lenient than most international regulations when it comes to assessing hardcore cartels. For example, under EU law, hardcore restrictions are generally considered to restrict competition—with no rebuttal of presumption or additional qualitative or quantitative assessment. On horizontal restrictions, *see* case C-67/13 P, *Groupement des cartes bancaires v. European Commission*, and on vertical restraints, case C-211/22, *Super Bock Bebidas SA, AN, BQ v. Autoridade da Concorrencia.*

84 Federal Council, Message LCart 2023 (n. 35), at 60.

85 S. Bangerter and B. Zirlick (n. 67) at 43, and M. Steiner, *Economics in Antitrust Policy: Freedom to Compete vs. Freedom to Contract*, Universal Publishers, Boca Raton, 2007, at 128.

86 *See* H. Schöchli, Die bussen fur baukartelle haben ein politisches Nachspiel, *NZZ*, 4 March 2022, https://www.nzz.ch/wirtschaft/bussen-fuer-baukartelle-haben-ein-politisches-nachspiel-ld.1672790?reduced=true.

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