

Developments in Swiss Competition Law and in the relation between Swiss and EU Competition Law

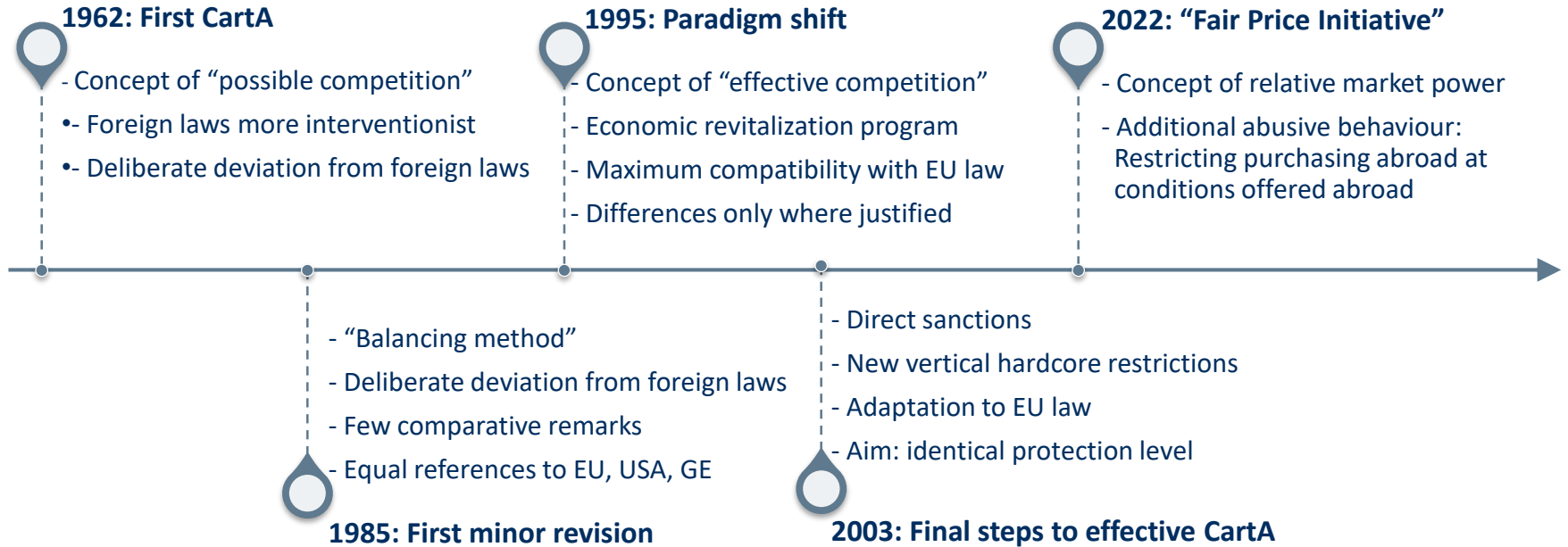
International Forum on EU Competition Law, Brussels

Dr. Monique Sturny | 25 May 2023

Agenda

- Influence of EU law on Swiss competition law – Milestones
- Recent and ongoing reforms of Swiss competition law
- Important recent Swiss case law

Influence of EU competition law on Swiss competition law – where do we stand?



Latest reform of CartA: Relative market power and abusive restriction of purchase outside of Switzerland

- Effective as of 1 January 2022
- Implementation of “**Fair Price initiative**”: Switzerland as “high price island”
- Introduction of concept of **relative market power** (Art. 4 para. 2bis CartA)
 - “An undertaking with relative market power is an undertaking on which other undertakings are dependent for the supply of or demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other undertakings.”
- Additional unlawful behaviour regarding **purchase abroad** (Art. 7 para. 2 let. g CartA):
 - Is considered unlawful: “the restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.”

Latest reform of CartA: Relative market power (II)

- Leading cases shall bring legal certainty
 - When is an undertaking dependent?
 - Appropriate conduct in case of dependence?
- But: Fewer cases than expected
- **Two investigations** opened and ongoing:
 - **Pharmaceutical wholesale trade**
 - **Trading of books**
- Both concern the new abusive behaviour: alleged restrictions to **purchasing abroad** at conditions applicable abroad
- Effect: Narrowing of the intragroup exemption

Ongoing partial revision of the CartA

- **Modernizing merger control:**
 - Changing from today's qualified dominance test to the Significant Impediment of Effective Competition test (**SIEC test**)
 - No changes to the high turnover thresholds
 - Filing obligation irrespective of turnover in case of dominance established by a final and binding decision shall remain
- Strengthen the **civil procedure / civil claims**
- **Procedural aspects:** *inter alia*, regulatory deadlines and party compensation
- **Motion Français: Qualitative and quantitative criteria** shall be considered when assessing whether agreements restrict competition (CartA 5)
- Separate project: **Institutional reform**

Conclusions with respect to historic influence of EU law

- Alignment, quite similar to an **autonomous adoption** of EU law
- Not mere instrument of comparative law, not mere eclectic copying of provisions
- **Deviations (Swiss finish) only if justified**
 - **For substantive reasons** (e.g. high price island in middle of Europe)
 - **Due to systematic difference**
 - Historically no prohibitions of certain agreements or concerted practices
 - Rebuttable presumption of elimination of effective competition for hardcore restrictions
 - Sanctions only for such hardcore restrictions

Consequences for the interplay with EU competition law

- **EU competition law, including its developments, should be taken into account** when interpreting Swiss competition law
- **Results should be substantially same**, despite systematic differences
- **Narrow exceptions to EU compatibility**, in particular aiming at opening borders
- There should be **no cherry picking**

Assessment of Agreements affecting competition

- **Gaba case law** (BGE 143 II 297): agreements in the sense of CartA 5 III and IV are *per se* significant restrictions of competition
- **Legal certainty** for the most severe forms (e.g. bid-rigging, horizontal price fixing)
- What falls under CartA 5 III and IV is **interpreted extensively**
- Case law: **purely form-based approach, effects are not needed**
- Hence **legal uncertainty for most common forms of cooperation**: e.g. horizontal cooperation agreements (consortium agreements, R&D agreements etc.)
- Deviation from EU case law: Narrow interpretation of restrictions by object; evaluation of nature of goods/services, economic context, structure of the market (*Cartes bancaires*, ECJ, 11 Sept. 2014, C-67/13 P, para. 53, 58, 78 et seq; *Budapest Bank*, ECJ, C-228/18, para. 76 et seq); differentiated approach in (draft revised) EU Horizontal Guidelines

Assessment of abuse of dominance cases

- *Publigroupe* (Federal Supreme Court, BGE 139 I 72, 2012): Interpretation on CartA 7 shall be closely aligned with Art. 102 TFEU
- *SIX/DCC* (Federal Supreme Court, 2C_596/2019, 2 November 2022):
 - Refusal to provide interface information to competing manufacturers of payment terminals regarding *Dynamic Currency Conversion* (DCC)
 - Only **tying** examined by Court (CartA 7 II f)
 - **Effects irrelevant**; risk that tying could be harmful is sufficient
 - Court's opinion: in line with EU case law. But recent EU case law rather suggests effects-based analysis in certain cases (*Google Android*, ECJ, 14 Sep. 2022, case T-604/18, paras 290 et seq and 842 et seq; *Microsoft*, CFI, 17 Sep. 2007, case T-201/04, para 867 et seq.)

Revised Swiss Vertical Notice and Explanatory Notes

- Entered into force on **January 1, 2023**
- Transition period of one year
- Adaptation to **revised EU VBER and new EU Vertical Guidelines**
- Recital VII.:

“This ensures that, as far as possible, the same rules continue to apply in Switzerland in the area of vertical agreements as in the European Union, that an isolation of the Swiss markets is avoided, and that legal certainty is created. In this sense, the European rules (cf. recital VI.) apply by analogy in Switzerland.”
- Reflects the recent **Swiss case law** (including “**Swiss finishes**”)

Vertical agreements: Recommended resale prices as RPM (*Pfizer*, BGE 147 II 72)

- Qualification of RRP as sanctioned resale price maintenance (RPM)?
- Special circumstances, but: **generalized in revised Explanatory Notes (para. 8)**
- **Concerted practice: based on EU law; but using a horizontal concept**
 - Coordination: Intensive communication, e.g. **repeatedly transmitted electronically to cash register system of distributor**; less likely if set out in a catalogue
 - Adaption of behaviour: adherence rate > 50% (or lower?, cf. Report re YAMAHA)
 - If causal link: vertical price-fixing; indication as «non-binding» not relevant
- No need for pressure or incentives (separately addressed in para. 9)

Vertical agreements: absolute territorial protection clauses

- **Gaba, BMW:** Restrictions of passive sales into Switzerland: sanctions, irrespective of effects
- **Nikon** (Federal Admin. Court, B-581/2012 of 2016.; para. 12 Explanatory Notes):
Obligation of distributor to purchase Nikon products from Swiss Nikon entity
 - Sanctioned indirect absolute territorial protection (restrictions of passive sales into CH)
 - Hardcore restriction, irrespective of whether selective distribution
- **Flammarion** (BGE 148 II 321; para. 13 Explanatory Notes): **Passive sales restrictions**
 - Distinction whether **manufacturer** or **non-manufacturing supplier** undertakes not to make passive sales into Switzerland
 - **Manufacturer** undertakes not to make passive sales into Switzerland: does not fall under CartA 5 IV (i.e. not sanctioned)
 - **Other supplier:** covered by CartA 5 IV, i.e. sanctioned restriction of passive sales

No additional regulation relating to digital markets

- No legislative projects aiming at GAFAM
- Few stand-alone Swiss procedures (are viewed as being redundant)
- Assumption that GAFAM do not operate differently in Switzerland compared to neighbouring countries
- COMCO requires GAFAM to implement measures imposed on them in foreign proceedings
- Pragmatic approach, saving resources
- But questionable in terms of legal certainty and resulting lack of guidance

Conclusions

- Swiss competition law **strongly influenced by EU competition law, but:**
 - Different systematic approach; limited number of sanctioned hardcore restrictions
 - Concerns related to high price island in the middle of Europe
- **Ongoing revision of CartA:**
 - Suggestion to repeal per se approach to hardcore restrictions highly debated
 - Reaction to overly formalistic, broad interpretation of hardcore restrictions
 - Call for: - Narrow interpretation of hardcore restrictions
 - Institutional reform: increase capability to do effects-based analysis

Thank you for your attention

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