Competition policy in Switzerland

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Abstract:

This paper provides a critical review of competition policy in Switzerland. We analyse the legal statute, the institutional arrangements for its implementation and the case law since 1985. We find that Cartel Commission which was given wide discretion by the law has been relative immune from judicial and political challenge and vulnerable to interest groups. The analysis of the relevant markets, the evaluation of dominance and that of countervailing benefits tend to be poorly motivated. In addition, the concept of effective competition, which is central to the implementation of the law, has not been substantiated by the case law. Accordingly, the decisions tend to be highly judgmental, which reflects the weak accountability of the Commission. Fortunately, both the substantial provisions of the law and the institutional framework have been improved by the recent revision of the statute. Being more accountable, the Commission may not have the choice but to improve its practice.

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Non technical summary

The first part of this paper discusses the main provisions of the Swiss competition statute. We argue that the statute has evolved from a weak to a potentially more restrictive instrument, which is now close to the EC framework. The central role given to the potentially elusive concept of effective competition in the Swiss law is the main feature of differentiation with the EC law. Effective competition is seen as a threshold beyond which restrictions of competition are without redemption (i.e. cannot be balanced by efficiency benefits). The case law however fails to bring the concept to life and in our view should be downplayed in further implementation of the law.

Turning to the institutional setting established under the 1985 law, we observe that the Cartel Commission operated with wide discretion (stemming mostly from general substantive legal provisions) and little threat of judicial and political challenge. In addition, the composition of the Cartel Commission, populated with representatives of various interest groups with no obvious interest in competition, made it potentially vulnerable to direct outside pressure. Economic expertise was not enhanced by this composition. The analysis of the case law supports the conjecture that the Cartel Commission was indeed weakly accountable; in various dimensions (definition of relevant markets, evaluation of dominance, evaluation of countervailing benefits, imposition of remedies), the analysis is rather poor by the standards of other jurisdictions. Its lacks organising principles, fails to bring appropriate evidence and often relies on highly judgmental evaluations. Surely, if the Commission had been accountable, it would felt compelled to back up its cases. In the event, judgements sufficed.

We find no evidence that the decisions of the Cartel Commission have been closely associated with the views of particular interest groups. Rather, we find that the Commission may have used the absence of appropriate checks and balances to pursue a somewhat unorthodox « policy towards competition ». In importance instances, as revealed by the case law, the Commission has attempted to introduce competition in the Swiss economy, even though there was no clear anti-trust issue in the cases at hand. As it turns out, given the highly cartellised structure of the Swiss economy, consumers may have benefited from this policy. Nevertheless, the legal and institutional framework have been used to pursue objectives that were beyond those normally assigned to a competition agency.

The recent revision of the law and institutions for its implementation go a long towards improving accountability and reducing the vulnerability of the Competition Commission to outside pressure. Faced with significant threats of judicial (and political) challenge, the Commission will presumably be led to improve on its analysis and to interpret its role more narrowly.

0. Introduction

The objective of this paper is to analyse competition policy in Switzerland. We consider several benchmarks against which the policy will be analysed. First, we will, to the extent possible, compare the Swiss practice with that followed in other jurisdictions. Second, we will evaluate the economic analysis on which the policy is determined on a case by case basis. Finally, we will study whether the policy is applied consistently across cases.

The first section of the paper reviews the main provisions of the Swiss competition statute emphasising their evolution over time and comparing them with other legal frameworks at the level of the EC and of member states with a substantial tradition in competition policy (namely the UK and Germany). This analysis covers the substantive provisions of the law but also the procedures and institutions that the law establishes for implementation.

As often, however, much of the policy arises from the case law, which is analysed in the second section. The analysis of the statute in the first section serves to highlight a number of features of the current legal framework which deserve particular attention in the analysis of the case law.

The second section focuses on the concept of effective competition, the balance between competition and efficiency, the analysis of markets and competition undertaken by the Commission, the remedies it has imposed and the balance between market power and fairness in Commission's decisions (recommendations).

The scope of our analysis should be clarified from the outset. In what follows, we focus on the implementation of the main statute which governs competition policy (namely the « cartel law »). Neither the law on price control (« Surveillance des prix ») nor the law on unfair business practices are considered in detail. If the latter is fairly standard by comparison with other developed market economies (it deals mainly with false or misleading advertising), the former is highly unusual. As such, it would be the subject of a separate analysis.

One may wonder whether a review of Swiss competition policy at this point in time is really appropriate given that a new law has just been passed. One might argue that the experience of the previous law offers little guidance about the functioning of the current law, so that our analysis is mainly of historical interest. We will argue however that the new law has inherited from its predecessor a number of key characteristics which will remain central to the implementation of the policy (in particular the concept of effective competition and the evaluation of countervailing benefits). Furthermore the civil servants enforcing the old law (essentially the staff of the former « Cartel Commission ») will also be the ones responsible for implementing the new one, so some continuity in their approach to the analysis of markets can be expected. As a result, a close analysis of past practices should help in evaluating and making recommendations for improving the implementation of the current framework. This prospective will also enable us to identify a number of issues in the previous statutes which have not been properly addressed by the recent revision.

1. The Swiss competition statute - a comparative analysis

The principle of freedom of contract is deeply rooted in the Swiss constitution so that making particular contracts unlawful requires a strong legal basis. Art 3.1 provides such a constitutional basis for introducing a cartel law. Its second paragraph states that the Federal government may, when it is the general interest, pass laws to curb the negative social and economic consequences of cartels and analogous organisations. This approach suggests that a general cartel prohibition (similar to that found in the German law) would be very difficult to introduce in Switzerland (barring a change of the constitution).

By comparison with Germany or the UK, Switzerland was also quite late in introducing any kind of competition law. The first law was not introduced until 1962. It has since been subject to two (major) revisions, the first in 1985 and the second in 1995. We will argue in this first section, that in very broad terms the evolution of the law could be characterised as a progressive shift from a very weak to a more restrictive statute, which is now reasonably close to EC standards.

We shall first review the substantive provisions of the law (in its various versions) before commenting on the institutional arrangements for its implementation.

1.1 Substantive provisions

1.1.1. The scope of the law

Unlike European competition statutes which introduced (back in 1959) a different treatment for agreements between undertakings (art 85 of the Treaty of Rome) and abuse of dominant positions (art 86), the original competition statute in Switzerland (cartel law of 1962) make no such distinction. It has " cartels and analogous organisations " as an single object, which includes agreements (art 2) as well as dominant firms (art 3). This encompassing definition was kept in the first revision of the law (in 1985) but abandoned in the recent revision (1995). The most recent law (95) adopts the EC approach by offering a different treatment for agreements (art 5) and dominant firms which abuse their position (art 7). This revision has also broadened the scope of the statute by introducing provisions on mergers (section 2). Indeed it was felt that a competition policy which controls cartels, but cannot prevent dominant positions to be attained through mergers[1] was inadequate[2]. Since the EC currently also has its own statute with respect to mergers (regulation 4064/89) the scope of EC and Swiss law are similar in terms of **broad** categories. As indicated below, there are however still significant differences between Swiss and EC law regarding the precise definition of cartels, abuses and mergers that are covered by the statute.

In terms of geographical scope, the original (62) law explicitly excluded export cartels. However this provision has been omitted from the first (85) and second (95) revisions. Still, to the best of our knowledge, there has not been any case where a cartel has been challenged on the basis of effects that it had abroad.

Regarding cartels in foreign countries, an early ruling by the federal court has clarified that the law was applicable as long as the effects (of cartels or abuses) were felt in Switzerland (see Carron,

[1] The Cartel Commission could only react to mergers ex post, on the basis of an abuse of dominance. This situation was similar to that prevailing in the Community before the merger regulation.

[2] The rapid concentration of the Swiss cement industry after the cement cartel was banned illustrates the weakness of such an arrangement.

1994)[3]. This approach is similar to that adopted in the Community (see for instance the court decision on "Wood pulp"). In the recent (95) revision of the law, the approach has been made explicit in art 2 § 2.

Overall, this suggests that the activities of Swiss cartels abroad are not covered but that foreign cartels (or abuses) having effects in Switzerland are covered.

In this context, it is worth noting that potential conflicts of jurisdiction could arise with the European Community[4]. The EEA treaty contains specific provisions (art 57) to allocate jurisdictions in cases of potential overlap, so that if Switzerland had signed the treaty, such conflicts would have been avoided. Even though it does not seem that significant conflicts have arisen so far, the implementation of the recent revision of the law (Oct. 1995) may change matters to the extent that mergers are now subject to a notification procedure (as in the Community). For instance, the acquisition of Source Perrier by Nestlé in 1992 would have been covered by both jurisdictions. Similarly, the merger of the rolling stock operations of ABB and Daimler Benz and the concentrative joint venture between Swissair and Sabena last year would also have led to an overlap (see EC, 1995). The recently announced merger between Sandoz and Ciba-Geigy will be reviewed by a number of jurisdictions including the EC and possibly the US and Switzerland[5].

1.1.2. Authorisation and Prohibition

The regime applicable to agreements and abuse of dominant positions in the EC is one of prohibition, with exceptions in the case of agreements (art 85 § 3) but not for abuse of dominant positions. By

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[3] It is not clear however how the principle of extra-territoriality can be applied in practice without explicit coordination between anti-trust authorities across countries. In the case of the Community, the 1972 free trade agreement with Switzerland contains a provision such that agreements between undertakings taking place in the Community but having effects in Switzerland (and vice-versa) are not compatible with the functioning of the agreement. This can form the legal basis for an action in the Community and the provision has been used recently by the Cartel Commission against car manufacturers which prevent parallel imports in Switzerland from the Community.

[4] Given the extra-territorial application of US law, a conflict could also arise with the US but such instances are however likely to be much less frequent.

[5] The merger meets the criteria for review laid down in the Swiss law but it is unclear whether the merger law will be enforced in time. If the target date of July 1st is maintained, the merger may well escape from the scrutiny of Swiss authorities. The merging firms have announced their intention to complete the merger by the end of June !

contrast, the original (1962) Swiss statute was one of authorisation with a list of illegal practices - which themselves could be justified on certain grounds. One of the essential characteristics of the second (95) revision has been to considerably strengthen the presumption that (certain types of) cartels are illegal, so that the new (95) law comes very close to a situation of prohibition[6].

One should not overemphasise the difference between prohibition and authorisation regimes. Much depends on the definition of agreements (or abuses) that are covered by a prohibition in comparison with the specification of agreements (or abuses) that are listed as illegal in an authorisation regime. The EC case law has indeed confirmed that some agreements are simply not covered by the prohibition of 85 § 1 (see Bellamy and Child, 1993), in the same way that many agreements are not listed as illegal by the Swiss statutes. Interestingly, the burden of proof does not seem to be markedly affected by the choice of a particular regime ; in the case of the Community, art 190 of the Rome Treaty clearly puts the burden of proof on the EC Commission, which must produce « sufficiently precise and coherent proof » to support its allegations of infringement. In the case of Switzerland, there is no explicit allocation of the burden of proof in the law, but in line with the general principle of an authorisation framework, it would seem from to the case law that the Cartel Commission has to motivate its decisions of infringement[7].

It should be stressed however that the legal status of agreements between firms is affected by the type of regime. Under a regime of prohibition, an agreement could be challenged by a contracting party as legally void, until it has been explicitly declared lawful under the competition statute. This gives a strong incentive for parties to an agreement to notify and obtain clearance. In an authorisation regime, the incentive to notify is much weaker to the extent that the list of illegal practices (which could be challenged as legally void) is likely to be both narrower and more clearly specified.

The Federal Coucil can still decide to bring forward the date at which the law comes into force. This is a good test of its resolve to an effective implementation of the new law.

[6] As indicated above, a regime of prohibition for cartels, which involve per see prohibition of some contracts would be difficult given that the Swiss constitution grants widespread freedom of contracting (see Tercier, 1993).

[7] The allocation of the burden of proof however mattered less in Switzerland to the extent that the scope for judicial review was much more limited, at least until the recent revision of the law.

Given the lack of a distinct treatment for agreements and abuse in the original Swiss law, there was until 1995 a potentially significant difference between the EC and Swiss practice : whereas abuses of dominant positions could not be justified under EC law by countervailing benefits (there is no 86 § 3 article), such abuses, being assimilated with agreements, could be justified under the Swiss law. Under the second revision (95), different regimes have been introduced for agreements and abuses of dominant positions (as indicated above) and the regime applicable to abuse of dominant position is for all practical purposes one of prohibition. Importantly, there are no specific countervailing benefits that can be considered to justify these practices and in this respect the Swiss law has again moved closer to the EC statute. However, as discussed below, decisions on agreements, abuses and mergers can still be overturned by the executive (on the basis of public interest) under Swiss law so that the convergence between the regime of the two statutes should not be exaggerated. In this regard, the Swiss situation is closer to that found in Germany.

1.1.3. From cartels to agreements

The original (62) statute and its first (85) revision considered agreements[8] which reduce competition including regulation of production, sales, purchases prices and other conditions. The law also specified that resale price maintenance should be considered as a cartel agreement but only if it is implemented by a cartel[9].

In the original (1962) statute (and its first revision, with respect to civil law and procedures), such agreements were presumed illegal when they aimed at preventing third parties from competing or impeding them in the exercise of competition.

This formulation is remarkable in at least three respects ; first, it is clear that **the law aimed at the protection of competitors and not consumers or competition per se**. This is confirmed by the (non exhaustive) list of unlawful practices that is provided by the law. This approach stands in contrast with the EC law enacted at about the same time which clearly aims (among other objectives)

[8] The (85) revision considers « recommandation » as an alternative form of agreement in addition to conventions and decisions which were specified in the original law.

[9] This definition is somewhat circular but the intention of the law is clear enough - namely to consider resale price maintenance only in the presence of other clauses which can restrict competition.

at protecting competition. The fundamental concept underlying the Swiss law at the time was **potential competition**. The emphasis was on protecting potential competitors and the need to prevent incumbents from erecting entry barriers. Interestingly, the theoretical underpinnings for a competition law which places such heavy emphasis on potential competition, the theory of « contestable markets », was not developed until the seventies.

Second, the laws avoided the protection of existing competitors and accordingly avoided getting explicitly involved in issues of " fair competition " like the evaluation of contracts between strong and weak parties. It rightly focused on the effects that agreement could have on third parties, which is the only anti-trust[10] aspect involved in the evaluation of agreements. Accordingly, the fact that the statutes protected competitors rather than competition may not have mattered much (by comparison with other statutes like that of Germany act which lean toward evaluations of fairness) because they focused on third parties.

Third, the law required that members of a cartel should have the **intention** of restricting competition. This requirement, which is absent from the EC law but has been much discussed in the US practice, is potentially damaging to the extent that cartels arising from tacit co-ordination of behaviour in a repeated interaction are potentially excluded. This provision was however dropped in the first revision (85) of the law which focuses on the **effect** of the restriction to competition.

The main new element introduced by the first (85) revision of the law was a different approach for the evaluation of agreements with respect to **administrative law**. The law explicitly stated (art 29 § 3) that cartels which impede effective competition were presumed to be illegal. In addition, the law indicated (art 29 § 2) that if significant restrictions to competition are observed, the Cartel Commission should evaluate the positive and negative consequences of cartels, taking into account the effect of the cartel on the **extent of competition** (« ampleur de la concurrence »)[11].

The second (95) revision of the law has introduced important changes. First, explicit references to cartels have been avoided and the law now focuses on agreements. Second, explicit reference to

[10] In what follows, we adopt the contemporary US practice and use the term anti-trust as an adjective meaning « raising concerns of market power ».

resale price maintenance in the scope of the law has been omitted but it is made clear that vertical agreements (of different types) are included. Third and most importantly, the presumption under civil law that only some types of agreements which affect **potential competitors** are unlawful has been abandoned. A much more general presumption that agreements which affect **competition** in a significant ("notable") way are unlawful is introduced for both civil and administrative procedures. Fourth, the law further specifies a list of agreements (those that suppress effective competition) which are simply (per se) unlawful (i.e. cannot be justified by the presence of countervailing benefits[12] - for both civil and administrative actions). The (apparently exhaustive) list of such agreements (art. 5) comprises agreements to fix prices, restrict quantities and allocate geographical markets. These practices correspond by and large to those that can be considered as "per se" illegal under EC law (i.e. those for which the provision of 85 § 3 are not effectively applicable according to the case law).

Overall, the Swiss approach to the definition of unlawful agreements has moved significantly closer to the EC practice (but not the letter of the law). It now focuses on competition (rather than competitors) and includes some (quasi) per se prohibitions.

1.1.4. Abuse of dominant positions

As indicated above, under the original statute and its first (85) revision, abuses of dominant positions were only covered to the extent that firms with a dominant position[13] were assimilated with cartels. The discussion above on the definition of illegal practices for cartels therefore applies to abuses of dominant position. In particular, under civil law, only attempts to restrict entry could be presumed to be unlawful.

The second (95) revision of the law has introduced a specific treatment for abuses (art 7). There is a presumption that the behaviour of dominant firms can be seen an abuse, and hence unlawful, when it

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[11] See section 1.1.6 for a detailed discussion of this evaluation.

[12] These practices can still be allowed by the executive on the basis of public interest (discussion below in section 1.1.6.).

[13] The first revision of the law is explicit about the factors that should be taken into account to evaluate dominance (art 4 § 2). The list of factors provided is certainly sensible but lacks some organising principle.

raises entry barriers or puts commercial partners at a disadvantage. The law also provides a (non exhaustive) list of such practices, which tracks the list provided by art 86 of the Rome treaty, and adds the refusal to sell and predatory pricing. Given that these two practices have been considered in EC case law (see for instance respectively the decisions on Polaroid/SSI Europe and Tetra Pak II) as unlawful, the set of practices that are in principle considered unlawful by Swiss and EC law are very similar.

The wording of the presumption in art 7 is still remarkable. Unlike the EC law which is very open on the conditions under which an abuse can be found, the Swiss law indicates that an abuse is associated with preventing entry or putting commercial partners at a disadvantage. If the emphasis on entry is commendable, one can wonder about the second reason for abuse (" putting commercial partners at a disadvantage "). This wording may well lead the administrative authorities and the court to enter into issues of fairness in contracts. As indicated above, one of the achievements of the Swiss statutes so far was that it had, **at least formally**, avoided this pitfall (see section 2.4. for an analysis of the case law on this matter).

1.1.5. Mergers

Like the EC merger regulation, the second (95) revision of the law has introduced a notification procedure for mergers (art 9). Two conditions have to fulfilled, namely (i) that the joint turnover of the enterprises involved in the concentration exceeds 2 billion francs world-wide or 500 million francs in Switzerland and (ii) at least two of the enterprises involved in the concentration have each had a turnover of 100 million francs in Switzerland.

By comparison, according to the EC merger regulation, a concentration has a Community dimension (and hence is covered by the statute) if (i) the world-wide turnover of all parties is in excess of 7.5 billion Swiss francs[14], (ii) the EC wide turnover of a least two parties is in excess of 375 million Swiss francs each and (iii) at least one of the parties does not achieve two third of its EC wide turnover in one and the same member state.

Quite appropriately given the size of the country relative to the Community, the Swiss statute will cover smaller concentrations. Yet, the lower limit on turnover for two partners in the concentration which is set at 100 million Sfr each seems relatively high by comparison with the Community limit at 375 million Sfr. However, the German law covers only concentrations where the joint turnover exceeds 400 million Sfr (or where the employment level of the companies concerned exceeds 10 000). Note however that the German law also has a market share criterion (20%) which is entirely absent in the Switzerland.

Importantly, the Swiss law has avoided making reference, like the EC merger regulation, to a relative criterion for the concentration of activities (namely the rule that at least one of the undertaking does not achieve two-third of its EC wide turnover in one and the same member state). Such a criterion introduces a bias in the scope of the review such that for a given increase in concentration in some national market, mergers between firms that are concentrated on their domestic markets might be excluded whereas mergers between geographically diversified entities will be reviewed (see Neven et al, 1993).

A concentration can be forbidden (or authorised with remedies) if it would create or reinforce a dominant position which could suppress effective competition and when there is no countervailing benefit in terms of improving competition in other markets. Two remarks are in order ; first, whereas the EC statute considers " **significant impediments** " to effective competition, the Swiss law insists on effective competition being « **suppressed** » From this perspective, the Swiss statute could be seen as more permissive[15]. Second, the statute does not allow for countervailing benefits (outside competition benefits) to be taken into account in the evaluation of the concentration. In this respect, the Swiss law closely follows the spirit of the German law. It is also close to the EC law which does not seem to allow for efficiency defences either (at least formally) and does not even consider countervailing benefits in terms of competition. Here again, it seems that the Swiss law could be marginally more permissive than the EC.

1.1.6. The exceptions

[14] In what follows, we use an exchange rate of 1.5 between the Ecus an the Swiss franc.

As indicated above, the Swiss statutes have allowed for various countervailing benefits to be taken into account which may overturn the presumption that some practice is unlawful. The approach followed by the statutes has also changed markedly over time but has followed the same structure: practices that are presumed unlawful can be justified by countervailing benefits but some cannot. There is therefore a **threshold beyond which restrictive practice should be seen as beyond redemption**. What has changed over time is the type of justifications that can be taken into account and the definition of those practices (a subset of those presumed illegal) which cannot be justified.

(i) The original statute

In the original (62) statute, practices that were presumed unlawful could still be justified by dominant legitimate interests as long as they did not restrict competition in excess of what is necessary to achieve their aim. The law also provided examples of legitimate dominant interests, including the preservation of loyal competition, establishing reasonable technical specifications at the industry level, the promotion of an industrial structure in the public interest, the implementation of a cartel abroad and the implementation of reasonable regulated prices (which maintain quality and services). This list is truly astonishing in its generality (e.g. by comparison with the provision of art 85 §3 of the Rome Treaty) and could certainly be abused. As suggested above, the law also stipulated however that measures which aim solely at barring entry could not be justified by legitimate interests. This provision confirms the importance of potential competition in the original statute.

(ii) The 1985 statute

The first (85) revision of the statute confirmed this approach with respect **civil law** and procedures. It merely clarified that private dominant interest could be taken into accounts as long as they did not conflict with the public interest. The (non exhaustive) list of admissible interests however remained unchanged.

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15 This evaluation is reinforced by the observation that the general exemption on the basis of the public interest also applies to mergers (as well as to agreements and abuses - see below for a discussion of this provision).

The main innovations in the first (85) revision concerned the provisions of **administrative law**. For cases where significant restrictions of competition are observed, it provided the Cartel Commission with clearer guidelines (art. 29) about the positive and negative, social and economic consequences it had to consider. It emphasised that it should explicitly study the effects on the extent of competition. And it stressed that when effective competition was impeded, there is a presumption that negative consequences will dominate. This presumption could be overturned only by dominating public interest.

A number of remarks are in order.

- First, it is striking that the provisions of civil and administrative sections of the 1985 law differed so much. Surely, this does not contribute to transparency and legal certainty.

- Second, the evaluation task assigned to the Commission is very general. The inclusion of social consequences certainly leaves a lot of room for manoeuvre in justifying some practices, and imposes a very strong workload on the Cartel Commission. Indeed, the mere idea of undertaking a rigorous market study in which one takes into account the whole spectrum of effects from labour interests to regional economics is somewhat daunting.

- Third, the statute introduced a complicated system of justification: at the first level, the Commission had to decide whether significant restrictions to competition were observed. If so, it had to decide whether effective competition was impeded (see figure 1). If not, a balance of social and economic consequences had to be considered. If indeed effective competition was suppressed, another type of justification had to be considered, namely the public interest.

What is striking in this system is that the justifications which could be used, depending on whether effective competition was impeded or not, are equally general (if anything the public interest is marginally more general that all social and economic consequences). One can more readily appreciate the use of a multiple evaluation system when more general considerations can be taken into account for more serious offences. Similarly, hierarchical reviews (as in the the UK) involving

wider criteria at a higher level could be justified. It is unclear however whether a multiple evaluation system with equally general criteria for all offences is at all useful.

- Fourth, the statute introduced a new concept, namely that of effective competition being impeded. This is a rather vague concept, which leaves a lot of discretion to the Commission. The effectiveness of the statute could thus be expected to depend very much on the quality and consistency of the analysis undertaken by the Commission.

(iii) The current law

The second revision of the law has maintained the idea of a multiple evaluation and has extended the procedure to civil law but the process of evaluation has changed in two fundamental ways (see figure 2). First, for those agreements that do not suppress effective[16] competition, the Commission of Competition is no longer required to do a balancing of economic and social costs and benefits to reach its conclusions. Rather it should limit itself to studying the impact the cartel has on **economic efficiency** and the law gives an apparently exhaustive list of these motives (reduction of distribution and production costs, improved quality, promotion of research and the diffusion of knowledge and a more rational exploitation of resources). Second, a hierarchy is introduced in the evaluation: both the agreements that suppress effective competition and those that do not but cannot be justified by countervailing economic benefits can be reviewed by the federal council. The decision of the competition commission can then be overturned on the basis of a wider criteria, namely the public interest. It is, however, clear that the legislator anticipates this step to be taken only in exceptional circumstances.

Note that the revision has addressed two of the shortcomings of the 1985 law mentioned above (inconsistency between civil and administrative procedure - equally general criteria of evaluation at the two levels). A priori, its seems that the law has become more restrictive as countervailing benefits have been narrowed to more strictly economic considerations . The list of motives that can be appealed to now closely tracks that of art 85 &3 of the Rome Treaty. Unlike the Treaty, however, no reference is made to the proportion of the efficiency benefits that should be passed on

to consumers and one may regret that the recent revision of the law has missed an opportunity to state that consumer welfare is a central consideration in the implementation of competition policy. Still, the law has become somewhat more stringent not only because the list of criteria is smaller but also because its implementation should gain both in transparency and consistency. Indeed, the balance between social and economic consequences is potentially a somewhat arbitrary exercise, which could be particularly vulnerable to capture. Narrower economic criteria are less prone to manipulation. In addition (as indicated above), the law has become considerably more stringent about the type of agreements that are presumed to suppress effective competition and accordingly cannot be justified by economic countervailing benefits (namely agreements to fix prices or quantities and share markets)[17].

Overall, the workload of the cartel authority has been considerably alleviated. The Swiss cartel law essentially follows the example of the German GWB in adopting a separation between efficiency considerations which are the competence of the BKA and more general considerations which are taken into account by the Minister.

As indicated above, abuses of dominant positions cannot be justified by efficiency considerations. A decision of infringement by the Commission in this matter can still be overturned by the executive on the basis of public interest.

For mergers, the situation is also different. Concentrations that could suppress effective competition are unlawful unless there are some benefits in terms of competition. Accordingly, both the presumption and the criteria that can be used to justify a concentration differ from the presumption and the criteria that can be used to justify an agreement at the first level of evaluation by the Commission. As in the case of agreements and abuses of dominance, a review by the Federal Council is still possible on the basis of the general interest. As indicated above, this approach is close to that used in Germany and the Community but is potentially more lenient than the latter.

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16 Note that « impede » (empêcher) has been replaced by « suppress » (supprimer).

17 There is one respect in which the law may have become weaker : as suggested above, the presumption of illegality is now formulated in terms of effective competition being suppressed rather than impeded. It is not clear whether the distinction matters - indeed the members of the secretariat were not aware of the change of in formulation ! The distinction between « empêcher » and « supprimer » in french is also not as strong as that between « impede » and « suppress ».

1.1.7. Conclusion

A number of conclusions emerge from this comparative analysis.

(i) The treatment of agreements under Swiss law has moved as close as possible to EC while retaining an authorisation framework (which is dictated by the Swiss constitution).

(ii) A significant achievement of the Swiss law has been to avoid explicitly covering issues of fairness in contracts. The recent revision of the law with respect to abuse of dominant positions could unfortunately be interpreted as leaning in that direction.

(iii) The treatment of abuses of dominant position has now moved closer to the EC practice to the extent that countervailing benefits can no longer be taken into account in their evaluation.

(iv) The treatment of mergers is a mixture between EC and German practices. Both the criteria for review of a concentration and those for their evaluation suggest that the treatment of mergers will be significantly more lenient than in Germany and the Community.

(v) The recent revision of the law has considerably narrowed down the set of countervailing benefits that the Commission can take into account and focused on economic criteria that are less prone to manipulation. From this prospective, the law has become more restrictive and the task of the Cartel Authority has been considerably simplified.

(vi) Like Germany and the UK, but unlike the Community, Switzerland has multiple levels of evaluation. The recent revision of the law has clarified matters a great deal by specifying different criteria for each level of evaluation (namely specific economic consequences and the public interest).

(vii) The recent revision of the statute has harmonised potentially damaging differences between civil and administrative law and procedures.

(viii) The concept of effective competition has become central in the statute. It is however a rather vague concept which leaves a lot of discretion to the commission. The effectiveness of the law will depend a great deal on the content that the Commission attaches to this concept (see also von Ungern-Sternberg, 1993, on this issue).

1.2 Procedures and institutions

Our main concern in analysing institutions is to evaluate whether the policy can be implemented effectively, i.e. whether the courts, the civil servants and the executive of the commission will defend the interests that they are supposed to serve according to the law. The **independence** of the institutions, namely their ability to resist pressure from particular interest groups is of course an important dimension to be considered in the analysis, as it should contribute to the effectiveness of policy implementation. The factors that shape the independence of an institution will also vary from one particular body to the other; for instance the independence of civil servants will presumably be much affected by their evaluation and promotion system. Relevant aspects will include the following : can the executive sanction an evaluation which does not support its own view ? is the practice of the revolving door common - such that civil servants can shift employment to the private sector and vice versa - ? Regarding the independence of the executive of the Commission one might include elements such as careers prospects but also the terms of his/her contract (who nominates him/her, what is the length of the contract ? how can he/she be dismissed ? is he/she allowed to have formal links with companies or professional associations ?).

Independence should not however be considered the sole answer to the effectiveness of the policy. Indeed, completely independent agents could take arbitrary or dogmatic decisions and appropriate the policy to their own benefits. Independence should be balanced by appropriate measures to ensure the **accountability** of the institutions entrusted with the implementation of the policy. The accountability of an institution will be determined by a variety of factors including the precision of the brief that is given by the law, the reporting requirements imposed on the institution, the verifiability of its achievement and the procedures for appealing its decisions. From this prospective, the assignment of precise rules to an institution is preferable to wide discretion. Precise rules can however not be designed for all contingencies so that a fair amount of discretion may be necessary to ensure a flexible implementation of the law, which can be tailored to the specifics of the case at hand. Discretion may be particular valuable in the implementation of competition policy (for instance, relative to the management of the central bank money supply), so that the trade off between the flexibility of the policy and the accountability of the institution implementing it, is particularly delicate for competition policy (see Neven et al., 1993, for a detailed discussion of these issues).

In principle, both the independence and the accountability of an institution can be enhanced by greater **transparency**; transparency ensures that institutions take full responsibility in view of the public for the decisions they take. For instance, the independence of the Competition Commission will be enhanced if its recommendations to the executive are made public, since the executive will have to bear full responsibility if it overturns a recommendation. But publication of the recommendations will also enhance the accountability of the commission.

Of course, the independence, accountability and transparency of a policy are not determined solely by the details of the statutes analysed in this section. For instance, the independence of the OFT in the UK is associated with the high standing and reputation of its civil service - a dimension which can at best be partially traced back to the details of the statute. As indicated by the previous discussion, many contractual arrangements which are not determined by the law will also matter.

1.2.1 The original procedure

The original statute (1962) emphasised the civil implementation of the law, so that much of the power to implement the law rested with the courts (at the canton level and at the federal level on appeal).

The original statute (1962) created the Cartel Commission, but gave it only very little power. It was supposed to undertake general studies of particular markets, either on its own initiative or at the request of the minister of economics. In addition, the minister could ask the commission to undertake "special" studies to examine if indeed cartels (or analogous organisations) were against the public interest.

The law specified that the Commission was made up of members (nominated by the federal council) coming from economics, and law as well as representatives from business and consumer organisations. In practice, this provision went a long way towards insuring a wide representation of interest groups in the council, possibly at the expense of expertise : both the COOP and the MIGROS (two large distributors- which account for about 70 % of the Swiss food retail market), the Association of Farmers, the Association of Employers, the Trade Unions, the Association of Small Businesses and the Consumer organisation have had a representative in the Commission.

Arguably, it is only the Consumer organisation that has a clear interest in fostering competition and this composition is highly unsusual. Funnily enough, the statute indicates that the member of the Council are **independent** but apparently what is meant here (according to private communication with the Secretariat) is that the members are not part of the civil service.

Even though the allocation of seats between interest groups is not statutory, is has never been changed. Members were nominated for a period of 4 years and could only be removed by the Federal Council for serious offences. It is not clear from the statute what the status of the secretariat was at the time. The law also gave the Commission the obligation and right to publish an annual report.

Overall, one cannot help noticing that the composition of the Commission was **not** made of independent experts and one can wonder whether this arrangement, which has been maintained until now, offered adequate guarantees in terms of independence. On the one hand, one could argue that a clear representation of interest in the Commission actually reduces the scope for capture by particular interests ; members of the Commission might fear losing credibility with their colleagues by defending the interest of their organisation too vocally and hence will be reluctant to do so. On the other hand, one could argue that all members of the commission have a strong incentive to reach a gentleman's agreement such that the interest of the parties their represent are not seriously encroached upon. The repeated nature of their interaction might also help them in sustaining this « collusive outcome » of no warfare. Which outcome will prevail might, in those circumstances, might depend very much on the profile of the President. Without putting forward a judgement ex post on this outcome, it seems unwise to leave the independence of a Commission too exposed to particular group dynamics or the personality of its president.

A further important weakness of the old cartel law was that the Commission could take very little action on the basis of its studies. It was limited to making **suggestions** to the cartel to change or abolish some of its clauses.

Finally, the Commission did not even have the right to publish the results of the studies. In the case of general studies, the presumption was that studies would be published but the minister could decide

otherwise. In the case of special studies, the minister simply decided ; in those circumstances where indeed it was more likely that serious competition issues were at stake, the cost of cover up for the minister was thus lowered (it is indeed more costly to prevent publication when the general public expects it).

The Minister could decide, on the basis of a special study, to take action in front the federal court against a cartel (or analogous organisation). However, between 1962 and the first revision of the law (1985), only seven special studies were undertaken and none of them was followed by an action in front of the federal court. Only a subset of them were published.

Overall, the original arrangements are characterised by a weak Cartel Commission and a procedure which lacks transparency.

1.2.2. The first revision

The first (85) revision of the law introduced many changes to the administrative procedure. First, while it did not change the composition of the Commission (which accordingly might have remained quite dependent on its composition and on the personality of its president - as argued above), it did go a first step in the direction of increasing its independence, by specifying that members should withdraw from the commission if they were associated with a particular party in the case at hand. Interestingly however, it is explicitly mentioned that representing a professional association to which one of the parties at hand belongs is not considered a reason for withdrawal !

The organisation of the secretariat is further specified in the law, which stipulates that the council of minister decides on its status and administrative level. Still, the members of the secretariat were answerable both to the Minister and to the Commission and personnel decisions (in particular, firing and promotions) were not delegated completely to the Commission (which would have guaranteed greater independence).

One of the main modifications of the 85 revision was to increase the power of the Commission: As before it could make recommendations to the cartel, but now the parties had to declare in writing

whether they accepted these recommendations. If they did so, the matter was closed and indeed, it (theoretically) might never come to the attention of the public at all as the Commission has no automatic right to publish its analysis and recommendations. (As before the minister decides whether or not to publish, but he never made use of his right to prevent publication). If the parties did not accept the recommendations of the Commission, the minister could take a formal decision, upon the proposition of the Commission. Firms could appeal this decision only in front of the Federal Court for points of law and procedure.

Importantly, in this arrangement, the recommendations of the Commission cannot be appealed to court (because they are not legal decisions). It is only the decision of the Minister of economics that can be challenged and such legal actions are rare. Being fairly immune from the threat of judicial review, the Commission therefore enjoyed a great deal of independence. Its only constraint was the acceptance of the recommendation by the Minister of economics.

In theory, this might have given a strong incentive to the Commission to negotiate with the parties. Indeed, if the Commission expects that the minister might not follow its recommendations (because the minister represents wider - or narrower - interests) , it will avoid being disavowed by the Minister by negotiating a deal with the parties involved. Whether the parties involved or the Commission have a strong hand in the negotiation thus depends very much on what the minister can be expected to do. If the parties at hand can rally the minister to their point of view, the Commission will be in a weak position. Of course, the fact that the minister bears relatively little cost when deciding not to follow the recommendations of the Commission (since there is no compulsory publication) might be expected to reinforce the bargaining power of the firms.

The observation that all recommendations have been accepted and published since 1985 is of course hard to interpret. It might suggest that the Commission has been careful in presenting recommendations that would be acceptable to the executive. Alternatively, it may very well be that the executive has decided, as a rule, to follow the recommendations of the Commission. The large debate and wide criticisms that has surrounded the publication of some studies tend to support the latter view.

Overall, it may very well be that the Commission has had a strong hand in dealing with firms, precisely because the Minister had committed himself not to make use of its power to undermine the Commission[18]. With little threat of judicial review and a determined political support it seems that the Cartel Commission may have enjoyed an unusual degree of independence. At the same time, given the power of the Commission and the generality of the law that it was applying, one can have legitimate worries about its accountability. It seems that institutional and legal circumstances were favourable to an outcome where the Commission was going to « write new laws » without effective checks and balances.

Irrespective of the outcome, one should still emphasise the vulnerability of the institutional arrangement prevailing under the 85 law. Indeed, the outcome seems highly dependent on the personal characteristics of both the president of the Cartel Commission and the minister of economics.

1.2.3. The current law

The second (95) revision of the law has confirmed the increasing role that the commission is supposed to play. It has been renamed "competition commission" and its opinion is now required even in the context of civil procedures.

The composition of the Commission has been modified. The reference to representatives of particular groups or professions has been dropped and the commission is supposed to count a majority of independent[19] experts. Even though the new formulation could be abused at the margin, it is a significant improvement over the previous provision. Unfortunately, the conditions of withdrawal for particular cases have not been modified. The wording of the nomination procedure for the Commission has been changed: the council of ministers nominates the chairman and two vice-chairman. It is thus not clear from the law who nominates the other members of the Commission. According to the Secretariat, they will also be nominated by the Council of ministers. It seems that a procedure of co-optation by the chair (and vice-chair) which could have contributed to greater

[18] Admittedly, we do not offer any explanation of why the Minister might have given up his power.
[19] By independent, the law apparently now means independent of particular interest groups.

independence of the Commission has been ruled out. (Co-option procedure are not of course without their own risks.)

The most important innovation of the current law concerns the formal authority of the Commission. The Commission can now issue **decisions** which are directly binding for the parties at hand. The Federal Council can still overturn the decision upon request from the parties involved on the basis of the public interest. The law makes it clear however that an authorisation by the council is expected to be rare, has to be limited in duration and that it can involve remedies of its own. This new procedure offers much stronger guarantees of independence than the previous law in several respects: first, it is more costly for the executive to overturn a decision than not to follow a recommendation. Accordingly, the incentive to negotiate and to accommodate the parties ex ante is much reduced. Second, it is now the responsibility of the whole executive and not a single minister to rule against the Commission. This matters because presumably, it is much more difficult for parties at hand to convince the whole council than a single individual (who is by tradition attached to right wing parties and hence is more likely to favour the interests of the firms). Finally, it is clear from the law that the exemption by the Federal council is not expected to be norm, and this increases the cost of implementing it.

The scope for judicial appeal has also been modified (see figure 2). There are now two levels of judicial appeal. One in front of the « appeal commission », which despite its name, is a judicial body ruling on both law and procedure. A second appeal can also be lodged in front of the Federal Court (again both on points of law and procedure). Importantly, since the Commission will now take « decisions », a direct challenge against the ruling of the Commission can be lodged. This new arrangement greatly enhances the accountability of the Commission.

Importantly, the Commission now has the right and duty to announce publicly that an enquiry is initiated. This reduces the risk that some agreement is reached without the public knowing that a negotiation ever took place and accordingly enhances the transparency and accountability of the procedure. The Commission also has the right under the new law to decide on the publications of its decisions. This is an improvement over the previous procedure, where the minister could block the publication. One may regret however that the Commission does not have an obligation to publish.

For the sake of transparency, it is important that the Commission should publish its reasoning in full ; this would ensure that the Commission is indeed accountable (the quality of its analysis can be scrutinised by the public) and it would further gain in independence (if the federal council overturns the argument, it would have to argue its case). One can also regret that the law does not require the federal council to motivate its decision. Indeed, the council would be less prone to capture if the particular influences motivating its decision could be more easily exposed.

Finally, the organisation and status of the secretariat has been changed. The members of the secretariat are answerable solely to its director and the Commission. Decisions on dismissals and promotion are normally taken by the director, in agreement with the Commission. The power of the Minister in this matter has been greatly reduced[20] and is now limited to disciplinary actions against some public offences. Importantly, the Secretariat is now formally responsible for undertaking the studies. It will organise the hearings, collect the evidence and undertake the analysis without direct interference from the Commission.

Overall, the new law offers significantly better guarantees of independence from outside pressure than the previous one. It has also greatly enhanced the accountability of the Commission.

1.3. Some organising principles for the analysis of the case law

Our discussion of the statute suggest a number of issues that should be kept in mind in evaluating the case law.

(i) The concept of effective competition is central both in the first (85) and second (95) revision of the law. Whether effective competition is impeded (or suppressed in the second revision) will determine whether countervailing benefits can be taken into account. Yet, the concept is somewhat vague and it is important to evaluate how it has been applied.

(ii) In the context of the first revision, the Cartel Commission was supposed to evaluate countervailing benefits and weight them against negative effects on competition. This evaluation is

critical and it will remain important for the current law. One should carefully scrutinise how the Commission has implemented this procedure.

(iii) Given the wide discretion given to the Cartel Commission, regarding both the definition of effective competition and the evaluation of countervailing benefits, its wide power and the weak threat of judicial and political challenge to which it is exposed, we formulated the hypothesis that the Commission was indeed weakly accountable, could potentially follow its own agenda but also that its composition may not offer appropriate guarantee of independence from interest groups. Particular attention to this hypothesis should be given, as the analysis of the cases may reveal confirm both the lack of accountability and the influence of interest groups.

(iv) The law has managed to avoid explicit reference to issues of fairness. One should however check that the case law has not confused them with anti-trust issues.

(v) As always the quality of decisions will depend on the analysis of the market. Accordingly, we will give particular attention to the market definition adopted by the Commission and to its analysis of dominance.

2. The Case law

Effective competition is a central concept for the implementation of competition policy in Switzerland. The concept is used as a threshold with determines in part the type of analysis which is performed. However, the evaluation of this threshold will itself be dependent on the analysis of the market and hinges in particular on the definition of the relevant market and on the analysis of dominance. Accordingly, we start by reviewing the analysis of markets and subsequently discuss effective competition, the evaluation of countervailing benefits and remedies. The objective of this section is not to provide a complete review of the cases but rather to illustrate through cases some important characteristics of the approach revealed by the case law. Similarly, the discussion of the cases and reports that follows is not meant to evaluate whether decisions were « right » or « wrong ». The information available from the report is often not sufficient to express such a judgement with

[20] At the time of writing, these questions are still being debated.

confidence. All we aim at, is to comment on the analysis which is presented in the report without judging the final outcome.

In what follows, we focus on the case law since the implementation of the first revision (85). Indeed, as argued above, the previous decisions were taken under a rather different law and accordingly are much less likely to be informative about the functioning of the current law. In addition, we will focus on decisions taken under the administrative procedure. The reason is twofold. First administrative decisions form the majority of cases. Second, the law which currently applies for both administrative and civil law is closest to the administrative procedure implemented since 1985. Accordingly, civil decisions may not be as informative as administrative decisions for the evaluation of the current statute.

At the outset, it is worth emphasizing that the case reports published by the Commission are highly unusual by comparison with those of other jurisdictions. This emphasis on « market studies » found in the orignal law has left traces until the recent practice of the Commission ; most cases include very long descriptions of the industry and the opinions of interested parties are often reported in great detail. Many of the facts and opinions that are reported have only debatable connections with the case at hand. More importantly, many case reports restrict themselves to a collection of opinions and judgmental statements by the Commission. The analysis is, in the best cases, short and often altogether missing. This feature, which will be illustrated by some case discussion later, can be seen a serious symptom of weak accountability. Indeed, if the Commission had been under serious threat of judicial of political challenge, it would presumably would have felt compelled to develop its analysis further.

2.1 The analysis of markets

In order to evaluate the anti-competitive effects of an agreement or merger, it is useful to define at the outset a market in which some market power could be exercised. Accordingly, most anti-trust analysts tend to start by defining the « relevant market ». Methods vary a great deal across jurisdictions, from the systematic 5% rule in the US to the more informal approach of the EC Commission (see Fischwick and Denison, 1992 for details), but the general approach is similar.

The authorities start with a narrow market (both in terms of product and geographical scope), ask whether market power (by a hypothetical monopolist) could be exercised in that market and consider wider and wider markets until one is found in which market power could indeed be exercised. In evaluating whether market power could be exercised in any particular market, the following elements are considered : demand substitution (to what extent will consumers switch to other firms if price is raised), supply substitution by existing competitors (to what extent will other firms outside the candidate market react to a change in price by the monopolist) and supply substitution by new products (to what extent will existing firms change their product offering as a consequence of the change in price by the monopolist). Here again, the emphasis given respectively to demand and supply substitution might vary across jurisdictions (with for instance, the EC emphasising demand substitution) but the basic approach is the same.

In the Cartel Commission reports, it seems in many cases that a proper analysis of the relevant market is simply omitted. For instance, in the analysis of the banking cartel, it is stated that[21] (p 178) « the market to take into account is determined on a case by case basis according to the scope of the agreement being considered ». Yet, in the analysis of each particular agreement nothing is said about the relevant market.

In other cases, the definition of market is somewhat confusing. A first important confusion seems to arise in many cases with respect to the geographical market. For instance, in the banking cartel, it is stated that « the Swiss territory should be considered as the area covered by the report ». Similarly, it is stated in the report on cars and spare part distribution that « the legal principle of territoriality dictates that the Swiss market should be taken into account ».

It is not clear what legal principle the reports refer to. Such a principle is certainly not explicitly stated in the law. In line with the approach followed by the statute, on can still understand this principle as indicating that only **effects** felt in Switzerland should be taken into account. Such an approach is sensible and it is followed by other jurisdictions (like the EC). However, this approach does not imply that the relevant market (from an anti-trust prospective) is the Swiss market.

Indeed, it may very well be that demand and supply substitutions are such that a « monopolist » in the Swiss market could not exercise market power, because of competition from abroad, so that the relevant market is wider. Yet, it seems that the commission has systematically considered that because of the legal principle of territoriality, the relevant (anti-trust) market was Switzerland.

There are some instances where the distinction may have mattered. For instance, in the report on banks, the Commission has failed to consider the possibility that in some segments, Swiss banks may have been unable to exercise market power on the Swiss market because of international competition. This is all the more surprising, since the Commission places heavy emphasis on the internationalisation of the banking sector in the preamble to its report. Most of the report is written as if the relevant market could only be domestic. This may be correct for some segments (e.g. savings account for Swiss customers). Yet, some banking services are clearly traded internationally. Banking services are one of Switzerland's most successful exports. In its analysis on Convention IV on « deposit fees for securities» the Cartel Commission writes: « Given that the majority of banks who offer and manage deposits have signed the convention and thus accepted a uniform tariff, the extent of competition has been considerably reduced ». International competition is not even mentioned in this section of the report.

The market for placing government securities is a further case where a more detailed analysis of the relevant market would have been warranted. In private communication, the Secretariat of the Cartel Commission has acknowledged that the relevant market could have been wider, but insisted that on the fact that the Swiss governement was only buying placement services from domestic banks. It is unclear whether there is a competition issue if a buyer decides, for whatever reason, to limit its purchases to a small subset of (high price) suppliers. In our view, this is an instance where the Commission has used its wide power and discretion to implement a **pro-active competition policy**, rather than applying competition law.

In the case of the Cement cartel, the Commission writes that the « geographical relevant market is the whole area of Switzerland. Imports and the danger of imports (potential competition) should also

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[21] Unless explicitly stated, references are made to the french version of the reports. The english translation is ours. For the Cement study which has not been translated in to french, references are made to the German

be considered. An area of approximately 200 km around Switzerland as a possible source of cement does not seem unrealistic in view of foreign cement and transport prices ». Nevertheless, the Cartel Commission dismissed the evidence that prices within Switzerland tend to fall as one approaches the borders (as a matter of fact, the Commission even refused to consider imports in its analysis of dominance and went on to conclude that the cartel had impeded effective competition - see discussion below).

In our view, a proper consideration of foreign competition is essential for the pursuit of competition policy in a small open economy such as Switzerland, and a careful definition of the relevant market can be of great help in properly directing the focus of the analysis.

The shortcomings of a non-systematic approach also manifest themselves with respect to product markets. In the report on the Swiss tennis magazine SMASH, the Commission has followed a more traditional approach and emphasises the need to take into account the substitutability between products. But the analysis in the report has remained at the level of general principles without providing evidence in favour of the very narrow view taken by the Commission : indeed, the Commission has concluded that the relevant market in this case was the « Swiss market for advertising space for tennis articles in specialised magazines ». Such an unusual market definition[22] could have been backed by a proper evidence, like a survey of market participants. The secretariat of the commission has told us in private communication that a quantitative analysis was undertaken. The fact that this evidence was not reported is yet another symptom of weak accountability ; if the Commission had been working under a significant threat of judicial or political review, it would have felt compelled to back up its decisions with adequate evidence. In the event, some terse judgment seemed to suffice.

Overall, one cannot help conclude that the issue of market definition is not given proper attention in the Commission reports, at least by comparison with decisions published by other competition authorities. The information that is given in the reports is frequently insufficient to convince the reader that a sensible market definition has been used in the analysis. The importance of a proper market

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version.

definition as a tool which provides structure and rigour to the analysis of markets should not be underestimated. This is further illustrated by the report on banks, which did not bother to specify the relevant market for retail banking services: as a result it simply omitted to mention the important role played by the PTT in that market. If the Commission has properly defined the market, it could not possibly have overlooked this large competitor.

2.2. Effective competition and the analysis of dominance

As indicated in the first section, the concept of effective competition is central to the implementation of the law. The intention behind the law in putting forward such a concept is clear enough, namely to determine a threshold for restrictions of competition which could be considered beyond redemption. But the evaluation of effective competition was bound to be difficult in practice.

Some clues as to the meaning of effective competition can be obtained from the Message to the parliament relating the adoption of the new law (23 Nov. 94). According to this « guideline », effective competition should not be considered as equivalent to «workable » competition. The concept of workable competition, which was developed in the sixties as the « acceptable approximation to perfect competition » is presented as the origin of the effective competition but is firmly rejected as such. This is probably due to the fact, that the concept of workable competition has never been given any precise content and it is hard to resist quoting Stigler on the matter: «To determine whether an industry is workably competitive, therefore, simply have a good graduate student write his dissertation on the industry and render a verdict. It is crucial for this test, of course, that no second graduate student be allowed to study the industry » (Stigler, 1956).

According to the «guideline », effective competition should be considered « in the context of modern theories of industrial organisation, recognising that competition is multi-facet dynamic process ». The guideline further elaborates by stating that effective competition is guaranteed when « the function of competition as a mechanism to allocate resources efficiently is not impeded ». From this, the guideline also concludes that competition policy, in ensuring effective competition,

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22 Interestingly a similar case was brought to the OFT in the early 80s and led to a much wider definition of the market.

should not be diverted by other political considerations (which might presumably interfere with competition as a mechanism to allocate resources efficiently).

It is hard to disagree with this statement. Unfortunately, it falls short of providing more practical insights for the implementation of the concept, namely the definition of a threshold beyond which restrictions of competition cannot be justified. Unfortunately, the experience of other competition authorities is not particularly helpful either. For instance, the EC barely uses the concept of effective competition. The concept is used in the EC merger law but is not given prominence in the case law (see Zachmann, 1994).

A common approach to the evaluation of effective competition can be found in a number of studies. This approach considers three tests, namely a structural, a behavioural and a outcome test (see for instance the report on banks). The intention behind these three tests is clear enough, but somewhat reminiscent of the « Harvard approach » which led to the, much criticized, concept of « workable competition ».

The behavioural test seems to focus on whether consumers can buy from firms that are not part of the agreement under review. For instance, in the bank report (p 179) the Commission emphasises that customers (of retail banking services) can still buy from firms who are not part of the agreement. Nevertheless, in the same report, the Commission also decided, that the Swiss Banking Cartel impeded effective competition on the market for placing Swiss government debt, despite the fact that the Government has the choice of placing debt with international banks (see discussion above). In the cement case, the report indicates that customers do not have the choice between members of the cartel (which allocate production) and that imports are not a significant alternative source of supply. In the car study, it is argued that garages do not have the choice between alternative car importers (p291). Concerning car importers (p276), the Commission has insisted that there is no intra-brand competition (it is impossible for a prospective car importer to compete with established ones). These cases illustrate that the Commission, through its behavioural test, was indeed trying to verify whether customers had alternative sources of supply. Interestingly, this evaluation has little to do with the usual issues raised by firms' behaviour. One would have expected a behavioral test to focus

on issues like collective dominance, coordination of behavior or pre-emption. In the presence of such behaviour, markets share are indeed a poor indicator of market power.

With respect to the structural test, the Commission seems to emphasise entry. For instance in the cement case, the Commission has commented on the high barriers to entry and the potential for retaliation by incumbents against potential entrants (strategic entry barriers). Similarly, in the case of banks, the Commission paid attention to entry barriers raised by the banking commission and noticed the constant flow of entrants in the industry (p179). Similar issues are raised for car importers (p 280), but for distributors, the emphasis is given to the lack of incentive to enter (because of excess capacity). In the case of spare parts, the Commission provides market share data on the distribution by type of channels - which is somewhat odd given that the emphasis is on the market for the provision of spare parts at the wholesale level- but also insists on the difficulty of entry. Overall, if the emphasis on entry in the structural test is commendable, it is striking that the Commission does not consider market share or concentration indices. Even if such indices can be easily abused as indicator of the existence of market power, they tend to provide reliable information on the **absence** of market power (a low market share is more informative than a high market share, see for instance, EC, 1994). The scepticism of the Commission towards market shares and concentration, which is revealed by their neglect of the issue, seems somewhat excessive, and certainly out of line with the practice of other jurisdicitions.

Regarding outcomes, various considerations have been mentioned. In the case of banks, the report notices that quality competition remains significant (p179), and for spare parts that both price and quality competition remain in a limited way (p305). Car distributors are described as being hostages to the manufacturers with no commercial freedom left (p291). In those cases, the arguments used by the Commission would thus appear to be more related to behavioral issues. For cement and car importers, the situation is different ; in these cases, the Commission has described in some details price differences across countries (p280) and has also considered costs, innovation and profits in the case of cement. It is remarkable that the Commission has avoided giving prominence to the evaluation of profits. This is, in our view, highly appropriate given that evidence on profits is very hard to interpret (low profits - high cost and the quiet life are probably the best of monopoly rents). In the Cement market, the Cartel Commission did look both at profits but, very wisely, in

connection with evidence on costs and prices relative to EC countries. Yet, the reasoning of the Commission is striking. The Commission concluded that the prices in Switzerland were not out of line with EC levels (but it still writes (p. 109) that: « the price level is high, but not arbitrarily high. »). On the basis of expert evidence, the Commission also concluded that the cartel does not lead to economically unjustified profits (p. 90) and that cost-levels correspond to Swiss norms. It is somewhat puzzling that on the basis of evidence that profits were not excessive and that cost and price were not of line with EC levels, it still concluded that effective competition on the market was impeded. Maybe the Commission thought that the EC markets were also cartellized. But then, EC benchmarks should have been explicitly dismissed.

A number of remarks are in order:

-First, the analysis of effective competition considers a number of factors that are clearly relevant to the anti-trust evaluation of a market position. For instance, the behavioural test effectively verifies the market share of the firms under review, whereas the structural test does by and large focus on the entry conditions and potential competition. But many considerations are missing and the analysis clearly lacks some organising principles. It is striking in this regard that the behavioral test has little to do with behavior, that the structural test omits the obvious structural indicators and the the outcome test has often more to do with behavior than outcomes. Furthermore, it is not clear why the Commission has dismissed the approach used by many jurisdictions (like the EC), which starts from an evaluation of concentration and further considers the relevants factors which may reduce the extent to which market power can be excercised by firms with significant market shares.

-Second, it is striking that the analysis remains both highly informal and highly general. For instance, there is no information on the market share of banks that are members of the cartels on various product markets. Similarly, there is no information on the strength of remaining competitors (are they fragmented?). In the report on banks for example, the Cartel Commission does not mention the competition that the Swiss banks face from the Post office, for small customers current and savings accounts. Yet, the PTT can be expected to exert strong pressure on conditions the banks have to offer the small customers. (The frequent public interventions by the Swiss Bankers Association with

the aim of inducing the PTT to reduce the interest rate they pay on their deposit account stromgly corroborates this view.)

-Third, a number of rather strong evaluations are not backed by appropriate evidence. For instance, much faith is given to the idea of collective dominance in the case of car importers, without further comment. Given that the concept of collective dominance is controversial in other jurisdictions (see e.g. the Nestlé-Perrier decision by the MTF), it would be interesting to know whether the Commission had any evidence (or suspicions) about price fixing between the different importers or indeed, whether they considered the fact that some large importers import several different brands an important impediment to competition. The statement in the case of cement that « possibilities of import substitution exist only at a potential level, and to such a theoretical extent that they have not real effect except the price limiting effect mentioned above » is surely worth supporting by a bit of evidence, in light of the fact that Swiss cement prices are not out of line with European ones. The strong emphasis on intra-brand competition being necessary to maintain effective competition in the car market is also highly debatable and could have been supported by appropriate data.

- Finally, and most importantly, there is little in the Commission's analysis which helps defining a threshold for restraints of competition without redemption. What the Commission effectively does is to analyse the market situation in rather informal term and puts forward a judgement on whether effective competition has been impeded. It is hard from the existing case law to deduce a number of factors that could help in determining the threshold in the future[23]. On the basis of this evidence, one can raise some doubt about the usefulness of the approach.

Overall, one cannot help concluding that the analyis of dominance undertaken by the Commission is somewhat muddled and often highly judgmental, even when clear alternatives were available. Surely, this is yet another symptom of weak accountability.

[23] The secretariat of the Commission has indicated in private communication that effective competition was impeded in the case of agreements fixing price, quotas and contingents. These are indeed the agreements that have become « quasi » per se illegal under the new law. Still, the new law opens the possibility (art 5) that other

2.3. The evaluation of countervailing benefits

The 1962 law did not give the Cartel Commission much guidance as to how it should analyse markets and according to what criteria it should formulate its recommendations. From art. 5 it was however clear that a wide variety of social and economic benefits could be appealed to, for justifying a cartel.[24] It is of course an exceedingly complex task to perform a complete cost benefit analysis taking into account not just narrow performance criteria, but also the impact on the labour market, environmental economics, regional economics. The Cartel Commission reacted to this situation by developing the so called « balance method » which can be described as follows: first the commission decided which effects were important, and which were not. This initial choice (which may be crucial) is typically not justified. In a second step, the Commission granted a positive mark if the effect was beneficial, and a negative one if it was not. Finally the Cartel Commission added up the marks to determine whether the beneficial effects outweighed the negative ones.

This procedure is akin to constructing an unweighted mean between variables that may be different by **orders of magnitude**. Some illustrations of this approach, admittedly from the period before the first revision of the law, belong more to the economic folkore than professional analysis : for example the exceedingly high prices for pharmaceuticals in Switzerland (documented by the report) were compensated by the fact that it prevented over-consumption of these same pharmaceuticals (1981). Similarly retail price maintenance for tobacco was considered acceptable because the high prices this produced was more than compensated for by a) less tobacco consumption, b) greater profits for small retailers including kiosks, which c) permitted a denser distribution of newspapers.

One can raise serious doubts about the usefulness of this procedure. The evaluation of countervailing benefits is, in all jurisdictions that practice it, a difficult exercise, which is somewhat arbitrary. Nevertheless, the simple minded addition of positive and negative signs, which is unusual by

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types of agreements might suppress effective competition. Little guidance is offered by the case law (or the secretariat) about these other agreements.

[24] For example the idea of « promoting a desirable structure in the general interest « can be (and was) given a very wide interpretation.

comparison with other jurisdictions, presumably does not temper the arbitrary character of the procedure.

When the 1985 law was introduced, the new art. 29 specified in somewhat greater detail the criteria the Cartel Commission should take into account in writing its reports: Unfortunately the list of criteria contained a mixture of structure and performance criteria as well as variables that are not usually considered to be relevant for competition policy (such as regional impact). This legal framework made it difficult for the Cartel Commission to produce sound economic analysis while respecting the letter of the law. The Cartel Commission reacted to this absence of a well structured legal constraint by maintaining it use of the « balance method ». The main innovation was thus as follows: since art. 29 explicitly mentioned that the Cartel Commission should take into account the effects the cartel had on « the freedom of competition and the extent of competition » these two concepts were explicitly introduced in the «balance ». From a purely technical point of view the change to the «balance method » was thus as follows: Every clause of a cartel agreement was now analysed first in terms of its effect on the « freedom of competition » and the « extent of competition ». This means that most clauses start off with one or two negative marks, which then have to be compensated by a sufficiently large number of positive ones. (The procedure is particularly well illustrated in the report on the banking cartel (1989)). From this prospective, the 1985 law was more pro-competitive than the 1962 law, because most agreements started off with one or two negative marks.

The report on banking can serve to illustrate the point. The following excerpt concerns a convention with the aim of preventing inappropriate and aggressive advertising (in particular advertising on television):

« Balance: Since one of the parameters of competition, advertising, is limited in important areas, the extent of competition is considerably reduced (negative effect). In particular sponsoring allows the big banks to be everywhere present. As a result of advertising in sports, they also succeed- in spite of article 9, number 2 of the convention - in being present on television. As a result there is a distortion of competition which reduces the competitive position of smaller banks (negative effect). The restrictions on competition further distort the choice between various means of advertising and

prevent isolated banks from having access to customers in an adequate form (negative element). The influences on other criteria are considered to be neutral. »

On the basis of this analysis the Cartel Commission recommended the suppression of the relevant convention.

One may wonder whether the legislator really intended the Cartel Commission to continue using the « balance method ». The Cartel Commission did write (in the report on banks) : « The analysis of the individual agreements follows a certain procedure determined by the cartel law. .....If we observe a substantial impediment to competition, but effective competition is not prevented the positive and negative effects have to be compared according to the balance sheet method. » (pp 64-66). Yet, the law itself did not compel the Commission to follow the balance method. The Commission could have adopted a different interpretation of the law and decided to focus mostly on efficiency criteria and to abandon the simple minded addition of positive and negative marks. In other words, the Commission could have used the wide discretion offered by the law to steer the analysis away from the previous practice and in favour a less arbitrary evaluation.

Why did the Commission not follow this course of action. Three motivations come to mind. First, the « balance method » was a simple way to directly translate the requirements on « freedom of competition » and « extent of competition » into a bias in favour of competition and stack the cards against the cartel agreement, even if the cartel was difficult to challenge on performance criteria alone. Second, any institution is affected by some inertia, and the staff of the Cartel Commission which had experience with the « balance method », may have been tempted to simply carry on. Finally, one cannot help noticing that the commission and its secretariat are heavily biased in favour of legal experts, which presumably would not have felt at ease with a more demanding economic analysis. (At the time of the report on the banking cartel for example, the president, the vice president and two of the members of the commission were professors of law. There was not a single professor of economics. In the secretariat, of the 8 members, seven had a law degree, only one was an economist and one had a degree in both diciplines.)

The new law clearly states that the commission should place much of the emphasis of its studies on economic efficiency. One can only hope that the Commission will now change its practice, abandon the simple minded addition of marks and focus on a quantitative analysis of a narrow set of well defined efficiency benefits. As the experience of other jurisdiction indicates, this can be done even if it is by no means a straightforward exercise. First, some effects are very difficult to quantify and firms will be tempted to overemphasise their claim of efficiency benefits. In arguing about efficiency, firms will also typically have more resources than the Commission (for instance in order to hire consultants to make their case). These problems have been encountered in many jurisdictions and addressed in different ways. The attitude of US authorities is interesting in this regard ; they have (see for instance the US merger guidelines) narrowed down the set of efficiency considerations that they are willing to consider by focusing on easily verifiable claims. For instance, claims about potential savings in general administration in the case of a joint venture (or a merger) are not given serious considerations relative to potential benefits associated with the consolidation of production units. It seems that the Cartel Commission should be encouraged to adopt an approach similar to that of the US authorities.

2.4. Fairness and market power

The proper distinction between issues of market power and fairness is a major difficulty faced by all anti-trust authorities. To illustrate, consider first a (highly theoretical) world in which we have textbook « perfect competition ». In such an economy every seller (or buyer) is faced with a large number of alternatives firms buying (or selling) close substitutes to the product which he is currently buying (selling). It is thus impossible for any one of the buyers (sellers) to have an important degree of market power over his counterpart. Any attempt to modify the terms of exchange would induce the party who is made worse off to change partner.

In practice, the number of firms producing perfect or even close substitutes is usually quite limited. In addition, firms frequently have to incur some fixed costs that are to a certain extent specific to particular commercial relations and accordingly these fixed costs should be seen as sunk. In the absence of (complete) long term contracts, this situation gives rise to the possibility of opportunistic behaviour.

The dominant tradition among economists is to consider that market power and competition should be the sole focus of competition policy. That the enforcement of competition leads to more « equitable » outcome is seen as a beneficial side effect, but certainly not a purpose as such.

Legal statutes are however often (and rightly) concerned with issues of fairness. It is thus not surprising that legal practitioners have a tendency to adopt the same perspective with respect to competition policy. They observe situations where the outcome of market processes is (in their opinion) unfair, conclude that the exploiting party must have market power, and use competition policy to solve the « problem ».

A well known example of such a case at the EC level is the « Hugin » case. Very briefly, Hugin is a Swedish producer of cash register machines. It is undisputed that there is intense competition on this market. In the middle of the 70s, Hugin decided to stop out-sourcing the repairs and servicing of their machines, and to take care of these activities themselves . As a result, they refused to supply spare parts to Liptons, their former repair agent. Liptons did not have a long term contract with Hugin, so there was no breach of contract. It is obvious that the decision by Hugin could (potentially) cause a (substantial) financial loss to Liptons. At the very least the specific human capital they had acquired for the repair of Hugin cash registers would have become worthless. Liptons complained to the EEC and won. The commission decided that Hugin had a dominant position in the market for spare parts for Hugin cash registers. Cancelling the contract with Liptons was therefore an abuse of a dominant position.

The problem in this case was that Liptons had a certain amount of relation specific capital tied up with Hugin. They had decided to invest this capital without requiring a long term contract from Hugin. The EEC Commission decided to use competition policy instruments to solve a problem, which is basically one of opportunistic behaviour in the presence of relation specific sunk costs. Most economists would say that the instruments have been subverted.

As indicated above, the Swiss legal framework has so far steered clear of abusing competition law for the purposes of solving issues of fairness. Judgement on the practice is however somewhat more

nuanced. According to art. 29 of the 1985 law, the Cartel Commission could make propositions to cartels (or analogous organisations) that the Minister of economics could be asked to enforce, but the law sets no restrictions as to the nature of these suggestions. An analysis of these recommendations (see next section) suggests that the Cartel Commission has developed a tendency to use remedies which go far beyond competition issues and address issues of fairness.

The following examples may illustrate the point:

-The market for food retailing in Switzerland is notably concentrated, with MIGROS having a market share of approx. 40% and the COOP a market share of approx. 30%. There is no other country in Europe where the retailing market even approaches this very high degree of concentration. The Cartel Commission has never undertaken anything to prevent the external growth of these two firms. But of course, both the COOP and the MIGROS have always had « their » representative in the Cartel Commission.

About a year ago some of the suppliers to DENNER, with a market share of roughly 6% (i.e. one 5th of the size of COOP), complained that DENNER was forcing them to accept unfair conditions of supply. The Cartel Commission accepted to handle the complaint and it is currently studying the case. The complaint should presumably have been dismissed simply on the basis of the argument that DENNER could not possibly have a dominant position, since the dominant positions were already occupied by MIGROS and COOP[25]. If a decision of infringement for abuse of dominance is taken against DENNER (despite its small market share), it will set a worrying precedent. The Commission could then be dragged into the evaluation of countless negotiations between strong and weak parties with do not involve issues of market power.

The case is all the more noteworthy, since the suppliers to DENNER cannot presumably even make a strong case that they have invested substantial amounts in relation specific sunk costs.

[25] Denner refused to supply evidence and the matter was brought by the Federal Commission in front of the Federal Court. The Court directed Denner to provide evidence and indicated that a market share of 6% was not a sufficient condition to dismiss the possibility of a dominant position.

- A second case, which is perhaps economically less important but also quite indicative is the report on the SMASH Tennis magazine. Smash is edited by a private publisher but is under strong control of the Swiss tennis federation, since the clubs affiliated to the federation are forced to buy about 2/3 of the total 30'000 copies printed. In exchange the magazine acts as an official media of the federation, which has 4-6 pages at its disposal in every issue.

Problems arose when the magazine refused to publish advertisements by a discount retailer of tennis rackets. The discounter complained to the Cartel Commission. In its analysis of the case the Cartel Commission reached the conclusion that SMASH had a dominant position in a very narrow market (see above) and had abused its position.

We have strong sympathy with the desire of the commission to make market access easy for discounters. As indicated above, it is however not at all clear that such a narrow market definition is warranted. One cannot help speculating that the choice of such a narrow definition was in part determined by the desire to justify an intervention in order to achieve a market outcome that the Cartel Commission deemed fair.

2.5. Remedies

When the Cartel Commission has decided that effective competition has been impeded, or that the negative effects of the cartel outweighs the benefits, it has to propose remedies. The aim of the remedies is usually (for instance in the EC) to make sure that competition is enhanced. Typical remedies include the cancellation of some agreements, partial divestments, the facilitation of entry, the cancellation of some vertical linkages... (see Bellamy and Child, 1993, for the EC practice). The Swiss cartel commission has developed a practice which goes well beyond these remedies and provides advice to the market participants on how they should behave. A particularly clear example is the following recommendation the Commission made to the banks (p173):

« The big banks should continue to show moderation in opening new branch offices , at least as far as reinforcing their position on certain local markets is concerned. »

« The big banks should not use their possibilities of internal return compensation in order to make particularly attractive offers and thus penetrate the traditional spheres of activity of the canton banks, the regional banks, the savings and Raiffeisen banks, particularly as concerns the market for small mortgages. »

While it is true that this advice stems from a report of 1979 (i.e. written under the first cartel law), the 1989 report explicitly reproduced theses recommendations as adequate if dismantling the cartel agreements led to too rapid a process of concentration.

- The case of sanitary equipment had all the characteristics of the traditional Swiss cartel. A cartel at the whole-sale level, a cartel of producers and importers, and exclusive buying (selling) agreements between the two, which stabilised the cartels. (The wholesaler promised not to buy from other producers and in counterpart the producers promised not to sell outside cartel)

In addition to recommending (quite rightly) the break up of the two cartels as well as the vertical restraints between them, the Cartel Commission then went on to make the following recommendation to the biggest Swiss producers:

« Céramique Holding SA, Laufon, is obliged to supply all its sanitary equipment to all shops specialised in sanitary equipment, as long as the customer buys by full lorries. The standard articles must be taken by full pallets, while specialised article can be taken by mixed pallets, or exceptionally by single units. A minimum turnover of 150'000 SFr. is necessary to have the right to delivery. »

The recommendation made to the second big producer is essentially similar in content.

These two examples indicate that the Cartel Commission has a tendency to undertake what might be termed « industrial engineering », a task which goes far beyond what is necessary to enforce competition law (see also the recent « codes of conduct » edicted by the Commission for Publicitas and Edipress, which corroborate this view).

The considerable latitude enjoyed by the Cartel Commission in the definition of remedies stemmed from art. 29 of the 1995 law which did not constrain the Commission in making recommendation. The new law may turn out to offer less latitude to the Commission. First, art 5 (for agreements) is more specific both about illegal practices and about countervailing benefits. It may thus be harder for the Commission to justify detailed intervention beyond cancellation of the practice found illegal. Second, as indicated above, the threat of direct judicial review of the Commission decision which was absent under the 85 law, should induce a somewhat more prudent behaviour. One can indeed presume that detailed industrial engineering would be among the first types of decisions to be challenged in court.

3. Conclusions

A number of conclusions emerge from our review of Swiss competition policy.

First, the new law (1995) is in many ways a substantial improvement over its predecessor. In particular, the institutional arrangements for the implementation of the policy are likely to offer much better guarantees of accountability and independence from outside pressure. In our view, one of the main shortcoming of the previous institutional and legal arrangements was the poor accountability of the Commission and its vulnerability to interest groups. The introduction of direct judicial review of the Commission decision should greatly enhance accountability and balance the wide powers enjoyed by the commission. In addition, the vulnerability of the Commission with respect to outside pressure has been reduced. The change in its composition and the new status of the secretariat are particularly significant in this regard. One can regret that the conditions of publication of Commission decision have not been strengthened. In our view, publication should be compulsory and not at the discretion of the Commission.

Second, the substance of the new law has also improved. In particular, the much criticised method of the « balance » will hopefully no longer be used and will be replaced by systematic evaluation of narrow efficiency benefits, the definition of per se unlawful agreements has been made more precise, specific provisions for abuse of dominance and a merger law have been introduced. Overall, the main provisions of the law have converged significantly towards EC law. Besides relatively minor

issues (for instance, the merger law could have been stronger), the new law has, in our view, one important shortcoming ; it is still structured around the concept of effective competition. This concept has been kept from the previous law, where in our view, it has not proved useful. The idea of defining a threshold beyond which restrains of competition are without redemption might be intellectually appealing. But the case law has failed to bring the concept to life. With respect to agreements, we would argue that the Competition Commission should place little emphasis on the concept. After all, the new law also contains some « quasi » per se prohibitions which may be quite sufficient to cover abuses without redemption. Indeed, if the Commission would choose to neglect the concept of effective competition, its statute with respect to agreements would become effectively like art 85 & 1 and 3 of the treaty. With respect to mergers, the concept of effective competition is less central and the practice (as in the EC) could choose not to emphasise it.

Third, the case law suggests that the Commission has not resisted the temptation to get involved in issues of fairness, even though the statutes are remarkably neutral in this regard. In our view, this tendency should be checked. A clear distinction between anti-trust and fairness issues would enhance legal certainty and enable the Commission to focus on its primary function, namely to ensure competition. If it is felt by appropriate legislative and executive bodies that intervention for the sake of fairness is essential for the functioning of the economy, these issues could be handled by another institution, on the basis of a separate statute. This might be an adequate role for the price supervisor.

Fourth, in the course of this review, we have become acutely aware that the Commission has played an unusual role. Rather than implementing a « competition policy », it has striven to implement a « policy towards competition ». The Commission has systematically tried to introduce competition in the Swiss economy and has stretched its mandate in order to achieve this. The report on the car industry is a case in point. The issue in the report is not one of anti-trust policy (there is no cartel, no agreement, no abuse, no merger) but one of international price discrimination facilitated by domestic regulations. Yet, the Commission has stretched its analysis (for instance by insisting on intra-brand competition) to make sure that it could recommend the opening of the market. In the same way that the EC Commission has used art 85/86 of the Treaty to ensure market integration **proactively** , the Swiss Cartel Commission has used its competition statute proactively to introduce

competition and break cartel habits in Switzerland. Of course, this objective may have been reasonable in view of the highly cartellised structure of the Swiss economy. But, for the sake of legal certainty and transparency, a more focused policy may be more appropriate.

Indeed, the competition Commission may not longer have much choice in the matter. In our view, the emphasis of a pro-active use of the law to introduce competition was greatly facilitated by the wide powers and weak accountability enjoyed by the Commission under the 85 law. As indicated above, matters are different under the new law. The challenge for the Commission is now to refocus its activities on more traditional antitrust issues.

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Figure 1 : Procedure under 1985 cartel law

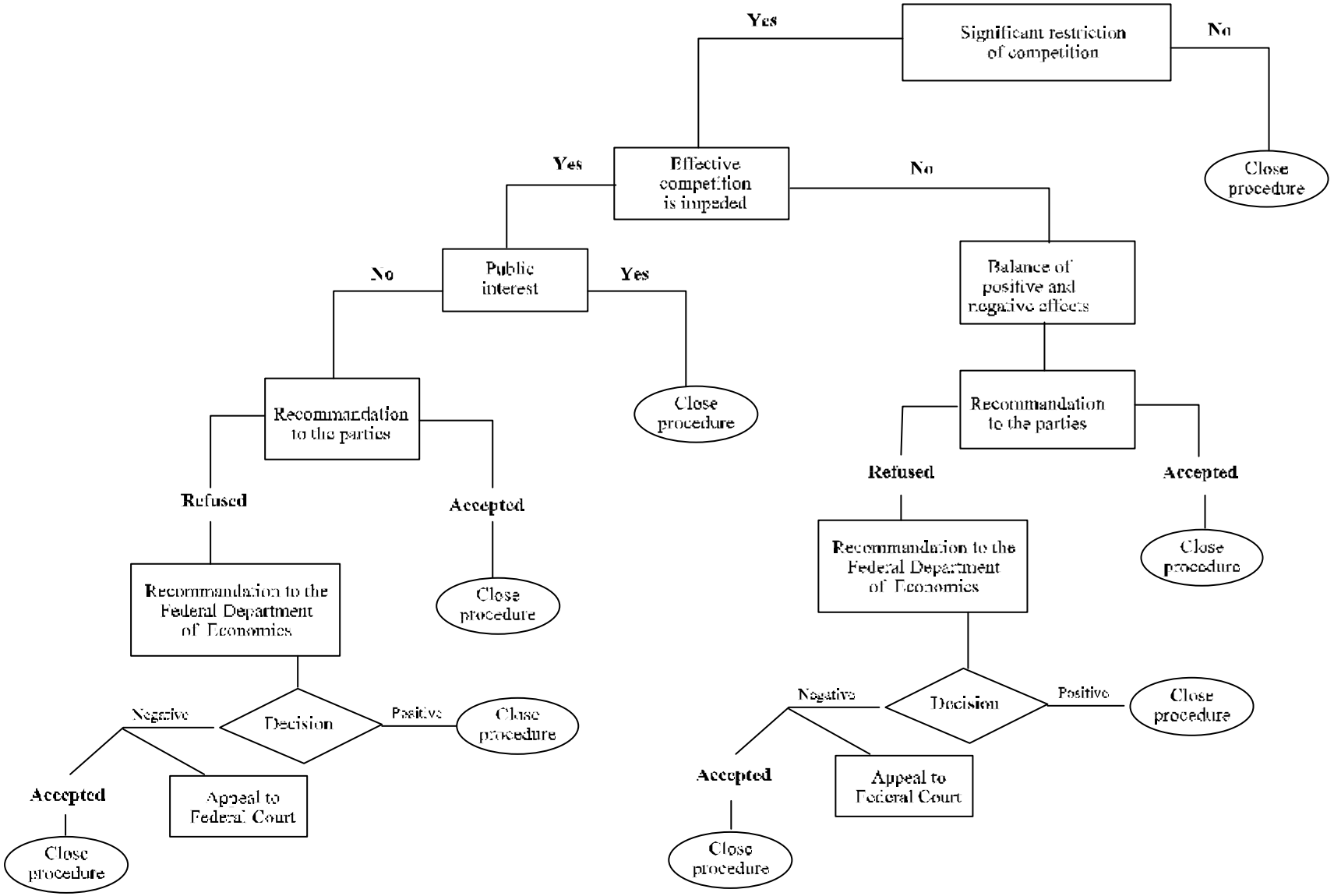

Figure 2 : Procedure under 1995 cartel law (for agreements)