



Survey on Competition Law in Small Economies

Answers from Switzerland

1 The Notion of a “Small Economy”

1.1 Adequateness of the Criteria

The criteria mentioned in the Survey are deemed adequate. However, one should be careful to indicate which criteria are analyzed and to what extent they are used. By the way, some criteria, such as GDP, territory, or population lack conclusive thresholds.

1.2 Is Switzerland a “Small Economy”?

Switzerland is a relatively small economy, both in terms of population and area. However, if one analyses the size of its absolute GDP or GDP per capita (CHF 67'223 in 2007¹), Switzerland might be considered as a medium-sized economy.

A specific characteristic of Switzerland is its location in the heart of Western Europe, between some of Europe's largest economies (Germany, France, and Italy). Switzerland is also bordered by the EU, now comprised by 27 Members from Ireland to Bulgaria. Moreover, in 2007, Switzerland exported 62% to, and imported 79,5% from, the EU. Eight out of the ten major trading partners are EU Members, the two other countries being the US and Japan². However, the Swiss economy is markedly divided between its highly competitive open export-oriented sectors, such as watches, or banking services, and its often highly concentrated, protected, closed market sectors, such as agricultural markets which are kept this way by cumbersome state regulations and political pressure (fear of competition and lobbying). Switzerland currently enjoys numerous free trade agreements in a number of economic sectors with its most important trade partners, and is actively seeking to expand such trade

¹ According to the data available at the Swiss Federal Statistical Office.

² According to the data available at the Swiss Federal Statistical Office.

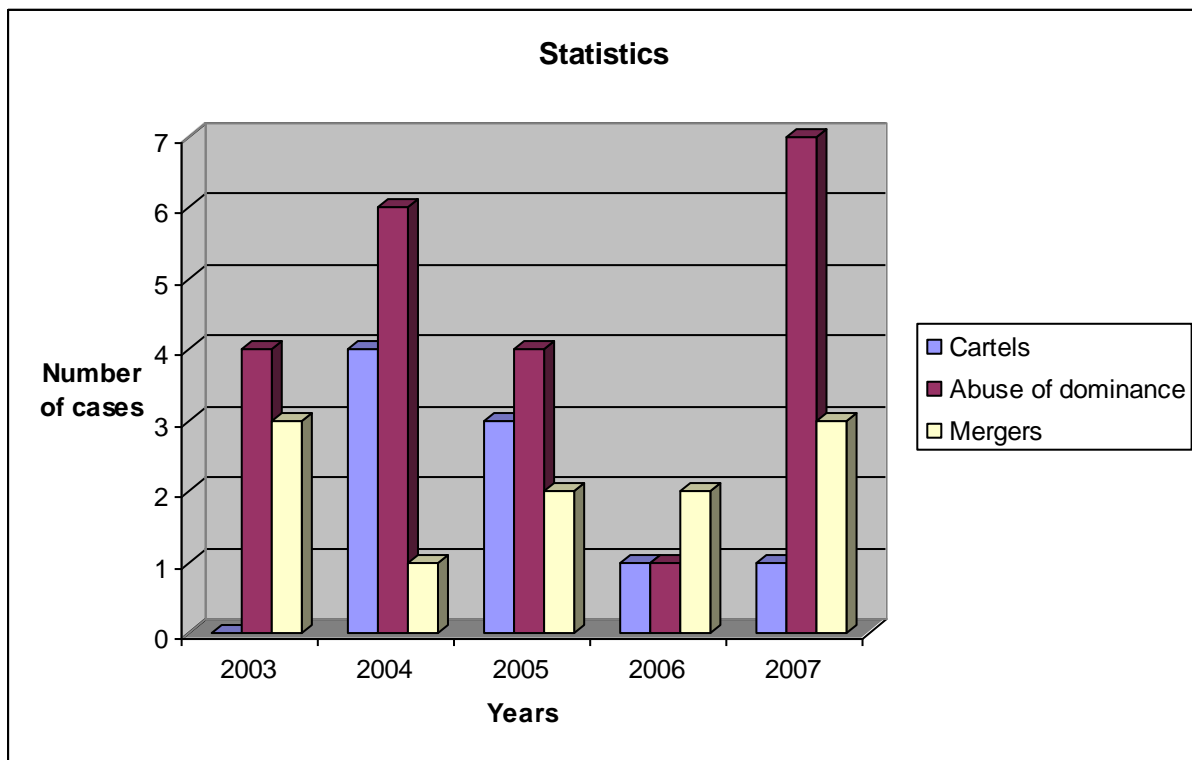
agreements. From an international perspective, Switzerland is ranked 9th out of more than 170 countries in the 2009 Index of Economic Freedom³.

After the refusal to join the now EU in 1992, Switzerland's main strategy is still to be euro-compatible in order to let its enterprises compete in the most efficient way with other global players. Many of the laws which came into force after 1992 reflect this commitment; the Swiss competition law is no exception. Indeed, in January 2009 an evaluation of the Swiss Competition Act was submitted to the Federal Council. The Competition Act Review Panel urged the Government and Parliament to consider amending the Competition Law in a more euro-compatible manner.

All in all Switzerland can be considered as a small to medium-sized economy.

2 Statistics

The following graph shows the number of formal decisions in cartel, abuse and merger cases treated by the Swiss Competition Commission (Comco) between 2003 and 2007. The statistic is meant to help to understand Switzerland's answers in Sections 3 to 5.



³ Data available at The Wall Street Journal, Tuesday, January 13, 2009, p. 13.

3 Anticompetitive Agreements

3.1 Horizontal Agreements

To our knowledge there is no recent empirical evidence regarding the question of whether markets in small economies are more concentrated than those in large economies. In general, for antitrust purposes, geographic market dimension is determined by the following two broad categories of criteria: (1) natural barriers to trade, such as transportation costs, local preferences, and (2) artificial barriers to trade, such as legal restrictions. Thus, independent of the size of a country, markets can be local, regional, national, or international, and even a large economy may have a significant number of small and concentrated markets. In the case of Switzerland, the first category of criteria determining market size is hardly an argument for more concentrated markets than in other neighboring countries, since – as mentioned above – Switzerland is an economically well integrated, open country in the middle of Europe. If markets in Switzerland are more concentrated and therefore more prone to anti-competitive agreements than could be justified by natural trade barriers, the reason must primarily lie in artificial trade barriers which may facilitate collusion. A first-best policy remedy to prevent high market concentration then implies a consequent elimination of such artificial trade barriers and not the adoption of special competition law rules. In other words, harsher sanctions or a different focus of the competition law in the context of agreements seems a second-best solution.

In the last ten years, Comco took approximately 30 formal decisions in cartel cases or roughly 3 decisions per year. When accounting for factors such as the size of the different economies, resources of the competition authorities, this average does not raise concerns about enhanced risks of collusion. During the past five years (2002-2007), the number of cartel cases investigated was lower than in the past. Another interesting observation is that the cases investigated usually involved high market shares. Indeed, all but one case had market shares above 50%, and some even reached 90% (such as the hospital billing system⁴) or a 100% (for example the tax on recycling⁵). However, the investigations in the two above examples were closed, without evidence of cartelistic behavior. More generally, for Switzerland, there seems not to be a distinct causality between the percentage of market shares and illegal cartelistic behavior.⁶

In Switzerland there are no “special” competition rules with regard to horizontal agreements. The Swiss Competition Act presumes that hardcore cartels (i.e. price fixing and territorial agreements) eliminate effective competition, which conceptually amounts to a *per se* illegality of such cartels. Practice shows however that this presumption can in most cases be rebutted. This implies that for most hardcore cartels only a substantial impediment of competition can be proved, which opens the door to an efficiency defense. Since hardcore cartels are basically never welfare enhancing, they hardly ever pass an efficiency defense; they are banned and sanctioned. In contrast, for soft cartels (e.g. R&D or distribution agreements) there is no presumption of illegality and they are always analyzed according to a *rule of reason* approach, i.e. on a case-by-case basis. This is in line with international best practice and seems reasonable, since such soft cartels often are efficiency enhancing.

3.2 Vertical Agreements

In general vertical restraints are an instrument for internalizing externalities in distribution chains, i.e. they help to organize distribution chains more efficiently, and are in most cases

⁴ RPW 2004/4 p. 1018 et 1026.

⁵ RPW 2005/2 p. 251.

⁶ These remarks are also valid for the vertical agreements in Section 2.2.

efficiency enhancing. Nevertheless, it is acknowledged in the economic literature that vertical restraints can have anti-competitive effects. As a rule of thumb, a vertical restraint is anti-competitive if it impedes inter-brand competition.⁷ The analysis of vertical restraints in anti-trust should consequently focus on inter-brand competition. There seems to be no reason why this focus should be different for small economies since the general rule implicitly accounts for the size of the relevant market. For example, if in a large economy there are 10 products in the relevant market, and for 2 of them there are vertical restraints in place which eliminate intra-brand competition, inter-brand competition most likely is still effective. In contrast, if in a small economy only 3 products are in the same relevant market, and for 2 of them vertical restraints are in place which eliminate intra-brand competition, this may be highly problematic since inter-brand competition may be seriously harmed. If one supposes that market forces in small economies are often not strong enough to correct inefficient economic behavior, it seems particularly important to encourage the use of instruments which may enhance efficiency. In other words, *per se* illegalities of certain types of vertical restraints should strictly be avoided. A different treatment of price and non-price vertical restraints would, independent of the size of a country, be highly questionable, since from an economic perspective they constitute nearly perfect substitutes. Finally, the problem raised by bans of parallel imports seems primarily to be rooted in patent law. Consequently, a first-best solution to this problem lies in an adequate patent law regime and not in “special” competition law rules.

In Switzerland, until 2003, the policy against vertical restraints would be characterized as relatively permissive. A popular belief in Switzerland was however that, due to this policy, international enterprises managed to isolate Switzerland by using vertical agreements preventing cross-border commercial exchanges and fixing resale prices. With the revision of the Swiss Cartel Act in 2003, the presumption that certain types of vertical restraints (resale price maintenance and territorial restraints) eliminate effective competition was therefore introduced. This new provision leads by and large to a harmonization with EU competition law. In the “*Notice regarding the Competition Law Treatment of Vertical Agreements*”⁸, adopted by Comco in 2007, a very restrictive and controversial interpretation of this new provision was proposed. According to the Notice, to rebut the presumption of the elimination of effective competition, it is not enough to prove the existence of inter-brand competition. However due to the lack of jurisprudence in this area, it is currently not entirely clear which requirements need to be satisfied to rebut the presumption of illegality. The existence of a certain degree of intra-brand competition seems to be a precondition. In sum, the new approach to vertical agreements in Switzerland was mainly driven by the fear that international enterprises used vertical restraints to isolate Swiss markets and not by efficiency considerations.

However, as mentioned in the introductory statement of this contribution, Switzerland aims to align its legislation and the interpretation of it with European Union developments. Such harmonization is paramount to Switzerland’s enterprises. Therefore, vertical agreements deemed to be legal according to the European Law should also be legal under Swiss Law.

In 2002 Comco adopted the “*Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade*”⁹, which is in form and in substance comparable to the respective EU-Notice¹⁰. Comco maintains its Notice with the evolution within the European Union, and it has also undertaken investigations of vertical agreements signed by spe-

⁷ See e.g. Rey, Patrick and Thibaud Vergé (2008) „Economics of Vertical Restraints.“ In: P. Buccirossi (Eds.), *Handbook of Antitrust Economics* (MIT Press, Cambridge, Massachusetts), 353-390.

⁸ Available at <http://www.weko.admin.ch/dokumentation/00160/index.html?lang=en>.

⁹ Available at <http://www.weko.admin.ch/dokumentation/00160/index.html?lang=en>.

¹⁰ Commission Regulation 1400/2002 of 31. July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector.

cific automobile manufacturers. *Volkswagen*¹¹ and *Citroen*¹² were investigated in 2000 and 2002 respectively. These particular investigations created an impetus in favor of the Notice. The effects of the Notice on the Swiss motor vehicle trade market were subject to a recent evaluation. While some authors¹³ estimate total gains for Swiss consumers exceeding a quarter billion of Swiss Francs during the period 2003-2006, others are more cautious about the Notice's positive effects on the motor vehicle trade market.¹⁴

4 Abuse of Dominance

It is an empirical question whether there is a higher fraction of dominant firms respectively abuse cases in small economies than in large economies. In general, as with the case of agreements, it should be borne in mind that artificial barriers to trade may constitute an important reason for the dominance of firms. The elimination of such barriers to trade would be an important remedy to enhance effective competition.

Investigations regarding abuse of dominance cases have risen these last years, as highlighted by the statistics available in Section 2 above. Such a high level of abuse of dominance cases may be due to the size of the Swiss economy, but also because of recent liberalization of some markets, such as the telecom and energy sectors. As with the cartelistic behaviors underlined in Section 3.1, a high percentage of market shares does not necessarily mean that an abuse of dominance case exists. Indeed, on the one hand, in the case of the fee structure of the Geneva doctors regarding their private practice, the market shares were about 90%, and the investigation was closed.¹⁵ On the other hand, the investigation in the case of directives issued by a federation concluded to an abuse of dominance, even though its market share was much lower (64%).¹⁶

An interesting question raised in the literature is whether there should be lower requirements for the determination of a dominant position in small economies than in large economies, since higher market entry and exit barriers may imply a weaker effect of potential concurrence. This would not seem to be a convincing argument since a standard element of the analysis of potential concurrence in abuse cases consists precisely in the assessment of market entry and exit barriers. Furthermore such a special rule for small economies may amount to a competitive disadvantage for domestic industries which compete on the international level.¹⁷ In Switzerland there are no "special" competition rules with regard to the abuse of dominance. In abuse cases in Switzerland there is a statutory assessment of possible efficiency reasons (so called "legitimate business reasons") for the behavior under scrutiny, i.e. there are no presumptions of illegality. Consequently, there is always consideration of anti- and pro-competitive effects of the alleged abusive behavior of dominant firms, which seems in line with the claim that small economies should take special care not to impede efficient economic behavior.

¹¹ Swiss Competition Commission (2000) "Volkswagen Vertriebssystem." *RPW 2000/2*, 196-211.

¹² Swiss Competition Commission (2002) "Système de distribution Citroën." *RPW 2002/3*, 455-465.

¹³ Evenett, Simon J. and Michael Meier (2008) "Competition Law and Europe's Open Borders: The Case of Motor Vehicle Distribution in Switzerland." *Working Paper* (University of St. Gallen).

¹⁴ See Zentrum für Europäische Wirtschaftsforschung ZEW und Eidgenössische Technische Hochschule KOF (2008) "Studien zu den Wirkungen des Kartellgesetzes." *Projekt P13/15 der KG-Evaluation gemäss Art. 59a KG* (Mannheim und Zurich).

¹⁵ *RPW 2003/2* p. 265.

¹⁶ *RPW 2007/2* p. 190.

¹⁷ Note that the legal determination of a dominant position may have far-reaching consequences for a firm. In particular, a dominant firm may not be entitled to engage in the same business practices as a non-dominant firm. Aggressive competition practices may be allowed to international competitors, but not to the domestic dominant firm, which has a „special responsibility“.

Another common concern in small economies is the issue of monopoly pricing, i.e. prices above marginal costs. Because of the higher market entry and exit barriers in small economies, monopoly power – respectively market power in general – may endure longer than in large economies, implying comparatively higher welfare losses. According to this argument, competition authorities in small economies should be empowered to assess price setting strategies of monopolies and dominant firms and take on the role of a quasi price regulator. In general, whether “unfair” or “excessive” prices should be subject to intervention by competition authorities is debatable. In any case, due to the complexity involved in calculating whether a price is unfair and determining the “correct” price level, excessive pricing abuses have proved to be notoriously difficult to prosecute in practice.¹⁸ There are as well problems of legal certainty for dominant firms, for example, how high can prices be set lawfully without risking sanctions? In other words, such special rules may not ultimately be welfare enhancing and should be applied with caution.

The Swiss Cartel Act expressively states that the enforcement of undue prices constitutes an abusive business practice. Comco is thus allowed to take on the role of a quasi price regulator, i.e. to intervene in cases of alleged excessive pricing and to impose sanctions. The most recent case of excessive prices in Switzerland was about mobile terminating fees of Swisscom, the largest Swiss telecom provider, and involved a sanction of more than 300 million Swiss Francs.¹⁹ The case is currently pending before the appeal court.

5 Mergers

5.1 Substance of Merger Control

Merger control in a small economy may be an important instrument to prevent high concentration in markets and reduce the risk of anti-competitive effects, i.e. coordinated and non-coordinated effects, of a merger. On the other hand, mergers may lead to efficiency gains, notably in economies of scale or scope, which may lead to lower prices for consumers. This trade-off between anti- and pro-competitive effects of horizontal mergers is known as the “Williamson trade-off”. The theory of small economies claims that this trade-off is more accentuated in a small economy than in a large one. Consequently, small economies should choose a merger control regime which optimally accounts for this trade-off.

The substantive test probably best suited to account for these competing effects is the “Substantial Lessening of Competition (SLC)”-test. As the name indicates, the SLC-test prohibits mergers where the effect may be to substantially lessen competition in the concerned market(s). At the same time, the SLC-test normally includes a so-called efficiency defense, which provides that if through a merger resulting in efficiency gains which overcompensate the possible negative effects of the merger, it can still be cleared by the competition authority. Concerning the chosen welfare standard (i.e. consumer surplus vs. total welfare standard) – which determines *inter alia* the strength of an efficiency defense – the total welfare standard seems most appropriate for a small economy. In other words, if small economies do have a problem with achieving efficiency, mergers which enhance the international competitiveness of domestic firms and increasing total welfare should be cleared, even if there are short-term negative effects on consumer surplus.

The substantive test used today in Swiss merger control is a dominance test. In general, under a dominance test a merger is prohibited if it results in the creation or strengthening of a dominant position which would significantly impede effective competition. In Switzerland, courts have in the past advanced the view that mergers may only be prohibited if they lead to

¹⁸ So far there is e.g. no case of excessive prices in the EU or in Germany that was approved by the courts.

¹⁹ Swiss Competition Commission (2007) “Terminierung Mobilfunk.” *RPW 2007/2*, 241-304.

an extremely high concentration in a market, which seems to require the creation or strengthening of some kind of “super-dominance”. The comparably high notification thresholds (see below), in combination with the “super-dominance” requirement, have led to an extremely permissive and toothless merger control regime in Switzerland. To date no merger has ever been prohibited in Switzerland. Most experts in Switzerland agree that merger control should be revised.

While the threshold for the prohibition of a merger in Switzerland is extremely high, the actual substantive analysis is not one which differs markedly from the analysis one can find in other large jurisdictions with a dominance test.²⁰ In particular, the Swiss practice does not privilege a total welfare analysis as opposed to a consumer welfare analysis. What differs is the systematic and careful consideration given to competitive pressure coming from foreign markets. In some circumstances, the practice also looked at specific dependencies which may result for domestic suppliers which face a distributor with large buying power. The UBS²¹ merger for example involved two out of the three big banking institutions, *Bankgesellschaft* and *Bankverein*, thus concentrating the industry almost into a duopoly (the new *UBS* and *Credit Suisse*). The banking industry must be divided into several markets. The private banking market is global. The market for large commercial credits and for investment banking is also international. On the contrary, the market for small commercial credits and for retail banking is national if not regional. The merger did not cause any problems on the level of the global and international markets. But it did cause obvious problems in some parts of the national market for small commercial credits and for retail banking. Comco required the sale of only some 30 branch offices which were situated in the problematic regions. It imposed a corresponding charge, along with behavioral charges for SME credits and an increased monitoring in a few other areas, but it cleared the merger otherwise. Looking back, the following can be said: The structure which the remedy was designed to favor could not be effectively implemented because the branches were sold to three different medium sized banks from within Switzerland, and therefore did not re-create a third big national banking pole. But the remedy of selling the branches showed the clients that banking relations can be changed and a significant number of clients spontaneously moved away to other banks. As a result, retail banking has again attracted interest from the banks and has become more competitive. This merger case was analyzed in the context of the economic geographic size of the market rather than within the market borders of the small economy.

Whether small economies should use different types of merger remedies than large economies is questionable. In general, remedies should solve diagnosed competitive problems of a merger. Only if these problems are systematically different in small economies, for which there is to our knowledge no evidence, should different, respectively special types of remedies be justified. While, as mentioned above, no merger has been prohibited in Switzerland so far, merger remedies are an often used instrument. Most of the remedies accepted by Comco in the last years have been structural in their nature. Comco shows however an inclination to agree on behavioral remedies, sometimes in connection with structural or quasi-structural remedies. Some recent examples of mergers where Comco accepted remedies are:

- *Swissgrid* (2005)²²: Structural separation and governance obligations;

²⁰ One important difference to other larger jurisdictions is however that in Swiss merger control there is no efficiency defense available to the merging parties.

²¹ Swiss Competition Commission (1998) „UBS/SBV“ *RPW* 1998/2, 278 ff.

²² Swiss Competition Commission (2005) “Swissgrid.” *RPW* 2005/2, 347-357.

- *Migros/Denner* (2008)²³: Structural separation and independent management and marketing of acquired entity;
- *Coop/Fust* (2008)²⁴ and *fenaco/Steffen-Ris* (2008)²⁵: Commitment to maintain non-exclusive supply and purchase agreements;
- *Coop/Carrefour* (2008)²⁶: Sale of shops and acquisition prohibition as well as purchase exclusivity prohibition.

Comco does not dispose of statistical evidence leading it to conclude that mergers in Switzerland result in higher market shares than in the EU, for example. However, anecdotal evidence shows that mergers in Switzerland can cause substantial market concentrations. The analysis of the Comco in the case *Migros/Denner*²⁷ revealed for example a post-merger two-firm concentration ratio of 84% in the Swiss retail industry.

5.2 Procedural Regime

In principal, the notification of a potential merger on the basis of structural criteria, such as market shares, and the degree of organizational integration would be desirable since it allows a better targeting of potentially problematic mergers by competition authorities. In practice however, it is difficult to define in advance those criteria which would require a specific proposed merger to be notified. Absent such certainty, the assessment of such criteria for firms contemplating a merger may be difficult or even impossible. In other words, the legal certainty whether a specific merger must be notified or not is likely to decrease. The use of turnover thresholds would seem therefore to provide a pragmatic and simple solution.

The Swiss Cartel Act (Article 9 par. 1) specifies that a merger must be notified if

- (a) the enterprises concerned reported joint turnover of at least 2 billion Swiss Francs or turnover in Switzerland of at least 500 million Swiss Francs, and
- (b) at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss Francs.

These turnover thresholds are high for a small country like Switzerland and lead in the practical application often to double or no control at all.²⁸ Indeed, most big merger cases are caught by the EU and Swiss thresholds which often implies an inefficient double control. In fact, between 2002 and 2007, 13 merger cases were fully investigated exclusively in Switzerland, whereas more than 60 cases were investigated both by the EU and Swiss authorities. On the other hand, the high thresholds do not catch a large fraction of mergers which might be potentially harmful to domestic markets. This situation is inadequate, and as noted above calls for a revision of the Swiss merger control regime.

It is however important to note that to simply lower turnover thresholds may not be an adequate solution. In particular, low turnover thresholds may imply an undue burden for firms and competition authorities and – in countries with small competition authorities – tie up considerable resources for merger control. A simple solution to this problem would consist in the following notification regime. Turnover thresholds which trigger a mandatory notification are

²³ Swiss Competition Commission (2008) “Migros/Denner.” *RPW* 2008/1, 129-212.

²⁴ Swiss Competition Commission (2008) “Coop/Fust.” *RPW* 2008/3, 475-506.

²⁵ Swiss Competition Commission (2008) “fenaco/Steffen-Ris Holding AG.” *RPW* 2008/2, 290-337.

²⁶ Swiss Competition Commission (2008) “Coop/Carrefour.” not published yet.

²⁷ See footnote 25.

²⁸ See as well Stoffel, Walter (2007) “International Mergers: Merger in Small Economies.” In: B.E. Hawk (Ed.), *Annual Proceedings of the Fordham Competition Law Institute – International Antitrust Law & Policy* (Juris Publishing, Inc.), 319-334.

set relatively high. For all mergers not subject to mandatory notification, there is the presumption that effective competition is not lessened, which may however – on a case-by-case basis – be rebutted by the competition authorities. Further, for Switzerland, a bilateral agreement with the EU (and probably other European countries) to settle the treatment of transboundary mergers would be desirable to avoid inefficient double controls.