INTERNATIONAL LEAGUE OF COMPETITION LAW

National Report Switzerland

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1 GENERAL CONTEXT

Overview

With the revision of the Swiss Cartel Act in the year 1995, the significance of civil competition law was meant to be reinforced. This is the reason why the administrative procedure and the civil procedure were developed to be two equivalent procedures. However, ten years after the revised Swiss Cartel Act entered into force, it has to be noted that civil cartel actions are very rare. Cases of successful civil cartel actions[1] are even rarer. To a large extent, there is a lack of specific cases. Still, scholars are increasingly interested in the topic. The courts also mention in their latest decisions that private interests should be pursued by means of civil procedures and administrative procedures should only be conducted if public interests are under consideration[2].

However, in practice administrative procedures carried out by the Competition Commission are prevailing. The Competition Commission is an authority which is independent from the administrative authorities and which is responsible for the enforcement of competition law. Due to the legislative concept and the short-staffed personnel resources, the Competition Commission should focus on cases which are economically relevant and in which public interests are under consideration. However, in its previous practice the Competition Commission has also taken on cases in which priority was definitely given to private interests of individual enterprises.

Applicable legal provisions

1 For example decision of the Commercial Court Aargau dated February 13th, 2003, RPW 2003, 451 ff.

2 See for example decision of the Federal Supreme Court 130 II 149.

Based on art. 12 of the Swiss Cartel Act, civil actions can be brought before the courts. A person impeded by an unlawful restraint of competition from entering or competing in a market may request:

- removal or cessation of the restraint;
- damages and reparations;
- remittance of the illicitly earned profits.

Regarding damages, reparations and profit remittance, art. 12 Swiss Cartel Act refers to the provisions of the Swiss Code of Obligations. This means the provisions of the non-contractual liability law[3] and the provisions of conducting a business without mandate[4]. Therefore, there are basically no differences in Switzerland between cartel claims for damages and general torts claims for damages.

The claimant may also request provisional measures in order to protect its interests immediately (art. 17 Swiss Cartel Act).

Description of the competent courts

The courts in the Cantons are responsible for civil cartel actions. The Swiss Cartel Act stipulates that each Canton designates a single court which is responsible for all civil cartel actions. Usually, it is a higher cantonal court. Some Cantons (such as Zurich, Berne, Aargau, St. Gallen) have set up special commercial courts, which have specific know-how about commercial law suits. However, even these courts are not specialising in competition law procedures. The procedure depends on the applicable cantonal rules on civil procedure[5].

A decision of a cantonal court can be appealed against before the Swiss Federal Supreme Court. This even applies if the amount in dispute for an appeal to the Federal Supreme Court is not reached.

Recent or foreseen changes in legal provisions

3 Art. 41 ff. Code of Obligations.

4 Art. 423 Code of Obligations.

5 In a few years, federal rules on civil procedure should come into force.

The latest revision of the Swiss Cartel Act was concluded in 2003 and came into force on April 1st, 2004. The provisions of the civil competition law were not changed in the revision.

However, with the latest revision it was made clear that the Swiss Cartel Act does not only protect competition as such but also the economic freedom of enterprises. Because such private interests shall be asserted in a civil procedure, the revision could indirectly lead to an increase in civil cartel actions.

Further changes in legal provisions are not planned at this point. Recent attempts at revising the general torts law, which is relevant for civil competition law, have been discontinued.

2 LEGAL SYSTEM

Access to courts

Legal requirements for bringing an action for damages

Any person who is impeded by an unlawful restraint of competition from entering or competing in a market is authorised to claim damages.

According to art. 5 – 7 Swiss Cartel Act, an unlawful restraint of competition can consist of

- Unlawful horizontal or vertical agreements which significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency or lead to the suppression of effective competition, (art. 5 Swiss Cartel Act) or
- Abuse of a dominant position (art. 7 Swiss Cartel Act).

In order to have standing for a claim, it suffices for the claimant to be affected by the restraint. It is neither necessary for the claimant to be a competitor nor does the restraint have to be directly aimed at the claimant. Thus, the right to have standing for a claim is understood in a rather broad sense in Swiss law. Enterprises which are obstructed in competition have standing for a claim, independent from the fact whether they are competitors, purchasers, suppliers or enterprises

which operate in neighbouring markets. Therefore, indirect purchasers do – in general – have standing.

According to existing doctrine, consumers are not authorised to bring claims based on the Swiss Cartel Act. According to art. 12 of the Swiss Cartel Act the right to have standing is connected to a restraint in competition. Because consumers without any commercial activity cannot be restraint in competition, they do not have standing for a claim.

The claim for damages is aimed at the company restraining competition, i.e. with regard to agreements against the parties of the agreement and with regard to abuse of a dominant position against the company holding a dominant position. It is not mandatory to sue several parties liable for the restraint together. The parties do not build a necessary passive dispute association but they have joint and several liability, i.e. each is individually liable for the total of the incurred damages.

The requirements for a claim for damages regarding competition law correspond to those of the torts law:

- **Illegality**: Illegality is given with respect to unlawful restraints of competition according to art. 5 or art. 7 of the Swiss Cartel Act.

- **Damages:** Quantifying the damages may present a bigger problem in the context of a claim. Still it should be possible in most Cantons to initially submit an action for an unspecified amount and to specify the amount after the procedure of taking evidence has been concluded. Under certain circumstances, an action for an unspecified amount can be submitted to the defendant together with a request for information. According to art. 42 para. 2 of the Code of Obligations, if the exact amount of damages cannot be established, the judge shall assess them in his discretion[6]. The provision is also applicable if the strict proof that an actual damage even occurred is not possible[7].

- **Causal link:** The violation of competition law (restraints of competition) must be a “conditio sine qua non” for the occurrence of damages. Moreover, the causal link has to be adequate in order to exclude that un-

6 See e.g. decision of the Commercial Court Aargau in which the court accepted a plausible estimate of the claimant’s damages (decision dated February 13th, 2003, para. 9/a/bb, RPW 2003, page 475).

7 See decision of the Federal Supreme Court 122 III 221, para. 3a.

predictable and completely unexpected damages are considered to be attributable to the restraint. Regarding the causal link it suffices that the claimant proves the predominant probability of a certain causal process.

- **Fault:** Different than in the context of contractual liability, the existence of fault (intent or negligence) must be proven by the claimant.
- **Statute of limitation:** According to art. 60 of the Code of Obligations, torts claims – including claims from competition law violations – are barred by the statute of limitation after one year from the date when the claimant knows about the damage and the identity of the person who is liable. For complex competition law cases this statute of limitation is very short.

The requirements for the profit remittance claim partly differ from these requirements. Instead of damages the claimant has to prove that the defendant made net profits for which the unlawful restraints of competition were causal. Instead of fault the bad faith of the defendant must be proven[8].

Collective actions, class actions especially

Collective actions or actions brought by associations do not exist in Swiss competition law, unlike for example the law against unfair competition. Class actions are completely unknown in Swiss law. However, it is possible that several claimants form a simple dispute association. It is also possible that several parties damaged by the restraint assign their claims for damages to a third party which will then bring the entire claim as claimant in its own name. Thus, if the number of damaged parties is moderate, the claims can be combined and asserted in a single procedure, however, the effect of a proper class action can only be achieved in a very limited way.

Today, the introduction of class actions may hardly be politically opportune in Switzerland. In connection with the preliminary work on a new federal law on civil procedure, the introduction of class actions was discussed but rejected[9]. Additionally, class actions would require considerable modifications of today's principle governing civil procedure. Because the introduction of class actions has been ex-

8 See decision of the Federal Supreme Court 126 III 72, para. 2a.

9 See report on the preliminary draft for law on civil procedure, page 45 f.

plicitly rejected in the context of preliminary work for a Swiss law on civil procedure, it will hardly be possible to introduce class actions in the foreseeable future.

Difficulties encountered when establishing the legal conditions for the award of damages

Proof of the fault and of the violation of competition law

Powers of the judges in the research of evidence

According to an established principle, the parties do not only have the burden of proof in the sense that they have to bear the consequences of the lack of proof but also have to bring the evidence into court. The parties shall collect and submit the evidence, in particular documents, to the court. The court is neither authorised to collect evidence on its own nor to base its judgement on evidence not submitted by the parties.

However, a party can request from the court the edition of documents, which are in the possession of the counter party. Nevertheless, this possibility is of limited use only since it presupposes adequately substantiated allegations by the claimant. Furthermore, it must be pointed out that third parties can refuse the edition of documents to the court, provided that they have the right to refuse to provide information[10]. In civil cartel proceedings, it might be that the applicable rules treat members of the board of a company as witnesses[11]. As a result, the members of the board of the defendant might refuse to provide information with reference to the impending financial loss for the defendant.

An explicit legal requirement to provide information only exists vis-à-vis the competition authorities[12] but not the civil courts. The Swiss Cartel Act itself does not contain any regulations regarding the burden of proof in civil cartel proceedings. Art. 16 para. 2 of the Swiss Cartel Act only states that documents which contain confidential information shall not be disclosed to the counter party. But the court shall have access to such confidential information. However, art. 16 para. 2 of

10 Rights to refuse to provide information are granted when the evidence directly damages the assets of the witness himself or of people close to him; see for example § 159 para. 1 Zurich law on civil procedure.

11 See for example § 157 Zurich law on civil procedure.

12 See art. 40 Swiss Cartel Act.

the Swiss Cartel Act implies that the counter party might not have access to all evidence which can hinder the counter party in its conduct of the case.

Role played by competition authorities in actions for damages

Under the applicable law, the Swiss Cartel Act lays down a certain duty of the civil judge to cooperate with the Competition Commission. If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred – apart from exceptional cases – to the Competition Commission for an opinion[13]. However, the Competition Commission restricts itself to an evaluation of the facts submitted by the civil court. In particular, the Competition Commission does not conduct its own investigations regarding the facts. This even applies when – due to its own investigation – the Competition Commission has more detailed information on the relevant facts available. Thus, an actual exchange of information between the Competition Commission and the civil courts does not take place.

However, it has to be kept in mind that potential claimants are often in a position to get access to the file of the Competition Commission by requesting to be treated as a party in the administrative procedure. In practice the Competition Commission is relatively generous in granting the status as a party. As a party in the administrative procedure, the damaged party has access to the entire file. The only documents which are off-limits are those which contain business secrets of other enterprises. However, the Competition Commission makes rather high demands when it comes to awarding secrecy character to a document. The damaged party is not only allowed to review the file but it can also make copies of the documents. The damaged party can then use these copies to support its civil cartel claim. This results in a considerable facilitation of proof for civil cartel actions in all of those cases where an administrative procedure is already pending or has already been terminated. Therefore, a potential claimant might be inclined to initiate an administrative proceeding first by filing a request to the Competition Commission[14].

It could be considered whether the administrative assistance between the Competition Commission and the civil courts should be expanded, for example by al-

13 Art. 15 Swiss Cartel Act.

14 See art. 27 para. 1 letter b of the Law on Administrative Procedures and Zäch Roger, Swiss Cartel Act, 2nd edition, Berne 2005, N 1067.

ways making available the complete files to the civil court on the part of the Competition Commission, provided that a civil action is being carried out regarding the same matter. Therefore, the use of the files would not depend on whether the damaged party has requested to be treated as a party on time. However, for such an enhancement the Swiss Cartel Act would have to be revised.

However, it should also be kept in mind that the objectives of administrative procedures and civil procedures are quite different. The administrative procedure primarily serves the protection of public interests whereas in civil procedures private interests may be pursued[15]. Therefore, the administrative procedure will focus on the economic impacts in general. Thus, only a limited amount of information can be found in the file of the Competition Commission as to which impact a restraint of competition will have on individual enterprises. Therefore, even an extensive cooperation between the Competition Commission and the civil courts would not release the claimant from the burden to prove the concrete injury.

Leniency programmes and actions for damages

Based on applicable law there is no direct link between leniency applications and civil procedures. A leniency application might release the applicant from administrative sanctions but not from the duty to pay damages.

It could be considered whether the applicant should be awarded with a reduction of the liability for damages. A possible approach could consist of recognising the applicant's willingness to cooperate in connection with the fault[16]. However, Swiss torts law is based on an objective standard of fault. In addition, the fault is assessed at the point in time when the cause for the occurrence of injury was set and not by the behaviour after that. A leniency application is thus only significant to the extent that it results in no further damages being incurred afterwards.

If several parties are involved in a restraint of competition they are jointly liable. Regarding the internal relationship the question arises whether the fact that one of the parties has contributed to the disclosure of the restraint of competition through its leniency application could be taken into account. Today, it is in the discretion of the judge to split the damages to be paid internally between several

15 See decision of the Federal Supreme Court 130 II 156 para. 2.4.

16 According to art. 43 para. 1 Code of Obligations, the judge shall determine the nature and amount of compensation for the damage sustained, taking into account the circumstances as well as the degree of fault.

parties[17]. Initially, the judge shall determine the extent of the fault. Furthermore, the judge will consider the concrete circumstances of the individual case, which means that at least the consideration of involvement in the disclosure of a restraint of competition seems not to be excluded.

De lege ferenda it should be considered to exclude the cooperative injuring party from joint liability externally and therefore to reduce its risk of damages. However, the interests of the damaged party to receive compensation for the injury sustained would partly be contrary to this. Moreover, in practice it could be difficult to decide for which part of the injury the individual company would be liable. As a rule, this could only be determined after the conclusion of the administrative procedure, which could take several years.

As mentioned above, damaged parties can request to be treated as a party in the administrative procedure before the Competition Commission. If this request is approved, which should generally be the case, the damaged parties have access to the file. This implies a considerable risk for the applicant for leniency. The evidence submitted as part of the leniency application, could fall into the hands of the damaged party and could be used by said party in a later civil procedure. This risk can deter companies from filing a leniency application and the leniency programme thus threatens to lose its effectiveness. A (partial) solution of this problem would be that the Competition Commission keeps all documents secret which have been submitted in the context of leniency application, with reference to public interests in a functioning leniency programme[18]. However, there is no clear practice of the Competition Commission as of now. Still, the Competition Commission has announced that it is aware of this problem and that it will protect the secrecy interests of the party filing a leniency application as far as possible.

Decisions of competition authorities

According to existing doctrine, the Competition Commission's decisions are not binding for civil courts. In practice, civil judges will hardly deviate from the Competition Commission's opinion.

17 If several parties are jointly involved in the same restraint of competition, a case of art. 50 Code of Obligations occurs (a so-called jointly caused damage). Therefore, art. 50 para. 2 Code of Obligations is decisive for the internal relationship.

18 See art 27 of the Federal Act on Administrative Procedure.

A binding effect is to be rejected since the procedures before the Competition Commission and before the civil judges serve different goals: the former serves the protection of public interests in functioning competition and the latter serves the protection of individual interests of injured market participants. Thus, it is possible that the same facts are judged differently in an administrative procedure (for example because competition as a whole is not affected) than in a civil procedure.

Difficulties encountered by the victims when they have to prove the fault

In practice, it should not be as hard to prove the fault of the defendant as it may appear at first glance. The fault is given when there is intent or negligence. In Swiss civil law, the fault is largely judged based on objective criteria. It is decisive whether the behaviour of the injuring party deviated from the expected average behaviour under the concrete circumstances. If there is an unlawful restraint of competition, then as a rule the fault should also be affirmed. The injuring party will only be able to assert in exceptional cases that it was mistaken with regard to the facts or in relation to the lawfulness of its behaviour.

Therefore, it is not to be expected that the proof of the fault will pose great difficulties in practice.

Causal link and injury

Actions by indirect victims of breach of competition law

Indirect victims have standing for a claim for damages, provided that they are impeded by the restraint from entering or competing in a market (art. 12 para. 1 Swiss Cartel Act). It is not necessary that the breach of competition law is directly aimed at the victim or that this victim is a competitor of the injuring party.

Another question is whether indirect victims can also assert the total of their damages. According to Swiss torts law, so-called reflex injuries are normally not compensated. Reflex injuries are considered to be injuries which a third person has sustained through the same event because that third person is in a special relationship with the direct victim. When it comes to restraints to competition, reflex injuries are rather rare. Basically, it is a question of an adequate causal link between the restraint and the damages occurred. The Federal Supreme Court is

relatively generous in this regard and also considers causes further removed still to be adequately causal[19].

As a rule, victims on upstream or downstream markets shall be authorised to conduct actions for damages, because competition law does not only intend to protect direct competitors and but also competition as a whole.

“Passing on defence”

The question whether a “passing on defence” is admissible according to Swiss law has not been decided yet by the courts. However, since Swiss torts only aims at compensating the victim for the injuries sustained the “passing on defence” seems to be admissible. If the victim was able to pass on a part of the damages to the next market level, he is no longer injured on this scale. If for example an enterprise has paid too much for commodities because of a price cartel and has passed on the too high purchase prices to its customers, its claim for damages shall be reduced to the extent the damage could be passed on to the customers. If and to which extent such a reduction is applicable has to be decided by the judge in each individual case. The judge will also have to consider that damages caused by a restraint of competition will ultimately always be passed on to the consumers. However, according to Swiss law the consumers do not have standing to bringing a claim based on the Swiss Cartel Act.

The injuring party has to prove that the victim was in a position to pass on at least part of the damage to third parties. In practice, this would be rather hard to prove. Therefore, it can be assumed that the “passing on defence” is available under Swiss law but it might be quite difficult to invoke such defence successfully in practice. However, due to a lack of court decisions on this issue, this can not be assessed conclusively.

A person impeded by an unlawful restraint of competition can not only request damages but also the remittance of the illicitly earned profits, independent from the fact as to which injury the claimant has effectively sustained. Accordingly, the “passing on defence” is not available with respect to a claim for remittance of earned profits.

19 According to the standard formula, the Federal Supreme Court examines whether, due to the ordinary course of events and general experience, an event is suitable for bringing about a success of the same kind (see e.g. 123 III 112 para. 3a).

However, concerning the claim for remittance of earned profits there are several difficulties involved for the claimant concerning the burden of proof. The difficulty consists of proving the causal link between earned profits and the restraint of competition. It might also be questionable whether a claimant can claim the remittance of the entire profit or only the part thereof which is attributable to the claimant. However, in one case a court held that several companies impeded in competition are to be considered as joint obligees[20]. According to this decision, the claimant would not have to prove individually which share of the profits was made at his expense but he could claim the total of the profits. It is, however, unclear whether this case law will prevail since it has been rejected by the majority of scholars.

Is the evaluation by the courts of the injury suffered satisfactory?

Due to scarce practice, no valid statement can be made in this respect. Some cases indicate that certain courts still have a great deal of trouble with competition law issues. These insecurities will probably subside as soon as the number of cases increases.

Furthermore, it has to be kept in mind that subject to the Swiss Cartel Act the civil courts are obliged to request an opinion from the Competition Commission, provided that the lawfulness of a restraint of competition is questioned (art. 15 Swiss Cartel Act). Even if the civil courts are not formally bound by these opinions, in practice these opinions will significantly determine the decisions of the civil courts.

Punitive damages

Punitive (multiple) damages are unknown in Swiss law and will hardly have a chance at being introduced, also in the area of competition law. In Swiss torts law, the principle of the rule against unjustified enrichment applies. The compensation granted by the courts shall only compensate for the actual damages incurred. Especially in competition law where there is the possibility to impose fines in administrative procedures, it seems not necessary to incorporate a further penal component in civil procedures.

20 Decision of the Commercial Court Aargau dated February 13th, 2003, para. 9/c/gg, RPW 2003, page 478.

Interest

According to applicable Swiss law, claims for damages shall earn interest from the date of the occurrence. The annual interest presumably amounts to 5%. From the date of the judgement which awards the damages default interest is also owed

3 PRACTICAL ISSUES

Ability of the courts to deal with actions for damages

In view of the rareness of civil cartel actions, it seems doubtful whether all competent courts have the necessary know-how for the evaluation of such cases. However, since the courts hardly had the chance to prove their competence in this respect, their ability to decide on competition law cases should not be denied per se. Some cantons have special commercial courts which are expected to have a higher degree of expertise. Nevertheless, these commercial courts are also not proper expert courts for competition law.

The claimant should not be affected all-too negatively by differences in experience in the individual cantons. For one, art. 15 of the Swiss Cartel Act obliges the courts to present the question of lawfulness of a restraint of competition to the Competition Commission for assessment. Moreover, Swiss law offers numerous alternative jurisdictions so that the claimant is in the comfortable position to choose the court suitable for him ("forum shopping")[21].

Costs of actions for damages

In case of defeat, the claimant shall pay the court costs and a compensation for the defendant. If no party wins completely, the judge has to decide how to divide the costs in his own discretion. The amount of both the court costs and the compensation for the other party is usually calculated based on the amount in dispute, which will mostly be rather high in competition law procedures.

It is to be assumed that the risk of costs partly deters claimants from bringing civil cartel procedures. This is partially due to the fact that the claimant can file a notifica-

21 In the context of pure domestic case, art. 25 of the Law on Competent Courts is applicable. Accordingly, the courts at the domicile or seat of the injured person or the defendant or at the place of performance or at the place of occurrence are alternatively competent.

tion to the Competition Commission as an alternative to the civil procedure. In the administrative procedure there is no risk of costs – with the exception of the claimant's own legal fees – for the claimant whatsoever, even if the notification should turn out to be unsubstantiated. However, in the administrative procedure the claimant cannot assert a claim for damages. If he wants to assert such a claim, he has to conduct a civil procedure.

The risk of costs could be reduced if the judge is granted the competence to divide the costs between the parties in his own discretion, provided that the claimant had well-founded cause for the action based on the circumstances and the legal situation. Swiss law already knows such a rule for certain company law actions[22]. But even when it comes to such a rule, the claimant cannot be sure beforehand how high the risk of costs is going to be since it can hardly be estimated how the judge will divide the costs. A more extensive solution could be that an unsuccessful claimant would have to bear his costs only if the claim had been blatantly wilful. Such an exemption from costs would, however, have the undesirable side effect that litigation would also take place if the chances of success were low and the claimant's willingness to settle would be reduced considerably.

Therefore, a substantial reduction of the risk of costs is to be rejected. A potential claimant will only carry out a careful analysis of the chances of success prior to bringing an action, if the claimant has to bear the costs of such action in case of defeat.

Other concrete measures to encourage actions for damages

It is suggested that the obligation to provide adequate security before provisional remedies are put in place shall be waived in civil cartel litigation. We view this proposal sceptically since a security is generally only required if the defendant could sustain a substantial injury due to the provisional remedies. Under these circumstances a security is justified.

4 SPECIFIC ISSUES

Invalidity of clauses or agreements which restrict competition

22 See for example art. 756 para. 2 of the Code of Obligations.

Agreements or clauses which restrict competition are invalid or partly invalid. The question whether an unlawful competition agreement is automatically *ex tunc* invalid or whether the judge has to hold the invalidity is controversial. Nowadays, there is a tendency towards the first notion, i.e. towards the invalidity *ex tunc*.

The principle of "nemo auditor" can prevent a party under certain circumstances from invoking invalidity. In Switzerland, such constellations are generally discussed under the title of abuse of legal right. Thus, for example it may be an abuse of legal right if a party reclaims services which it has rendered knowing that the agreement restricts competition.

International dimension: competent court and applicable law

Jurisdiction for civil competition actions in Switzerland is given if the defendant has his seat or domicile or – for lack of domicile – his ordinary residence or his settlement in Switzerland. Even if the defendant does not have a seat nor a residence or settlement in Switzerland, jurisdiction is given if the place where the act was committed or had its effects lies in Switzerland[23]. If the Lugano Convention is applicable the defendant can be sued at his seat or his domicile respectively or at the place where the act had its effects [24]. Therefore, the nationality or residence of the suing party does not matter.

This sheer volume of jurisdictions means that a Swiss civil court can always be approached if a Swiss company is the defendant or if the violation has been committed by a foreign company in Switzerland or if the violation has caused damages in Switzerland. It is another question which law the Swiss judge shall apply in these cases. Regarding claims from a restraint of competition, Swiss law is always applicable if the Swiss market has been affected by this restraint[25].

Forum shopping

With its numerous alternative jurisdictions, Swiss law promotes "forum shopping", especially according to art. 25 of the Law on Competent Courts. However, in practice this has not led to negative developments so far.

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23 Art. 129 of the Swiss Federal Act on International Private Law.

24 Art. 2 and art. 5 para. 3 Lugano Convention.

25 Art. 137 of the Swiss Federal Act on International Private Law.

Arbitration as an alternative means

According to Swiss law, arbitration procedures in the area of civil competition law are applicable both in a national and in an international context. However, the question whether arbitral tribunals are also obliged to present the issue of lawfulness of a restraint of competition to the Competition Commission for assessment is debatable. In our opinion, there is no duty to do so.

Arbitral tribunals offer various advantages. For example it would be possible in an individual case to establish procedural rules, which would be tailored to the specifics of civil cartel actions. However, if such rules would favour the claimant, it appears to be unlikely that the defendant would agree to those rules. Furthermore, enhanced discretion is also an advantage of arbitration.

In this regard there is no need for action by the legislator in Switzerland.

5 CONCLUSION

Until today, there were only very few civil cartel proceedings in Switzerland. It seems however, that the lack of cases is not so much due to the often cited problems (burden of proof, passing-on defence, costs etc.) but rather to the very attractive alternative available to a potential claimant. Instead of bringing a claim before a civil court, the claimant can file a simple notification to the Competition Commission at no cost. In the past the Competition Commission has taken on cases in which only individual interests of a particular company were at stake. As long as the Competition Commission is willing to deal with such cases, there will hardly be any claimants who take the risk of a civil procedure. Therefore, the Competition Commission should reject cases which focus on private interests and refer the company to the civil courts. Only if the Competition Commission limits its practice to the cases relevant for competition, the civil courts will have a chance to deal with the other cases.