

# **Federal Act on Cartels and Other Restraints of Competition (Cartel Act; LCart)<sup>1</sup>** (AS 1996 546)

**of 6 October 1995**  
(position as at 13 June 2006)

*The Federal Assembly of the Swiss Confederation*

having regard to Articles 27 para 1, 96<sup>2</sup>, 97 para 2 and 122<sup>3</sup> of the Federal Constitution<sup>4,5</sup> in application of the competition law provisions of international agreements, having regard to the Federal Council Bulletin of 23 November 1994<sup>6</sup>,

*hereby decides:*

## **Chapter 1: General Provisions**

### Article 1: Purpose

The purpose of the present Act is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles.

### Article 2: Scope

1. The present Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises.
- 1<sup>bis</sup> The term "enterprises" means all customers and suppliers of goods or services in the commercial process regardless of their legal or organisational form.<sup>7</sup>
2. The present law applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country.

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<sup>1</sup> Diese Übersetzung wurde von Herrn Dr. iur. Alessandro Celli und Frau Nicola Benz zur Verfügung gestellt.

<sup>2</sup> This provision corresponds to Article 31<sup>bis</sup> of the Federal Constitution of 29 May 1874 [BS 1 3].

<sup>3</sup> This provision corresponds to Article 64 of the Federal Constitution of 29 May 1874 [BS 1 3].

<sup>4</sup> SR 101

<sup>5</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385 1390; BBl 2002 2022 5506).

<sup>6</sup> BBl 1995 I 468

<sup>7</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385 1390; BBl 2002 2022 5506).

### Article 3: Relationship with other provisions of law

1. To the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over the provisions of this Act, including in particular:
  - a) provisions which establish an official market or price system;
  - b) provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.
2. The present Act does not apply to effects on competition that result exclusively from laws governing intellectual property. However, import restrictions based on intellectual property rights fall to be assessed under this Act.<sup>8</sup>
3. The procedures set forth herein regarding assessment of restraints of competition shall take precedence over the procedures set forth in the law of 20 December 1985<sup>9</sup> on the monitoring of prices except in the event of a decision to the contrary taken by common consent by the Competition Commission and the Price Inspector.

### Article 4: Definitions

1. The term "agreements affecting competition" means binding or non-binding agreements and concerted practices between enterprises operating at the same or at different levels of the market, the purpose or effect of which is to restrain competition.
2. The term "enterprises having a dominant position in the market" means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market.<sup>10</sup>
3. The term "concentration of enterprises" means:
  - a) the merger of two or more enterprises hitherto independent of each other;
  - b) any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more hitherto independent enterprises or of a part thereof.

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<sup>8</sup> Sentence introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBI **2002** 2022 5506).

<sup>9</sup> SR **942.20**

<sup>10</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBI **2002** 2022 5506).

## **Chapter 2: Substantive Provisions**

### **Section 1: Unlawful restraints of competition**

#### Article 5: Unlawful agreements

1. Agreements that significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency and all agreements that lead to the suppression of effective competition are unlawful.
2. An agreement is deemed to be justified on grounds of economic efficiency:
  - a) when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how, or exploit resources more rationally; and
  - b) when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.
3. The following agreements among actual or potential competitors are presumed to lead to the elimination of effective competition when they:
  - a) directly or indirectly fix prices; or
  - b) restrict the quantities of goods or services to be produced, bought or supplied; or
  - c) allocate markets geographically or according to trading partners.
4. The elimination of effective competition is also presumed in the case of agreements between enterprises at different levels in the market regarding fixed or minimum prices as well as in the case of agreements in distribution contracts regarding the allocation of territories in so far as sales by other distributors into these territories are not permitted.<sup>11</sup>

#### Article 6: Categories of agreements deemed to be justified

1. The conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications. The following in particular will be taken into consideration in this respect:
  - a) co-operation agreements relating to research and development;
  - b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs;
  - c) agreements granting exclusive rights to deal in certain goods or services;

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<sup>11</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

- d) agreements granting exclusive licences for intellectual property rights;
  - e)<sup>12</sup> agreements with the purpose of improving the competitiveness of small and medium-sized enterprises, in so far as they have only a limited effect on the market.
2. Such ordinances and communications may also recognise particular forms of co-operation specific to certain branches of the economy as being deemed to be justified, in particular agreements concerning the effective implementation of legal provisions for the protection of customers or creditors in the field of financial services.
  3. Communications shall be published in the Federal Bulletin by the Competition Commission. The Federal Council shall issue the ordinances provided for at paragraphs 1 and 2 above.

#### Article 7: Unlawful practices of enterprises having a dominant position

1. Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.
2. The following in particular may constitute unlawful practices:
  - refusal to deal (e.g. refusal to supply or buy goods);
  - discrimination between trading partners with regard to prices or other conditions of trade;
  - the imposition of unfair prices or other unfair conditions of trade;
  - the under-cutting of prices or other conditions directed against a specific competitor;
  - restrictions on production, outlets or technical development;
  - the conclusion of contracts only on condition that partners agree to supply additional goods or services.

#### Article 8: Exceptional authorisation on the grounds of compelling public interests

Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.

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<sup>12</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

## Section 2: Concentrations of enterprises

### Article 9: Notification of concentrations

1. The Competition Commission must be notified of concentrations of enterprises before they are carried out when, in the last accounting period prior to the concentration:
  - 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.
2. ...<sup>13</sup>
3. In the case of insurance companies, turnover shall be replaced by the total amount of gross annual premiums; in the case of banks and other financial intermediaries by gross income insofar as it falls under the accounting regulations in the Banking Act of 8 November 1934<sup>14, 15</sup>.
4. Notwithstanding paragraphs 1 and 3 above, notification is mandatory when, on termination of a procedure initiated pursuant to the present law, a legally enforceable decision establishes that a participating enterprise occupies a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream.
5. The Federal Assembly may, by way of a decree not subject to referendum:
  - a) adjust the amounts set forth at paragraphs 1 and 3 above according to changed circumstances;
  - b) establish special criteria for notification of concentrations in certain branches of the economy.

### Article 10: Assessment of concentrations of enterprises

1. Concentrations of enterprises subject to notification shall be investigated by the Competition Commission if a preliminary review (Article 32, para 1) reveals signs that they create or strengthen a dominant position.

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<sup>13</sup> Repealed by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

<sup>14</sup> SR **952.0**

<sup>15</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

2. The Competition Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration:
  - a) creates or strengthens a dominant position liable to eliminate effective competition, and
  - b) does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position.
3. If a concentration of banks within the meaning of the Federal Act on banks and savings institutions of 8 November 1934<sup>16</sup> is deemed necessary by the Federal Banking Commission in order to protect the interests of creditors, such interests may be given priority. In such case, the Federal Banking Commission shall take the place of the Competition Commission, which it shall invite to submit an opinion.
4. In assessing the effects of a concentration of enterprises on the effectiveness of competition, the Competition Commission shall also take into account market developments and the situation with regard to international competition.

#### Article 11: Exceptional authorisation on the grounds of compelling public interests

A concentration of enterprises prohibited pursuant to Article 10 may be authorised by the Federal Council at the request of the enterprises taking part if, in exceptional cases, it is necessary in order to safeguard compelling public interests.

### **Chapter 3: Provisions relating to civil procedure**

#### Article 12: Actions arising from an obstacle to competition

1. A person impeded by an unlawful restraint of competition from entering or competing in a market may request:
  - a) removal or cessation of the obstacle;
  - b) damages and reparations in accordance with the Code of Obligations<sup>17</sup>;
  - c) remittance of illicitly earned profits in accordance with the provisions on conducting business without a mandate.
2. Obstacles to competition include in particular refusal to deal and discriminatory measures.
3. The actions set forth at paragraph 1 above may also be taken by a person who, on account of a lawful restraint of competition, is impeded more seriously in his ability to compete than is warranted by the implementation of such restraint.

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<sup>16</sup> SR 952.0

<sup>17</sup> SR 220

#### Article 13: Exercise of actions for removal or cessation of the obstacle

In order to ensure removal or cessation of the obstacle to competition, the courts may, at the petitioner's request, rule that:

- a) contracts are null in whole or in part;
- b) the person at the origin of the obstacle to competition must conclude contracts on market terms with the person impeded under the conditions usually pertaining in the business concerned.

#### Article 14: Jurisdiction

1. Cantons shall designate for their territory a court with sole jurisdiction within the canton in suits brought for restraint of competition. Such court shall also have jurisdiction in other civil suits if they are brought at the same time as the suit in restraint of competition and are related thereto.
2. ...<sup>18</sup>

#### Article 15: Assessment of the lawfulness of a restraint of competition

1. If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case shall be referred to the Competition Commission for an opinion.
2. If a restraint of competition that is as such unlawful is presented as being necessary for the safeguard of compelling public interests, the matter shall be referred to the Federal Council for a ruling.

#### Article 16: Keeping of business secrets

1. In disputes concerning restraints of competition, the parties' manufacturing or business secrets shall be kept.
2. The adverse party may have access to means of proof liable to reveal such secrets only to an extent that is compatible with the keeping of the secrets.

#### Article 17: Provisional remedies

1. In order to protect justified claims arising from a restraint of competition, the courts may order provisional remedies at a party's request.
2. Articles 28c to 28f of the Swiss Civil Code<sup>19</sup> shall apply by analogy to such provisional remedies.

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<sup>18</sup> Repealed by Annex Paragraph 15 of the Jurisdiction Act of 24 March 2000 (SR 272).

<sup>19</sup> SR 210

## **Chapter 4: Provisions relating to administrative procedure**

### **Section 1: Competition authorities**

#### Article 18: Competition Commission

1. The Federal Council shall institute the Competition Commission (hereinafter the "Commission") and appoint the members of the presiding body.<sup>20</sup>
2. The Commission shall comprise between eleven and fifteen members, the majority of whom shall be independent experts.
- 2<sup>bis</sup> The members of the Competition Commission shall publicly declare their interests in a register of interests.<sup>21</sup>
3. The Commission shall take all decisions that are not expressly reserved for another authority. It shall submit recommendations (Article 45, para 2) and opinions (Article 46, para 2) to the political authorities and shall give expert advice (Article 47, para 1).

#### Article 19: Organisation

1. The Commission shall be independent of the administrative authorities. It may consist of chambers, each empowered to take decisions. It may, in specific cases, instruct a member of the presiding body to settle urgent business or matters of minor importance.
2. The Commission shall be attached for administrative purposes to the Federal Department of Public Economy (hereinafter the "Department").

#### Article 20: Internal regulations

1. The Commission shall draw up regulations setting out the details of its organisation, including in particular its own powers, those of the members of its presiding body and those of each chamber.
2. The regulations shall be subject to the approval of the Federal Council.

#### Article 21: Decisions

1. The Commission and the chambers shall constitute a quorum when at least half the members are present; such number may not under any circumstances be less than three.
2. Decisions shall be taken by a simple majority of members present; in the event of a tie, the president shall have the casting vote.

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<sup>20</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

<sup>21</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

#### Article 22: Disqualification of members of the Commission

1. Members of the Commission must disqualify themselves if grounds for disqualification exist pursuant to Article 10 of the Federal Law on administrative procedures of 20 December 1968<sup>22</sup>.
2. As a general rule, a member of the Commission is not deemed to have a personal interest in a case nor to offer any other grounds for disqualification by the mere fact of representing an umbrella organisation.
3. If the disqualification is challenged, the Commission or chamber concerned shall rule in the absence of the member in question.

#### Article 23: Duties of the Secretariat

1. The Secretariat shall prepare the Commission's business, conduct investigations and, with a member of the presiding body, take procedural decisions. It shall make proposals to the Commission and carry out its decisions. It shall deal directly with interested parties, third parties and the authorities.
2. The Secretariat shall draw up opinions (Article 46, para 1) and advise officials and enterprises on matters relating to application of the law.

#### Article 24: Secretariat staff

1. The Federal Council shall appoint the Secretariat's directors and the Commission the remainder of the staff.
2. Conditions of service shall be governed by the laws applicable to federal government employees.

#### Article 25: Professional and business secrecy

1. The competition authorities shall be bound by professional secrecy.
2. Information collected in performance of their duties may be used only for the purpose of the investigation.
3. The competition authorities may provide the Price Inspector with all information necessary for the accomplishment of his duties.
4. The competition authorities' publications may not reveal any business secrets.

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<sup>22</sup> SR 172.021

## **Section 2: Investigations concerning restraints of competition**

### Article 26: Preliminary investigations

1. The Secretariat may conduct preliminary investigations on its own initiative, at the request of enterprises concerned or on information received from third parties.
2. The Secretariat may propose measures to suppress or prevent restraints of competition.
3. The preliminary investigation procedure does not imply the right to consult files.

### Article 27: Opening of an investigation

1. If there are signs of an unlawful restraint of competition ~~exist~~, the Secretariat shall open an investigation, with the consent of a member of the Commission's presiding body. It shall open an investigation in all events if asked to do so by the Commission or by the Department.<sup>23</sup>
2. The Commission shall determine the order in which investigations that have been opened should be conducted.

### Article 28: Notice

1. The Secretariat shall give notice of the opening of an investigation in an official publication.
2. Such notice shall state the purpose of the investigation and the parties concerned. It shall further invite concerned third parties to come forward within 30 days if they wish to take part in the investigation.
3. Non-publication shall not prevent the investigation from being conducted.

### Article 29: Amicable settlement

1. Should the Secretariat consider that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved concerning ways of removing the restraint.
2. Such settlement shall be in writing and must be approved by the Commission.

### Article 30: Decision

1. On a proposal from the Secretariat, the Commission shall take its decision on measures to be taken or on approval of the amicable settlement.

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<sup>23</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBI **2002** 2022 5506).

2. The participants in the investigation may furnish in writing their opinions on the Secretariat's proposal. The Commission may conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation.
3. Should a significant change have occurred in the legal or factual circumstances, the Commission may, on a proposal from the Secretariat or the interested parties, revoke or amend its decision.

#### Article 31: Exceptional authorisation

1. If the Commission has decided that a restraint of competition is unlawful, the interested parties may, within 30 days, submit to the Department an application for exceptional authorisation from the Federal Council on the grounds of compelling public interest. If such application is submitted, the period in which an appeal may be lodged with the Federal Administrative Court shall begin to run only after notification of the Federal Council's decision.<sup>24</sup>
2. Applications for exceptional authorisation from the Federal Council may also be submitted within 30 days of the entry into effect of a judgement of the Federal Administrative Court or the Federal Supreme Court.<sup>25</sup>
3. Exceptional authorisation shall be of limited duration and may be subject to terms and conditions.
4. The Federal Council may, at the request of the interested parties, extend exceptional authorisation if the conditions for granting it are still met.

### **Section 3: Investigation of concentrations of enterprises**

#### Article 32: Opening of an investigation procedure

1. On receiving notice of a concentration of enterprises (Article 9), the Commission shall decide if there are grounds for investigating such concentration. The Commission shall inform the enterprises concerned of the opening of the investigation procedure within one month of receiving notice of the planned concentration. Should the Commission fail to do so, the concentration may proceed without reservation.
2. The participating enterprises shall refrain from carrying out the concentration for one month following notification unless, at their request, the Commission has authorised them to do so for important reasons.

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<sup>24</sup> Sentence amended pursuant to Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

<sup>25</sup> Amended pursuant to Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

### Article 33: Investigation procedure

1. Should the Commission decide to conduct an investigation, the Secretariat shall publish the principal terms of the concentration notice and state the time within which third parties may communicate their opinions on the notified concentration.
2. The Commission shall decide, at the outset of the investigation, whether the concentration may be carried out provisionally by way of exception or whether it should remain suspended.
3. The Commission must complete its investigation within four months unless prevented from doing so for reasons attributable to the enterprises taking part.

### Article 34: Legal effects

The effects in civil law of a concentration subject to the notification requirement shall be suspended, without prejudice to expiry of the deadline as set forth at Article 32, para 1, and the authorisation provisionally to carry out the concentration. Should the Commission fail to take a decision before the deadline set forth at Article 33, para 3, the concentration shall be deemed to have been authorised, unless the Commission states in a decision that it has been prevented from conducting the investigation for reasons attributable to the enterprises taking part.

### Article 35: Violation of the notification requirement

If a concentration of enterprises has been carried out without due notification, the procedure set forth at Articles 32 to 38 shall be initiated ex officio. In this case the period set forth at Article 32, para 1 shall begin to run when the competition authority is in possession of the information that should be provided in a notification of concentration.

### Article 36: Exceptional authorisation procedure

1. If the Commission prohibits a concentration, the enterprises involved may, within 30 days, submit to the Department an application for authorisation from the Federal Council on the grounds of compelling public interest. If such application is made, the period within which an appeal may be lodged with the Federal Administrative Court shall begin to run only after notification of the Federal Council's decision.<sup>26</sup>
2. Applications for exceptional authorisation from the Federal Council may also be submitted within 30 days from the entry into effect of a judgement of the Federal Administrative Court or the Federal Supreme Court.<sup>27</sup>

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<sup>26</sup> Sentence amended pursuant to Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

<sup>27</sup> Amended pursuant to Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

3. The Federal Council shall take its decision if possible within four months following receipt of the application.

#### Article 37: Re-establishment of effective competition

1. If a prohibited concentration has been carried out or if a concentration is prohibited after completion and exceptional authorisation for the concentration has not been requested or granted, the enterprises taking part are required to take the necessary steps to re-establish effective competition.
2. The Commission may require the enterprises taking part to make binding proposals with a view to re-establishing effective competition and may set them a deadline to this end.
3. If the Commission accepts the proposed measures, it may decide how and by when the enterprises taking part shall implement them.
4. If the Commission does not receive the proposals it has requested or if it rejects them, it may order:
  - a) separation of the concentrated enterprises or assets;
  - b) cessation of the effects of control;
  - c) other measures to re-establish effective competition.

#### Article 38: Revocation and revision

1. The Commission may revoke an authorisation or decide to investigate a concentration despite expiry of the deadline set forth at Article 32, para 1, if:
  - a) the enterprises taking part have furnished inaccurate information;
  - b) the authorisation was obtained fraudulently;
  - c) the enterprises taking part are in grave breach of a condition attached to the authorisation.
2. The Federal Council may revoke an exceptional authorisation on the same grounds.

### **Section 4: Procedure and recourse**

#### Article 39: Principles

The Federal Act on administrative procedure of 20 December 1968<sup>28</sup> applies to procedures, insofar as this Act does not provide otherwise.

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<sup>28</sup> SR 172.021

#### Article 40: Requirement to provide information

Members of cartels, enterprises with market power, enterprises taking part in concentrations of enterprises and concerned third parties are required to provide the competition authorities with all relevant information and to produce all necessary documents. The right to refuse to provide information is governed by Article 16 of the Act on administrative procedure of 20 December 1968<sup>29</sup>.

#### Article 41: Mutual assistance

The administrative services of the Confederation and the cantons are required to co-operate with the competition authorities in their research and to make the necessary documents available to them.

#### Article 42<sup>30</sup>: Investigative measures

1. The competition authorities may hear third parties as witnesses and require the parties to the investigation to make statements. Article 64 of the Act on federal civil procedure of 4 December 1947<sup>31</sup> applies by analogy.
2. The competition authorities may order searches and seize exhibits. Articles 45-50 of the Federal Act on administrative penal law of 22 March 1974<sup>32</sup> apply by analogy to these measures of force. Searches and seizures will be ordered by a member of the presiding body on the basis of a request from the Secretariat.

#### Article 42a<sup>33</sup>: Investigations in proceedings under the Swiss/EU Air Traffic Treaty

1. The Competition Commission is the Swiss authority responsible for co-operation with the organs of the European Community according to Article 11 of the Treaty between the European Community and the Federation of Switzerland of 21 June 1999<sup>34</sup> regarding air traffic.
2. If an enterprise opposes a review in a proceeding under Article 11 of the Treaty, an investigative measure under Article 42 may be undertaken at the request of the European Commission. Article 44 applies.

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<sup>29</sup> SR 172.021

<sup>30</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385 1390; BBl 2002 2022 5506).

<sup>31</sup> SR 273

<sup>32</sup> SR 313.0

<sup>33</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385 1390; BBl 2002 2022 5506).

<sup>34</sup> SR 0.748.127.192.68

#### Article 43: Participation of third parties in the investigation

1. The following may come forward in order to take part in an investigation concerning a restraint of competition:
  - a) persons who cannot gain access to or exercise competition because of a restraint of competition;
  - b) professional or economic bodies whose bylaws authorise them to defend their members' economic interests, inasmuch as members of the body or of one of its sections may take part in the investigation;
  - c) organisations of national or regional importance which work for consumer protection under the terms of their bylaws.
2. The Secretariat may require groups of more than five participants in an investigation having identical interests to appoint a common representative if not doing so would excessively complicate the investigation. It may if necessary limit participation in a hearing; the rights of parties deriving from the Act on administrative procedure of 20 December 1968<sup>35</sup> are reserved.
3. Paragraphs 1 and 2 above are applicable by analogy to the procedure whereby the Federal Council grants exceptional authorisation for an unlawful restraint of competition (Article 8).
4. In the investigation procedure for concentrations of enterprises, only enterprises taking part have the status of parties.

#### Article 44<sup>36</sup>

### **Section 5: Other duties and powers of the competition authorities**

#### Article 45: Recommendations to the authorities

1. The Commission shall constantly monitor the competition situation.
2. The Commission may address recommendations to the authorities, the purpose of such recommendations being to promote effective competition, especially with regard to the drafting and enforcement of laws relating to economic affairs.

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<sup>35</sup> SR 172.021

<sup>36</sup> Repealed by Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

#### Article 46: Opinions

1. The Secretariat shall review draft Confederation legislation, especially in economic matters, that is likely to influence competition. It shall determine whether the effect of such legislation is not to introduce distortions or excessive restraints of competition.
2. In the consultation procedure, the Commission shall adopt a position with regard to draft Confederation legislation that limits or influences competition in any way whatsoever. It may issue opinions on draft cantonal legislation.

#### Article 47: Expert advice

1. The Commission shall provide expert advice to other authorities on questions of principle relating to competition. In cases of minor importance, it may instruct the Secretariat to carry out this task.
2. ...<sup>37</sup>

#### Article 48: Publication of decisions and judgements

1. The competition authorities may publish their decisions.
2. The courts shall, without being asked to do so, furnish a complete copy of any judgements they may render pursuant to the present Act. The Secretariat shall collect such judgements and may publish them periodically.

#### Article 49: Duty of information

1. The Secretariat and the Commission shall inform the public of their activities.
2. The Commission shall draw up an annual report for the Federal Council.

### **Section 6: Administrative penalties<sup>38</sup>**

#### Article 49a<sup>39</sup>: Penalties for unlawful restrictions of competition

1. An enterprise that participates in an unlawful agreement in terms of Article 5 paragraphs 3 & 4 or that behaves unlawfully in terms of Article 7 will be required to pay a sanction of an amount equal to up to 10 per cent of its turnover in Switzerland in the previous three business years. Article 9 para 3 is applicable by analogy. The amount of the sanction is

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<sup>37</sup> Repealed by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

<sup>38</sup> Originally above Article 50.

<sup>39</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506). See also the final provision at the end of this piece of legislation.

dependent on the duration and severity of the unlawful behaviour. The a priori profit thereby achieved by the enterprise will also be taken into consideration.

2. If the enterprise assists in the discovery and removal of the restriction of competition, a charge may be wholly or partially waived.
3. The charge is waived if:
  - a) the enterprise notifies the restriction of competition before it takes effect. If the enterprise is informed of the opening of a procedure under Articles 26-30 within five months of notification and if it then continues with the restriction of competition, the charge is not waived;
  - b) the restriction of competition has not been practised for a period of longer than five years prior to the opening of the investigation;
  - c) the Federal Council has authorised a restriction of competition under Article 8.

#### Article 50<sup>40</sup>: Contravention of amicable settlements and administrative decisions

An enterprise that contravenes to its profit an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay an amount of up to 10 per cent of the turnover achieved in Switzerland in the last three business years. Article 9, para 3 applies by analogy. In assessing the amount, the a priori profit made by the enterprise as a result of the unlawful behaviour is to be taken into appropriate consideration.

#### Article 51: Non-compliance related to a concentration of enterprises

1. An enterprise that carries out a concentration without giving due notice thereof or fails to comply with a provisional ban on carrying out the concentration or fails to comply with a condition attached to the authorisation or carries out a prohibited concentration or fails to implement a measure intended to re-establish effective competition shall be required to pay an amount of at most one million Swiss francs.
2. Should an enterprise repeat its failure to comply with a condition attached to the authorisation, it shall be required to pay an amount of 10 per cent at most of the total revenue in Switzerland of all the enterprises taking part. Article 9, para 3 applies by analogy.

#### Article 52: Other cases of non-compliance

An enterprise that fails to fulfil its obligation to provide information or produce documents or complies only partially therewith shall be required to pay an amount of at most 100 000 Swiss francs.

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<sup>40</sup> Amended pursuant to Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

Article 53: Procedure<sup>41</sup>

1. Cases of non-compliance shall be investigated by the Secretariat, with the consent of a member of the presiding body. The Commission shall rule.
2. ...<sup>42</sup>

**Section 7:**<sup>43</sup> **Fees**

Article 53a

1. The competition authorities may charge fees for:
  - a) orders regarding the investigation of restrictions of competition under Articles 26-31;
  - b) reviews of mergers of enterprises under Articles 32-38;
  - c) opinions and other services.
2. The fee is set according to the time involved.
3. The Federal Council determines the level of fees and regulates the charging of fees. It may provide that no fees will be charged for certain procedures or services, in particular for the abandonment of a procedure.

**Chapter 5: Criminal penalties**

Article 54: Violation of amicable settlements and administrative decisions

Any person who intentionally violates an amicable settlement, a legally enforceable decision of the competition authorities or a decision of an appeals body shall be required to pay a fine of at most 100 000 Swiss francs.

Article 55: Other violations

Any person who intentionally fails to comply or complies only partially with a decision of the competition authorities concerning the obligation to provide information (Article 40) or carries out a concentration of enterprises without giving due notice thereof or violates decisions relating to concentrations of enterprises shall be required to pay a fine of at most 20'000 Swiss francs.

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<sup>41</sup> Amended pursuant to Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

<sup>42</sup> Repealed by Annex Paragraph 27 of the Administrative Court Act of 17 June 2005, in force from 1 January 2007 (SR 173.32).

<sup>43</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS 2004 1385 1390; BB1 2002 2022 5506).

Article 56: Limitation of actions

1. Criminal action is barred at the end of five years for violations of amicable settlements and administrative decisions (Article 54). It is barred in all events if, because of an interruption, such period is exceeded by half.
2. Criminal action is barred at the end of two years for other violations (Article 55).

Article 57: Procedure and recourse

1. The Federal Act on administrative criminal law of 22 March 1974<sup>44</sup> applies to actions and judgements for violations.
2. Actions shall be brought by the Secretariat, with the consent of a member of the presiding body. The Commission shall rule.

**Chapter 6: Implementation of international agreements**

Article 58: Establishment of the facts

1. If a party to an international agreement asserts that a restraint of competition is incompatible with such agreement, the Department may instruct the Secretariat to conduct a preliminary investigation.
2. On a proposal from the Secretariat, the Department shall decide what further action to take, if any, after first hearing the interested parties.

Article 59: Removal of incompatibilities

1. If, in implementation of an international agreement, it is found that a restraint of competition is incompatible with such agreement the Department may, with the consent of the Federal Department of Foreign Affairs, propose an amicable settlement to the parties concerned with a view to removing the incompatibility.
2. If an amicable settlement cannot be reached in time and one party to the agreement threatens to take measures against Switzerland the Department may, with the consent of the Federal Department of Foreign Affairs, order the necessary measures to remove the restraint of competition.

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<sup>44</sup> SR 313.0

## **Chapter 6a:<sup>45</sup> Evaluation**

### Article 59a

1. The Federal Council will arrange for the evaluation of the effectiveness of the measures and implementation of this Act.
2. The Federal Council will report back to the Parliament after conclusion of the evaluation, at latest however five years after entry into force of this provision, and will submit proposals for further action.

## **Chapter 7: Final provisions**

### Article 60: Implementation

The Federal Council shall enact the provisions for implementation.

### Article 61: Repeal of the law in force

The Act of 20 December 1985 on cartels and similar organisations<sup>46</sup> is repealed.

### Article 62: Transitional arrangements

1. Current procedures before the Cartel Commission relating to agreements affecting competition shall be suspended as of the entry into effect of the present law; if necessary, they shall be continued under the new law on expiry of a six month period.
2. New procedures before the Commission relating to agreements affecting competition may be introduced only after expiry of a six month period as of the entry into effect of the present law, unless the potential recipients of a decision have asked for an investigation to be conducted sooner. Preliminary investigations may be conducted at any time.
3. Decisions in force and recommendations accepted pursuant to the Federal Act of 20 December 1985 on cartels and similar organisations<sup>47</sup> shall continue to be governed by the former law, including matters regarding penalties.

### Article 63: Referendum and entry into effect

1. The present Act is subject to optional referendum.
2. The Federal Council shall set the date of entry into effect.

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<sup>45</sup> Introduced by Paragraph I of the Federal Act of 20 June 2003, in force from 1 April 2004 (AS **2004** 1385 1390; BBl **2002** 2022 5506).

<sup>46</sup> [AS **1986** 874, **1992** 288 Annex Paragraph 12]

<sup>47</sup> [AS **1986** 874, **1992** 288 Annex Paragraph 12]

**Final provision to the amendment of 20 June 2003<sup>48</sup>**

If an existing restriction of competition is notified or terminated within one year of the entry into force of Article 49a, any charge pursuant to that provision will be waived.

Date of entry into force:

Articles 18-25 on 1 February 1996<sup>49</sup>

all other provisions on 1 July 1996<sup>50</sup>

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<sup>48</sup> AS **2004** 1385; BBI **2002** 2022 5506

<sup>49</sup> Federal Council Resolution of 24 January 1996 (AS **1996** 562)

<sup>50</sup> Ordinance of 17 June 1996 (AS **1996** 1805)