Switzerland

The Latest Swiss Cartel Law Reform Paradox: Escaping Brussels Only to Invite It Back?

*Idris Abdelkhalek**

I. Introduction

The latest reform of the Swiss Federal Cartel Act (CartA) was approved on 19 December 2025.[1] This significant reform enshrines the latest case law of the Federal Supreme Court of Switzerland (FSCS) on the conditions for assessing the abusive behaviour by market-dominant undertakings;[2] strengthens the civil aspects of Swiss competition law for consumers; and brings several key amendments to the administrative procedural law applicable to competition law investigation.

In particular, the 19 December 2025 reform brought two significant changes that are discussed in this report. First, it modifies the methodology for assessing how an agreement between undertakings affects competition. Second, it modernises the merger control procedure through the adoption of the SIEC test, replacing the previous qualified market dominance test. However, these two changes, give rise to a profound paradox. While the latter aligns Swiss law more closely with EU competition law, the former may produce the opposite effect.

To highlight this paradox, this report first outlines the historical framework governing the assessment of agreements between undertakings in Swiss competition law (II.). As will be shown, this assessment has been characterised by constant shifts, which continue to cause difficulty – even with the current reform – to find the right equilibrium (III.). As for the SIEC test (IV.), although it may enhance efficiency in certain cases, it also raises unresolved issues concerning the specific control of the Swiss market.

II. Agreements Affecting Competition

1. Historical Perspective

The CartA stems from Article 96(1) of the Federal Constitution of the Swiss Confederation (FCSC). This provision states that '[t]he [Swiss] Confederation shall legislate against the social and economic consequences of cartels and other restraints on competition'. As recalled by the FSCS, Article 96(1) FCSC implies that only the economically or socially harmful consequences of restraints on competition are to be combated. Unlike EU law, the conception of Swiss competition law does not allow for a general prohibition of agreements restricting competition.[3]

This approach was specifically adopted in the two previous versions of the CartA. The first 1962 CartA used the 'balance method' (*Saldomethode*; *méthode du solde*). This method assessed all the economic and social consequences of a restriction on competition by weighing up their negative and positive effects. If the negative effects outweighed the positive ones, the restriction had harmful economic and social consequences. In this case, the Competition authority could issue recommendations to the undertakings concerned but could not prohibit a given behaviour. For example, tobacco resellers could agree on cigarette prices as these would rise and smokers would smoke less, thereby contributing to public health.[4]

Twenty-three years later, the 1985 CartA repealed the 1962 CartA. The 1985 version kept the use of the 'balance method', but raised the threshold for consid-

---

DOI: 10.21552/core/2026/1/10

* Idris Abdelkhalek, PhD, LL.M. (Bruges), Attorney at law in corporate and competition law at Kellerhals Carrard Lausanne, Switzerland. For correspondence: <idris.abdelkhalek@kellerhals-carrard.ch>. The author thanks Alexandre Köhler, LL.M. (Bruges) and Robert Kerslake, Barrister-at-Law (Ireland) for their proofreading and insightful comments.

1 Swiss Federal Gazette (2026), 18 ff.

2 Judgment of the Federal Supreme Court of Switzerland (FSCS) *Vifor Pharma/HCI Solutions* [2025] 2C_244/2022.

3 Official Compilation of the FSCS 135 II 60 para 3.1.1.

4 Publication by the Swiss Cartel Commission (1976), 215 ff.

ering the validity of certain restrictive agreements.[5] If certain types of hardcore agreements were to eliminate effective competition, their effects were considered harmful, unless an overriding public interest made them indispensable.[6] In applying this higher threshold, the Cartel Commission thus ruled that an agreement on the price of cement to promote its transport by rail was not indispensable on grounds of environmental protection.[7]

The current CartA was adopted in 1995 following the 1992 vote of the Swiss people and the cantons refusing Switzerland's accession to the EEA. The CartA established a paradigm shift and brought Swiss competition law closer to EU Law. It repealed the 'balance method' and refocused the objective of the law on protecting competition as an institution.[8] An agreement restricting competition could thus only be justified on grounds of economic efficiency. Only the Swiss federal government may exceptionally authorise an unlawful agreement necessary to safeguard an overriding public interest.[9]

www.lexxion.eu

2. The Assessment of Agreements Impacting Competition

Article 5(1) CartA states that:

> [a]greements that significantly impact competition in a market for certain goods or services and cannot be justified on grounds of economic efficiency, as well as agreements that lead to the elimination of effective competition, are unlawful.

This general provision distinguishes agreements significantly impacting competition and which cannot be justified from agreements eliminating effective competition.

For agreements impacting competition, the FSCS established that the 'significant impact' criterion is based on the overall assessment of qualitative and quantitative aspects understood as communicating vessels.[10] The qualitative aspects focus on the importance of the competition parameter affected by the agreement on the relevant market.[11] The quantitative aspects are assessed according to the parties' market shares and internal, external, current, and potential competition on the relevant market.[12]

Aside agreements significantly impacting competition, the CartA contains presumptions that certain agreements eliminate effective competition. These presumptions are provided by Article 5(3) and (4) CartA. Article 5(3) CartA covers horizontal agreements that:

> (a) [...] directly or indirectly fix prices; [...] (b) restrict the quantities of goods or services to be produced, purchased or supplied; [...] (c) allocate markets geographically or allocate trading partners.

Article 5(4) CartA concerns vertical agreements that:

> [...] impose a minimum or fixed selling price, as well as distribution agreements allocating territories [...] when sales by other authorised suppliers are excluded.

The presumptions that the enumerated conducts eliminate (all) competition are quite easy to overturn. Indeed, proof that a small amount of residual competition exists on the relevant markets is sufficient in that regard.[13] Once the presumption has been rebutted, the lawfulness of an agreement is assessed according to its significant impact on competition as stated by Article 5(1) CartA.

If an agreement is found to be contrary to Article 5(1) CartA, it may be justified based on economic efficiency grounds exhaustively provided for in Article 5(2) CartA. Since 1 April 2004, agreements provided for in Article 5(3) or (4) CartA and found to be unlawful can be directly sanctioned based on Article 49*a* CartA.

3. The *Gaba* Case

The assessment of agreements provided for in Article 5(3) or (4) CartA was reshaped by the 2016 landmark decision in the *Gaba* case.[14] The Swiss compa-

5 Swiss Federal Gazette, Message concerning the Federal Act on Cartels and Other Restrictions on Competition (1995) I 472, 506.

6 CartA 1985, 29(3).

7 Publication by the Swiss Cartel Commission and the Price Supervisor (1993), 5 14 ff.

8 CartA, 1.

9 CartA, 8.

10 Official Compilation of the FSCS 143 II 297 para 5.2.2.

11 Official Compilation of the FSCS 129 II 18 para 5.2.1.

12 Ibid.

13 Judgment of the Federal Administrative Court of Switzerland *Implenia (Ticino)* [2010] B-420/2008, para 7.

14 Official Compilation of the FSCS 143 II 297.

ny Gaba entered into an agreement with Austrian company Gebro to restrict the re-export of dental hygiene products to Switzerland. This agreement constituted absolute territorial protection falling under Article 5(4) CartA. The Swiss National Competition Authority (ComCo) sanctioned Gaba.[15] Gaba appealed to the Federal Administrative Court of Switzerland and subsequently to the FSCS.

As it constituted an absolute territorial protection, the FSCS confirmed that the agreement between Gaba and Gebro fell under the scope of Article 5(4) CartA and was presumed to eliminate effective competition. The FSCS noted that this type of agreement remains particularly harmful to competition.[16] Thus, it considered that once the presumption is overturned, agreements provided for in Article 5(3) and (4) CartA generally significantly impact competition as per Article 5(1) CartA, without having to assess their quantitative impact on the relevant market.[17] Their significant impact on competition is solely based on qualitative criteria, i.e., the affected parameters of competition provided in Article 5(3) and (4) CartA. Unless they can be justified by economic efficiency grounds of Article 5(2) CartA, these agreements are unlawful and sanctionable.

III. The Reform of Article 5 CartA

1. The Significant Impact

The 19 December 2025 reform amended Article 5 CartA. The new Article 5(1^{bis}) CartA states that:

[t]he significant nature of the infringement [on competition] is examined on a case-by-case basis, as part of an overall assessment based on qualitative factors on the basis of empirical values and quantitative factors on the basis of the specific situation in the relevant market.

Article 5(1^{bis}) CartA stems from a motion[18] tabled by Olivier Français, member of the Council of States (upper house of the Swiss Parliament). This motion is intended to overturn the *Gaba* case law, considered to be too rigid and detrimental to undertakings.[19] Once the presumption of Article 5(3) or (4) CartA is rebutted, the assessment of the significant impact of an agreement on competition must therefore also include quantitative aspects. Such agreements can no longer significantly impact competition solely because they restrict a qualitative parameter of competition provided for by Article 5(3) or (4) CartA.

2. The Setting of Gross Prices

The 19 December 2025 reform also amended the scope of Article 5(3)(a) CartA. This presumption will only apply to agreements 'which directly or indirectly set minimum prices, fixed prices or maximum prices paid by the purchaser'. This amendment means that undertakings will be authorised to exchange price recommendations or gross prices without this behaviour being covered by the presumption in Article 5(3)(a) CartA. According to this new wording, the presumption will only cover agreements on the prices ultimately paid by purchasers. 'Other prices agreements' will fall under the scope of Article 5(1) CartA and will not be sanctionable.

3. Comments

a. Article 5(1^{bis}) CartA

Article 5(1^{bis}) CartA has prompted several comments. Some scholars see the explicit definition by the law of the significant impact criterion as a welcome clarification.[20] Others see it as a weakening of Swiss cartel law as well as a departure from EU law and international standards.[21] For the latter, Article 5(1^{bis}) CartA will increase the burden for the ComCo. It would be more complex to declare most hardcore restrictions unlawful, extend proceedings, and lead to legal uncertainty.[22] Undertakings would also no longer be certain whether a given behaviour is unlawful.

Nevertheless, this reform highlights several key points. First, Article 5(1^{bis}) CartA stresses a persistent

15 ComCo decision *Gaba und Gebro* [2009] 22-0349.

16 Official Compilation of the FSCS 143 II 297 para 5.2.4.

17 Official Compilation of the FSCS 143 II 297 para 5.6.

18 In Switzerland, a motion instructs the Federal Government to submit a draft act to the Parliament or to take action.

19 Swiss Federal Gazette, Message concerning the partial reform of the CartA (2023) 1463, 26 ff.

20 Daniel Emch, 'Moins de formalisme dans le droit des cartels' *Le Temps* (2 December 2025) 4.

21 Damiano Canapa, 'Proposed Revisions to the Swiss Cartel Act: Opportunities and Risks' [2025] 6 JECLAP 235.

22 Idem, 237.

difficulty for Swiss competition law to find the right balance in implementing the effects-based approach required by Article 96(1) FCSC. The message that accompanied the CartA bill expressly states that hardcore restrictions provided for in Article 5(3) and (4) CartA significantly impact competition within the meaning of Article 5(1) CartA, once the presumption is rebutted.[23] Originally, the adoption of Article 5 CartA also intended to ease the identification of hardcore restrictions and to repeal the 'balance method'.[24] Nevertheless, prior to the *Gaba* case law, the FSCS opted for a permissive approach. In its *Buchpreisbindung* case law, it considered that the assessment of whether an agreement covered by Article 5(3) CartA significantly impacts competition also had to include quantitative aspects.[25] This case undoubtedly added to the confusion surrounding the legislator's initial intention and the requirements set out in Article 96(1) FCSC.

Additionally, even though Article 96(1) FCSC focuses on the 'social and economic consequences' of competition restraints, the FSCS admits to prohibiting certain cartels, thereby highlighting the alignment of CartA with the object/effect distinction in EU law.[26] Therefore, hardcore restrictions provided for in Article 5(3) and (4) CartA can, to some extent, be compared to the 'by object' restrictions of Article 101 TFEU, i.e. restrictions which reveal a sufficient degree of harm to competition so that there is no need to examine their effects. This reasoning stems from the *Gaba* case law, as the significant impact on competition is solely based on their qualitative parameters. Agreements that do not fall under these presumptions are assessed based on their qualitative and quantitative impact on competition under Article 5(1) CartA. The latter are then close to the 'by effect' analysis under Article 101 TFEU. In view of this interpretation, Article $5(1^{bis})$ CartA can be considered as a departure from EU law.[27]

b. The Limits of Presumptions

Despite the above, the *Gaba* case law may have opened the door to an overly rigid application of the presumptions. For example, a purchase agreement constitutes a 'price agreement' within the meaning of Article 5(3)(a) CartA.[28] After the rebuttal of the presumption, such an agreement should, according to the *Gaba* case law, significantly impact competition within the meaning of Article 5(1) CartA. The ComCo Secretariat nonetheless considered that even if a purchase agreement is covered by Article 5(3)(a) CartA, its significant impact on competition according to Article 5(1) CartA must be conducted in terms of qualitative and quantitative assessments.[29] This reasoning is in line with EU law for which purchase agreements do not generally constitute by object restrictions even if they fix prices.[30]

It may be desirable to categorise certain types of behaviour as almost harmful per se for competition. That said, such an approach must not preclude a certain degree of discretion on the part of the authorities. The absence of such leeway could lead to a shift towards assessing each behaviour on a full case-by-case basis, endangering legal certainty. It follows that the rigidity sought in the *Gaba* case law may stem from the system of presumptions as such, which allows for overly broad coverage of certain types of behaviour. Considering the presumptions in Article 5(3) and (4) CartA are to be equivalent to the 'by object' restrictions in EU law, the latter classification remains restrictive.[31]

One option to consider would be to repeal the presumptions of Article 5(3) or (4) CartA and only retain Article 5(1) CartA, which distinguishes agreements that significantly impact competition from agreements that eliminate effective competition. As for the 'by object – by effect' distinction, case law would establish categories of agreements for which significance is determined solely based on qualitative aspects. The Swiss precision sought by a system of presumptions may therefore prove to be far too conceptual for competition law geared towards an economic approach and a need for pragmatism.

---

23 Swiss Federal Gazette, Message concerning the Federal Act on Cartels and Other Restrictions on Competition (1995) I 472, 561.

24 Idem, 560; Damiano Canapa, 'Proposed Revisions to the Swiss Cartel Act: Opportunities and Risks' [2025] 6 JECLAP 235, 237.

25 Official Compilation of the FSCS 129 II 18 para 5.2.2.

26 Official Compilation of the FSCS 143 II 297 para 5.1.2 and 6.2.3.

27 Swiss Federal Gazette, Message concerning the partial reform of the CartA (2023) 1463, 18.

28 Law and Policy on Competition *Einkaufskoperation* [2020] 2 405 para 61.

29 Idem, para 62 ff.

30 European Commission, Guidelines on the applicability of Article 101 TFEU to horizontal cooperation agreements [2023] OJ C259/1 para 278.

31 Case C-67/13 P *CB v Commission* [2014] ECLI:EU:C:2014:2204 para 58.

c. Interpreting Article 5(1bis) CartA

The new wording of Article 5(1bis) CartA should not lead to an overly alarmist interpretation. It would be possible to interpret that for hardcore restrictions provided for in Article 5(3) and (4) CartA, the assessment of quantitative criteria remains minimal in view of the economic and legal context. Such an approach is considered in EU law when assessing a restriction by object. This assessment relies on taking into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the concerned markets.[32] However, according to the *Toshiba* case law, the contextual analysis is limited to what is strictly necessary to determine whether a given behaviour constitutes a restriction by object.[33] Under Article 5(1bis) CartA, such an interpretation would meet the requirement that the quantitative aspect of the significant impact is based on an 'overall assessment' and on the 'specific situation on the relevant market'. This summary contextual analysis constitutes a supporting criterion for reinforcing or refuting the quantitative nature of the significant impact. Hardcore restrictions could then be easier considered as significantly impacting competition without the assessment being purely formal.

d. Article 5(3)(a) CartA

The amendment of Article 5(3)(a) CartA implies that producers could agree on a lower maximum price that they would be ready to fix for their buyers. Such an approach clearly contradicts EU law, which generally categorises such price fixing agreements as by object restrictions. In 2016, the EU Commission sanctioned a cartel of truck manufacturers because they agreed upon 'gross list' prices.[34] With the new wording of Article 5(3)(a) CartA, such a cartel could not be directly sanctioned any more in Switzerland.[35]

IV. Introduction of the SIEC Test

1. The Assessment

While the reform of Article 5 CartA may be seen as a departure from EU law, the introduction of the SIEC test undoubtedly constitutes a rapprochement. Article 10(2) CartA currently states that the ComCo:

> may prohibit a concentration or authorise it subject to conditions and obligations if the operation (a.) leads to the creation or strengthening of a dominant position, which eliminates effective competition and (b.) does not lead to an improvement in competitive conditions on another market sufficient to outweigh the disadvantages resulting from the dominant position.

Although Regulation 139/2004 replaced the 'dominance test' with the SIEC test, Article 10(2) is inspired by former Regulation 4064/89. The new Article 10(2) CartA states that:

> [ComCo] may prohibit the concentration or authorise it subject to conditions or obligations where the examination shows that the concentration (a.) significantly impedes effective competition, in particular by creating or strengthening a dominant position, and (b) does not generate efficiency gains for purchasers that are specific to the concentration, verifiable and justified by the notifying undertakings, and which offset the disadvantages caused by the significant impediment to competition.

The reform thus aligns Swiss merger control more closely with EU law, while strengthening its preventive function.

More interestingly, the new Article 9(1bis) CartA provides that cross-border mergers no longer need to be reported to the ComCo, if all relevant product markets affected by the operation include Switzerland, at a minimum the EEA and provided that the merger was reviewed by the EU Commission.

2. Comments

The introduction of the SIEC test will allow for better assessment of non-coordinated effects in oligopolistic markets and a focus on merger-specific efficiencies.[36] This will undoubtedly lead to a better inclu-

32 Idem, para 53.

33 Case C-373/14 P *Toshiba Corporation v Commission* [2016] ECLI:EU:C:2016:26 para 29.

34 European Commission, Decision *Trucks* [2016] AT.39824 paras 49 to 60, 75, 81.

35 Damiano Canapa, 'Proposed Revisions to the Swiss Cartel Act: Opportunities and Risks' [2025] 6 JECLAP 235, 238.

36 Idem, 241.

sion of both the positive and negative effects of mergers.[37] Currently, only the effects of mergers on two separate markets are compared, and only an improvement in the conditions of competition in another market that outweighs the harmful effects of the dominant position can be included in the assessment.[38]

As cross-border mergers involve costs due to the duplication of operations to be submitted to several authorities, the one-stop shop system proposed by the new Article 9(1bis) CartA could be advantageous for Switzerland.[39] However, this could result in a loss of sovereignty in the field of merger control policy.[40] It would de facto grant decision-making power to the European Commission, without Switzerland being an EU member state. A referral system such as that provided for in Article 9 of Regulation 139/2004, which allows the Commission to refer a transaction to a Member State upon its request, would have been desirable in view of Switzerland's position as a non-EU Member State.[41] It is in fact possible that a merger may not raise competition concerns in the EEA, but may do so on the sole Swiss market.

V. Conclusion

The 19 December 2025 CartA reform creates a certain paradox in that it departs from EU law regarding the assessment of agreements and aligns itself with it by introducing the SIEC test for mergers. Although it may highlight a certain inconsistency in the competition policy that Switzerland intends to pursue, the reform confirms a constant difficulty for the Swiss lawmaker, authorities, and courts in implementing the effects-based approach set out in Article 96(1) FCSC. The reform is a continuation of a constant shift between a broad effects-based approach and a more rigid approach based on a system of presumptions according to which effective competition is eliminated.

The significant impact criterion of Article 5(1) CartA is based on qualitative and quantitative assessments of the agreement. Past criticism has therefore focused particularly on the Gaba case law, according to which agreements provided by Article 5(3) or (4) CartA significantly impact competition solely based on qualitative parameters, once the said presumption has been overturned. *Gaba* has thus brought Article 5(3) and (4) CartA close to the 'by object' restrictions in EU law. However, criticisms raised by this case seem to stem more from a presumptions system perceived by critics as too conceptual. In this regard, even a purchase agreement, which is not considered as a 'by object' restriction in EU law, falls under the scope of Article 5(3)(a) CartA. Repealing the presumptions and retaining only Article 5(1) CartA with the categories it proposes would allow for a better case law approach and still bring Swiss competition law closer to EU law.

As it stands, the new Article 5(1bis) CartA diverges somewhat from EU law as it overturns Gaba and imposes a quantitative assessment for hardcore restrictions provided in Article 5(3) and (4) CartA, once the presumption has been rebutted. However, the assessment of the quantitative aspects could be based on a summary analysis of the legal and economic context of the market concerned. This would provide an overall assessment of the agreement without leading to a too permissive interpretation of this provision for hardcore restrictions.

The introduction of the SIEC test for mergers is to be welcomed. It brings Swiss competition law into line with international and EU standards and allows for a more detailed analysis of the effects of a merger. The introduction of a 'one-stop shop' allowing the EU Commission to assess a merger, provided that the EEA and Switzerland are covered, will also lead to efficiencies. However, the reform does not include a referral mechanism for the ComCo to conduct an analysis of the Swiss market. Such a mechanism would have been welcome, particularly given that Switzerland is a non-EU member state. This choice is surprising given Switzerland's current difficulties in moving closer towards institutional integration with the EU. In any case, while distancing itself from Brussels, Switzerland always seems to be seeking to move closer to it, revealing a complex relationship fraught with certain doubts.

37 Swiss Federal Gazette, Message concerning the partial reform of the CartA (2023) 1463, 57.

38 Damiano Canapa, 'Proposed Revisions to the Swiss Cartel Act: Opportunities and Risks' [2025] 6 JECLAP 235, 241.

39 Idem, 241.

40 Idem, 241.

41 Idem, 241.