Federal Act on Cartels and other Restraints of Competition

Last change: 30.06.2023

PDF generated on: 22.09.2026

ONLINE COMMENTARY
THE OPEN ACCESS
LEGAL COMMENTARY

TABLE OF CONTENTS

COMMENTARY ON

Vorb. zu Art. 58 – 59 CartA

A commentary by Anne Mirjam Schneuwly / Giulia Sonderegger

SUGGESTED CITATION

Anne Mirjam Schneuwly/Giulia Sonderegger, Vorbemerkungen zu Art. 58–59 KG, in: Patrick Krauskopf (Hrsg.), Onlinekommentar zum Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen

Short citation: OK-Schneuwly/Sonderegger, N. XXX zu Vorb. zu Art. 58–59 KG.

CONTENT

I. GENERAL INFORMATION ON CHAPTER 6

Cross-border economic traffic is protected by international cooperation - and thus the conclusion of international agreements. In this context, the implementation of international agreements must be monitored and any incompatibilities with a restriction of competition must be eliminated. Chapter 6 of the Cartel Act aims precisely at this and provides for concrete measures to eliminate an incompatible restriction of competition in the event that such a restriction is identified during the execution of an international agreement. More precisely, it has a diplomatic purpose, or rather, it aims to promote international cooperation and ensure the domestic implementation of competition norms in international agreements that are not directly applicable, thereby avoiding trade policy conflicts. 1

A. Scope of application and delimitation

Art. 58 and 59 of the Act come into play when companies engage in unlawful practices that restrict competition in Switzerland but have effects only or for the most part abroad - in other words, restrictions of competition that have an effect abroad. However, Chapter 6 does not apply to situations in which unlawful restrictions of competition take place abroad and have an effect on Switzerland; in such cases, Art. 2 para. 2 of the Act is to be applied. For the purposes of delimitation, the principle of impact (Art. 2 para. 2 CO) is briefly presented below, before the scope of application of international agreements and in particular free trade agreements is discussed. 2

1. Demarcation from the impact principle

a. Definition

In Swiss law, Art. 2 para. 2 CO defines the local scope of application by means of the so-called effects doctrine. It entitles the national competition authority to apply its jurisdiction to any facts that have an effect on its territory, even if the anti-competitive practice does not take place on its own territory. Accordingly, Swiss antitrust law is applied extraterritorially when a restriction of competition has domestic effects. In approach, this can lead to an encroachment of sovereignty in the foreign state, which in turn can degenerate into diplomatic conflicts between the states concerned or even into a trade war. In 3 order to avoid conflicts in the case of extraterritorial application of national competition law, states can draw up bilateral or multilateral agreements under international law on the application of national competition norms.

4 The question thus arises to what extent a state's national competition law can exert control over cross-border business activities. This is because transnational companies operate in a tension of national dependencies and it is difficult for a national authority to control activities that go beyond the borders of that state. Moreover, the extraterritorial application of national antitrust law can - depending on the state - be very different. In such transnational situations, economically and politically weaker states can hardly demand the enforcement of their own legal system (extraterritorial application) against more important or stronger states.

b. The problem of limited administrative cooperation

5 The problem with the extraterritorial application of national competition law is the limited cooperation of the authorities or the geographically limited possibility of investigation by the competition authorities. This is due, among other things, to the fact that the exchange of confidential information between competition authorities is generally not permitted. According to the principle of sovereignty, the investigation of a competition violation is the responsibility of the national competition authority of the state in which the competition restriction was initiated. If the initiating state wishes to seek investigations abroad, it can only do so by way of mutual legal assistance. If the competition authority involved only cooperates insufficiently or refuses mutual assistance, the initiating state must discontinue the proceedings due to a lack of sufficient information about the entrepreneurial conduct or due to a lack of proof of the restrictive effects of the conduct on competition. For this reason, it is all the more important that international cooperation mechanisms are in place to guarantee the exchange of factual and procedural information.

c. Relationship of the Impact Principle to Chapter 6

6 Chapter 6 does not refer to the application and enforcement of national competition rules to restrictions of competition with foreign effect in terms of the impact principle. As a rule, the impact state will sanction the competition restriction or the foreign competition authority will apply its national competition law directly and extraterritorially against companies domiciled in

Switzerland without resorting to the consultation mechanisms provided for in international agreements. This raises the question of the usefulness of Art. 58-59 CPC, which will be analysed in the following section.

2. Violation of competition rules in international agreements

In addition to restrictive conduct in Switzerland with effects abroad, it must be examined whether there is a violation of indirectly applicable competition norms. 7

a. Competition norms in international agreements

Art. 58 and 59 of the Swiss Competition Act do not constitute substantive competition law, but merely support the enforcement of substantive competition rules in international agreements or free trade agreements that aim to reduce barriers to trade. Prominent examples are the EFTA Convention, Switzerland's free trade agreements with the European Economic Community (FTA) and the WTO trade agreements. These agreements often include rules against private restraints of competition, which have only a limited scope. This is due to the fact that these rules have no direct effect under substantive law and also do not allow for genuine international cooperation under procedural law, as they do not permit the exchange of confidential information between competition authorities. However, it is recognised that state treaties which do not contain competition rules in the sense of the Cartel Act, but instead list anti-dumping rules or general protective provisions on non-discriminatory competition, also fall under Chapter 6. 8

b. General exclusion of directly applicable competition law

Chapter 6 allows the Swiss authorities to investigate and take measures against restrictions of competition that originate in Switzerland and violate the competition rules contained in international agreements. It primarily targets non-self-executing norms, i.e. those that cannot be directly enforced in court. The scope of application thus includes parts of international agreements that require a special mechanism to be enforced. In addition, Art. 58-59 of the CPC also do not apply if joint bodies are provided for in the (free trade) agreement, which both apply the substantive competition rules and regulate the enforcement of these rules under national law. This is because, as Ducrey clearly puts it, no statutory implementing provisions are necessary for directly 9 applicable international competition law, since it is already applied by the domestic authorities.

10 M.a.W. the WEKO is competent to respond to self-executing rules. If anti-competitive behaviour is found in Switzerland with effects abroad, which is not based on self-executing competition rules, the WEKO's hands are tied and according to Art. 58-59 of the Competition Act, the Federal Department of Economic Affairs, Education and Research (EAER) must intervene.

B. Diplomatic objective

11 Competition law is an integral part of a state's economic policy and aims to protect the competitive mechanism from the endogenous dangers of economic freedom. First and foremost, freedom must not be used to eliminate competition in markets. In bilateral and international agreements, the contracting states undertake to comply with substantive antitrust provisions and to enforce them domestically. Art. 58 and 59 are intended to ensure that Switzerland, as a contracting party to such agreements, complies with its obligations; for as a consequence of any failure to act, it is threatened with retaliatory measures.

12 In assessing the purpose of Chapter 6, it must be borne in mind that the legislature originally designed the special procedure for the execution of international agreements to improve the enforcement of the then relevant international agreements in the former CP-62. For this reason, it introduced the provisions Art. 42 and 43 into the KG-85. With the agreement of the Department of Foreign Affairs (FDFA), the EAER was to be given negotiating leeway in order to be able to intervene diplomatically if an amicable settlement with the State Party was not reached in a timely manner and Switzerland was threatened with retaliatory measures. The provisions were further adapted in the 1995 revision and specified in Art. 58-59 of the CPC.

13 In summary, Art. 58-59 CPC come into play when Switzerland wants to pursue a diplomatic objective on its own initiative and promote international cooperation. But if the primary objective is for the EAER to intervene diplomatically, the question arises why it should be reserved only for the non-self-executing provisions. For example, if the Competition Commission would not intervene in the case of a restrictive practice with foreign effects, non-compliance with competition rules in international agreements may lead to interna-

tional disgruntlement or even retaliatory measures by other states, which may require the intervention of the EAER. Furthermore, the application of Art. 58-59 CPC should not depend on the randomness of whether the Federal Supreme Court declares a rule directly applicable or not. Indeed, this criterion of application seems to be left to arbitrariness.

C. Practical relevance due to limited scope of application

Critically, e.g. Mamane and Amberg note that the scope of application of Chapter 6 is limited to cases "(i) where the de facto effects of conduct occur only abroad, as well as cases where the conduct caused in Switzerland, which has effects at home and abroad, either (ii) does not qualify as restrictive of competition under Swiss antitrust law, or (iii) qualifies as restrictive of competition but cannot be stopped." 14

As already mentioned, Art. 58 and 59 of the CPC (Art. 42-43 CPC-85) were originally enacted for the purpose of being able to address domestic conduct with foreign effect that violates competition provisions of international agreements and in particular free trade agreements by means of domestic competition law. However, this purpose has lost much of its relevance due to the increasing extraterritorial application of other national cartel laws and the extensive harmonisation of Swiss cartel law with European provisions, as well as the increased convergence of the cartel law practices of the most important trading nations. 15

The fact that the norms are hardly used can probably also be explained by the fact that "the parties to a state treaty resolve any problems informally among themselves instead of initiating a generally cumbersome procedure". It can therefore be assumed that Art. 58 and 59 CPC will hardly gain in practical relevance in the future, unless the scope of application would be extended to self-executing norms or Switzerland would conclude new treaties. 16

With only two cases of application, the subordinate importance of Art. 58-59 CPC is also reflected in the case practice. The former Art. 42 and 43 CPC-85 were applied for the first time in 1990 when an Italian sanitary ware producer complained about the behaviour of Swiss competitors and based his complaint on the obstruction of the free movement of goods. The European Commission then followed the procedure provided for in the FTA and remedied the anti-competitive behaviour by means of an amicable settlement pursuant 17 to Art. 42-43 CPC-85. In 1995, another case arose: the Competition Commission received complaints regarding a potential ban on the export of Volkswagen Group cars to Switzerland, which was not compatible with the FTA. Unlike the first case, the primary issue here was the application of the competition law norms of the FTA and not Articles 58-59 of the PCA. The import restrictions were eventually eliminated by an amicable settlement between the Competition Commission and the Swiss car importers.

II. INSTRUMENTS OF FORMAL COOPERATION

18 After the scope of application of Chapter 6 has been defined, the individual international agreements with non-self-executing competition rules must be discussed. Art. 58 and 59 of the CPC primarily complement the instruments of formal and informal cooperation. Bilateral agreements between the EU and Switzerland as well as other free trade agreements that contain both substantive and procedural competition rules are relevant here.

A. Cooperation agreements between Switzerland and the EU

19 For cross-border matters that take place in the European region, it is essential that Switzerland cooperates with the EU. To this end, they have concluded a cooperation agreement. For example, Regulation EC 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty regulates administrative cooperation within the EU, in particular through Articles 12 and 15. However, this regulation does not apply to the Switzerland-EU relationship; rather, the L 347/3 Agreement of 3 December 2014 between the European Union and the Swiss Confederation on cooperation in the application of their competition laws governs the exchange of information between Switzerland and the EU.

B. EFTA Convention

20 The competition rules in the EFTA Convention are found in Chapter VI. They address the tension between trade and competition policy and define anti-competitive behaviour for this purpose. Specifically, Member States must ensure that undertakings refrain from practices which have the effect of protecting domestic production and which would be incompatible with the EFTA Convention (Art. 18(1)(a) EFTA Convention). In addition, discrimination (in trade on grounds of nationality) by undertakings which frustrates the benefits

expected from the EFTA Convention is to be prohibited (Art. 18(1)(b) EFTA Convention).

If a member state considers its benefits from the Agreement to be at risk, it can initiate a dispute settlement procedure (Art. 46-48 EFTA Convention). The first step is to seek a consensual interpretation and application of the Agreement (Art. 47 para. 1 EFTA Convention). As a second step, the consultation procedure (Art. 47 para. 2 in conjunction with Art. 43 para. 2 EFTA Convention) is intended to provide a remedy if the informal route fails. If the consultation procedure does not lead to a solution either, the member state can initiate arbitration proceedings after 45 days (Art. 48 para. 1 EFTA Convention). 21

C. Free Trade Agreement between Switzerland and the European Economic Community (FTA)

The Free Trade Agreement of Switzerland with the European Economic Community (FTA) aims to guarantee the free circulation of goods under fair conditions of competition within the EU and Switzerland and contains antitrust provisions in Art. 23 FTA to protect competition in the movement of goods. Thus, private agreements or concerted practices between companies that have the purpose or effect of preventing, restricting or distorting competition with regard to production and the movement of goods are incompatible with the objectives of the agreement (Art. 23 para. 1 no. i FTA). Also incompatible with the objectives of the Agreement is the abuse by one or more undertakings of a dominant position over all or a substantial part of the territory of the Parties (Art. 23 para. 1 item ii FTA); in other words, abuse of dominant position. Even though these two provisions are close to Art. 101 and Art. 102 TFEU, they differ from European law firstly because of their legal nature and function. Secondly, it should also be specified that the abusive practices mentioned only apply in the area of trade in goods and not to the services or infrastructure sector. Thirdly, any state aid that distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods is prohibited (Art. 23 (1) (iii) FTA). Sturny also points out that when the FTA was concluded in 1972, "it also covered facts that did not fall within the scope of application of the then Swiss Act, in particular vertical agreements between individual companies (individual contracts) and export bans. 22

23 If a contracting party is of the opinion that the conduct of a company violates Art. 23 para. 1 FTA and endangers the treaty objectives of the FTA, it can take appropriate measures in accordance with the conditions and procedures laid down in Art. 27 FTA (Art. 23 para. 2 FTA). Specifically, the contracting party can initiate the dispute settlement mechanism provided for in the FTA by referring the matter to the Joint Committee (Art. 27 para. 2 FTA), which is composed of representatives of Switzerland and the EU. The contracting parties shall provide the Joint Committee with all relevant information and assistance necessary to examine the case and, where appropriate, to remedy the practice complained of (Art. 27 para. 3 let. a FTA).

24 If the Joint Committee determines that the conduct of a company is incompatible with the FTA, the initiating state - on whose territory the offending practice takes place - must put a stop to it. If the initiating state does not act within the time limit set by the Joint Committee or does not put an end to the practice in question, or if no agreement is reached within three months of the matter being referred to the Joint Committee, safeguard measures may be taken, such as the withdrawal of tariff concessions, in order to remedy the serious difficulties arising from the practices in question (Art. 27 (3) (a) FTA).

D. Air transport agreement

25 The prohibition of agreements on competition (Art. 8 FTA) and the prohibition of abuse of a dominant position (Art. 9 FTA) are taken verbatim from Art. 101 and 102 TFEU. They are directly applicable and do not require Articles 58 and 59 TCA in order to be invoked in the event of a possible violation of the aforementioned competition rules. The form of cooperation between the Member States is defined in the procedural provisions (Art. 19 FCA). These stipulate that all necessary information is to be transmitted to the contracting parties and that the member states are to assist each other in the investigation of possible infringements.

E. WTO Agreement

26 Finally, the compatibility of practices with WTO agreements must also be examined. The WTO was established in 1995 as the successor to the General Agreement on Tariffs and Trade (GATT) concluded in 1948. It forms the institutional framework for various multilateral agreements and, in addition to the rules on trade in goods contained in the GATT, also includes the General

Agreement on Trade in Services (GATS) and Trade-Related Aspects of Intellectual Property Rights (TRIPS). WTO rules are to be understood as indirect competition rules in that they aim at taking trade policy measures against state actions that restrict or distort foreign competition in the market for goods or services.

1. GATT

The GATT agreement - which was established in 1948 as a precursor to the WTO - served primarily as an instrument for trade liberalisation. In this context, rules were enacted within the framework of the GATT, which primarily served to reduce tariffs and other trade barriers and to secure international trade relations and which have been further developed over the years. Today it includes, among other things, the prohibition of import monopolies (Art. II para. 4 GATT), equal treatment of domestic goods with regard to taxation and other legal provisions (Art. III GATT) and quantitative import restrictions (Art. XI GATT). The GATT and the GATS, discussed below, provide only limited protection against discrimination under competition law. 27

2. GATS

The GATS also contains indirect competition rules against state actions that may restrict foreign competition in the services market. M.a.w., the GATT provides certain provisions that allow for the challengeability of private restraints of competition if they are covered by the state and impede foreign competitors' access to the domestic market. For example, according to Art. VIII GATS, for example, member states must ensure that domestic companies comply with the most-favoured-nation principle (Art. I GATT) when providing services under exclusive rights and do not engage in anti-competitive behaviour outside the respective monopoly area. In addition, Art. IX (1) GATS declares that service suppliers may engage in other business practices that may restrict competition. By invoking Art. IX para. 2 GATS, a Member State may then initiate consultations in this context in order to remedy anti-competitive practices in the Party State. 28

3. TRIPS Agreement

The TRIPS Agreement aims to harmonise intellectual property rights. To this 29
end, the agreement obliges its contracting parties to respect industrial proper-

ty rights and to respect monopoly rights, thereby creating incentives to create and disseminate knowledge. The agreement is thus not primarily aimed at clarifying the highly complex relationship between competition law and intellectual property law. Nevertheless, the relevance of the Agreement to competition law is unmistakable.

30 Art. 8 TRIPS Agreement, for example, shows the importance of prohibiting anti-competitive situations that may arise from the use of intellectual property rights. For this reason, Art. 8.2 of the TRIPS Agreement provides that contracting parties may take appropriate measures if such measures are necessary to prevent the abuse of intellectual property rights by the right holder or the resort to practices that unreasonably restrain trade or adversely affect the international transfer of technology. However, the standard does not specifically define restrictive conduct.

31 Also of relevance to competition law is Article 31 of the TRIPS Agreement, which is dedicated to compulsory licensing, which according to its title can lead to other use without the consent of the right holder. According to the article, the granting of compulsory licences is a way to deal with cases where anti-competitive practices may occur in connection with the use of patents.

32 Finally, Art. 40 TRIPS addresses the issue of licensing of intellectual property and recognises in para. 1 that restrictive licensing practices may affect trade and hinder the transfer and dissemination of technology. For this reason, Article 40.2.1 of the TRIPS Agreement empowers the Parties to take appropriate countermeasures consistent with the other provisions of the Agreement.

III. INSTRUMENTS OF INFORMAL COOPERATION

33 In addition to the formal instruments, there are also more informal cooperation mechanisms that can promote cooperation between different competition authorities and provide an opportunity for exchange. However, these instruments do not establish a requirement for Member States, but are only intended to be supportive. They primarily serve to further develop competition law and to discuss global as well as national challenges in plenary.

A. OECD

34 The OECD's primary purpose is to promote economic cooperation and development. Among other things, it provides an important forum for the (fur-

ther) development and effective enforcement of national competition law and plays a central role in the debate on the internationalisation and harmonisation of competition law. For example, in 2001 it founded the Global Forum on Competition to bring together the world's antitrust authorities. In addition, the Competition Committee of the OECD regularly issues non-binding recommendations and repeatedly deals with highly topical issues that pose new challenges to competition law (such as digitalisation). These recommendations receive a lot of attention in the field of antitrust law and are generally regarded as authoritative sources, whether by antitrust authorities, practitioners or academics.

B. ICN

The International Competition Network (ICN) was established in 2001 and serves as an informal forum where national as well as multinational competition authorities from around the world can exchange views on their competition policies and achieve a degree of convergence on fundamental issues of competition law application and enforcement. The exchange of experience focuses on the discussion of practical problems that may arise in particular in international competition cases. In this context, the ICN working group regularly publishes non-binding recommendations in the form of "Recommended Practices" or "Guiding Principles", which are often used as guidelines by competition authorities and thus contribute to a convergence in the application practice of the competition authorities. The Competition Commission is also part of the network and regularly participates in conferences such as the Annual ICN Conference. 35

MATERIALS

Botschaft des Bundesrates zur Genehmigung der GATT/WTO-Übereinkommen (Uruguay-Runde) vom 19.9.1994, BBl 1994 IV S. 1 ff. (zit. Botschaft WTO 1994).

Botschaft zu einem Bundesgesetz über Kartelle und ähnliche Organisationen (KG) vom 13.5.1981, BBl 1981 S. 1293 (zit. Botschaft KG 1981).

Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen vom 23.11.1994, BBl 1995 I S. 468 (zit. Botschaft KG 1994).

Evaluationsgruppe Kartellgesetz, Evaluation gemäss Art. 59a KG: Zusammenarbeit mit ausländischen Wettbewerbsbehörden, Projektbericht P8, 23.12.2008 (zit. Evaluationsgruppe Kartellgesetz).

BIBLIOGRAPHY

Amstutz Marc/Gohari Ramin, Kommentierung zu Art. 4 KG, in: Amstutz Marc/Reiner Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 2. Aufl., Basel 2021 (zit. BSK-Amstutz/Gohari).

Basedow Jürg, Weltkartellrecht: Ausgangslage und Ziele, Methoden und Grenzen der internationalen Vereinheitlichung des Rechts der Wettbewerbsbeschränkungen, Hamburg 1998.

Baldi Marino, Die Wettbewerbsbestimmungen internationaler Abkommen der Schweiz und die Art. 42/43 des Kartellgesetzes (KG), in: Zäch Roger (Hrsg.), Kartellrecht auf neuer Grundlage, Bern et al. 1989, S. 279–308.

Borer Jürg, Orell Füssli Kommentar, Wettbewerbsrecht I: Schweizerisches Kartellgesetz (KG) mit den Ausführungserlassen sowie einschlägigen Bekanntmachungen und Meldeformularen der WEKO, 3. Aufl., Zürich 2011 (zit. OFK-Borer).

Cottier Thomas/Meitinger Ingo, The TRIPs Agreement without a Competition Agreement?, Fondazione Eni Enrico Mattei Working Paper No. 65–99, abrufbar unter SSRN: https://ssrn.com/abstract=200622, besucht am 25.5.2023.

Cottier Thomas/Oesch Matthias, Die unmittelbare Anwendbarkeit von GATT/WTO-Recht in der Schweiz, in: SZIER 2004, S. 121–154.

Dabbah Maher M., International and Comparative Competition Law, New York 2010.

Drolshammer Jens Ivar, Wettbewerbsrecht: Vom alten (KG 85) zum neuen Recht (KG 95), Bern 1996.

Ducrey Patrik, Vorbemerkungen zu Art. 58 und 59, in: Homburger Eric/Schmidhauser Bruno/Hoffet Franz/Ducrey Patrik (Hrsg.), Kommentar zum schweizerischen Kartellgesetz vom 6. Oktober 1995 und zu den dazugehörenden Verordnungen, Zürich 1997 (zit. Kommentar zum KG).

Freund Benedikt, Vorbemerkungen zu Art. 58–59, in: Zäch Roger et al. (Hrsg.), KG Kommentar, Kartellgesetz, Zürich 2018 (zit. Dike Kommentar-Freund).

Heinemann Andreas, Das Kartellrecht des geistigen Eigentums im TRIPS-Übereinkommen der Welthandelsorganisation, GRUR Int. 1995, S. 535–539.

Heizmann Reto/Mayer Michael, Kommentierung zu Art. 2 KG, in: Zäch Roger et al. (Hrsg.), KG Kommentar, Kartellgesetz, Zürich 2018 (zit. Dike Kommentar-Heizmann/Mayer).

Homburger Eric, Kommentierung zu Art. 42 aKG, in: Kommentar zum Schweizerischen Kartellgesetz, Zürich 1990.

Immenga Ulrich, Internationales Wettbewerbsrecht: Unilateralismus, Bilateralismus, Multilateralismus, in: Tietje Christian/Kraft Gerhard/Sethe Rolf (Hrsg.), Beiträge zum Transnationalen Wirtschaftsrecht, Heft 31, Oktober 2004 (abrufbar unter https://opendata.uni-halle.de/bitstream/1981185920/76469/1/BeitraegeTWR_31.pdf, besucht am 25.5.2023).

Kearns Jason E., International Competition Policy and the Gats: A Proposal to Address Market Access Limitations in the Distribution Services Sector, in: University of Pennsylvania Journal of International Economic Law (2) 22/2001, S. 285 ff.

Mamane David/Amberg Karin, Vorbemerkungen zu Art. 58–59, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 2. Aufl., Basel 2021 (zit. BSK-Mamane/Amberg).

Martenet Vincent/Heinemann Andreas, Droit de la concurrence, 2. Aufl., Genf 2021.

Matsushita Mitsuo/Schoenbaum Thomas J./Mavroidis Petros C./Hahn Michael, The World Trade Organization: Law, Practice, and Policy, 3. Aufl., Oxford 2017.

Merkt Benoît, Harmonisation internationale et entraide administrative internationale en droit de la concurrence, Neuenburg 2000.

Merkt Benoît, Vorbemerkungen zu Art. 58–59, in: Martenet Vincent/Bovet Christian/Tercier Pierre (Hrsg.), Commentaire Romand, Droit de la concurrence, 2. Aufl., Basel 2013 (zit. CR-Merkt).

Nüesch Sabina, Vorbemerkungen zu Art. 58–59, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 1. Aufl., Basel 2010 (zit. BSK-Nüesch).

Oeter Stefan/Petersen Anna, WTO und Wettbewerb, in: Hilf Meinhard/Oeter Stefan (Hrsg.), WTO-Recht, Rechtsordnung des Welthandels, 1. Aufl., Baden-Baden 2005, S. 623–635.

Reinert Peter, Kommentierung zu Art. 58, in: Baker & McKenzie (Hrsg.), Stämpflis Handkommentar, Kartellgesetz, Zürich 2007 (zit. SHK-Reinert).

Stoffel Walter A., Die schweizerische Wettbewerbspolitik im internationalen Kontext, in: Zäch Roger (Hrsg.), Das revidierte Kartellgesetz in der Praxis, Zürich 2006, S. 1 ff.

Sturny Monique, Der Einfluss des EU-Rechts auf das schweizerische Kartellrecht, Bern 2013.

Sturny Monique, Der Einfluss des europäischen Kartellrechts auf das schweizerische Kartellrecht, in: Cottier Thomas (Hrsg.), Die Europakompatibilität des schweizerischen Wirtschaftsrechts: Konvergenz und Divergenz, Bibliothek zur Zeitschrift für Schweizerisches Recht, Beiheft 50, 2012, 107 ff. (zit. Sturny, europäisches Kartellrecht).

Schürmann Leo, Kommentierung zu Art. 42 aKG, in: Schürmann Leo/Schluep Walter (Hrsg.), Orell Füssli Kommentar, Kartellgesetz und Preisüberwachungsgesetz (KG + PüG), Zürich 1988.

Terhechte Philipp, WTO und Wettbewerb, in: Hilf Meinhard/Oeter Stefan (Hrsg.), WTO-Recht, Rechtsordnung des Welthandels, 2. Aufl., Baden-Baden 2010, S. 643–661.

Wagner-von Papp Florian, Internationales Wettbewerbsrecht, in: Tietje Christian/Nowrot Karsten (Hrsg.), Internationales Wirtschaftsrecht, 3. Aufl., Berlin et al. 2022, S. 605 ff.

Weber Rolf H., Einleitung, Geltungsbereich und Verhältnis zu anderen Rechtsvorschriften, in: von Büren Roland/Lucas David (Hrsg.), Band V/2: Kartellrecht (Schweizerisches Immaterialgüter- und Wettbewerbsrecht (SIWR), Basel 2000, S. 1–54 (zit. Weber, V/2 SIWR).

Wurmnest Wolfgang, Kommentierung zu Art. 6 Rom II-VO, in: von Hein Jan (Hrsg.) Münchener Kommentar BGB, Bd. 13, Internationale Privatrecht II, Internationales Wirtschaftsrecht, 8. Aufl., München 2021 (zit. MüKoBGB-Wurmnest).

Zäch Roger, Schweizerisches Kartellrecht, 2. Aufl., Bern 2005.

Zurkinden Philipp, Extraterritoriale Anwendung des EG-Wettbewerbsrechts zwischen der Schweiz und der EU, in: Schmeling Manfred/Veith Michael (Hrsg.), Universitäten in europäischen Grenzräumen / Universités et frontières en Europe: Konzepte und Praxisfelder / Concepts et pratiques, Bielefeld 2015, S. 283–296. (zit. Zurkinden, Extraterritoriale Anwendung).

Zurkinden Philipp, Ausführung internationaler Abkommen, in: von Büren Roland/Lucas David (Hrsg.), Band V/2: Kartellrecht (Schweizerisches Immaterialgüter- und Wettbewerbsrecht (SIWR), Basel 2000, S. 533–545 (zit. Zurkinden, V/2 SIWR).

Zurkinden Philipp/Wenger Boris, Das Auswirkungsprinzip im schweizerischen Kartellrecht nach dem Bundesgerichtsurteil i.S. Gaba, in: Grolimund Pascal/ Koller Alfred/Loacker Leander D./Portmann Wolfgang (Hrsg.), Festschrift für Anton K. Schnyder, Zürich 2018, S. 1327–1338.

COMMENTARY ON

Art. 58 CartA

A commentary by Anne Mirjam Schneuwly / Giulia Sonderegger

SUGGESTED CITATION

Anne Mirjam Schneuwly/Giulia Sonderegger, Kommentierung zu Art. 58 KG, in: Patrick Krauskopf (Hrsg.), Onlinekommentar zum Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen

Short citation: OK-Schneuwly/Sonderegger, N. XXX zu Art. 58 KG.

Chapter 6 Implementation of International Agreements

Art. 58 Ascertainment of the facts

[1] If a party to an international agreement asserts that a restraint of competition is incompatible with that agreement, the EAER may instruct the Secretariat to conduct a preliminary investigation.

[2] In response to a motion proposed by the Secretariat, the EAER decides what, if any, further action to take; before that, it shall hear the parties involved.

CONTENT

I. OVERVIEW OF THE PURPOSE OF THE NORM

Art. 58 KG is the jurisdictional norm for action by Swiss authorities in the case of competition violations originating in Switzerland and whose incompatibility with an international agreement is asserted by a contracting party. The provision specifies the authorities that are competent to deal with such matters and the procedure to be followed in this regard. 1

II. JURISDICTION

In contrast to the ordinary procedure under the Cartel Act, Art. 58 of the Cartel Act does not designate the Competition Commission as competent to determine the facts, but the Department of Economic Affairs, Education and Research (EAER). The reason for this division of competences is that the EAER negotiates and concludes international agreements - such as the Free Trade Agreement - and is thus closer to the contracting parties. This division of competences makes sense, particularly in view of the diplomatic purpose of Chapter 6 of the KG. 2

As a rule, the EAER is represented by the State Secretariat for Economic Affairs (SECO). Pursuant to Art. 58 para. 1 KG, the EAER may instruct the Secretariat of the Competition Commission to conduct a preliminary investigation. This is intended to guarantee the transfer of knowledge from the competition authority when clarifying the facts. However, the Competition Commission itself is not involved in the proceedings. In contrast to the ordinary competition proceedings pursuant to Art. 23 of the Competition Act, the Secretariat is therefore not subordinate to the Competition Commission, but to the Federal Department of Economic Affairs, and only becomes active at the latter's request. In addition, the EAER can only instruct the Secretariat to carry out a preliminary investigation, but not an investigation as under Art. 27 of the Competition Act. The Secretariat cannot therefore open an investigation as it can under Art. 27 KG. 3

III. PROCEDURE

Art. 58 KG can be divided into the following procedural steps: 4

A. Initiation

5 The procedure in the sense of Chapter 6 is not initiated by the EAER on its own initiative, but the competition violation must be asserted by a party to an international agreement. In other words, the EAER only becomes active when one of the contracting parties to the agreement complains of an incompatible restriction of competition. If there is an official complaint, i.e. if the contracting party to the international agreement claims a restriction of competition that is incompatible with the international agreement, it is at the discretion of the EAER to decide whether it wishes to initiate a preliminary investigation at all. This discretion is available to the EAER, as Art. 58 para. 1 of the Act on the Protection of Competition is an "optional provision". However, if the allegations made by the foreign party are not completely unfounded, the EAER would normally instruct the Secretariat of the Competition Commission to conduct a preliminary investigation. In general, however, it is open to the authority to also resolve the disagreement through diplomatic negotiations. In this respect, the EAER has considerable room for manoeuvre.

B. Preliminary clarifications and submission of applications

6 If the Department has decided within its discretion to initiate a preliminary clarification, it may instruct the Secretariat to determine the facts of the case. The purpose of the preliminary clarifications is to brief the representatives of the competent bodies appointed by the international agreement on the factual situation in Switzerland. Specifically, they serve to provide the Swiss representatives in the competent body with a basis for decision-making on how to proceed.

7 Once the preliminary clarifications have been completed, the Secretariat submits a request to the EAER to decide on the further course of action (Art. 58 para. 2 KG). This request does not require a legal assessment of the admissibility of the competitive conduct with the international agreement; rather, this legal assessment is within the competence of the bodies named in the agreement. The reason for this is that the compatibility of the conduct with the competition provisions of the international agreement is not being examined.

C. Enactment of measures

Finally, the Department decides, taking into account the Secretariat's clarification of the facts, which measures are to be taken to remedy the offending practices and to avoid possible retaliatory measures. In general, it is open to the EAER either to remedy the conflict situation by informal means or to apply the measures listed in Art. 59 KG. 8

IV. DISPUTED APPLICABILITY OF THE VWVG TO THE PROCEDURE

It has not been conclusively clarified whether the procedural provisions of the VwVG are applicable to the preliminary clarification procedure of the Secretariat and the hearing of the parties by the EAER. 9

Part of the doctrine is in favour of the application of the VwVG, subject to Art. 39 KG. This approach is justified by the extensive protection of the parties and the observance of their rights, which are guaranteed by the established procedural rules. In contrast, another part of the doctrine argues that Art. 58 KG should be interpreted as establishing a procedural law sui generis, which takes precedence over the application of the VwVG. According to this doctrine, the special procedural provisions on Art. 58 KG thus take precedence over the application of the procedural provisions under the KG and the VwVG. Finally, they serve a fast and, if necessary, informal negotiation mechanism, which is necessary for the enforcement of international obligations. Accordingly, according to this view, the preliminary clarification does not take place in the sense of an "ordinary preliminary clarification" pursuant to Art. 26 KG. However, such an interpretation of the procedure also has the consequence that the Secretariat's request to the EAER is not a formal request, but rather a kind of communication against which no appeal can be filed. Accordingly, according to this view, an appeal could only be lodged once an order has been issued pursuant to Art. 59 para. 2 KG regarding the measures that are capable of eliminating the incompatibility. However, the EAER can only issue such an order if efforts to reach an amicable settlement have failed. Another argument against the primacy of special procedural provisions and in favour of the applicability of the VwVG is that - if in the end an order is issued under the VwVG - it makes sense in principle to conduct the entire procedure according to these provisions. 10

11 The disagreement regarding the procedural rules to be applied appears unavoidable in view of the special international and extra-political context in which Chapter 6 operates and underlines the dilemma that Chapter 6 attempts to solve: On the one hand, the Swiss authorities are to be provided with a flexible instrument that can also be used in cases of temporal urgency, thus protecting the diplomatic purpose of Chapter 6. On the other hand, the judicial legal protection of the parties should be guaranteed. However, a wholly satisfactory solution that encompasses both the necessary temporal flexibility and the extensive legal protection of the parties is probably not possible due to these two conflicting goals.

MATERIALS

Botschaft zu einem Bundesgesetz über Kartelle und ähnliche Organisationen (KG) vom 13.5.1981, BBl 1981 S. 1293 (zit. Botschaft KG 1981).

Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen vom 23.11.1994, BBl 1995 I S. 468 (zit. Botschaft KG 1994).

BIBLIOGRAPHY

Baldi Marino, Die Wettbewerbsbestimmungen internationaler Abkommen der Schweiz und die Art. 42/43 des Kartellgesetzes (KG), in: Wirtschaft und Recht, Jg. 41, Heft 1, 1989, S. 54–69.

Borer Jürg, Orell Füssli Kommentar, Wettbewerbsrecht I: Schweizerisches Kartellgesetz (KG) mit den Ausführungserlassen sowie einschlägigen Bekanntmachungen und Meldeformularen der WEKO, 3. Aufl., Zürich 2011 (zit. OFK-Borer).

Drolshammer Jens Ivar, Wettbewerbsrecht: Vom alten (KG 85) zum neuen Recht (KG 95), Bern 1996.

Ducrey Patrik, Kommentierung zu Art. 58 KG, in: Homburger Eric/Schmidhauser Bruno/Hoffet Franz/Ducrey Patrik (Hrsg.), Kommentar zum schweizerischen Kartellgesetz vom 6. Oktober 1995 und zu den dazugehörenden Verordnungen, Zürich 1997 (zit. Kommentar zum KG-Ducrey).

Freund Benedikt, Vorbemerkungen zu Art. 58–59 KG und Kommentierung zu Art. 58 KG, in: Zäch Roger et al. (Hrsg.), KG Kommentar, Kartellgesetz, Zürich 2018 (zit. Dike Kommentar-Freund).

Mamane David/Amberg Karin, Kommentierung zu Art. 58 KG, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 2. Aufl., Basel 2021 (zit. BSK-Mamane/Amberg).

Merkt Benoît/Metzger Philippe, Kommentierung zu Art. 58 KG, in: Martenet Vincent/Bovet Christian/Tercier Pierre (Hrsg.), Commentaire Romand, Droit de la concurrence, 2. Aufl., Basel 2013 (zit. CR-Merkt/Metzger).

Nüesch Sabina, Kommentierung zu Art. 58 KG, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 1. Aufl., Basel 2010 (BSK-Nüesch).

Reinert Peter, Kommentierung zu Art. 58 KG, in: Baker & McKinzey (Hrsg.), Stämpflis Handkommentar, Kartellgesetz, Zürich 2007 (zit. SHK-Reinert).

Zurkinden Philipp/Trüeb Hans R., Das neue Kartellgesetz: Handkommentar, Zürich 2004.

COMMENTARY ON

Art. 59 CartA

A commentary by Anne Mirjam Schneuwly / Giulia Sonderegger

SUGGESTED CITATION

Anne Mirjam Schneuwly/Giulia Sonderegger, Kommentierung zu Art. 59 KG, in: Patrick Krauskopf (Hrsg.), Onlinekommentar zum Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen

Short citation: OK-Schneuwly/Sonderegger, N XXX zu Art. 59 KG.

Art. 59 Elimination of incompatibilities

[1] If in implementing an international agreement, it is found that a restraint of competition is incompatible with that agreement, the EAER may in consultation with the Federal Department of Foreign Affairs propose an amicable settlement to the parties involved so as to eliminate the incompatibility.

[2] If an amicable settlement cannot be reached in time and one party to the agreement threatens to take protective measures against Switzerland, the EAER may in consultation with the Federal Department of Foreign Affairs determine the measures necessary to eliminate the restraint of competition in a ruling.

CONTENT

I. INTRODUCTION

Whereas Art. 58 of the Act regulates the provisions regarding jurisdiction and the procedure for determining the facts of the case, Art. 59 of the Act deals with the possibilities for the EAER to act when an incompatibility is determined by the body provided for in the international agreement. In other words, this article deals with how a restriction of competition that is incompatible with the international agreement in question can be eliminated domestically. Art. 59 KG provides for two possible courses of action: An incompatibility can be eliminated by means of an amicable settlement within the meaning of para. 1 or, if an amicable settlement cannot be reached in time, the EAER can take further measures pursuant to para. 2. However, before the EAER can eliminate an incompatibility at all, the bodies appointed in the international agreement must first establish such an incompatibility, which is analysed in the following section. 1

II. IDENTIFICATION OF INCOMPATIBILITY

In order to apply Art. 59 of the Act, the first step is to determine whether the restriction of competition is incompatible with the substantive rules of the international agreement in question. The material rules provided for in the relevant international agreement are decisive for the determination of an incompatibility. "Incompatibility" is not to be equated with illegality. According to Art. 23 para. 1 FTA, for example, restrictions on competition are considered incompatible with the good functioning of this agreement if they are "likely to affect trade in goods between the Community and Switzerland." Art. 18 para. 1 FTA also stipulates that those practices are incompatible with the Agreement which "frustrate the benefits to be expected from the Agreement." From these two examples, it is clear that Art. 59 TCA is largely aimed at eliminating harmful behaviour, reducing trade benefits or even nullifying them altogether. M.a.w., the term "incompatibility" refers to restrictive conduct that affects trade benefits flowing directly or indirectly from the international agreement and thus jeopardises the functioning of effective competition. 2

The competence of the legal clarification of incompatibility is solely incumbent on the body provided for in the relevant agreement (e.g. in the form of a Council or a Joint Committee). Specifically, the competent bodies must deter- 3 mine whether there is a restriction of competition within the meaning of the agreement and whether the restriction is incompatible with the agreement. Since such bodies are often composed of representatives of all contracting parties, it can be assumed that in the event of a conflict, Switzerland would also allow the findings of the preliminary investigation pursuant to Art. 58 para. 1 PCA to flow into the decision-making of the body.

4 If an incompatibility with the international agreement is identified by the competent bodies, it is then up to the Swiss authorities to examine whether and with what measures this can be eliminated. In other words, once an incompatibility is identified, the assessment of the facts and the effects of the conduct in terms of competition and trade policy depends exclusively on the Swiss authorities. Once the incompatibility has been identified by the bodies provided for in the international agreement, there is thus a shift of competences from the bodies to the EAER.

III. POSSIBILITIES FOR ACTION

5 If incompatibility of the restrictive conduct with the international agreement in question is established, the EAER has the following options for action:

A. Mutual agreement (para. 1)

6 Pursuant to Art. 59 para. 1 of the Act, the EAER may, in agreement with the Federal Department of Foreign Affairs (FDFA), propose an amicable settlement to the parties involved. The agreement of the FDFA is assumed, since foreign policy aspects are always affected in these cases, for which the FDFA is sometimes responsible.

7 The term "parties involved" used in Art. 59 para. 1 and in Art. 58 para. 2 refers primarily to the companies that have brought about the restriction of competition, as is also the case under Art. 29 KG. The interpretation of the term "involved parties" results from the fact that only these undertakings can remove the restriction of competition. However, part of the doctrine is of the opinion that the parties harmed by the restrictive conduct are also to be considered as participants.

8 As in Art. 29 KG, the legislator uses the term "amicable settlement" in Art. 59 KG. In contrast to Art. 29 para. 2 KG, however, neither the wording of Art. 59 para. 1 KG nor the messages provide for formal requirements. Accordingly, it

is not presumed that the amicable settlement requires the written form. Even if for political reasons it may be understandable that a formal requirement could hinder the negotiations, for the sake of legal certainty this amicable settlement should in principle be made in writing and published.

With regard to the content, Art. 59 KG only states that the purpose of the amicable settlement is to eliminate the incompatibility, thereby preventing possible retaliatory measures against Switzerland. Accordingly, the amicable settlement must take into account the substantive content of the competition provision of the international agreement at issue. This generally serves the overriding goal of guaranteeing the enforcement of international obligations in the area of competition law. 9

Whether and to what extent use is made of a consensual settlement is likely to depend, among other things, on how the time limit regime of the international agreement in question is structured. In addition, the willingness of the other contracting parties to cooperate in negotiating a consensual settlement with the parties concerned is also decisive. 10

B. Necessary measures (para. 2)

If there is an urgency, i.e. if an amicable settlement cannot be adopted in time and concrete retaliatory measures are imminent, the EAER may, in agreement with the FDFA, order measures that are necessary to eliminate the restriction of competition in accordance with Art. 59 para. 2 KG. Two conditions must be met for this: (i) the deadline stipulated in the international agreement is not met and (ii) Switzerland is threatened with retaliatory measures by the contracting parties that make it impossible to settle the matter in a timely manner. These requirements must be applied cumulatively, i.e. it is not sufficient if only the formal deadline is not met but there are no indications that a contracting party will initiate retaliatory measures. Conversely, this also means that the cumulative requirement gives the affected companies the possibility to temporarily refuse to conclude a mutually agreed settlement in order to strengthen their negotiating position until the potential concretisation of the retaliatory measures. Pursuant to Art. 59 para. 2 KG, it is at the discretion of the EAER - again in consultation with the FDFA - to assess which measure it deems necessary to remove the incompatibility. However, the measure must be suitable for eliminating the incompatibility and resolving the conflict. Accordingly, not just any measure can be adopted, but only those that are neces- 11 sary to eliminate an incompatibility and can avert any protective measures (for example, the suspension of trade concessions) of the contracting party. It should be clarified that even if Art. 58 and 59 KG provide for a separate procedure that differs from the ordinary procedure, in practice the same measures as under Art. 30 KG are used.

IV. RELATIONSHIP BETWEEN PARA. 1 AND PARA. 2

12 Since Art. 59 para. 1 KG is an "optional provision", there is no obligation to eliminate the restrictive conduct by a friendly settlement. If an amicable settlement is not concluded in time or Switzerland is threatened with retaliatory measures by the contracting party, the EAER may, in agreement with the FDFA, take the measures necessary to eliminate the restriction of competition (Art. 59 para. 2 KG). It can be deduced from this that the amicable settlement pursuant to Art. 59 para. 1 KG generally takes precedence over the measures within the meaning of Art. 59 para. 2 KG. This also follows from the 1994 Dispatch KG, according to which para. 2 actually only applies if there is a temporal urgency that requires other protective measures to keep the situation in check.

V. PROCEDURAL PROVISIONS

13 According to Art. 1 para. 2 lit. a VwVG, the provisions of the VwVG are applicable to the procedure of the EAER. The order issued by the EAER is a formal order within the meaning of Art. 5 VwVG. Pursuant to Art. 33 lit. d of the Administrative Procedure Act, it may be appealed to the Federal Administrative Court.

MATERIALS

Botschaft zu einem Bundesgesetz über Kartelle und ähnliche Organisationen (KG) vom 13.5.1981, BBl 1981 S. 1293 (zit. Botschaft KG 1981).

Botschaft zu einem Bundesgesetz über Kartelle und andere Wettbewerbsbeschränkungen vom 23.11.1994, BBl 1995 I S. 468 (zit. Botschaft KG 1994).

BIBLIOGRAPHY

Baldi Marino, Die Wettbewerbsbestimmungen internationaler Abkommen der Schweiz und die Art. 42/43 des Kartellgesetzes (KG), in: Zäch Roger (Hrsg.), Kartellrecht auf neuer Grundlage, Bern et al. 1989, 279–308.

Beuret Carla, Kommentierung zu Art. 59 KG, in: Zäch Roger et al. (Hrsg.), KG Kommentar, Kartellgesetz, Zürich 2018 (zit. Dike Kommentar-Beuret).

Borer Jürg, Orell Füssli Kommentar, Wettbewerbsrecht I: Schweizerisches Kartellgesetz (KG) mit den Ausführungserlassen sowie einschlägigen Bekanntmachungen und Meldeformularen der WEKO, 3. Aufl., Zürich 2011 (zit. OFK-Borer).

Drolshammer Jens Ivar, Wettbewerbsrecht: Vom alten (KG 85) zum neuen Recht (KG 95), Bern 1996.

Ducrey Patrik, Kommentierung zu Art. 59 KG, in: Homburger Eric/Schmidhauser Bruno/Hoffet Franz/Ducrey Patrik (Hrsg.), Kommentar zum schweizerischen Kartellgesetz vom 6. Oktober 1995 und zu den dazugehörenden Verordnungen, Zürich 1997 (zit. Kommentar KG-Ducrey).

Ducrey Patrik/Carron Benoît, Kommentierung zu Art. 59 KG, in: Martenet Vincent/Bovet Christian/Tercier Pierre (Hrsg.), Commentaire Romand, Droit de la concurrence, 2. Aufl., Basel 2013 (zit. CR-Ducrey/Carron).

Freund Benedikt, Kommentierung zu Art. 59 KG, in: Zäch Roger et al. (Hrsg.), KG Kommentar, Kartellgesetz, Zürich 2018 (zit. Dike Kommentar-Freund).

Mamane David/Amberg Karin, Kommentierung zu Art. 59 KG, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 2. Aufl., Basel 2021 (zit. BSK-Mamane/Amberg).

Merkt Benoît/Metzger Philippe, Kommentierung zu Art. 59 KG, in: Martenet Vincent/Bovet Christian/Tercier Pierre (Hrsg.), Commentaire Romand, Droit de la concurrence, 2. Aufl., Basel 2013 (zit. CR-Merkt/Metzger).

Nüesch Sabina, Kommentierung zu Art. 59 KG, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 1. Aufl., Basel 2010 (zit. BSK-Nüesch).

Reinert Peter, Kommentierung zu Art. 59 KG, in: Baker & McKinzey (Hrsg.), Stämpflis Handkommentar, Kartellgesetz, Zürich 2007 (zit. SHK-Reinert).

Schürmann Leo, Kommentierung zu Art. 59 KG, in: Schürmann Leo/Schluep Walter (Hrsg.), Orell Füssli Kommentar, Kartellgesetz und Preisüberwachungsgesetz (KG + PüG), Zürich 1988 (zit. OFK-Schürmann).

Sturny Monique, Der Einfluss des EU-Rechts auf das schweizerische Kartellrecht, Bern 2013.

Zirlick Beat/Tagmann Christoph, Kommentierung zu Art. 59 KG, in: Amstutz Marc/Reinert Mani (Hrsg.), Basler Kommentar, Kartellgesetz, 2. Aufl., Basel 2021 (zit. BSK-Zirlick/Tagmann).