Internal Market Approaches –

Comparative Research (Switzerland)

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Key Points Summary

- Art. 95 para. 2 Cst. confers on the Confederation a comprehensive but concurrent competence for the creation of an internal market. The Confederation may enact any federal law necessary to create a unified Swiss economic area. However, as long as the federal level has not used its powers, private economic activities remains regulated by cantonal law or even municipal regulations.
- Despite its comprehensive competence in the field of the internal market, the federal legislator cannot enact federal laws that would effectively undermine or partially abolish federal structures. The realisation of the internal market must take place without any levelling of cantonal differences. Quite the contrary, there should be room for different cantonal and municipal legislation in areas of the internal market.
- Against this background, we can identify three regulatory approaches for the creation of an internal market: Cantonal harmonisation through inter-cantonal agreements, selective top-down harmonisation through federal laws for specific economic sectors or economic activities and an approach that promotes the mutual recognition of market access rights. Switzerland relies on a flexible combination of the three approaches; there is, however, certain preferences for the mutual recognition approach as it involves the least interference with cantonal autonomy.
- If the cantons have concluded an inter-cantonal agreement or if the Confederation has enacted a law regulating a specific private economic sector or activity, the cantons must comply with these harmonised rules. Inter-cantonal and federal (including international) law overrides contradicting cantonal and municipal law. In case of harmonisation, the regulatory space of the cantonal legislator depends on the legal character of the overriding legislation and the autonomy left for cantonal implementation. Despite its extensive competence in matters relating to the internal market, the Confederation has only rarely made use of this competence. The vast majority of private economic activities are therefore still regulated by cantonal laws or even municipal regulations.
- In order to create an internal market despite different cantonal market access regulations, the federal legislator has enacted framework legislation promoting and enforcing the mutual recognition of rules for cantonal market access. This happened following the EEA rejection in 1992. It was deemed economically crucial to set up internal market conditions, which comply with the European single market requirements. The then adopted Internal Market Act aims at removing obstacles to competition originating from cantonal or municipal laws and regulations and other barriers to inter-cantonal mobility. It ensures that persons with a place of business or registered office in Switzerland have free and equal market access for the exercise of their gainful employment throughout the entire territory of Switzerland. Furthermore, it facilitates professional mobility and commercial trade within Switzerland.
- The Internal Market Act operates with two fundamental principles: First, cantons are not allowed to restrict market access based on the fact that certain market participants have their place of business or their registered offices in another canton (*principle of non-discrimination*). Second, the Act guarantees the mutual recognition of the equivalence of cantonal market access regulations (*principle of place of origin*).
- Initially, the Internal Market Act did not lead to any noticeable opening of the internal market. Thus, a partial revision of the Act should turn the Act into a more efficient instrument. The 2005 revision identified three main reasons for the rather limited impact of the Internal Market Act and the persisting fragmentation of cantonal markets: Firstly, the Federal Supreme Court's case law continued to value cantonal autonomy more highly than the realisation of the internal market. It applied the Internal Market Act in a narrow understanding and excluded the freedom of establishment from the Act's scope of application. Hence, one of the aims of the revision was to extend the principle of origin explicitly to commercial companies and professionals wanting to establish themselves permanently in another canton. Secondly, cantons and municipalities enjoyed a wide scope to restrict free market access for non-local market participants under Art. 3 IMA. The revision thus also focused on tightening the admissible conditions for restricting market access under Art. 3 IMA. Lastly, under the previous law, the non-binding recommendations and expert opinions of the Competition Commission received little attention in the cantons. The enforcement of the internal market therefore depended primarily on individual market participants, as they were the only one with a right to appeal. The revision established a right of appeal by the Competition Commission against decisions, which since has the possibility to induce a court decision whenever it considers that a cantonal or municipal regulation restricts market access in an inadmissible manner.

- Since the partial revision of the Act, aspects of the internal market have gained importance in the jurisprudence of the Federal Supreme Court. The improvement at the procedural level and in legal protection was therefore of particular practical importance. However, it is too early to make a final judgement as to whether the effects hoped for by the legislator will be sustainable and widespread.
- The revised IMA continues to rely dominantly on the mutual recognition approach. The Act thus continues to allow cantons and municipalities to make and apply their own subnational rules and mechanisms to regulate the same economic activity in the way they see fit. In addition, the Act operates with an exception regime that provides the cantons with considerable regulatory space to restrict market access in areas they consider as being of overriding public interest (Art. 3 IMA). The tensions between the plethora of different cantonal rules and regulations and the federal mandate to seek to create a unified Swiss economic market continue to be controversial in the country. Some actors refer to the need for more unity, more legal certainty and less cantonal protectionism to advocate for the adaption of new harmonising and unifying federal rules. Others insist on the autonomy of the cantons to define and protect overriding public interest or refer to the advantages of regulatory competition and the potential of bottom-up innovation in the economic sphere to safeguard more diversity-friendly approaches to market regulation.

I. Assignment

A. Background

1 On 25 March 2019, the Finance and Constitution Committee noted in a Report on Common Frameworks that whilst at EU level the internal market is defined through treaties and legislation, it is not clear what the UK equivalents is. The Committee, thus, questioned how Common Frameworks can be established in order to enable the functioning of the UK internal market after Brexit. In order to explore the issue further, the Committee hold a roundtable discussion on 19 June 2019. In that context, the Committee reached the conclusion that it would be helpful to examine the approaches used in other jurisdictions in which power-sharing arrangements are in place between national and subnational tires of government.

B. Task

2 We have been approached to provide research on the functioning of the Swiss internal market. We were asked to focus in particular on the division of competences between the national and the subnational tiers of government, while also taking into account the overarching bilateral and multilateral international legal framework that influences the functioning of the internal market in Switzerland.

C. Method

3 In order to capture the structure of the Swiss internal market, we will first present the constitutional order and its requirements regarding the creation and the proper functioning of the internal market. Although the Federal Constitution, dividing the competences between the two tiers of government, assigns far-reaching competences to the Confederation, the cantons nevertheless have considerable scope to regulate in certain areas of economic activity that are closely linked to the functioning of the internal market (II).

We will then briefly recall the origins of vertical power-sharing in the economic sphere and highlight the developments, which have led to the adoption of the Internal Market Act in 1995. We will show that the objectives of the Internal Market Act did not only consist in improving the Swiss internal market while still respecting cantonal autonomy. The making and amending of the Act was also, and largely, influenced by bilateral and multilateral international agreements. Most notably, the Internal Market Act also serves as a means to achieve compatibility with the requirements of the European single market (III). 4

Finally, we will describe what approach has been taken in order to respect both, the federal mandate to create an internal market and the vertical division of competences, which leaves considerable autonomy to the cantons in matters related to the economy and the internal market. In doing so, we will turn to the most important legal instrument to implement the internal market, which is the Internal Market Act adopted in 1995. We will present on the one hand the principles underlying the Internal Market Act and examine how these have been applied in practice by authorities and courts (IV). 5

II. Structure of the Swiss Internal Market: A Fine Balance between a Unified Economic Area and Cantonal Autonomy

A. Concept of a Unified Swiss Economic Area

Art. 95 para. 2 Federal Constitution of the Swiss Confederation (hereafter referred to as Federal Constitution or Cst.), which has been introduced on the occasion of the total revision of the Federal Constitution in 1999, is the constitutional basis of the Swiss economic area (hereafter referred to as internal market). 6

> **Art. 95 Professional activities in the private sector** 7
>
> [1] The Confederation may legislate on professional activities in the private sector.
>
> [2] It shall seek to create a unified Swiss economic area. It shall guarantee that persons with an academic qualification or with a federal or cantonal educational qualification or an educational qualification recognised by a Canton are able to practise their profession throughout Switzerland.

Together with the Internal Market Act (hereafter referred to as IMA), adopted in 1995 and amended in 2005, they represent the two fundamental cornerstones on which the internal market relies on. While the constitutional norm determines the scope of the internal market and the division of competences in this area, the IMA primarily serves to implement these principles. Neither the Constitution nor the IMA explicitly define the concept of a 'unified Swiss economic area'.[1] It is generally understood that it refers to an area in which commercial traffic is not affected by cantonal borders.[2] The unified economic area thus is achieved by providing for the *freedom of commercial trade across cantons*, in particular the free circulation of goods and capital, the free movement of workers and the freedom to provide services throughout the entire country.[3] 8

1 BSK BV-Uhlmann, Art. 95 N 11; Auer/Martenet, p. 282.
2 Biaggini, BV-Kommentar, Art. 95 N 7.
3 BSK BV-Uhlmann, Art. 95 N 11; Biaggini, BV-Kommentar, Art. 95 N 7; Rhinow *et al.*, § 7 N 42; Auer/Martenet, p. 282-283.

9 The full implementation of a unified Swiss economic area and the right of commercial actors to move and trade freely across cantonal border may, however, be in tension with the fact that the exercise of some professions is subject to (different) subnational regulations that make the profession either dependent on certain professional qualifications (diplomas, certificates) or on a licence. The internal market approaches commonly used in Switzerland can be characterised as attempts to deal with the tensions and to balance economic freedoms and cantonal regulatory competences.

10 As the headline of Art. 95 Cst. indicates, the internal market covers professional activities in the private sector. The scope of the mandate is therefore very large as only sovereign activities are excluded.[4]

11 The constitutional mandate to create an internal market is part of the principle of economic freedom, which is guaranteed by the Constitution (Art. 27 and 94 Cst.) and can be described as a *fundamental constitutional choice for a free market economic system*. According to Art. 94 para. 1 Cst. the Confederation and the cantons must abide by this principle and are in general not permitted to enact legislation which undermines the principle. Any divergence from economic freedom is only permitted if it is provided for in the Federal Constitution (Art. 94 para. 4 Cst.).[5] In such cases, the competences to legislate are exclusively assigned to the federal level.[6] The Federal Constitution does authorize the Confederation either explicitly or tacitly to deviate from market-based principles in many central areas of economic policy if necessary. These economic areas are subject to specific legislation.

12 The most important areas are banking (Art. 100 para. 3 Cst.), foreign economic policy (Art. 101 para. 2 Cst.), national economic supply (102 para. 2 Cst.), agriculture (104 para. 2 Cst.), railways and other modes of transport (Art. 87 Cst.), nuclear energy (Art. 90 Cst.), transport of energy (Art. 91 Cst.), postal and telecommunications services (Art. 92 Cst.), radio and television (Art. 93 Cst.), alcohol (105 Cst.), and health and accident insurance (Art. 117 Cst.)[7]

13 The internal market therefore does not cover all sectors of the economy. It is limited, on the one hand, to the regulation of professional activities in the *private* sector, and, on the other hand, to economic sectors which *are not already exempted* from the principle of economic freedom.[8]

B. Comprehensive and Concurrent Competence of the Confederation

1. In General

14 The federal system follows the principle of subsidiarity: The Confederation only assumes tasks which the cantons cannot fulfil or which require uniform regulation by the Confederation. Art. 3 Cst. enshrines the federal maxim that the Confederation has only those powers which the Constitution assigns to it. Competences and tasks not attributed to the Confederation by a specific constitutional norm shall remain with the cantons. In addition, Swiss federalism is qualified as a *mixed system* as it provides for

4 This is also taken up by Art. 1 IMA which guarantees that persons and entities permanently resident or established in Switzerland have free and equal access throughout the entire territory of Switzerland in order to pursue their gainful economic activity, cf. Decision of the Federal Supreme Court, BGE 136 II 470, consid. 5.3., in which the Federal Supreme Court recognized that teaching activities of a local authority school are considered as non-sovereign state activities as they represent a gainful activity; OESCH, (2012) ZBJV, p. 400-401, criticises the legal uncertainty that prevails in this area due to the jurisprudence of the Federal Supreme Court.

5 Another exception refers to cantonal monopoly rights, most of them of historic origin (e.g. cantonal salt monopolies).

6 HALLER, N 155.

7 RHINOW *et al.*, § 7 N 29-30.

8 In addition, and contrary to the European Single Market, the Swiss internal market is not complemented by a prohibition of state aid by cantons as there is no explicit provision neither in the Constitution nor the Internal Market Act that would regulate to what extend cantonal state aid is permissible, cf. OESCH, (2013) AJP 1337, p. 1340 and 1342.

a division of legislative powers between the federation and the cantonal tier (dual federalism) and generally limits federal powers to legislation, leaving the implementation of federal law to the 26 cantons (integrated federalism). In most cases, including the unified economic area, it is thus up to the cantons to implement federal law (Art. 46 para. 1 Cst.) and to adopt any cantonal legislation needed to do so. According to the Constitution, the Confederation must allow cantons "all possible discretion to organise their own affairs and shall take account of cantonal particularities" (Art. 46 para. 3 Cst.). Thus, even in fields of federal competence, harmonised not unified law results.

For the economic sector, for example, it was important that there had long been federal competence in the field of civil law. At the end of the 19th century, the Confederation made use of this competence and enacted a unified Code of Obligations and a Federal Act on Debt Collection and Bankruptcy. Almost all other competences were originally with the cantons. Since the creation of the Confederation in 1848, however, the powers of the Confederation have grown steadily (cf. N 12).[9] 15

There has been a similar development in the area of the internal market. The first Federal Constitution of 1848, establishing the Swiss federation, already contained some elements that had an effect on the creation of an internal market. In particular, the Federal Constitution of 1848 provided for the abolition of cantonal customs duties and other inter-cantonal tariff barriers and guaranteed the right to freely trade across cantonal borders. It also established unified weights and measures and introduced a single currency.[10] The actual realisation of the internal market progressed rather slowly and was considered inadequately guaranteed throughout the 20th century. Many cantonal particularities were conserved and restrictions to inter-cantonal commercial trade remained in effect, especially in the field of public procurement, the free movement of workers and the freedom to provide services.[11] It was only in the context of the total revision of the Federal Constitution of 1999 that the Confederation was given an explicit constitutional basis in Art. 95 para. 2 Cst. to create an internal market. 16

2. Internal Market

The constitutional provision states that the Confederation 'shall seek' to create an internal market.[12] This formulation is understood as assigning all legislative competences to the federal tier, which are *necessary to effectively create an internal market*.[13] The federal competence is thus a *comprehensive* one. It provides the Confederation with the authority to adopt any federal law or federal ordinance essential to create a united Swiss economic area effectively allowing for free commercial traffic across cantonal borders. 17

The comprehensive federal competence to create a unified economic area is *concurrent*, not exclusive.[14] Concurrent federal competences leave the residual competence of the cantons intact (Art. 3 18

9 Rhinow et al., § 7 N 29-30.

10 AUBERT/MAHON, Art. 95 N 8; HETTICH, St. Galler Kommentar zu Art. 95, BV N 1.

11 BIAGGINI, (1996) 97 ZBl 49, p. 77; RHINOW *et al.*, § 7 N 51.

12 Some authors point out that the wording is vague as it obliges the federal level to create an internal market, but does not specify how this is to be done. Therefore, they hesitate to subscribe to the comprehensive and concurrent character of Art. 95 para 2 Cst. They do agree, however, that the constitutional mandate is broad and provides the Confederation with considerable discretion to define and determine the measures necessary to create an internal market, cf. AUER/MARTENET, p. 282.

13 AUBERT/MAHON, Art. 95 N 10; HALLER, N 442.

14 BSK BV-UHLMANN, Art. 95 N 8; BIAGGINI, BV-Kommentar, Art. 95 N 7.

Cst.). Therefore, cantons only see their jurisdiction diminish once federal law governs a specific economic activity.[15] As long as and as far as the Confederation has not made use of its competence, cantonal laws remain applicable and can be amended and complemented at the discretion of the cantons. Whenever there is a federal law, it takes precedence over any conflicting provision of cantonal law (Art. 49 para. 1 Cst.).

19 However, there are limits to the exercise of federal legislative competences in the area of the internal market due to the federal structure of the State.[16] When adopting Art. 95 para. 2 Cst., the constitution-maker did not have the intention to undermine cantonal autonomy.[17] Even though the federal tier enjoys a comprehensive competence, the federal legislator cannot enact federal laws related to the internal market that would effectively erode or even partially abolish federal structures. In addition, by using its comprehensive competence, the Confederation is obliged to respect the constitutional principle of subsidiarity (Art. 5a Cst.). The principle is not justiciable but requires the Federal Assembly and the Federal Council to clarify whether the 'Cantons are unable to perform' the task or whether it requires 'uniform regulation by the Confederation' (Art. 43a Cst.) before legislating. Thus, the objective of Art. 95 para. 2 Cst. is not the levelling of cantonal differences. In contrast, there should still be room for different cantonal or municipal legislation in areas related to the economy.[18] As a matter of fact, there is a widely accepted understanding that the federal legislator should only become involved in situations in which divergent cantonal laws so severely impair the internal market that its proper functioning is no longer guaranteed.[19] Whenever the Confederation exercises its legislative competences, the cantons have a constitutionally guaranteed right to participation; they must be informed and consulted whenever their interests are affected (Art. 55 and 147 Cst.).

C. Different Approaches to Implementing the Internal Market: A Complex Interaction of Unifying and Harmonising Instruments

20 Given the scope of Art. 95 para. 2 Cst. and the resulting division of competences, the Confederation cannot simply undertake a comprehensive harmonisation of cantonal rules and regulations in order to create the internal market. It rather has to strike a fine balance between respecting the federal division of competences in matters related to the economy and the obligation to provide for an internal market throughout Switzerland.[20] The federal and cantonal levels can pursue *three main regulatory approaches* in order to meet both requirements. While two approaches aim at legal harmonisation, the other one relies on the principle of mutual recognition and guarantees cross-border trade without harmonising the different cantonal and municipal market access regulations.

15 HALLER, N 138; RHINOW *et al.*, § 7 N 2.
16 AUER/MARTENET, p. 283.
17 AUBERT/MAHON, Art. 95 N 10.
18 BIAGGINI, BV Kommentar, N 7-8.r
19 AUER/MARTENET, p. 285.
20 RHINOW *et al.*, § 7 N 43-45.

3. Three Approaches

a. Harmonisation at Federal Level

The Confederation may opt for *top-down unification* of specific economic sectors or activities in which the Confederation enjoys a constitutional competence. Art. 95 para. 1 Cst., for instance, provides the federal tier with the competence to legislate on the exercise of economic activities in the private sector. The Confederation thus has the right – but not the duty – to establish federal rules relating to private professional activities overriding the cantonal ones.[21] As top-down harmonisation presents the most far-reaching measure encroaching cantonal autonomy, it is generally seen as subsidiary to other measures. It is only justified when the other two approaches have failed or have proven not effective enough to ensure the smooth functioning of the internal market.[22] 21

Federal legislation can be divided into federal laws harmonising a particular economic activity and in federal laws regulating a particular economic sector: 22

Regulation of a particular economic sector	**Regulation of a particular economic activity**
These federal laws can be seen as *complementary* to the IMA. They all pursue the same objective – removing obstacles to competition – but deal with different sectorial issues.	These federal laws aim at harmonising the conditions for the exercise of a specific profession or economic activity and are therefore more *specific* than the IMA.
– The Federal Act on Cartels deals with restrictions of competition by private actors. – The Federal Act on Technical Barriers to Trade aims to create a homogeneous basis for eliminating or reducing technical barriers to trade that fall under the Confederation's regulations. – The Federal Act on the Supply of Electricity aims to open up the electricity market by providing non-discriminatory but regulated access to the network.	– The Federal Act on Freedom of Movement for Lawyers adopted in 2000 – The sale by mail order of medicinal products, which is regulated in the Federal Law on Therapeutic Products since 2000. – The Federal Act on the Traveller Trade adopted in 2001 – The Federal Act on Medical Professions adopted in 2006.[23] – In 2016, Parliament passed a Federal Act on Health Professions which lays down uniform training and professional requirements for the whole of Switzerland.[24]

b. Mutual Recognition

Most importantly, the Confederation can support the internal market by promoting and enforcing the *mutual recognition of rules concerning access to the economic sector* of the cantons. This regulatory 23

21 BSK BV-UHLMANN, Art. 95 N 14; HETTICH, St. Galler Kommentar zu Art. 95 BV, N 15.
22 BSK BV-UHLMANN, Art. 95 N 14.
23 DREYER/DUBEY, p. 150-151; RHINOW *et al.*, § 7 N 45.
24 While the Federal Act on Medical Professions covers doctors, dentistsm chiropractors, pharmacists and veterinarians, the new Federal Act on Health Professions deals with nursing professionals, physiotherapists, occupational therapists, midwives, nutritionists, optometristins and osteopaths.

approach is predominant in Switzerland as it guarantees inter-cantonal trade while preserving the legislative autonomy of the cantons. It consists in ensuring a free and equal market access throughout Switzerland by relying largely on the two following principles:[25]

a. Prevention of discrimination against non-local market participants from other cantons;

b. Reduction of excessive restrictions of inter-cantonal commercial trade.[26]

24 Although the federal and cantonal legislators have made use of the two other regulatory approaches, the mutual recognition approach represents the most important one to fulfil the constitutional mandate to create an internal market.[27] The core of this approach is a set of principles laid down in the Internal Market Act which will be presented in detail further below.

25 **c. Inter-cantonal Harmonisation**

26 The unity of the internal market can be achieved by measures, which *enhance the compatibility of cantonal laws*. Cantons can either harmonise and coordinate their economic laws and policies or conclude inter-cantonal agreements, so-called concordats, on specific economic matters.[28] Whenever the cantons are competent to legislate or implement, they are free to enter into agreements with each other and establish common organisations and institutions (Art. 48a para.1 Cst.). This is a more flexible and autonomy-friendly approach than federal harmonisation as the cantons can freely decide to negotiate an inter-cantonal agreement and choose to join or not and existing one. If an agreement is only accepted by some cantons and not by others, the effectiveness of the approach in guaranteeing free cross-border trade is however limited. In addition, the negotiation of an agreement acceptable to all cantons is a very lengthy process and amendments to agreements are cumbersome, since the consent of all the cantons involved must be obtained. Inter-cantonal harmonisation, while having the advantage of leaving cantonal competences intact, thus has the disadvantage of being slow and rigid. The approach is also criticized for strengthening the role of the cantonal executive and limiting the role cantonal parliaments to approving whatever resulted from inter-government negotiations. [29]

27 The Confederation may participate in inter-cantonal organisations or institutions as long as its engagement remains within the scope of its own competences (Art. 48 para. 2 Cst.). Additionally, in some areas, enumerated in the constitution and which are relevant to the economic sector, including waste management, waste water treatment, specialist clinics, the Confederation, on request of interested cantons, can declare inter-cantonal agreements to be generally binding or require cantons to participate (Art. 48a Cst.). This relatively new possibility has however never been used until now and is unlikely to ever be applied.

28 Horizontal cooperation has become an increasingly prominent feature of Swiss federalism. For that purpose, cantons have established several inter-cantonal governmental and directorial boards and other political institutions in order to cooperate more closely. The most prominent of the inter-cantonal con-

25 RHINOW *et al.*, § 7 N 43; BIAGGINI, BV Kommentar, N 8.
26 BSK BV-UHLMANN, Art. 95 N 15.
27 AUER/MARTENET, p. 284; BSK BV-UHLMANN, Art. 95 N 13.
28 BSK BV-UHLMANN, Art. 95 N 12.
29 DE CHAMBRIER, p. 81.

ferences is the Swiss Conference of Cantonal Ministers of Education associating the 26 cantonal government members responsible for education, culture and sport. The Conference was responsible for the nationwide recognition of cantonal educational qualifications, which was achieved through a nationwide inter-cantonal agreement in 1993.[30] The agreement is highly relevant to the proper functioning of the Swiss internal market as it enhances and facilitates inter-cantonal mobility.

4. The Regulatory and Policy Space

Against the background of the three approaches, the cantonal scope of regulation can be described as follows: If the cantons have concluded an inter-cantonal agreement or if the Confederation has enacted a law, which regulates a specific private economic activity, the cantons must comply with these harmonised rules and cannot continue to regulate the activity. Both harmonising instruments prevail over the general principle-based approach set out in the IMA.[31] However, the Confederation has a wide discretion as to the density of regulating the exercise of a particular private economic activity or profession. The respect of the principle of subsidiarity generally obliges it to refrain from extensive regulation and opt for a federal framework legislation, which leaves the cantons considerable scope for *implementation*. Similarly, inter-cantonal agreements rarely lead to a comprehensive unification of a particular economic activity, but have a harmonising effect, as the participating cantons agree on minimum standards. 29

The Federal Act on Freedom of Movement for Lawyers, for example, is organised based on cantonal registers. Once a lawyer is registered in a cantonal register, she or he may practice legal representation in the whole of Switzerland without further authorisation or other formalities. The Federal Act not only guarantees the free movement but also unifies certain essential aspects of the practice of the legal profession, such as professional rules, job titles, as well as supervision and disciplinary measures.[32] 30

Similarly, the Federal Act on the Medical Profession also guarantees the free movement, but on the basis of a federal diploma and not based on cantonal diplomas or registers. Moreover, and contrary to the Federal Act on the Free Movement of Lawyers, other personal requirements for obtaining a cantonal licence are not uniformly regulated or even harmonised in any way. They remain entirely within the competence of the cantons.[33]

Despite its extensive competence in matters relating to the internal market, the Confederation has rarely made use of this competence. Consequently, and because of the concurrent nature of the competences, these private economic activities remain governed by cantonal laws or even municipal regulations. As long as the federal legislature does not use its competence more comprehensively, cantons remain entitled to set up their own regulations, particularly for economic activities that are subject to an authorisation. 31

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[30] Inter-cantonal Agreement of 18 February 1993 on the recognition of educational qualifications. The mutual recognition of academic degrees has been in use in Switzerland for over a hundred years. The agreement therefore concerned the mutual recognition of non-academic degrees in the areas of secondary and upper secondary school-leaving certificates, cantonal apprenticeships, teaching staff (all levels), artistic professions, health professions, librarians and adult education.

[31] This is expressly anchored in the IMA for inter-cantonal agreements (Art. 4 para. 4 and Art. 6 para. 3 IMA). A federal law regulating a specific economic activity takes precedence over the IMC, which only regulates the activity in general (*lex specials* doctrine).

[32] DREYER/DUBEY, p. 152-153.

[33] DREYER/DUBEY, p. 156.

Most notably, these competences include the hospitality industry, the taxi trade, the security industry, sanitation trades and parts of the health care.[34] In addition, cantons are responsible for regulating public procurement insofar as it concerns the award of public contracts by cantons or communes.[35]

33 However, their regulatory scope is limited with regard to inter-cantonal trade or market access for non-local market participants from other cantons, as they must comply with the constitutional guarantees of economic freedom and the general principles laid down in the Internal Market Act.

5. The Trade-off between Mutual Recognition and Harmonisation

34 The different approaches to the realisation of the internal market are controversially discussed in scholarship and practice. Actors favouring uniform solutions adopted by the federal legislator, often refer to the fact that Switzerland's internal market is small and the various cantonal and municipal market access rules comparatively similar. Against this background, they argue that there is only little meaningful regulatory diversity and that it comes at a high price for the economic system. They also claim that a system operating based on mutual recognition of market access rules is costly and can lead to unequal treatment of market participants. A plethora of different subnational market access rules also leads to legal uncertainty and makes the implementation of international agreements on the free movement of persons more difficult. They argue that the federal legislator is in the best position to guarantee free cross-border trade and to ensure that the Swiss regulations comply with the dense and dynamic network of international regulations.

35 Others subscribe to the need of further harmonising economic regulations throughout the country, but prefer inter-cantonal harmonisation to federal unification. They insist that this approach has the advantage of taking Switzerland's federal tradition into account and of offering more flexibility to the cantons. As a Swiss wide concordat requires the approval of all cantons, the inter-cantonal approach prevents cantons from being overruled by the majority and guarantees that that essential interests of all cantons are taken into account.

36 However, there are also a number of reasons in favour of a mutual recognition approach: First, harmonisation of market access rules might lead to over-regulation, as there is a tendency to follow the stricter rules rather than the more liberal ones. The mutual recognition approach, in contrast, creates an incentive to the contrary, as it favours more liberal market access rules. Second, harmonisation also leads to the elimination of regulatory competition, as the bottom-up innovation potential is strongly inhibited. Lastly, the development of uniform rules takes a long time while the mutual recognition can enter into effect without further ado.

37 In a federal system, both approaches represent regulatory advantages and disadvantages. With a view to creating an internal market, the federal legislator has therefore opted for a combined approach that offers the greatest possible flexibility. With the IMA, the federal legislator has chosen an approach that best respects cantonal autonomy: Within the limits of overriding rules, cantons (and municipalities) remain free to regulate economic sectors and activities as they see fit but have to recognize economic authorisations issued in other cantons as equivalent. However, both the federal legislature and the

[34] RHINOW *et al.*, § 7 N 17.
[35] RHINOW *et al.*, § 7 N 23.

cantons have instruments at their disposal with which they can harmonise certain economic sectors or activities where such a need exists.[36]

III. The Need for an Internal Market

1. The Acceleration Triggered by the Opening to the European Single Market

Following the rejection of the Agreement on the European Economic Area in 1992, the Federal Council launched a programme for the renewal of the market economy. 38

> As a member of the European Free Trade Agreement (EFTA) Switzerland took active part in the negotiations of the European Economic Area (EEA). On December 6, 1992, the Swiss electorate cast its ballot in a popular vote and rejected EEA membership by a slim 50.3% (23'836 votes) majority, and with a record high voter turnout of 78.7%. The vote followed a campaign fought with exceptional intensity and ferocious vigour on both sides, making it one of the most polarising votes in Swiss history. The victorious opponents of the referendum successfully framed the EEA accession as a fundamental question affecting Switzerland's very sovereignty. The vote also revealed a deep rift between the French-speaking cantons voting yes and almost all German-speaking cantons rejecting the referendum[37], as well as a deep divide between the urban and the rural regions of the country. Following the rejection of the EEA membership, Switzerland started to negotiate bilateral agreements with the EU. 39

The aim of the programme for the renewal of the market economy was to intensify competition by removing market entry barriers, quantitative restrictions and price regulations[38] and consisted of a legislative package[39] with the Federal Act on the Internal Market being one of the central cornerstones. The technical purpose of the Internal Market Act was to remove obstacles to competition originating from cantonal or municipal laws and barriers to inter-cantonal mobility, as both abetted the emergence of closed regional submarkets.[40] By focusing on reducing restrictions on free access to the market under cantonal and communal public law, the Internal Market Act supplements the Federal Act on Cartels, which was also part of the legislative package and deals with private law restrictions of competition.[41] On a political scale, the Internal Market Act should significantly contribute to unifying the internal market in order to achieve compatibility with the requirements of the European single market. Despite the EEA rejection, it was deemed economically crucial to set up internal market conditions, which comply with the European single market requirements in order to ensure a future participation of some kind in the latter.[42] 40

[36] See for this discussion ZWALD, N 17-19 and DE CHAMBRIER, p. 78-82.
[37] BBl 1993 I 167 ff.
[38] BBl 1993 I 805, p. 823; OESCH/ZWALD, Art. 1 N 1.
[39] The legislative package consisted of the Federal Act on Cartels and other Restraints of Competition, Federal Act on Technical Barriers to Trade, Federal Act on Public Procurement and the Federal Act on the Internal Market.
[40] BBl 1995 I 1213, p. 1213 and 1228.
[41] LPC 2013/1, p. 61.
[42] BBl 1993 I 805, p. 829.

2. The Importance of International Agreements on Mutual Market Access and the Effects on the Swiss Internal Market

41 The economic relationships between Switzerland and the European Union are governed by a whole set of bilateral agreements and arrangements concluded over the years after Switzerland's rejection of becoming a member to the EEA. The agreements create an extensive mutual market access in specific and numerous economic areas. Indeed, the EU is by far the most important trading partner for Switzerland. Two thirds of Swiss foreign trade take place with the EU (52% of Swiss exports (2018: around CHF 121 billion) go to the EU. Conversely, 70% of Swiss imports (2018: around CHF 142 billion) come from the EU.[43]

42 The closely intertwined economic relations by way of bilateral agreements influence the Swiss internal market to a great extent. This can be best illustrated by the free movement of people and the requirements regarding the recognition of certificates of qualification:

43 > The agreement with the EU on the Free Movement of Persons obliges cantons to treat European certificates of qualification for professions governed by cantonal law in accordance with the recognition procedure under EU law.[44] This would have led Swiss citizens with a profession covered by the Agreement on the Free Movement of Person being treated less favourably than EU citizens with regard to general Swiss market access, as they would still have been subject to different cantonal recognition procedures, which hinder the free exercise of their profession. On the occasion of the partial revision of the Internal Market Act in 2005, the federal legislator therefore introduced a new provision according to which the recognition of cantonal certificates of qualification for professions covered by the Agreement is to take place in accordance with the EU recognition procedure (Art. 4 para. 3bis IMA). This means that the same rules of recognition now apply for both inter-cantonal and bilateral recognition of qualifications and that reversed discrimination is no longer possible.[45]

44 The obligations stemming from the bilateral agreements with the EU have a great impact on the legislation in Switzerland given that the level of economic integration guaranteed by the agreements is much deeper than with usual forms of bilateral and multilateral economic cooperation. Like all international obligations, the bilateral treaties with the EU are binding on all tiers of government and limit the regulatory space cantons would otherwise have. All internal market regulations have to take obligations arising from international agreements into account and can be challenged in case they do not.

45 Bilateral Free Trade Agreements work in a similar yet much more indirect way. Under a Free Trade Agreement equal market access is usually guaranteed to foreign suppliers throughout the whole country whilst non-local domestic suppliers from other cantons might still face considerable obstacles to competition when it comes to inter-cantonal trade due to cantonal and municipal laws.[46] In order to treat domestic suppliers that are in direct competition with international market participants no less favourably, efforts are usually undertaken to provide for them the same market access as their inter-

43 Cf. Eidgenössisches Departement für auswärtige Angelegenheiten, Direktion für europäische Angelegenheiten, Die Europapolitik der Schweiz: Informationsblatt (Juli 2019), <https://www.eda.admin.ch/dam/dea/de/documents/fs/00-FS-Europapol-lang_de.pdf>, (accessed August 12, 2019), p. 4.

44 Cf. Annex III of the Agreement on the Free Movement of Persons between Switzerland and the European Union.

45 BBL 2005 465, p. 474 and p. 482; OESCH/ZWALD, Art. 4 BGBM N 4.

46 BBl 1995 I 1213, p. 1229 f.

national competitors enjoy. Therefore, the international layer supplements or partially replaces internal market regulations as it creates considerable pressure to enact legislations putting local competitors in a similar market situation.

Accordingly, a report of the Federal Office for Economic Affairs on the Internal Market in 1993 concluded that the most problematic economic sectors in terms of inter-cantonal market access were those, which were strongly oriented towards the internal market and inter-cantonal commercial trade and not exposed to international competition. The report identified, in total, eight of such highly problematic economic sectors, which covered medical professions, sanitation trades, opticians, lawyers, taxi trade, hospitality industry, itinerant trade and real estate.[47] It comes as no surprise that for three of these economic activities, the federal legislator decided in the early 2000s to harmonise rules by enacting federal laws that should facilitate the free movement of workers. These economic activities are thus governed by federal laws and no longer by the IMA.[48] 46

The Internal Market Act responds to international competition by establishing a principle of non-discrimination against nationals. In order to prevent situations in which foreign market participants are legally better off than their Swiss counterparts due to international treaties, Art. 6 IMA states that all persons with a commercial establishment or a registered office in Switzerland should have at least the same rights with regards to access to the market as those granted by the Confederation to foreign market participants under international agreements.[49] 47

IV. The Main Approach to the Regulation of the Swiss Internal Market: The Internal Market Act

A. The Regulatory Approach of the Internal Market Act

The IMA ensures that persons with a place of business or registered office in Switzerland have free and equal access to the market for the exercise of their gainful employment throughout the entire territory of Switzerland (Art. 1 para. 1 IMA). It facilitates professional mobility and commercial trade within Switzerland, supports the efforts of the cantons to harmonise the conditions for market authorisation and thereby strengthens both the competitiveness and the economic cohesion of Switzerland.[50] The IMA constitutes a framework law, which does not aim at undermining cantonal competences or unifying cantonal (and municipal) laws but rather lays down minimum standards the cantons have to comply with.[51] By doing so, the federal legislator was largely inspired by the case law of the European Court of Justice on the fundamental freedoms, whereby the principle of place of origin, which has been developed in the context of the Cassis-de-Dijon jurisprudence, gained central importance.[52] The regulatory 48

47 Cf. Report of the Federal Office for Economic Affairs on the Internal Market.

48 Cf. Federal Act on Freedom of Movement for Lawyers, the Federal Act on Medical Professions and the Federal Act for the Travel Industry.

49 OESCH/ZWALD, Art. 6 BGBM N 1.

50 GAMMENTHALER, N 7.

51 OESCH, (2013) AJP 1337, p. 1340; COTTIER/MERKT, p.459; cf. Decision of the Federal Supreme Court, BGE 136 II 470, consid. 3.3.

52 RHINOW *et al.*, § 5 N 58-60; cf. COTTIER/MERKT, p. 465-471, on the influence of international economic law and European law on the principles established in the IMA.

approach taken relies on two fundamental pillars – which should provide for sufficient incentives for the cantons to take the necessary steps for the full realisation of the internal market:[53]

49 1. *The principle of non-discrimination*: Cantons are not allowed to restrict market access based on the fact that market participants have their place of business or their seats in another canton. Local and non-local market participants from other cantons have to be treated equally.[54]

50 2. *Principle of place of origin* (a Swiss version of the Cassis-de-Dijon principle): Mutual recognition of the equivalence of cantonal and municipal market access regulations. Cantonal licensing requirements for the exercise of private economic activities are presumed to be equivalent.[55]

B. The Principles Governing the Internal Market Act

1. The Right to Market Access in Accordance with Rules of Origin (Art. 2 IMA)

51 Art. 2 IMA reflects the principle of place of origin and therefore ensures that cantonal licensing requirements for the exercise of private economic activities are presumed to be equivalent (Art. 2 para. 5 IMA). Up until the partial revision of the Internal Market Act in 2005, the principle only applied to *trade across cantons*, ensuring that if a private economic activity is permitted in the canton in which the provider has its registered office, he or she has had the right to exercise the activity in all cantons (Art. 2 para. 3 IMA).

52 A recent case in the Canton of Ticino highlights that imposing additional requirements has not only been in use in the past but continues to this day: In 2018, the Administrative Court of the Canton of Ticino upheld the appeals filed by the Competition Commission against the cantonal Commercial Enterprises Act (*Legge sulle imprese artigianali, LIA*).[56] The LIA provided for a mandatory, costly and time-consuming registration of skilled trades businesses. Notably, more than ten documents with supporting evidence had to be submitted for each registration (including *inter alia* extracts from the commercial register, criminal records, debt enforcement registers, insurance certificates as well as certificates of diplomas, study titles and references). The Cantonal Administrative Court regarded the requirements of the LIA as restricting free access to the market and as a breach of the IMA as the latter allows commercial enterprises to carry out economic activities in another canton if they already meet the personal and professional requirements at their place of origin.[57]

53 The partial revision of the Internal Market Act was initiated seven years after its entry into force. It was triggered by an evaluation report of the Control Committee of the National Council in 2000, in which it noted a gap between the objectives envisaged and the real impact of the Internal Market Act.[58] The report concluded that the Internal Market Act had not yet led to any noticeable opening of the internal market.[59] One of the main reasons identified for this was the narrow scope of application of the IMA which initially only covered commercial activities *across* borders. Therefore, the partial revision aimed

53 BBl 1995 I 1213, p. 1257; OESCH/ZWALD, Art. 1 BFBM N 6.
54 OESCH/ZWALD, BGBM Kommentierung, Art. 1 N 6; GAMMENTHALER, N 4; DE CHAMBRIER, p. 8.
55 OESCH/ZWALD, BGBM Kommentierung, Art. 1 N 6; GAMMENTHALER, N 4; DE CHAMBRIER, p. 8; In addition, to these principles, which govern market access across cantonal borders, the IMA deals with public bidding processes for concessions and cantonal procurements, cf. LPC 2019/1, p. 66.
56 The Competition Commission received over 50 enquiries relating to the LIA from companies from outside the Canton of Ticino, cf. LPC 2019/1, p. 66.
57 LPC 2019/1, p. 60.
58 BBl 2000 6027, p. 6040.
59 BBl 2005 465, p. 475.

at extending the principle of origin to commercial companies and professionals that wished to establish themselves permanently in another canton.[60]

54 This took place against the background of the jurisprudence of the Federal Supreme Court, which excluded the freedom of establishment from the scope of application of the IMA: The case concerned a complaint by a dental prosthodontist from Zurich who held a certificate of qualification issued by the Canton of Zurich. The complainant wanted to settle in the Canton of Grisons and exercise his professional activity. Based on cantonal law which prohibited the activity of an independent prosthodontist at that time, the Canton of Grisons refused him a license to practice.[61] The Federal Supreme Court argued that the place of origin approach only applied to non-local market participants in cases of commercial trade across cantons. However, the IMA did not regulate the situation where a person holding a certificate of qualification from one canton wishes to settle permanently in another canton where the profession is not permitted or subject to different cantonal or municipal rules that the person concerned does not comply with.[62]

After the partial revision of the IMA, the Federal Supreme Court reinforced the application of the federal law in two ground-breaking decisions in 2008. The first case concerned a lawyer who had moved from the Canton of Geneva to the Canton of Vaud and was prohibited from hiring a trainee as cantonal legislation prescribed that lawyers wishing to employ trainees had to have practised in the Canton of Vaud for a minimum of five years. The lawyer, however, was permitted to employ a trainee under cantonal laws from the Canton of Geneva. The Federal Supreme Court found that the regulation presented an unreasonable restriction of market access since the newly introduced art. 2 para. 4 IMA allows anyone who wishes to establish him- or herself permanently in another canton and carry out a gainful economic activity may do so in accordance with the regulations applicable in the first place of the permanent commercial establishment.[63] Another leading case concerned a woman who was authorised in the Canton of Grison to work as a psychotherapist but wanted to permanently establish herself and exercise her profession in the Canton of Zurich. According to cantonal licensing requirements she had the special training and the experience of practising as a psychotherapist but did not have the required basic education in the form of a university qualification in psychology. Therefore, the Public Health Directorate of the Canton of Zurich only granted her a licence under the condition that she would successfully complete the basic education in accordance to cantonal legislation. The highest Court was of the view that according to art. 2 para. 5 IMA market access regulations have to be regarded as equivalent despite divergent cantonal laws on the basic education required. The woman was, therefore, allowed to work as a psychotherapist in the Canton of Zurich without being subject to any further licensing conditions.[64]

2. The Right to Non-discriminatory and Unrestricted Market Access (Art. 3 IMA)

55 The Internal Market Act lays down a right to non-discriminatory market access. Cantons are not allowed to restrict market access based on the fact that certain market participants have their place of business or their seats in another canton. Local and non-local market participants have to be treated equally (Article 1 para. 1 in in conjunction with Art. 3 para 1 let. A IMA). However, free market access under the principle of place of origin does not apply in absolute terms. *Restrictions for non-local market participants are permissible*, provided that the cantonal or municipal regulations of the place of origin in a specific case provide for a considerably lower protection of public interests, such as the quality of

60 BBl 2005 465, p. 481; cf. also GAMMENTHALER, N 5.
61 Decision of the Federal Supreme Court, BGE 125 I 276.
62 Decision of the Federal Supreme Court, BGE 125 I 276, consid. 4 and 5.
63 Decision of the Federal Supreme Court, BGE 134 II 329, consid. 5.
64 Decision of the Federal Supreme Court, BGE 135 II 12, consid. 2.4 and 2.5; cf. LPC 2009/1, p. 57-58.

work, the protection of workers or the health of patients, than the cantonal or municipal regulations of the place of destination. Such restrictions comply with the IMA provided that they (i) apply equally to local market participants as well, (ii) are indispensable for the protection of overriding public interests and (iii) are proportionate (Art. 3 para. 1 IMA).[65] The conditions allowing for a derogation were introduced to the IMA as a way to balance the federal structure of the state with the requirements of the internal market.[66] The exception regime should provide cantons with sufficient regulatory space to legislate on issues they considered as being of overriding public interest while preventing them from following protectionist agendas. The partial revision of the IMA in 2005 aimed at tightening the conditions for admissible market access restrictions, without formally amending the requirements.[67]

56 The reform was deemed necessary because the conditions for admissible market access restrictions, together with the Federal Supreme Court's rather federalism-friendly case law, led to a fairly wide regulatory scope for cantons and municipalities to restrict free market access to non-local market participants from other cantons.[68] The presumption that the cantonal licensing requirements for private economic activity are equivalent could easily be undermined in the past and had therefore not achieved the intended effect of opening up the market.[69]

3. The Right to the Recognition of Professional Qualifications (Art. 4 IMA)

57 Pursuant to Art. 4 para. 1 IMA, cantonal or cantonally recognized certificates of qualification for the exercise of a gainful employment are valid throughout Switzerland, unless they are subject to restrictions pursuant to Art. 3 IMA. This provision supplements the principle of place of origin as it lays down the same rules for the cantonal recognition of certificates of qualification. It is intended to ensure that the Swiss internal market is not thwarted by different cantonal requirements in the case of gainful activities subject to permit. Ultimately, it should contribute to increase inter-cantonal mobility by facilitating market access.[70]

4. The Right to Non-discriminatory Access to Cantonal and Communal Procurement (Art. 5 IMA) and Monopoly Markets (Art. 2 para. 7 IMA)

58 The federal level does not have a comprehensive competence to legislate in the area of cantonal and municipal public procurement. It may only enact specific policies that are necessary for the creation of an internal market. For this purpose, Art. 5 IMA specifies certain minimum standard for cantonal and communal procurement: First, the procurement procedure must be carried out in a non-discriminatory way (Art. 5 para. 1 IMA). Second, complex projects as well as the conditions for participating and securing contracts in the bidding procedure must be made public (Art. 5 para. 2 IMA).[71] Lastly, restrictions on market access have to be issued in the form of a ruling, and cantonal law must provide for an avenue of appeal before an independent cantonal appellate authority (Art. 9 para. 1 and 2 IMA). The principle

65 Cf. RHINOW *et al.*, § 5 N 64.
66 Cf. RHINOW *et al.*, § 5 N 63.
67 BBL 2005 465, p. 482.
68 DE CHAMBRIER, p. 18-19; cf. COTTIER/MERKT, p. 453-456, for a historical overview of the jurisprudence of the Federal Supreme Court.
69 BBL 2005 465, p. 473-474.
70 RHINOW *et al.*, § 5 N 69; cf. the case mentioned above regarding the psychotherapist who wished to work in the Canton of Zurich, Decision of the Federal Supreme Court, BGE 135 II 12.
71 OESCH/ZWALD, Art. 5 BGBM N 1.

of non-discrimination and the transparency requirements set out in Art. 5 IMA are put into specific terms and implemented by the inter-cantonal Agreement on Public Procurement, which exists since 1994, and cantonal and communal procurement laws.[72]

Since its entry into force on 1 January 1996, the WTO Agreement on Government Procurement (GPA) has been the foundation of public procurement regulations in Switzerland. The international agreement contains substantial minimum requirements for the award of public contracts in the area of trade in goods and services as well as construction contracts. The implementation of the requirements set out in the GPA happens on different levels in Switzerland: While a specific federal law (Federal Act on Public Procurement) is concerned with the award of public contracts by the Confederation, public procurement otherwise remains largely within the competence of the cantons. The inter-cantonal Agreement described above is a means for cantons to facilitate the implementation of the GPA at cantonal level.[73] 59

C. The Enforcement of the Internal Market Act

1. The Role of the Competition Commission

The Competition Commission is an independent federal authority with a two-pillar structure.[74] First, there is the *Commission* itself which is appointed by the Federal Council.[75] The majority of the members of the Commission must be independent experts.[76] Currently, the Commission consists of 13 members. It has a three-member presiding committee and 10 members of which normally five are independent experts – usually professors of law or economics – and five represent business associations and consumer organisations.[77] The members of the Commission carry out these tasks on a part-time basis. 60

Second, the Commission is supported by a fully-fledged *Secretariat*. The Secretariat employs more than 70 employees and is divided into four divisions, each responsible for specific markets: product markets, services, infrastructure and construction. The Secretariat is headed by its Executive Board. In addition, the work of the Secretariat is supported by its Competence Centres in the fields of law, economics, internal market, international affairs and communications. 61

The size and the composition of the Commission itself is subject to criticism. Repeatedly, there are attempts to reduce the number of Commissioners significantly and to professionalise the Commission. Most authors advocate for a 17rofessionalization of the commission by forming a pure expert commis- 62

[72] LPC 2013/1, p. 63.

[73] Cf. the description regarding the inter-cantonal agreement on the website of the Swiss Conference of Directors of Building, Planning and Environmental Protection, <https://www.bpuk.ch/bpuk/konkordate/ivoeb/>, (accessed August 12, 2019).

[74] The aim of the structure is to separate the Commission and the Secretariat institutionally. This is considered crucial with regard to the Cartel Act, where the Commission takes *decisions* and the Secretariat carries out *investigations* into private restraints of competition. With regards to the internal market, the Competition Commission has no decision-making power but is tasked to monitor compliance with the IMA by the Confederation, cantons and municipalities. Thus, the institutional structure is less important in this field.

[75] The members of the Committee are elected for a term of four years. For each new term of office, general elections are held. The term of office is limited to a total of 12 years, but may be extended to 16 years in justified individual cases.

[76] Art. 18 para. 2 Federal Act on Cartels.

[77] There are no individual companies represented in the Commission. The following associations and interest groups are generally represented in the Commission with one member each: The Swiss Chamber of Commerce, the Swiss National Unions' Association, the Swiss Farmers' Union, Economiesuisse – a Swiss corporate union and a consumer organization.

sion in which no stakeholders are allowed to sit. This would help to avoid conflicts of interests and reduce the knowledge and power gap between the full-time Secretariat and the part-time Commission. However, reducing the number of commissioners and creating a Commission without stakeholders has proved politically unfeasible. Decision-makers seem convinced that the relatively high number of commissioners as well as the involvement of stakeholder representatives ensure a balanced mix between theorists and practitioners.[78]

In addition to the Competition Commission, which is concerned with the application of the Cartel and Internal Market Act, there are specific regulatory authorities for certain economic sectors, which in some cases also monitor and regulate competition in the areas assigned to them. These independent authorities are active in the fields of telecommunications, postal service, electricity market and non-discriminatory access to the rail network.[79]

2. The Supervisory Function of the Competition Commission in the Area of the Internal Market

63 The instruments of the Cartel Act and the Internal Market Act primarily ensure the protection of competition in Switzerland. The application of these laws is the responsibility of the Competition Commission.

64 The Cartel Act deals with the restriction of competition by private companies and applies to private or public undertakings that are parties to cartels or to other agreements affecting competition, which exercise market power or which participate in concentrations of undertakings.[80] In application of the Cartel Act, the Competition Commission decides on the appropriate measures as soon as there is an unlawful restriction of competition.

65 In the area of the internal market, the Commission is responsible for preventing cantonal restrictions on competition and distortions of inter-cantonal trade. Its task is to monitor compliance with the IMA by the Confederation, the cantons and the municipalities. The Commission's powers to enforce the internal market do not extend as far as those in the area of the Cartel Act, since it has no decision-making powers.

66 The reason for this is the division of competences in the field of the internal market: Since the IMA is a framework law, the responsibility of the cantons for regulating market access remains unaffected. If the Commission considers that certain cantonal or communal regulations distort market access or inter-cantonal trade, it cannot issue a binding order to lift these restrictions. Rather, this must be done by the cantonal or communal legislature itself.[81] Therefore, it cannot itself issue a decision, but can only appeal to the courts.

3. Soft Enforcement Instruments by the Competition Commission

67 As the Competition Commission cannot take decisions in the field of the internal market, it has other means of enforcement. First, the Commission provides for informal advice and *explanatory reports* by its Secretariat based on enquiries from authorities, businesses and self-employed people. Second, it may issue *recommendations* to the Confederation, cantons and communes on planned or already existing legislation or it may conclude an investigation with certain recommendations (Art. 8 para.2 and

78 BSK KG-BANGERTER, Art. 18 N 23-31.
79 BSK KG-BANGERTER, Vor Art. 18 -25 N 3-4.
80 Art. 2 para. 1 Cartel Act.
81 ZWALD, N 141.

3 IMA). Even though these recommendations are non-binding on the recipient, they have considerable political significance.[82] The Commission has a high level of competence in the field of the internal market. If the commissioners find that certain regulations restrict market access or inter-cantonal trade, cantons will expect to soon be confronted with judicial proceedings and act accordingly. The Commission's recommendations therefore operate as a preventive, non-binding review of cantonal or communal statues– or as a red flag. The cantons or municipalities are generally not very interested in taking the risk of the criticised market regulations being examined by the judicial authorities in long, resource-intensive proceedings, and most often comply with the recommendations.

68 In a leading case, the Federal Supreme Court in 2011 held, for example, that switchbord centres could not be prohibited from giving driving jobs to non-local taxi companies.[83] The Competition Commission used this judgement to issue a recommendation that specified the requirements of the IMA regarding taxi markets. In doing so, it examined the relevant laws in the Canton of Berne, Basel-Stadt and Basel-Landschaft as well as in the City of Zurich and Winterthur. It specified, however, that these laws served as an exemplary basis for the recommendations and that they are important for all cantonal or communal authorities throughout Switzerland that regulate market access regulations in the taxi industry.[84] Cantonal and communal legislators then took up the Commission's recommendation as a set of guidelines for regulating the taxi industry in accordance to IMA requirements. The City of Zurich has implemented, for example, the recommendations in its new Taxi Ordinance.[85]

69 In a proceeding, the Competition Commission may also issue an *expert opinion* on the application of the IMA at the request of a competent authority or a court (Art. 10 para. 1 IMA).

70 In 2017, the Federal Supreme Court gave the Competition Commission the opportunity to comment in six cases. The Competition Commission finally submitted four expert opinions. One was related to a case in which the Federal Supreme Court had to assess whether the label 'Geneva Region – Terre Avenir' (GRTA) is also available for bakery products in which the grain was ground outside the Geneva region.[86]

4. The Right to Appeal as a Mean to Enforce the Internal Market (Art. 9 para. 1 and 2bis IMA)

71 Until the revision of the IMA in 2005, only private entities affected by cantonal and communal market access restrictions had the right to appeal against them. In the past, the enforcement of the IMA was therefore dependent on individuals and private enterprises using the individual complaints to implement the IMA through binding court decisions. The law did not put in place any other instrument leading to binding decisions. In order to enable private actors to assert their rights effectively and speedily, the IMA obliged cantonal or communal authorising bodies to provide for a simple, rapid and cost-free market-access procedure (Art. 3 para. 4 IMA). In addition, the IMA required that cantonal laws provide for at least one appeal to an authority that is independent of the administration (Art. 9 para. 2 IMA).

72 However, the instruments originally developed to enforce the internal market did not produce the intended effects. Especially the strong focus on an individual right to appeal could not live up to its expectations as complaints by those affected have been largely absent. This was mostly due to the

82 LPC 2013/1, p. 61; OESCH/ZWALD, BGBM Kommentierung, Art. 8 N 3.
83 Decision of the Federal Supreme Court of 17 May 2011, 2C_940/2010.
84 LPC 2012/2, p. 438-439.
85 LPC 2013/1, p. 63.
86 LPC 2018/1, p. 68; cf. also Decision of the Federal Supreme Court of 2 November 2017, 2C_261/2017.

duration and cost of the proceedings and their uncertain outcome, having a deterrent effect on individuals who wanted to appeal. The IMA in its original version thus suffered from a rather severe implementation deficit. Because of the very limited jurisprudence, a need for clarification and a level of legal uncertainty persisted and continues to persist about the application and the scope of the IMA.[87] In addition, the small number of complaints also has had the consequence that cantons and municipalities hardly feel compelled to ensure the conformity of their regulations with the internal market.[88]

73 In order to reinforce the enforcement mechanisms of the IMA, the Competition Commission received an *independent right of appeal* when the IMA was partially revised in 2005. Since then, it has been able to obtain directly a ruling as to whether a cantonal or municipal decision restricts access to the market in an inadmissible manner.[89] The introduction of the Competition Commission's right of appeal should provide for a more effective instrument in order to resolve outstanding and central issues of market access by the courts and thereby advance the full realisation of the internal market.[90] For the time being, however, there is no clear evidence that the revision was sufficient to overcome the implementation deficit the IMA was suffering from. It is probably safe to say that cantons and municipalities continue to make and apply a plethora of norms regulating private economic activities, which are not or only marginally affected by the bilateral treaties between Switzerland and the EUT and other trade agreements. These legal differences between cantons, often enjoying considerable (direct) democratic legitimacy, are unlikely to phase out in the near future.

87 Cf. for some still unanswered questions DIEBOLD, p. 224
88 BBL 2005 465, p. 474.
89 LPC 2013/1, p. 61.
90 BBL 2005 465, p. 482.

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