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# The Legal 500 Country Comparative Guides

# Switzerland

# CARTELS


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This country-specific Q&A provides an overview of cartels laws and regulations applicable in Switzerland.

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# SWITZERLAND
# CARTELS

## 1. What is the relevant legislative framework?

The Federal Law on Cartels and Other Restraints of Competition (the Cartel Act) is the legislation regulating cartels in Switzerland. The regulatory framework is complemented by several federal ordinances. Furthermore, there are general notices and communications of the Competition Commission (the Commission) such as for example the Verticals Notice. These are however, not legally binding.

## 2. To establish an infringement, does there need to have been an effect on the market?

The Cartel Act is based on the principle of abuse. The mere existence of an anti-competitive agreement does in principle not mean that the agreement is unlawful. To be unlawful, an agreement must either eliminate effective competition or significantly restrict effective competition without being justified on economic efficiency grounds. The following horizontal and vertical restraints (hardcore restraints) are presumed to eliminate effective competition without actual effect on the market: (a) horizontal agreements that directly or indirectly fix prices; restrict quantities of goods or services to be produced, purchased or supplied; or allocate markets geographically or according to trading partners; and (b) vertical agreements that contain minimum or fixed resale prices; or foreclose geographical markets. The presumption is rebuttable if it can be shown that, as a matter of fact, effective competition is not eliminated by these agreements. However, hardcore restraints constitute significant restraints of competition by definition (per se) and are unlawful and lead to sanctions if they cannot be justified on economic efficiency grounds. For all other anti-competitive agreements it needs to be assessed as to whether they significantly affect competition (both quantitatively as well as qualitatively) and if yes, whether they can be justified on economic efficiency grounds. Only hardcore restraints (even if they can be rebutted) may trigger direct sanctions under the Cartel Act.

## 3. Does the law apply to conduct that occurs outside the jurisdiction?

The Cartel Act applies to all concerted practices and agreements that have a direct, substantial and reasonably foreseeable effect within Switzerland (effects doctrine). The mere possibility of effects is sufficient. Therefore, agreements concluded abroad or conduct that takes place outside Switzerland but that has such effects in Switzerland may fall under Swiss jurisdiction. In its practice that has been confirmed by the Courts, the Commission imposed severe sanctions on Nikon and BMW because their European dealer agreements contained provisions prohibiting exports to countries outside the EEA.

## 4. Which authorities can investigate cartels?

The relevant authorities are the Commission and the Secretariat of the Commission (the Secretariat). They are independent of the federal government. The Commission is the deciding body in cartel matters, while investigations are conducted by the Secretariat. The Secretariat also prepares the Commission’s decisions, i.e. it sends out requests for information, writes draft decision (equals procedurally the Statement of Objections in the EU) and prepares the hearing before the Commission.

## 5. What are the key steps in a cartel investigation?

In some cases, the Secretariat may conduct a market observation. This is an informal proceeding. In this phase, the Secretariat has no investigative powers and the companies usually have no duty to cooperate. Accordingly, market observations can also be terminated informally without issuing a decision. A formal cartel

 

investigation is in general a two-staged procedures consisting of a first stage preliminary investigation that may be followed by a second stage in-depth investigation. Nevertheless, the Commission may open an in-depth investigation even without going through a preliminary investigation. The Secretariat may open such a preliminary investigation either at its own initiative, at the request of companies concerned (competitors) or in response to a complaint from third parties. It is at the discretion of the Secretariat to open a preliminary investigation. In the preliminary investigation, the Secretariat may allow the companies concerned to comment on a complaint, send questionnaires to them or propose measures to eliminate or prevent restraints of competition. However, during the preliminary investigation procedure, there is no right to inspect the files. There are no deadlines and the specific steps depend largely on the case and are at the discretion of the Secretariat. An in-depth investigation will be opened directly (e.g. in case of dawn raids) or following the preliminary investigation if there are indications of an unlawful restraint of competition. The Secretariat publishes the opening of an investigation in the Swiss Official Gazette of Commerce SOGC as well as on the Commission's official homepage. The investigation by the Secretariat is concluded with a proposed draft decision by the Secretariat (equals procedurally the Statement of Objections in the EU). Formally, the decision itself is not issued by the Secretariat, but by the Commission. The parties involved in the investigation may comment on the Secretariat's proposed draft decision in writing. The written statement of the companies involved is usually followed by an oral hearing by the Commission. The purpose of this hearing is to give the parties the opportunity to present their main arguments again directly to the Commission. Often, the Commission also uses the hearing to ask questions that are still open. The duration of the investigation depends largely on the case and can take many years.

## 6. What are the key investigative powers that are available to the relevant authorities?

The Secretariat has broad investigative powers during an investigation. It may send requests for information to the companies concerned as well as to third parties (such as competitors, customers or suppliers), ask for statements and interrogate parties and witnesses. The parties to the investigation are, in principle, required to disclose information and documents. The Commission has the power to order inspections/dawn raids and seizures. The dawn raid itself is carried out by the Secretariat and the Secretariat has the right to search all types of premises, both business premises and private apartments, and all types of devices. In the field of electronic data, the search authorisation extends to all data that can be accessed from within the searched premises irrespectively of the actual place of storage. The Secretariat often conducts interrogations of directors/employees already during the dawn raid. The companies concerned have an obligation to tolerate the dawn raid passively and not to obstruct the investigative activity. Companies subject to a dawn raid have the right to be assisted by external lawyers. The representatives of the Secretariat in charge of the investigation will not wait for the external lawyer to arrive before searching the premises or seizing documents and electronic data. Any evidence discovered while external lawyers are not present will be separated. Once an external lawyer is on site, he or she may screen the evidence collected in his or her absence, comment on its content and, if necessary, ask for it to be sealed.

## 7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?

The legal privilege applies only with regard to lawyers who are entitled to represent the person before Swiss courts in accordance with the Lawyers act, i.e. independent attorneys admitted to the Swiss bar. This excludes in-house counsels, who cannot invoke the legal privilege and professional confidentiality. Objects and documents containing legally privileged information may not be confiscated and do not require production, provided the lawyer himself is not accused of the same conduct. It is irrelevant, where the documents are situated (be it in the possession of the company or the lawyer).

## 8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?

A company that cooperates with the Commission in view of the discovery and the elimination of a restraint of competition may benefit from total or partial immunity. There are no statutory deadlines for applying for immunity or leniency. However, only the first applicant may enjoy total immunity. Immunity and leniency applications may be submitted orally (paperless proceeding). Anonymous leniency applications are allowed, although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis. Total

 

immunity requires the companies to (i) provide new information enabling the Commission to open an in-depth investigation (disclosure cooperation); or (ii) submit new evidence enabling the Commission to find a hardcore horizontal or vertical agreement, provided that no other company has already been granted conditional immunity (identification cooperation). In addition, the company has to fulfill further conditions (no instigating role, continuous cooperation, abandoning of the infringement). It is disputed as to whether the leniency applicant must admit its involvement in an unlawful agreement and admit effects on the market. In addition, no fine will be imposed if the company itself notifies the restraint of competition before it produces any effects (notification procedure).

## 9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?

In order to get partial immunity the company has to notify its participation in a restriction of competition and to cooperate unsolicited in the proceedings. The sanction may be reduced by up to 50% depending on the importance of the company's contribution to the success of the proceedings.

## 10. Are markers available and, if so, in what circumstances?

Markers are available and may be applied for, preferably by email. It is also possible to place the marker in person, to send it by mail or to make an oral statement (paperless proceeding) on record at the premises of the Secretariat in Bern. Further, in 2019 the possibility of an e-marker was introduced. The e-marker is also paperless as it can be submitted to the Commission via the form on the Commission's website. Therefore, no confirmation email is triggered after the marker is set. As the Secretariat is not available outside office hours, there is some uncertainty when setting an e-marker. It is not possible to set a marker via telephone. There are no statutory deadlines for applying or perfecting a marker. Anonymous markers are possible although the leniency applicant will be required to reveal its identity within a specific time frame established by the Secretariat on an ad hoc basis.

## 11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?

All leniency applicants are under an obligation to continuously cooperate with the competition authority throughout the whole procedure without restrictions and delay. In practice, companies must answer questionnaires and provide newly discovered evidence to the authorities immediately. If a company disputes its involvement in an unlawful agreement for which it filed a leniency application, the Commission may consider this a breach of the cooperation requirement. Even though, there is no express obligation to keep the identity of the leniency applicant confidential, in practice, the Secretariat does so until the draft decision is issued.

## 12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?

The competition authorities may not impose direct criminal sanctions on individuals (see below, question 6.1).

## 13. Is there an 'amnesty plus' programme?

Yes. The reduction can amount up to 80% if a company provides unsolicited information or presents evidence of further infringements of competition law ("Bonus Plus"). This information or evidence must be such that it meets the usual conditions (see above, question 3.1).

## 14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?

The Secretariat may propose settlements to the companies involved concerning ways to eliminate the restraint of competition. A settlement requires formal approval of the Commission (no court approval required). The settlement may include a proposal of the range of the fine as only the Commission can decide on the fine. Settlements are binding on the parties and the Commission, and may give rise to administrative and criminal sanctions in the case of a breach of any of its provisions by the parties. The procedure for a settlement starts with the Secretariat or the parties expressing their interest in a settlement. Typically, this is the moment when parties submit commitments. The Secretariat then sends the standardised framework conditions to the parties who have to agree thereto. The Secretariat also provides for a draft settlement, which is the basis for the "negotiations". In its current practice, the Secretariat insists on a quasi-waiver with regard to an appeal of the settlement decision. The agreed settlement is part of the

 

draft decision written by the Secretariat. If the Commission (or its Chamber) approves the settlement, it becomes binding and will be published. Hybrid proceedings are possible and have become more recent in the past few years. In the case of sequential hybrid proceedings (i.e. first a settlement decision and a decision in ordinary proceedings later) the Commission established an independent Chamber for partial decision which approves the settlement.

## 15. What are the key pros and cons for a party that is considering entering into settlement?

Possible advantages: (i) A reduction of the fine of 5-20% (depending on how early in the process the settlement occurs), (ii) shorter proceedings, (iv) lower costs and (iii) shorter decisions leading to lower exposure with regard to any follow-on damage claims.

Possible disadvantages: (i) The amount of the fine cannot be negotiated and (ii) implicit acknowledgement of guilt.

## 16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?

The competition authorities are bound by the rules on official secrecy and may use information obtained in the performance of their duties only for the purpose for which it was obtained or for the purpose of the investigation. Any information exchange needs a legal basis and must be assessed in the individual case. The Cartel Act contains a provision only with regard to the Price Supervisor, who can be provided with any information required for the accomplishment of its duties by the competition authorities. With regard to foreign competition authorities the Cartel Act states that data may only be disclosed to a foreign competition authority based on an act, an international agreement or with the consent of the company concerned. The competition authorities shall notify the company concerned and invite it to state its views before transmitting the data to the foreign competition authority. Switzerland has entered into an agreement with the European Union concerning cooperation on the application of their competition laws (the EU Cooperation Agreement), which contains further details. Special rules regarding the delivery of sovereign acts such as sanction decisions or the prohibition of a certain behaviour are regulated in a separate exchange of notes between Switzerland and the EU. In addition, the Cartel Act contains a specific provision with regard to investigations in proceedings under the Swiss/EC Air Transport Agreement. The EU and the Commission provide each other with all necessary information and assistance in the case of investigations, which the other authority carries out under its respective competences as provided in the Air Transport Agreement. The Agreement on Free Trade and Economic Partnership between the Swiss Confederation and Japan provides for full cooperation with regard to competition issues. Upon request, the national authorities may transmit information which is in their possession and which is relevant for the execution measures of the competition authority of the other state. However, the passing on of confidential is excluded from the cooperation. Settlements or leniency applications in other jurisdictions have no legal influence in Switzerland since the Secretariat conducts an independent investigation and legal assessment. The EU Cooperation Agreement excludes any exchange of information under the leniency or settlement procedures, unless the company, which provided the information, has given its express consent in writing.

## 17. What are the potential civil and criminal sanctions if cartel activity is established?

Agreements infringing the Cartel Act, irrespectively of whether they may trigger direct sanctions are totally or partially null and void as of the moment they were entered into (ex tunc). Direct sanctions (fines) are imposed on companies that participate in a hardcore restraint (see above, question 1.2). The maximum administrative sanction is a fine of up to 10% of the turnover realised in Switzerland during the preceding three financial years (cumulative). Furthermore, a company that violates an amicable settlement or a decision can be fined up to 10% of the turnover it achieved in Switzerland in the preceding three financial years. Finally, a company that fails to provide information or produce documents, or that only partially complies with its obligations during an investigation, can be fined up to 100’000 Swiss francs which is however, rare. There are no direct criminal sanctions for individuals for cartel activities in the Cartel Act. However, individuals acting for a company, which violates a settlement decision, any other enforceable decision or court judgment in cartel matters, may be fined up to 100’000 Swiss francs. In addition, individuals who intentionally fail to comply or only partly comply with the obligation to provide information during an investigation can be fined up to 20’000 Swiss francs. The Swiss Public Procurement Act provides that the contracting authority may exclude companies from an ongoing procurement procedure or delete them from a

 

list of qualified companies in cases of cartel conduct. In addition, several cantonal procurement acts provide that companies may be banned from participating in procurement procedures for a period of several years in cases of cartel conduct. Individuals involved in cartel conduct in public procurement proceedings may be subject to direct criminal sanctions under the Swiss Criminal Code, particularly for fraud, bribery and forgery of documents.

## 18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?

The amount of the fine is calculated by taking into account the duration and gravity of the unlawful agreements or practices, as well as the presumed profit arising from the unlawful agreements or practices. Aggravating factors (such as recidivism, a leading role in the cartel or non-cooperation with the authorities) or mitigating factors (such as a passive role in the cartel, effective cooperation with the authorities or settlement) also have an influence on the final amount. In its recent practice, the Commission has decided that compensation payments to injured parties of a competition law infringement, which are made under civil law and prior to a decision of the Commission, are to be taken into account as sanction mitigating factor (see below, question 7.1). The highest sanction the Commission ever imposed was around 157 million Swiss francs against BMW restricting parallel imports to Switzerland.

## 19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?

If the company is controlled by another entity, the unlawful practice is attributed to the controlling entity, which is jointly and severally liable with its subsidiary. According to a recent decision of the Federal Administrative Court, the shier possibility of exercising control shall be sufficient for the establishment of joint and several liability, while an actual exercise of effective control shall not be required. As an appeal has been filed, the Swiss Federal Supreme Court will have to decide on this issue.

## 20. Are private actions and/or class actions available for infringement of the cartel rules?

Third parties impeded may request the elimination of the unlawful agreement, injunctions, damages or restitution of unlawful profits before the civil courts. However, contrary to the proceedings before the Commission the burden of proof for all requirements in civil proceedings is with the claimant. Thus, the strength of the claim depends on the concrete proof the claimant has. Furthermore, Swiss law does not provide for an actual discovery procedure.

Under Swiss law, the main hurdles are providing concrete proof of the damage incurred, as the passing-on defence is possible, and establishing a sufficient nexus between the anticompetitive agreement and the damage. Court costs and legal costs (calculated relative to the amount of the claim) must usually be borne by the losing party and a limitation period of one year as of knowledge of the damage and the infringing party applies. Consequently, civil proceedings are very rare in Switzerland.

Swiss law does not recognise the possibility of a class action. This means that someone can only act as a claimant if he himself has suffered damage or if all claims of the injured parties have been duly assigned to him. This is a question of the active legitimation (locus standi, “Aktivlegitimation”) of a party. This is, under Swiss law, a question of substantive law and must therefore be assessed under Swiss law.

The Swiss Parliament, however, has instructed the Federal Council to prepare a legislative amendment in order to adopt a group settlement procedure and an expansion of group actions into the Swiss Civil Procedure Code. Further, in an effort to enforce civil law claims, the Commission has decided that compensation payments to injured parties of a competition law infringement, which are made under civil law and prior to a decision of the Commission, are to be taken into account as sanction mitigating factor. With its new practice, the Commission introduced civil damages into the administrative cartel procedure, thus circumventing the difficulties of obtaining damages in civil cartel procedures. *In the case in question, compensation payments in the amount of approx. 6 million Swiss francs made by the members of a bid-rigging cartel to the injured parties of the competition law infringement (Canton of Grisons and municipalities of Grisons) led to a reduction of the sanctions imposed by the Commission by approx. 3 million Swiss francs.*

## 21. What type of damages can be

 

### recovered by claimants and how are they quantified?

The claim is limited to the damage actually incurred; no punitive damages are available in Switzerland. Further, passing-on defences are not excluded. However, a claimant may request the remittance of illicitly earned profits.

### 22. On what grounds can a decision of the relevant authority be appealed?

Final decisions of the Commission can be appealed before the Federal Administrative Court, which has full cognition regarding the facts and legal assessment. An appeal against interim orders such as decisions regarding the status of third parties or access to the files is subject to more restrictive conditions. The final decisions of the Federal Administrative Court can be appealed before the Federal Supreme Court. Again, an appeal regarding interim orders such as for example referral of the decision back to the Commission is subject to more restrictive conditions. Before the Federal Supreme Court, the appellant may only contend a violation of federal, cantonal or international law. The establishment of the facts may be challenged only if it is manifestly incorrect or based on an infringement of law and if it may be decisive for the outcome of the proceedings. New facts and evidence may only be presented to the extent that the decision of the lower court gives rise to them. New motions are inadmissible.

### 23. What is the process for filing an appeal?

The fully reasoned appeal against the decision of the Commission must be filed within 30 days of notification of the fully reasoned ruling with the Federal Administrative Court. The appeal has suspensive effect (i.e. any sanction in particular does not have to be paid until the decision of the appeals court). The proceeding before the Federal Administrative Court is a written one albeit the court may conduct hearings. The Federal Administrative Courts issues a new decision in the case or in exceptional cases (in particular if investigative steps are lacking) refers the case back to the Commission and issues binding instructions. The appeal against the decision of the Federal Administrative Court must be filed within 30 days of the notification with the Federal Supreme Court. The appeal before the Federal Supreme Court has no suspensive effect by law but can be requested by the appellant. The court proceeding is a written one. However, the court is free to hold a public debate on the decision at its discretion. This happens relatively often in antitrust cases, as they often concerns questions of principle.

### 24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?

The leading decision regarding unlawful agreements is the Gaba decision (also known as the toothpaste case). According to the Commission, the manufacturer of the toothpaste Elmex had prevented its licensee in Austria (Gebro Pharma GmbH) from exporting its products from Austria to another country, which restricted sales to Switzerland. The Commission qualified the contractual ban of exports as a hard-core restriction which is per se subject to fines. Both the Federal Administrative Court and the Federal Supreme Court upheld the Commission's decision including the fine of 4.8 mio. Swiss francs in 2014 and 2016 respectively (the reasoning was however, not available until 2017). This decision has resulted in a similar approach to the EU practice and leads to an increased focus on the justification of a restraint and no longer on the lack of effect. This strict approach has been confirmed by the Federal Supreme Court in its BMW decision in 2017 and its Altimum SA decision in 2018. Nevertheless, based on the recent practice of the Secretariat which is however, not binding for the Commission, it seems that the strict approach taken in the Gaba case is loosened slightly. In a recent case the Secretariat did not apply the strict Gaba approach to joint purchase agreements and indicated that also actual effects have to be taken into account, at least if the parties do not have market power on the supply or the sales side. It remains to be seen, whether the Secretariat is willing to make more exceptions.

Further, in July 2014, the Commission opened an investigation against several Swiss car leasing companies, e.g. BMW Finanzdienstleistungen (Schweiz) AG, FCA Capital Suisse SA (formerly: Fidis Finance (Schweiz) SA), Ford Credit (Switzerland) GmbH, Opel Finance SA (formely: GMAC Suisse SA) or Mercedes-Benz Financial Services Schweiz AG for alleged price fixing. In July 2019, the Commission imposed fines against seven of the aforementioned car leasing companies in the total amount of CHF 30 million based on amicable settlement agreements. According to the Commission, the car leasing companies had developed a system for the exchange of information on interest rates. Mercedes-Benz Financial Services Schweiz AG, the whistleblower, was granted full immunity from fines. Ford Credit Switzerland GmbH is the only party, which did not settle and decided to continue the investigation in the ordinary procedure. The investigation is still ongoing. The case is

 

interesting as the Commission, contrary to its ASCOPA decision of October 2011, is of the view that the agreements qualify as hardcore restrictions (agreement on prices). In ASCOPA the companies (manufacturers, importers) had exchanged gross sales prices, gross turnovers and advertising costs with each other via their association ASCOPA. The exchange primarily included historical but also current information. The ASCOPA decision is currently still pending before the Federal Administrative Court.

## 25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, impact of COVID-19 in enforcement practice etc.)?

While for many years the focus of the Commission was primarily on vertical price fixing agreements and vertical territorial foreclosure (in particular restrictions on direct or parallel imports from the European Economic Area into Switzerland), there is an increased focus on cartels (horizontal agreements between competitors; in particular suspected bid-rigging in public and private procurement matters). Also, the Commission maintained a focus on bid rigging, sanctioning an agreement in the area of optical networks and opening a new investigation into possible agreements in the construction sector. Further, the Secretariat is not affected by the Covid-19 crisis. In March 2020 the Commission issued a press release “Cartel law applies during Corona crisis”. In it, companies are reminded that antitrust law also applies during the crisis. Switzerland has not introduced any special provisions and the Commission does not seem to be restricted in its activities by the crisis. The Commission conducted dawn raids against several trading companies due to possible agreements in summer 2020.

Further, the trend towards a tightened practice that started with Gaba in the matter of the Elmex toothpaste continued. In particular, we observe (i) that for agreements the qualification as type of agreement (either vertical or horizontal) is becoming less important and (ii) the practice regarding exclusivity clauses is being further tightened. In the French-language book market case, the Federal Administrative Court issued nine judgments in October 2019, which confirmed the Commission’s decision. A peculiarity of the nine cases is the wording of the investigated exclusivity clauses. They did not provide for an exclusion or restriction of passive sales. However, under the concept of “proof by indication”, it was concluded that the exclusivity clauses were to be qualified as hardcore restraints because there were sufficient indications of a restriction of parallel imports, or restriction of passive sales, on the downstream market. If the decisions were to be confirmed Federal Supreme Court, the practice on hardcore restraints would be further tightened.

Also, the trend towards more amicable settlements continues. Of particular interest are three investigations: the Forex investigation, the Yen Libor and Euroyen Tibor investigation, and the automobile leasing investigation. In all three investigations, not all parties to the proceedings were part of the settlement agreement and, thus, the investigations that have been ongoing since 2010 and 2014 will continue – in the Forex and automobile leasing investigation for only one party – in an ordinary procedure and will result in an ordinary decision only for the non-settling parties.

In addition, there is an increased focus of the Commission on damages compensation. As shown, the Commission found in a bid-rigging case a mechanism to encourage the parties to pay damages (see above, question 7.1). The Commission also recently mentioned that improving the situation of those suffering damages is on its agenda for the years to come.

## 26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?

In terms of new legislation, the Federal Council has mandated the Federal Department of Economic Affairs, Education and Research in February 2020 to prepare a consultation draft on the revision of the Cartel Act. An important part of the upcoming revision will be the planned introduction of the Significant Impediment to Effective Competition-Test (SIEC-Test) as the relevant standard for merger control proceedings. The fundamental difference between the current dominance test applied in Switzerland and the SIEC test to be introduced lies in the threshold for intervention. With the SIEC test, notified mergers may be prohibited or be subject to conditions and obligations if they lead to a significant impediment to competition. Under the current test, this is only possible if effective competition is eliminated. Other elements of the envisaged revision are regulatory deadlines for the competition authorities and courts, party compensation also for proceedings before the Commission, and a strengthening of civil antitrust law. However, the legislative process has only begun and it is not expected that any of these reforms will come into force before 2022.

Furthermore, the Swiss Parliament has adopted the

 

counter-proposal to the Fair Price Initiative, introducing three novelties. First, the concept of relative market power will be introduced. The concept extends the prohibitions previously applicable only to market dominant companies, such as for example the abusive refusal to supply goods or the abusive discrimination between trading partners in relation to prices, to companies with so-called “relative market power”. A company is considered to have “relative market power” if other companies depend on it with respect to the supply of or demand for a product or service in such a way that there is no sufficient and reasonable possibility to switch to other companies; high market shares are no longer necessary. Second, a further type of abusive practice will be introduced, prohibiting companies (both marked dominant and with relative market power) to restrict customers from purchasing goods or services offered in Switzerland and abroad at local prices and conditions, thus introducing a new obligation to supply from abroad. Finally, geo-blocking in e-commerce will be prohibited. Accordingly, online retailers are not allowed to restrict their access to an online platform or redirect customers to a Swiss website with higher prices. It is expected that the new rules will have far-reaching consequences for companies. A larger number of companies will be subject to the prohibition of abusive behaviour. Therefore, it is likely that also medium-sized and smaller companies will increasingly be confronted with Art. 7 of the Cartel Act by their contractual partners. Also, both the new concept of “relative market power” as well as the new type of abusive practice encompass Swiss companies and purely Swiss situations. However, there are no direct sanctions for an abuse of “relative market power”. Nevertheless, in the event of a violation of a decision prohibiting such a behaviour, sanctions can be imposed. In addition, civil law claims are also possible. The new regulation will come into force later this year or early next year.

Further, the Federal Administrative Court is expected to issue its decision in the sanction proceeding against sanitary wholesalers this year. In 2015, the Commission imposed fines in the total amount of CHF 80 million on the members of an alleged sanitary wholesaler cartel. According to the Commission, the majority of the sanitary wholesalers participating in the alleged cartel shall have agreed on gross prices. The companies concerned lodged an appeal with the Federal Administrative Court against the Commission’s sanction decision. In January 2020, hearings took place before the Federal Administrative Court.

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