

ComCo specifies new rules on market power effective as of January 1, 2022

Shortly before the new rules in the Cartel Act on "relative market power" come into force, the Swiss competition authorities have published a guidance paper and a notification form on the new "relative market power" rules in Switzerland.

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| EXPERTISE | Competition and Regulated Markets | |

Introduction

In March 2021, Parliament adopted the counter-proposal to the so-called Fair Price Initiative. The counter-proposal contains, in particular, provisions in the Cartel Act ("**CartA**") on "relative market power", which will come into force on **1 January 2022**. Yesterday, the Secretariat of the Competition Commission ("**ComCo**") published (with ComCo's acknowledgement) a guidance paper and a notification form on these provisions.

Pro Memoria: Concept of "Relative Market Power" and Purpose of the Guidance Paper

The concept of "relative market power" extends the prohibitions of abuse previously applicable only to dominant undertakings, such as abusive refusal to supply or price discrimination (see Art. 7 CartA), to undertakings with "relative market power".

"Relative market power" exists when a business partner is "dependent" on another undertaking for the demand or supply of a product or service, i.e. there is no "*sufficient*" and "*reasonable*" alternative.

Unlike dominant undertakings, relatively dominant undertakings **cannot be sanctioned directly** for abusing a position of "relative market power". However, such undertakings are at risk of antitrust investigations and civil lawsuits.

With the guidance paper and the notification form, the competition authorities attempt to specify the rules, which are open to interpretation.

Overview of the Material Provisions and Initial Interpretative Aids

On the one hand, the guidance paper contains general explanations on the concept of "relative market power" and on the substantive rules.

For example, the competition authorities clarify that only undertakings (and not consumers) can invoke the regulations and briefly summarise which types of conduct are unlawful for undertakings with relative market power.

ComCo further specifies when alternatives are "*sufficient*" and "*reasonable*":

- According to the guidance paper, they are "*sufficient*" if, based on objective criteria, other offers are available that can also adequately satisfy the undertaking's needs.
- They are "*unreasonable*" if they are ruled out as an alternative due to individual characteristics (such as specific investments in connection with a business relationship) of the dependent undertaking.

The competition authorities further clarify that, as a rule, an undertaking can only invoke the allegation of relative market power if it has already **unsuccessfully** tried to find reasonable alternatives beforehand.

Practical Implementation

The guidance paper also contains information on how the new provisions will be handled in practice and on the procedure.

ComCo confirms that it does not plan to leave the application of the new provisions up to the civil courts. Rather, it intends to take a leading role, be it as a contact partner, as an expert in civil proceedings, or as an investigating authority. It plans to ensure a uniform interpretation of the new provisions. However, the competition authorities announce that they intend to focus on important cases.

The procedure for investigating "relative market power" is the same as in other antitrust proceedings. Before opening a preliminary investigation, ComCo plans to inform the accused undertaking of the allegations and the accused undertaking may comment thereon. This allows reacting to the accusation and adjusting the behaviour before ComCo proceeds with the investigation.

If ComCo finds a violation, it can impose behavioural remedies, such as an obligation to supply. By

contrast, sanctions are not possible upon first, but only in the event of a subsequent infringement. In the case of undertakings abroad,

ComCo points out the difficulties with regard to enforcement and refers to the possibility of civil actions.

Notification Form

The competition authorities have published a notification form so that undertakings can easily report a suspected abuse of "relative market power". In this form, information must be provided on the undertaking affected and on the one suspected of having abused its "relative market power". In addition, the dependency and the allegation against the undertaking with presumed "relative market power" must be described in detail and available evidence must be submitted.

It is worth noting that ComCo also asks about efforts that the undertaking concerned has made in order to eliminate or reduce the dependency. The reporting undertaking may consent to the disclosure of the notification form.

Assessment

The timing of the publication and the content of the guidance paper, in particular the notification form, confirm that ComCo wants to create clear guidelines on the application of "relative market power" as soon as possible.

Even though it is generally welcome that the competition authorities try to clarify the new rules and to ensure a uniform practice, the guidance paper and notification form at least partly anticipate a practice that is yet to be established by the courts. Also, it is astonishing that ComCo did issue the guidance paper without any consultation process.

The first cases will show how far the competition authorities are willing to intervene in the contractual freedom of undertakings and whether the courts will uphold ComCo's interpretation of the new rules on dominance.

Please do not hesitate to contact us in case of any questions.

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