

Revision of Swiss Cartel Act: Federal Council unveils its draft legislation

The Swiss government aims at a partial revision of the Swiss Cartel Act. Now that the consultation process is completed, the Federal Council has unveiled its draft legislation. The revision aims at modernizing merger control and strengthening private damage litigation. The draft legislation remarkably also provides for a re-introduction of the effects test for hardcore cartel agreements. The revision will now be deliberated in Swiss Parliament. The revised Cartel Act is not expected to enter into force before 2024.

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Background

On 24 May 2023, the Federal Council presented its draft legislation ("Draft") for a partial revision of the Swiss Cartel Act ("CartA") and adopted the accompanying dispatch. The Draft largely takes up the preliminary draft put forward in the consultation process in November 2021. The main changes to the CartA proposed by the Draft can be summarised as follows:

Modernization of merger control

Transition to the SIEC test

As in the Federal Council's proposal submitted for consultation in November 2021, the Draft

adopts the Significant Impediment to Effective Competition test ("SIEC test") as the relevant standard for Swiss merger control. The transition from the dominance test, on which merger control has been based until now (i.e., a transaction can only be prohibited or burdened if it creates or strengthens a dominant position that completely eliminates effective competition), to the SIEC Test brings Swiss law into line with European Union practice in this area.

Under the SIEC Test, the Swiss Competition Commission ("COMCO") will be able to prohibit a transaction (or authorize it subject to conditions or obligations) if the following two cumulative conditions are met

- the transaction significantly impedes effective competition, in particular by creating or strengthening a dominant position.
- the transaction does not generate merger-specific efficiencies for buyers that are verifiable and justified by the notifying undertakings and that outweigh the disadvantages caused by the significant impediment to competition.

The SIEC Test will lower the current threshold for intervention by COMCO, which will probably lead to the issuance of stricter decisions in the future, and even to a greater number of national merger bans.

New exemption from the notification obligation

Transactions that meet the turnover thresholds of the current Article 9(1) of the CartA must be notified to COMCO. The Draft introduces an exception to this obligation for cross-border mergers if the following two cumulative conditions are met:

- the proposed transaction must not be focused to Switzerland, i.e. each of the product markets affected by the transaction can be delineated geographically in such a way that it includes Switzerland and at least the European Economic Area ("EEA"). If the transaction affects at least one market that is geographically limited to Switzerland, the notification obligation remains in force.
- The proposed transaction must be assessed by the European Commission. If the transaction is not notified to the European Commission, the exemption does not apply.

The Draft aims at avoiding a parallel double review by COMCO and the European Commission. However, in practice, it will certainly be difficult to answer in each case whether all relevant product markets also include the EEA, as the Comco often does not provide a fixed definition of the geographic market in its decisions.

Strengthening of civil antitrust law

The Draft provides for an extension of capacity for civil claims to any person whose economic interests are threatened or affected by an unlawful restriction of competition, including consumers and public authorities.

It then provides for the suspension of the statute of limitations applicable to civil claims arising from an unlawful restriction of competition between the initiation of an investigation by COMCO and the issuance of a legally binding decision.

In addition, the Draft aims to promote voluntary compensation for victims of anti-competitive practices, thus reflecting COMCO's recent practice in this area. Accordingly, voluntary damages

and compensation for non-material harm as well as voluntary return of unduly realized gains may be taken into account in determining the amount of the sanction.

It is to be expected that the strengthening of civil antitrust law will lead in the future to an increase in the number of claims for damages against targeted companies.

Clarifications

- Unlawful agreements under Art. 5 CartA:
- As in the in the previous draft submitted for consultation, the Draft reintroduces the consideration of quantitative and qualitative aspects of agreements in order to assess the significant nature of restrictions of competition, thus restoring the de facto legal situation that prevailed before the judgement of the Swiss Federal Court in the GABA case, according to which all horizontal agreements on prices, quantities and territories (including for instance purchase organisations) as well as vertical hardcore agreements constitute a significant restriction of competition by object. Thus, it is proposed that in the future, such agreements will have to be examined in particular also from a quantitative perspective.
- Minor infringements: The Draft introduces the principle of opportunity in cases of minor infringements in order to avoid that competition authorities have to deal with insignificant cases.

Procedural changes

- Consultation procedure: The Draft strengthens the opposition procedure by allowing companies to notify COMCO of planned conduct and agreements before they are implemented. If the competition authorities do not initiate an investigation within the opposition period, the direct risk of sanction for the companies regarding the notified will definitively disappear. In addition, the opposition period will be reduced from 5 to 2 months.
- Regulatory time limits: The Draft introduces specific time limits for competition authorities and courts based on the "comply or explain" principle in order to speed up antitrust proceedings.
- Compensation: The Draft introduces an award of compensation to the parties for the first instance administrative proceedings before COMCO. If the investigation is closed (in whole or in part), it will now be possible to award compensation to companies that have been the subject of unfounded suspicions.

Outlook

The Draft will now be deliberated in Swiss Parliament which can still propose changes. The revised CartA is not expected to enter into force before 2024.

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

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