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Competition and Antitrust

Partial Revision of the Cartel Act: an Overview of the Main Innovations

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Key Take-aways

1.
On May 24, 2023, the Federal Council adopted the dispatch on the partial revision of the Swiss Cartel Act. The aim is to strengthen the Cartel Act and to accelerate cartel proceedings.

2.
The revision modernizes merger control. The introduction of the SIEC test means a lowering of the intervention thresholds and better consideration of efficiencies.

3.
Civil antitrust law will also be strengthened and the opposition procedure improved. In addition, the reintroduction of the examination of impact criteria is envisaged in the case of hard-core cartels.

1 Introduction

On May 24, 2023, the Federal Council adopted the dispatch on the **revision of the Swiss Cartel Act** (**CartA**). The proposed partial revision aims to strengthen competition law and accelerate antitrust proceedings. Accordingly, merger control will be modernized, civil antitrust law will be strengthened and opposition proceedings will be improved. In addition, several parliamentary initiatives are implemented. In particular, this leads to a reintroduction of the examination of quantitative criteria for hard-core competition agreements.

The last revision of the CartA took place in 2004. The revision of the CartA proposed by the Federal Council in 2012 failed in parliament. In addition to the proposals for implementing certain parliamentary initiatives, the certain revision components of the current draft are based on elements of the failed 2012 revision of the CartA that were not disputed. The current bill will now enter parliamentary consultation. It is expected to enter into force in 2025 at the earliest.

The parallel discussion on the **reform of the institutional setup of the competition authorities** is not part of the current revision. This institutional reform is being examined in parallel. On 17 March 2023, the Federal Council commissioned the Federal Department of Economic Affairs, Education and Research to set up a commission of experts to explore options by the end of 2023.

The Federal Council issued a dispatch on the partial revision of the CartA.

2 Main Changes

2.1 Core Element: Modernization of Merger Control

2.1.1 Lower Intervention Thresholds based on the SIEC Test

A core element of the revision is the **modernization of merger control**. The adjustment to international practice is achieved by changing the standard of review from the current qualified market dominance test (dominance plus) to the "Significant Impediment to Effective Competition" test (**SIEC test**) used in the EU.

The difference between the qualified market dominance test applied in Switzerland to date and the newly envisaged SIEC test lies in the **intervention threshold**. Currently, the Competition Commission (**ComCo**) can only prohibit a merger or approve it subject to conditions or obligations if the merger creates or strengthens a dominant position as a result of which effective competition can be eliminated (Art. 10 para. 2 CartA). Based on the proposal, the ComCo could already intervene if the merger **significantly impedes** competition, in particular by creating or strengthening a dominant position, and the disadvantages of this impediment are not compensated by efficiency advantages specifically resulting from the merger. Merger control will thus be more strongly oriented towards economic principles.

The SIEC test can also be used to intervene in mergers that significantly impede competition but are below the market dominance threshold. This could be applied in particular if a merger in an oligopoly market does not lead to the creation of a dominant position, but the competitive pressure in the market is significantly reduced.

Consequently, the current intervention thresholds will be significantly reduced, which is why more in-depth review procedures (Phase II) can be expected. Overall, the complexity of the notifications and procedures will probably increase and generate additional effort and costs.

The effectiveness of Swiss antitrust law is improved.

2.1.2 Consideration of Efficiency Advantages

With the SIEC test, **efficiencies of a merger can be considered more comprehensively, provided they are** justified and verifiable and are specifically brought about by the merger. Until now, only improvements in competitive conditions in another market could be considered.

The SIEC test thus allows to balance between undesirable effects on competition and desired efficiency gains. However, the detailed presentation of efficiency gains will also generate additional efforts, which may lead to a prolongation of the procedure. The possibility of extending the deadlines in the review procedure with the consent of the reporting companies, which is newly provided for in the revised CartA, also points in this direction.

2.1.3 Simplification of the Notification Procedure for International Mergers

In addition, duplications in **international mergers** can in some cases be avoided and cooperation with the European Commission facilitated. International mergers may no longer have to be notified separately to the ComCo if all product markets affected by the proposed merger include Switzerland as well as the European Economic Area and the proposed merger is assessed by the European Commission. In this case, the EU notification can be submitted to the ComCo. Since market definitions are often unclear and uncertain, the practical relevance of this innovation will possibly remain low, because in this case a Swiss notification will still be submitted as a precaution.

2.2 Strengthening of Civil Antitrust Law

Another part of the proposed revision is to **strengthen civil antitrust law**. In the future, all those affected by an unlawful restriction of competition, in particular also consumers and the public sector, will be able to file civil lawsuits based on antitrust law.

Furthermore, a suspension of the statute of limitations for civil law claims arising from unlawful restraint of competition until a final decision by the ComCo and a claim for a declaration of unlawful restraint of competition are introduced. A new possibility is also created to take into account voluntary reparation payments to injured parties in the event of an administrative sanction, even after the fact, in order to reduce the sanction.

Strengthening civil antitrust law may result in companies potentially facing more civil antitrust claims.

2.3 Improvement of the Opposition Procedure

The opposition procedure allows for a **preliminary examination** by the ComCo whether there is violation of antitrust law prior to the implementation and thus serves to ensure legal certainty. This procedure is strengthened and made more practicable. Accordingly, the direct sanction risk for companies with regard to the reported conduct falls away if the competition authorities do not open an investigation within the objection period. In addition, the objection period is reduced from five to two months.

The merger control is modernized by the SIEC test.

2.4 Extension of Investigative Measures to Searches of Persons

As part of the revision, the investigative measures are extended in order to include the possibility of **personal searches**. This extension is being justified by the alleged fact that it has been shown in practice that employees of a company affected by a dawn raid may be tempted to take possible evidence and hide it on their own body. In addition, it is explicitly stated that objects that cannot be clearly assigned to premises, such as vehicles, can also be searched by the competition authorities.

2.5 Implementation of Parliamentary Initiatives

2.5.1 Time Limits and Party Compensation before ComCo

Based on the "comply or explain" principle (comply with regulations or explain deviations from them), **deadlines for procedures** are introduced for **all instances**. Of the total period of 60 months (from the opening of a formal investigation), 30 months are allocated to the ComCo, 18 months to the Federal Administrative Court and 12 months to the Federal Supreme Court. In case of a referral back to the lower court, the period of order amounts to 12 months in each case. Thus, the authorities and courts are in principle obliged to comply with the time limits in all phases of the proceedings.

In addition, companies will in future be given the opportunity to be **compensated for their expenses** depending on the outcome of the first-instance administrative proceedings, provided that the investigation proceedings pursuant to Article 27 CartA have been discontinued in whole or in part by the competition authorities without consequences.

Strengthening the civil antitrust law and improving the opposition procedure.

2.5.2 Consideration of Qualitative and Quantitative Criteria

Further adjustments demanded by a parliamentary motion aim at reintroducing the consideration of quantitative criteria in the assessment of agreements affecting competition.

Accordingly, the draft law specifies that both qualitative and quantitative criteria are to be taken into account when assessing **an agreement**. With regard to the quantitative criteria relevant for agreements affecting competition, this amendment is intended to restore the de facto legal situation prior to the decision of the Federal Supreme Court in the Gaba case (BGE 143 II 297 of June 28, 2016). Thus, in the future, also in the case of hard competition agreements, i.e. horizontal price, quantity and territory agreements, as well as vertical price fixing and absolute territorial protection, an examination of **quantitative** elements - such as market shares, sales or market entries or exits - will again be required. The imposition of fines was already possible in several cases prior the Gaba case law. Consequently, the consideration of qualitative and quantitative criteria in the materiality assessment of agreements affecting competition does not constitute an obstacle to effective antitrust law. Thus, the dispatch on the revision states that, for example, bid-rigging agreements were already a significant restriction of competition in practice prior the Gaba decision, as they were typically followed by a significant share of the parties involved in the respective relevant market. In addition, the law clarifies that agreements in certain joint ventures (ARGE) are generally not considered as agreements affecting competition.

Finally, the competition authorities are given the option of waiving an investigation or closing an investigation if there are indications of a minor infringement.

2.5.3 Principle of Investigation, Presumption of Innocence and Burden of Proof

The implementation of another parliamentary motion aims to strengthen various procedural and substantive principles in the CartA that already apply in current law, partly on the basis of international and constitutional law, partly on the basis of legal provisions to which the CartA refers. In the foreground are the principle of investigation, the presumption of innocence and the burden of proof at the expense of the state. Most of these new provisions are declaratory in nature.

3 Conclusion and Outlook

The reintroduction of the quantitative criteria test for hard-core competition agreements leads to additional protection for companies, but does not hinder the effective enforcement of the CartA. In contrast, the introduction of the SIEC test in Switzerland is initially likely to lead to increased legal uncertainty and effort for companies, as the competition authorities cannot rely on an established Swiss practice.

In a next step, the bill will now be discussed in parliament. The revised CartA is not expected to enter into force before 2025.

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