Federal Council opens consultation on partial revision of the Cartel Act

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Key takeaways

The Federal Council initiated a consultation procedure on the partial revision of the Cartel Act (CartA). If the government's proposals were to become law as proposed, this would have various implications for companies:

- **For notifiable transactions, increased intervention by the Competition Commission (COMCO) would have to be expected, even below the threshold of clear market dominance.**
- **Regarding hardcore agreements under Article 5 paragraph 3 and 4 CartA, the line of defence that there is no significant restriction of competition due to a lack of quantitative effects would again be possible.**
- **Civil actions based on a breach of competition law are likely to increase.**

The partial revision is not expected to enter into force before 2023/2024.

Introduction

On 24 November 2021, the Federal Council opened the consultation procedure on the partial revision of the Cartel Act. The centrepiece of the proposal is the modernisation of merger control by changing from the current qualified market dominance test to the SIEC test ("Significant Impediment to Effective Competition"). In addition, a clarification of the substantive standard of review for hardcore agreements under Article 5 paragraph 3 and 4 CartA and modernisation of civil cartel law and cartel procedural law are proposed.

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Background

After the failure of the ambitious revision of the law in 2014, the most important points of this comprehensive revision are to be implemented in a new attempt. In the eyes of the Federal Council, there is a particular need for action against the background of advancing digitalisation of the markets. Modernised merger control should enable the increasing tendency towards concentration of platforms to be counteracted more effectively.

In addition, a strengthening of civil cartel law should support better enforcement of cartel law and at the same time reduce COMCO's workload. Finally, the "clarification" of the assessment of hardcore agreements under Article 5 paragraph 3 and 4 CartA and the improvement of the administrative cartel procedure will implement various demands from parliamentary motions.

Change to the SIEC test in merger control procedures

Today's qualified market dominance test for assessing a planned concentration takes little account of the positive and negative effects of the concentration. The SIEC test, on the other hand, enables a more comprehensive assessment of all effects of a concentration on competition. With the SIEC test, the hurdle for prohibiting a concentration will be lowered in the future. The introduction of the SIEC test also results in a harmonisation with EU practice.

At the same time, a new exemption from the notification requirement in Switzerland is to be created for planned concentrations subject to notification in the EU whose product markets include both Switzerland and the EEA. These shall no longer be examined by COMCO. Only a copy of the notification to the European Commission shall be submitted to COMCO.

Clarification of the assessment of hardcore agreements

In the Gaba decision, the Federal Supreme Court ruled that for hardcore agreements (horizontal agreements on prices, quantities or territories as well as vertical territorial foreclosures and resale price maintenance) the significance of the restriction of competition is in principle (irrefutably) presumed and quantitative effects (primarily based on market shares) are not to be taken into account. Now, however, the admissibility of hardcore agreements affecting competition is again to be determined based on a weighing of qualitative and quantitative criteria in the individual case.

Strengthening of civil cartel law

Strengthening civil cartel law is intended to create an incentive for private parties to increasingly take the civil law route. The proposed instruments to achieve this goal are:

- Extension of the right to sue to, among others, also include consumers (or after assignment of the claims consumer organisations)
- Suspension of the statute of limitations for claims for damages during the investigation proceedings of COMCO
- Declaratory relief of the unlawfulness of agreements affecting competition

- Sanction-reducing effect of compensation payments and profit disgorgement payments made

Selective adjustments to the administrative procedure

The administrative law procedure is to be simplified, shortened and improved overall. Planned measures include the introduction of non-binding deadlines for COMCO and the courts and party compensation for the first instance proceedings before COMCO. In addition, the time limit for the opposition procedure ("Widerspruchsverfahren"), which is rarely used today, is to be reduced from five to two months.

Significance for companies and next steps

The proposal for the partial revision of the Cartel Act is still at a very early stage. The consultation period will last until 11 March 2022, after which Parliament will have to discuss the proposal. It remains to be seen which of the proposed changes will ultimately remain part of the reform. The revised provisions are not expected to enter into force before 2023/2024.

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No legal or tax advice

This legal update provides a high-level overview and does not claim to be comprehensive. It does not represent legal or tax advice. If you have any questions relating to this legal update or would like to have advice concerning your particular circumstances, please get in touch with your contact at Pestalozzi Attorneys at Law Ltd. or one of the contact persons mentioned in this Legal Update.

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