New developments in Swiss Competition Law – Partial revision of Swiss Cartel Act to facilitate claims for damages and modernize merger control

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Introduction

On May 24, 2023, the Federal Council adopted the dispatch on the partial revision of the Cartel Act. The proposed revision is intended to revise several aspects of the Swiss Cartel Act, which were already discussed in the context of the failed revision attempts in 2012. At the same time, the amended draft implements several important parliamentary motions.

Key points

Main aspects of the revision now submitted are to facilitate the enforcement of claims before the civil courts, such as claims for damages (follow-on damages), and to modernize merger control (introduction of the "SIEC"-test). Furthermore, the possibilities for undertakings to report planned concentrations without sanctions (so-called objection procedure) are to be extended, which could provide greater legal certainty in sustainability cooperation between competitors, for example.

The new regulation on hardcore agreements in the draft is expected to cause some political controversy. Competition authorities would be obliged by statutory law to examine the actual effects of hardcore agreements also quantitatively, which would correct the case law of the 2016 Federal Supreme Court (Gaba).

The newly published dispatch was subject to an extensive consultation procedure.

Strengthening Swiss civil competition law

An important part of the draft is the strengthening of Swiss civil competition law. On the one hand, this shall be achieved by extending the active legitimation to all parties affected by unlawful restraints of competition - which would now also entitle both consumers and the public sector to file a claim. Further, a suspension of the statute of limitations for civil law claims arising from unlawful restraints of competition is introduced. More specifically, the statute of limitations is suspended, or does not even begin, during the period between the opening of the competition authorities' administrative investigation, pursuant to Art. 27 CartA, and the final decision. This suspension is to ensure that affected parties can assert civil claims

for a longer period of time.

Modernization of merger control

A central concern of the partial revision is also the modernization of merger control. The qualified market dominance test, currently required by the CartA, shall be replaced by the internationally used SIEC-test ("Significant Impediment to Effective Competition"). The SIEC-test no longer focuses exclusively on cases of market dominance, but in particular allows intervention in cases of unilateral (non-coordinated) effects below the threshold for single market dominance. The Federal Council justifies the amendment by arguing that the current control system takes too little account of both the negative and positive effects of mergers and that the markets' digitalization is progressing and requires a more modern test.

Improvement of the objection procedure

The objection procedure, which has largely remained a dead letter to date, shall also be strengthened. The draft aims to improve the possibilities for companies to obtain more legal certainty, for example by reporting innovative concentrations. The direct sanction risk for companies regarding the reported conduct would under the new law be eliminated if the Competition Authorities do not open an investigation, pursuant to Art. 27 CartA within the objection period. The objection period would also be shortened from five months to two months.

Other changes

Finally, several parliamentary motions are implemented in the draft:

- On the one hand, official processing times and compensation for parties in competition law proceedings will be introduced to effectively accelerate proceedings and thus to improve the situation for SMEs in competition law proceedings.
- Despite the resistance of the Competition Commission, Art. 5 CartA will be revised to the extent that in the future quantitative criteria must also be considered in the case of hardcore horizontal and vertical competition agreements, so that de facto the legal regime prior to the Gaba decision will be reinstated.
- With regard to working cooperatives, a new explicit provision is introduced in Art. 4 para. 1bis CartA, according to which working cooperatives that enable or strengthen effective competition do not constitute unlawful competition agreements.
- Finally, provisions on the principle of ex-officio investigation, the presumption of innocence, and the burden of proof are included in the revised Cartel Act.

The reform of the Competition Authorities ("institutional reform"), which has also been under discussion for some time, has been excluded from the present revision proposal. However, in the first quarter of 2024, the responsible department will examine various reform options and submit a proposal for a corresponding reform to the Federal Council.

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No legal or tax advice

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