

# NewsLetter

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## Amendments to the Swiss Cartel Act

**The current Cartel Act has been in force since 1 July 1996. The amendments, which are planned to be debated in parliament this spring, are aimed at introducing direct sanctions for severe anti-competitive behaviour and bonus incentives for cartel members willing to cooperate. In the following, a general description of the current Cartel Act will be presented and the planned amendments will be considered.**

### Essential Features of the Current Cartel Act

The current Cartel Act (CA) is based on three principles: the regulations about anti-competitive arrangements (Art. 5 CA), the provisions against abuse of a dominant position (Art. 7 CA) as well as controls on mergers (Art. 9/10 CA).



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Anti-competitive arrangements are illegal if, to a considerable degree, they adversely affect competition in the relevant market, which cannot be justified for reasons of economic efficiency, or if they suppress effective competition. Apart from horizontal arrangements (arrangements between competitors, e.g. different

manufacturers of the same kind of product), vertical arrangements (arrangements between companies at different levels in the production and distribution chain, e.g. manufacturers and their distributors) are also covered by the legislation. Horizontal arrangements, which are concerned with price-fixing, limiting volumes or market sharing, are regarded as particularly detrimental. For that reason, the law assumes that these "hard" cartels are per se illegal.

The Cartel Act does not prohibit market dominance as such. However, the abuse of such a position is not permissible. The types of abuse can be manifold which is why the law only provides for examples but not for a comprehensive list thereof.

Finally, with the controls on mergers it is intended to prevent that the planned mergers of companies lead to the establishment or reinforcement of a dominant position, which can be used to eliminate effective competition. Therefore, the Competition Commission is to be notified of all mergers of companies with a certain turnover in Switzerland.

### Enforcement of the Current Cartel Act

The Competition Commission and the associated Secretariat are responsible to implement the current Cartel Act. In case of anti-competitive behaviour, the Competition Commission decides about the measures to be taken after the Secretariat has examined the case and made a recommendation. The Competition Commission has the power to order non-complying companies to adopt certain behaviour or to refrain from certain actions. If companies violate these orders, the Competition Commission may impose fines of up to 10 % of the previous annual turnover.

According to the current Cartel Act, in contrast to competition regulations of the EU or the USA for example, non-complying companies cannot be sanctioned immediately for their anti-competitive behaviour. This difference became evident in the case of anti-competitive arrangements on the market for vitamins. While the American and European competition authorities imposed heavy fines on the companies involved, the Competition Commission could only state that these arrangements were not permissible and that the practice had to stop.

### Features of the Amendments

The main aim of the amendments is to increase the deterrent effect of the Cartel Act by introducing direct sanctions for certain offences.

### Direct Sanctions

According to the amendments, direct sanctions can be applied in case of price, volume and territory arrangements between competitors as well as in case of abuse

of a dominant position. Arrangements not concerned with price, volume or territory are not covered by these direct sanctions. Price, volume and territory arrangements, which neither eliminate competition nor have a considerable detrimental effect on it, are also not covered by the system of direct sanctions.

Direct sanctions can be fines of up to 10 % of the turnover achieved by the offending company in Switzerland during the previous three years.

To eliminate legal uncertainty, the amendments to the Cartel Act provide for a notification option. The option is to submit in advance to the Competition Commission for examination a possibly anti-competitive arrangement or a possibly anti-competitive behaviour of a dominant company. This submission would have the effect of making disappear, from the outset, the possibility of direct sanctions.

### **Bonus Incentives**

In its proposal to parliament, the Federal Council starts with the assumption that hard cartels become increasingly professional over time and their detection becomes more difficult. To curb this development, the introduction of bonus incentives is being considered. According to this proposal, the Competition Commission can either fully or partly waive direct sanctions against a company, which, as a previous cartel member, cooperates with the Competition Commission in the detection and elimination of the particular cartel.

### **Market Dominance**

The amendments to the Cartel Act amount to an insignificant refinement of the concept of market dominance. However, the details regarding market dominance in the proposal of the Federal Council are controversial. It is not clear whether in future one has to start with a lower threshold for the assumption of a market-dominance.

### **Controls on Mergers**

The draft amendments also provide for a few changes concerning controls on mergers, even though these changes are predominantly of a technical nature. The special turnover thresholds applying to the mergers of media companies are intended to be abolished. Furthermore, in case of planned mergers by banks and insurance companies, the calculation of thresholds is no longer to be based on the balance-sheet total but rather on gross yields.

### **Transitional Rules**

The transitional rules provide that, within six months after the new sanction rules come into force, the Competition Commission can be given notice of existing restrictions on competition. This amnesty option has the effect that no direct sanctions can be imposed after notice is given. After this period has expired, direct sanctions can be applied to existing restrictions on competition.

### **Conclusion**

The parliamentary debates on the amendments to the Cartel Act are planned for the forthcoming spring session. If the draft amendments are passed, the Cartel Act will gain in importance. The Competition Commission will then have an effective instrument for pursuing behaviour that restricts competition. In future, anti-competitive behaviour can become expensive for companies. A careful examination of any kind of cooperative agreement becomes imperative prior to its adoption. Companies in a dominant position need to take note, too, and in their behaviour have to consider the Cartel Act. It is clear from the transitional rules that there is no 'immunity' for existing restrictions on competition. In order to avoid later complications or, worse still, sanctions, companies are well advised to already fully comply now with the provisions of the Cartel Act.

### **NewsLetter**

The ww&p NewsLetter provides comments on new developments and significant issues of Swiss law. These comments are not intended to provide legal advice. Before taking action or relying on the comments and the information given, addressees of this NewsLetter should seek specific advice on the matters which concern them.

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