

Banks & Financial Services
Providers

Competition Law

Construction & Real Estate Law

Corporate & Commercial Law

Data Law

Energy Law

Financial Market Infrastructure Law

Financing

FinTech

Funds & Asset Management

Immigration Law

Information Technology Law

Inheritance Law & Estate

Planning

Insurance

Intellectual Property Law

Labor & Employment Law

Litigation & Arbitration

Media Law

Mergers & Acquisitions

Notarial Services

Pharmaceutical & Health Law

Restructuring & Insolvency

Tax Law

Venture Capital & Private Equity

White-Collar Crime

Further tightening of the Cartel Act as of 1 January 2022 – Opportunities and risks in dealing with relative market power

On 17 September 2021, the Federal Council enacted the latest revision of the Cartel Act as of 1 January 2022. This amendment to the law stems from the counter-proposal to the «Fair Price Initiative», which has since been withdrawn. It extends the broad supervision of dominant companies to include companies that are only powerful relative to individual companies. According to the legislator, cartel law can and should also intervene in the case of unilateral behaviour by companies with low market shares. If there is a dependency between companies, various common practices and contractual clauses are open to competition law scrutiny. While the risk of new compliance cases increases, opportunities also arise – especially for consumers of niche products, for buyers in relation to strong suppliers and for parallel imports.

Effective competition – an overall market view

Competition law is intended to guarantee effective competition. Where the state does not set the outcome of competition, e.g. via price regulation, the economic participants should not define the price via cartels, for example. The provisions against cartels had already been tightened considerably by the Federal Supreme Court a few years ago. Since this new leading case no analysis of the effects of hard-core cartels (i.e. agreements between competitors on prices, quantities, territories and customers) is required, which is why companies without market power and low market shares can also be sanctioned.

Competition is also at risk where individual companies are so strong that they can behave, to a substantial extent independently of market conditions. Market forces are weak in monopolistic markets. Therefore, competition law ensures that monopolies do not, for example, build up barriers to entry. Dominant companies may therefore not, among other things, refuse to do business without objective reasons (obligation to contract), discriminate against trading partners (obligation to treat equally) or tie their product to the purchase of other products or services (prohibition of tying/bundling). Exclusive arrangements and more subtle practices, such as loyalty rebates, are also generally sensitive. In principle, this far-reaching monitoring of market-dominant companies is not very controversial – especially since it has only affected a few companies so far.

Wenger & Vieli Ltd.

Dufourstrasse 56
P.O. Box
CH-8034 Zurich

Office Zug
Metallstrasse 9
P.O. Box
CH-6302 Zug

T +41 58 958 58 58
spotlight@wengervieli.ch
www.wengervieli.ch

**MICHAEL TSCHUDIN**

Dr. iur. | Partner

m.tschudin@wengervieli.ch

T +41 58 958 53 36

**DOMINIQUE ROOS**

MLaw | Attorney at Law

d.roos@wengervieli.ch

T +41 58 958 55 47

Recommendation

- strategic compliance management
- identifying effective legal risks at an early stage
- use antitrust tools in the procurement process
- check whether suppliers are involved in cartel cases

Relative market power in individual business relationships

These provisions now also apply to companies with relative market power. In order to be considered as having relative market power, it is sufficient if a single other company (supplier or customer) is so dependent, that there are no sufficient and reasonable possibilities of switching to competitors. Thus, for the question of relative dependence, not the entire relevant market is analysed, and the focus is not on typically economically negative effects. Rather, the focus is on individual contractual relationships and the question of whether an individual company receives fair conditions and can thus participate freely in the economy.

Such dependence can be considered in the following cases, for example:

- Dependence on the supply of spare parts
- Dependent licensee with regard to software maintenance and updates
- Dependence on access to products, services or data required for own offer / own products
- Dependence on contract-specific investments (lock-in effect)
- Dependence on customers with high volumes

In the case of individual dependency, the same rules apply under the revised Cartel Act, which previously only applied to market-dominant companies. Based on the application of the concept of relative market power in other jurisdictions, it is expected that, especially the obligation to contract and the prohibition of discrimination, may frequently be applied to companies with relative market power.

In addition, a new rule will be added to the catalogue of abusive practices: As of 1 January 2022, a dominant company, as well as a company that already has relative market power, will behave abusively if it restricts the possibility for companies to purchase goods or services (offered in Switzerland and abroad) abroad at the prices and conditions prevailing there. In this way, the legislator creates a right of purchase for companies doing business in Switzerland from companies located abroad at

the conditions applicable there. This core concern of the Fair Price Initiative is to enable companies in Switzerland to benefit from similarly favourable conditions as their competitors abroad. Consequently, in the future, price differentiation between countries will be more difficult.

Recommendation

- identifying dependencies in procurement and with customers
- in the case of discriminatory prices (also in comparison to foreign countries), seek dialogue with suppliers
- check and document justification for own discrimination and refusal to deal

Enforcement of the new rules

While abuses by dominant companies can be sanctioned with an amount of up to 10 percent of the turnover achieved in Switzerland in the last three business years, abuses by companies with relative market power will only be fined in repeated cases. The Competition Commission has already announced that it will actively implement this new instrument of the Cartel Act. In addition, it is to be expected that companies will also enforce their interests through the civil courts. The route via the civil courts has the advantage of shorter proceedings, an established precautionary legal protection, the possibility of claims for damages and the obligation of the civil judges to submit the case to the Competition Commission for an assessment. Swiss court decisions may be enforced abroad, in particular in the EU.

Conclusion

Since the tightening of cartel regulations by the Federal Supreme Court, cartels without proven effects on the market, especially by companies with small market shares, can also be prosecuted under competition law. With the extension of the control to companies with relative market power, many companies now also fall under the Competition Commission's control of unilateral behaviour. It is now necessary to not only clarify legal risks, but also to take advantage of opportunities in dealing with the new requirements. Competition law today is generally seen as a compliance issue (as a shield from state intervention) and still too little as an opportunity to act as a «sword» against market-powerful companies and cartels.

**SPOTLIGHT AS PDF:**

<https://www.wengervieli.ch/en-us/publications?typ=spotlight>