

C/M/S/ von Erlach Henrici



Amendment of the Swiss Law on Cartels

April 1, 2004

On April 1, 2004 the revised law on cartels entered into force. The revision introduced important new rules relevant in the context of your business activities. It aims at increasing the preventive effect of the cartel law and at providing better means of enforcement to the competition authorities.

The main amendments are:

- The introduction of direct sanctions**
- The introduction of leniency provisions**
- The possibility to notify potentially infringing new agreements or practices**
- A clear legal basis for dawn raids**

The purpose of this newsletter is to give you a short overview of the specific amendments introduced by the revision of the law on cartels and to demonstrate the areas in which there may be a call for action in your company.

Main Amendments

Introduction of Direct Sanctions

Previously, sanctions, i.e. fines, could only be imposed in case of a repeated breach of the law on cartels. From now on the Competition Commission may impose sanctions without prior warning for the following first time infringements of the law on cartels:

Horizontal agreements regarding

- direct or indirect price fixing
- restriction of production, purchase or supply
- market segmentation with respect to territory or customers

Vertical agreements regarding

- direct or indirect setting of minimal or fixed resale prices
- absolute territorial protection in distribution agreements

Abuse of a dominant position, e.g.

- refusal to deal (e.g. refusal to buy or to supply goods)
- discrimination between trading partners
- imposition of unfair prices or other unfair conditions of trade

The sanction will be determined according to the gravity and duration of the infringement as well as to the presumed profit. The Competition Commission will start from a basic amount of up to 10% of the turnover realized by the undertaking in Switzerland *in the relevant markets* during the last three business years. Such basic amount will be increased to take account of aggravating circumstances or reduced to take account of attenuating circumstances. The maximum amount of the sanction may not exceed 10% of the *total* turnover realized by the undertaking in Switzerland during the said time period.

Leniency Provisions

If an undertaking notifies the Competition Commission of its participation in a cartel and submits evidence enabling the authorities to uncover such cartel, it may benefit from a total immunity from any fine which would otherwise have been imposed. However, only the undertaking which is the first to submit evidence may benefit from this total immunity. Other cartel members are only eligible to benefit from a reduction of the sanction. If unsolicited information is supplied on any further sanctionable agreement affecting competition, the reduction can be as high as 80%. If an undertaking cooperates in an unsolicited way in the proceedings and has terminated its involvement in the infringement, the reduction can amount to 50%.

By means of these new leniency provisions the legislator hopes to undermine the loyalty among cartel members and to provoke a „race“ for the immunity from or the reduction of sanctions.

Further Amendments of the Law

Notification of Potentially Anticompetitive Behaviour

In case of uncertainty as to whether a behaviour is anticompetitive and may entail sanctions, such behaviour may be notified to the Competition Commission *before* it becomes effective. Thereby, the undertakings can ensure that they do not have to bear the consequences of a potential misjudgment and obtain legal certainty, in particular, if they envisage long-term investments. If the Competition Commission informs the undertaking that no investigation will be initiated respectively, if no reaction occurs within 5 months, no sanctions may be imposed with regard to the notified behaviour.

Dawn Raids

The revised law contains a clear legal basis for dawn raids. The Competition Commission has announced that it now also intends to use this means of investigation. It hopes to achieve a more efficient uncovering of cartels, similar to the EU Commission which has successfully applied dawn raids to this effect.

New Thresholds for Bank and Media Mergers

Envisaged concentrations require prior notification to the Competition Commission if certain thresholds are exceeded. Generally, the thresholds are based on the turnover of the undertakings concerned.

For banks and financial intermediaries it is now the gross income which is relevant for the determination of the thresholds and no longer the balance sheet total. This corresponds to the rules applicable in the EU.

With respect to media undertakings the previously lower thresholds have been abandoned in favor of the general turnover thresholds.

Exceptional Position of SMEs

In order to strengthen the position of small and medium-sized enterprises the Competition Commission can now determine the conditions under which agreements affecting competition among SMEs are justified. Pursuant to the revised law this is particularly the case if agreements are aimed at improving the competitiveness of SMEs and merely have a limited effect on the market.

Investigation of Past Events

Prior to the revision the Competition Commission could only investigate ongoing behaviour. If the anticompetitive behaviour was ceased before the initiation of an investigation, the Competition Commission had no possibility of investigating the circumstances. This situation was particularly dissatisfying with regard to bidding cartels, which are regularly dissolved after the tender.

Under the new law, the Competition Commission also has the right to investigate behaviour which is no longer in effect, provided that it occurred not more than five years prior to the investigation. However, based on the prohibition of retroactivity, the Competition Commission can not investigate behaviours which were terminated before April 1, 2004.

Miscellaneous

The revised law on cartels now specifies that *impediments to parallel imports* based on intellectual property rights (e.g. patents, trademarks, or copyrights) can be reviewed in light of competition law.

Further, the *definition of a dominant undertaking* has been slightly revised. In addition to the market structure, the determination of a dominant position shall also take into account the specific dependencies on the relevant market.

Finally, a clear legal basis has been established for the *fees* charged by the Competition Commission.

Consequences of the Revision of the Law on Cartels for your Company

What are the specific consequences for your company?

The risk of sanctions has substantially risen by the revision of the law. In many instances there will no longer be an advance warning before a potentially heavy sanction is inflicted. In addition, dawn raids are to be expected in the future. The leniency provisions create incentives to notify cartel agreements to the Competition Commission. Members of a cartel must weigh the risk of being denounced by other cartel members against the benefits of a self-indictment.

Company Audit

We recommend performing an audit to detect any potentially problematic circumstances in good time respectively to make sure that there are no such circumstances in any of your fields of business.

Notification of Critical Circumstances

If the audit reveals circumstances that may be prohibited by competition law and could entail direct sanctions, you should consider a notification to the Competition Commission in order to eliminate the risk of a sanction.

Alternatively, you may also request advice from the Secretariat of the Competition Commission regarding the legality of a behaviour. This is a less formal means of proceeding, albeit without providing the benefit of a waiver of sanctions.

Training of Employees

In order to enable your employees to assess potentially problematic circumstances, we recommend training measures which are tailored to the specific market situation of your company. Concise and practical guidelines regarding correct behaviour are also a helpful means to call the attention of employees to problematic behaviours (including the behaviour of other market participants).

Behaviour in Case of Dawn Raids

Your employees should be prepared for a dawn raid by the Competition Commission. This preparation can be achieved e.g. by adequate training and distribution of guidelines that explain the correct behaviour in case of a dawn raid.

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