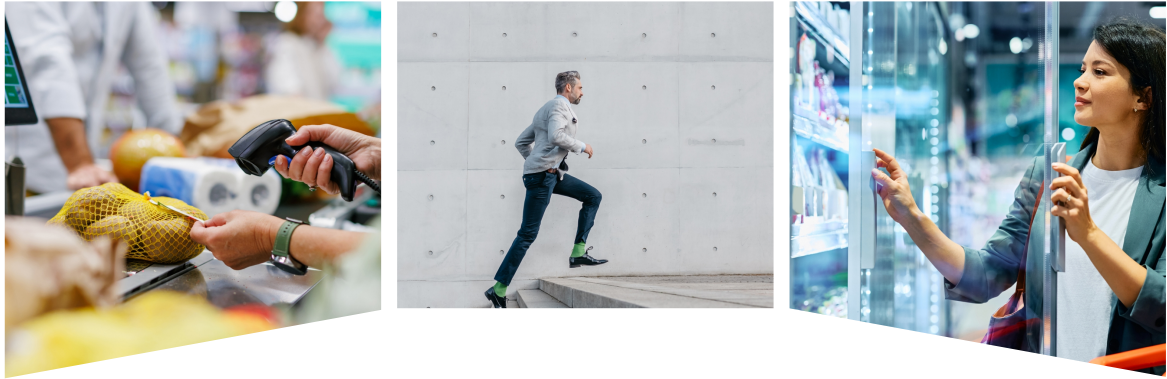




Competition, Consumption & Prices, Company Law

New antitrust law: What will change for companies

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At a glance

- The core elements of the new antitrust law are the introduction of an effects-based approach to agreements and abuses as well as the modernization of merger control.
- The result is an effective but more efficient framework for companies. Meaningful cooperations that do not impair competition will be made possible.
- After the substantive revision, bolder institutional reforms are now needed to noticeably improve antitrust proceedings.

In the winter session, Parliament adopted the partial revision of the antitrust law. The revision modernizes key substantive provisions and at the same time adapts various procedural rules. Several concerns of the business community were taken on board and enshrined in the law. Below we provide an overview of the key changes and their significance for companies.

1. Effect-based assessment of agreements to restrict competition

With the new provision in Art. 5 para. 1bis CartA, the legislator has specified the requirements for the assessment of agreements to restrict competition. In future, an overall assessment must always be carried out when assessing materiality, which takes into account both qualitative elements - namely empirical values on the type of agreement - and quantitative elements such as the specific market circumstances in the individual case. The starting point is that restrictive agreements are not illegal because they take a certain form, but because they are likely to impair effective competition. The type of agreement remains an important indicator, as it allows conclusions to be drawn about a typical potential for harm based on general experience. However, this indication cannot conclusively establish the facts of the case. The new regulation therefore requires an additional examination of whether this potential for harm can actually be realized in the specific market environment. Interference under antitrust law is therefore no longer based solely on the formal qualification of an agreement, but rather on its specific suitability to significantly impair competition in individual cases. In addition, the catalog of presumptions in Art. 5 para. 3 CartA has been clarified. In future, indirect gross price agreements on the supply side will no longer automatically fall under the presumption of elimination of competition, but will be subject to the general examination under Art. 5 para. 1 CartA.

2. Clarification of abuse control

The revision also makes a targeted clarification of abuse control. The starting point was the uncertainty created by the Federal Supreme Court ruling SIX/DCC (BGer 2C_596/2019 of 2 November 2019) as to whether an abstract threat to competition could be sufficient for the assumption of an abuse of a dominant market position. However, the conduct of dominant companies is often ambivalent in terms of competition and can - depending on the market structure and context - both promote and restrict competition. With the amendment of Art. 7 para. 3 CartA, the legislator therefore clarifies that an abuse only exists if the objectionable conduct is effectively capable of impairing effective competition in the specific individual case. What is required is not a proven actual competitive effect, but a comprehensible analysis of the potential effects, taking into account the specific market circumstances. At the same time, the recent practice of the Federal Supreme Court - namely in the Vifor/HCI Solutions decision (BGer 2C 244/2022 of 23 January 2025) - is thus legally secured and the focus of abuse control is consistently aligned with the protection of competition as a system.

3. Modernization of merger control

Another key point of the partial revision is the modernization of merger control. The previous qualified market dominance test set the intervention threshold very high and in some cases only insufficiently covered competitively problematic mergers. With the introduction of the internationally established Significant Impediment to Effective Competition Test (SIEC Test), the material test standard is now being adapted. In future, COMCO will be able to prohibit mergers or impose conditions and requirements if they significantly impair effective competition, even below the threshold of single market dominance, for example in the case of one-sided effects in concentrated markets. At the same time, the SIEC test allows for a more systematic and transparent consideration of efficiency advantages. The revision also provides for simplifications for international mergers: For transactions that are subject to the European Commission, the Swiss reporting obligation can be waived under certain conditions. This will reduce duplication and make cross-border proceedings more efficient without weakening the substantive protection of competition.

4. Consideration of compliance measures (compliance defense)

The partial revision clarifies that effective antitrust compliance measures can be taken into account in a mitigating manner when assessing sanctions in the future. The legislator thus recognizes that companies make an independent contribution to the protection of effective competition through preventive internal structures - such as training, clear guidelines and functioning control mechanisms. As a result, sanctioning practice is more strongly geared towards prevention and individual responsibility, without calling into question the effectiveness of antitrust enforcement.

5. Further relevant innovations

In addition to the amendments to competition agreements, abuse of power and merger control, the partial revision contains further substantive and procedural innovations. Civil antitrust law is strengthened by extending the right to sue to end customers, suspending the statute of limitations during ongoing official proceedings and expressly enabling the judicial determination of unlawful restrictions of competition. In addition, the legislator clarifies key procedural rules - namely by setting time limits, expressly enshrining the principle of investigation, introducing compensation for parties and improving the objection procedure.

6. Next steps

Overall, the partial revision improves the protection of competition by enabling more targeted intervention by the authorities where effective competition can actually be expected to be impaired and, at the same time, setting clearer guidelines for competitively unproblematic conduct. This will make antitrust law more precise and efficient and enable it to exert its control effect where it is objectively required.

The parliamentary deliberations on substantive antitrust law have also made it clear that this is only a first step. The institutional structure of competition supervision remains of central importance for the economy. In the view of the business community, the consultation process on institutional reform, which

has now been completed, has shown that the proposed bill has not taken the opportunity for a bolder reform step and only addresses key structural issues to a limited extent. Accordingly, these points were clearly raised in the consultation process. Only the combination of up-to-date substantive rules and a convincing institutional structure will guarantee antitrust law that protects effective competition and is also applied reliably and proportionately.



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