

Legal Compass

Competition Law

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Introduction of relative market power in Swiss competition law

In the spring session 2021, the Swiss Parliament introduced into Swiss competition law the concept of relative market power, which is well known in foreign legal systems. At the same time, a ban on so-called geoblocking in online-commerce will be enshrined in law.

It is expected that these new rules will enter into force without resistance probably already in the course of 2021, but at the latest as of 1 January 2022. They will lead to a comprehensive and far-reaching need for action for national and international companies, but at the same time to increased legal uncertainty. This article is intended to raise awareness of these new regulations.

1. Background and key points of the revision

The forthcoming revision of the Swiss Cartel Act is taking place on the background of the popular ballot initiative "Stop the high price island - for fair prices".

In summary, the revision implies the following changes:

- Introduction of the concept of relative market power into Swiss competition law
- Extension of the existing provisions regarding the abuse of a dominant position to companies with relative market power
- Introduction of a new provision of abusive behavior in connection with the purchase of goods or services abroad
- Prohibition of online-geoblocking

It is expected that the new rules will enter into force already in the course of 2021, but at the latest as of 1 January 2022.

2. Introduction of the concept of relative market power into Swiss competition law

Under the currently applicable Swiss Cartel Act ("CartA"), it is unclear whether the legal definition of a dominant company also covers relative market power.

The forthcoming revision of the Swiss Cartel Act clears up this ambiguity about the scope of the legal definition of market dominance and extends Article 4 of the Swiss Cartel Act to include an explicit definition of relatively dominant companies. Pursuant to this provision, relative market power exists if "companies are dependent on it for the supply of or demand for a good or a service in such a way that there are no sufficient and reasonable possibilities to switch to other companies"(art. 4 para. 2^{bis} revCartA).

Relative market power, and thus the question of whether a company has sufficient and reasonable alternatives, is examined on a vertical level. If such dependence is established, the company in question is deemed to have relative market power; and this regardless of the company's position on the horizontal level.

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Not only suppliers of goods and service providers are considered to possess relative market power in the aforementioned sense. Their customers may also meet the requirements to be deemed as relatively dominant. This applies to constellations in which companies at the upstream market level (manufacturer or service provider level) are dependent on their goods or service providers being distributed by certain buyers (so-called relative buyer power).

3. General test for relative market power

The authors of the popular ballot initiative were guided by the German regulation on relative market power. Consequently, it can be expected that the competition authorities and courts will in the future also take German case law into account in their considerations. There, a comprehensive legal practice on relative market power has developed over four decades. Unlike Germany, the Swiss regulation does, however, not contain any restriction of the scope of protection in relation to small and medium-sized companies.

The question whether a situation of relative market power exists must be examined with reference to individual companies and individual products or services. In contrast to (classic) market dominance, where a company may behave abusively towards all other companies, relative market power is always examined on the basis of a specific, bilateral individual case and with reference to a concrete individual product or service group. Consequently, a supplier or customer may be deemed to have relative market power towards certain companies, but not towards others. Furthermore, it is possible that relative market power is affirmed with respect to certain products or services, but denied in connection with other products or services of the same supplier.

In order for relative market power to be affirmed in such an individualized relationship, the company in question must *not have sufficient alternatives*. This will be the case if there are no alternatives available to the company in question which, from an objective perspective, satisfy the needs of the company in the same way.

In addition, the existing *alternatives* must *not be reasonable* for the company concerned, i.e. they are disproportionately burdensome or jeopardize competitiveness.

Even if the company in question has itself caused this lack of alternatives, this does not necessarily mean that the lack of unreasonableness must be assumed.

Furthermore, the impediment to competition for the company concerned must be serious. It must therefore be examined whether a switch to alternatives is associated with weighty/substantial competitive disadvantages for the company.

The aforementioned requirements for relative market power will have to be examined in detail in particular in cases of product or company-related dependencies. This concerns, for example, cases in which the company in question is dependent on certain products in order to be able to exist on the market ("must-stock-products"), has made specific investments for the distribution of the relevant products or services, whereby the company in question is dependent on being supplied by the company with relative market power ("lock-in effect"), must procure updates for software, needs to maintain complex equipment or requires original spare parts.

4. Extension of the existing provisions regarding the abuse of a dominant position to companies with relative market power

The Swiss Cartel Act regulates the abuse of a dominant position in article 7. The general clause is revised to the effect that dominant companies and companies with relative market power behave unlawfully if they, by abusing their position in the market, hinder other companies starting or continuing to compete, or disadvantage trading partners (art. 7 para. 1 revCartA).

The non-exhaustive list of abusive behavior contained in art. 7 para. 2 CartA will apply not only to dominant companies, i.e. companies with high market shares, but also to companies with relative market power, where companies with significantly lower market shares may come under the scrutiny of Swiss competition law.

With the forthcoming revision, therefore, even companies with relative market power may, for example, be accused of refusing to trade (e.g., blocking supplies or purchases; art. 7 para. 2 let. a CartA), discriminating trading partners in relation to prices or other conditions of trade (e.g. discounts, art. 7 para. 2 let. b CartA), imposing unfair prices or other unfair conditions of trade (art. 7 para. 2 let. c CartA) or concluding unlawful tie-in transactions (art. 7 para. 2 let. f CartA).

The aforementioned change has far-reaching implications, especially since the application of this provision does not require a cross-border component, but is also applicable to purely domestic situations. A company with relative market power cannot, therefore, simply terminate contracts, refuse to enter into business relationships, refuse to license intellectual property rights or fail to disclose interface information. Increased caution is also required when introducing discount systems.

5. Introduction of a new provision of abusive behaviour in connection with the purchase of goods or services abroad

In the general spirit of the initiative, the revised Swiss Cartel Act contains a new type of abusive behavior. Pursuant to this new provision, it is inadmissible to restrict the ability of customers to purchase goods or services offered in Switzerland and abroad at the market prices and conditions customary in the industry abroad (art. 7 para. 2 lit. g revCartA).

A company with relative market power, but also a dominant company, is thus obliged, on the basis of this provision, to allow a Swiss company dependent on it (pro memoria: both on the supply side and on the customer side, as the case may be) to purchase the products or services of the company with relative market power (or the dominant company) abroad at the local prices and conditions. In other words, a company with relative market power (or a dominant company) is subject to an obligation to supply and an obligation not to discriminate: it must supply companies dependent on it (suppliers or clients) at their request at the (more favorable) local conditions offered abroad.

This obligation to supply and obligation not to discriminate even applies to re-imports. A Swiss company is thus entitled to purchase and re-import products or services from a Swiss supplier with relative market power, which exports them abroad and offers them there at lower prices or more favorable conditions, at these local conditions.

6. Prohibition of online-geoblocking

The popular ballot initiative further demanded that non-discriminatory purchase in online-commerce be "fundamentally guaranteed". The Swiss Parliament implemented this request with an amendment to the Federal Act against Unfair Competition ("UCA").

The new provision targets discrimination in online-commerce. Pursuant to this provision, will be liable of an act of unfair competition in particular whoever without objective justification discriminates in remote commerce a customer in Switzerland on the basis of his nationality, place of residence, place of establishment, place of business of his payment service provider or place of issue of his means of payment (a) with regard to price or terms of payment, (b) blocks or restricts his access to an online portal, or (c) forwards him, without his consent, to a version of the online portal other than the one he originally visited (art. 3a para. 1 revUCA).

The purpose of this new provision is to prohibit geographical market foreclosure in e-commerce. Not only companies, but also end consumers are going to benefit from this new regulation. Unlike the provisions on relative market power outlined above, there is no case-by-case examination of dependencies when applying the new regulation in the UCA.

Subject to an objective justification, customers from Switzerland must therefore be served at the prices publicly announced and practiced abroad. In particular, it is inadmissible for an international online provider to charge Swiss customers higher prices due to their origin or to redirect these customers to a Swiss website against their will.

The provision provides for several exceptions to this prohibition. For example, it does not apply to non-economic services of general interest, financial services,

public transport services, gambling, lotteries, casinos and betting, private security services or social services (art. 3a para. 2 revUCA).

In formulating the prohibition of geoblocking in e-commerce, the initiators were guided by the respective regulation in the European Union, more specifically, the Regulation EU 2018/302 (Geoblocking Regulation), which came into force on 3 December 2018. Case law will show whether the Swiss courts will follow this Geoblocking Regulation and the underlying case law when applying the new UCA regulation.

7. Enforcement of the new regulations

The provision of the Swiss Cartel Act are enforced either through administrative (criminal) proceedings before the COMCO, or through civil litigation. Especially since cases of relative market power concern individual, bilateral relationships, affected companies are likely to increasingly turn to civil courts with their claims, in particular since specific, individual dependence is often easier to prove than absolute market dominance.

The COMCO itself has already publicly announced that, at least in the initial phase after the entry into force of the revised Swiss Cartel Act, it intends to issue leading decisions for various case groups and industries relatively quickly. As soon as such leading decisions are available, new complainants would, pursuant to the COMCO, be referred to civil courts.

If the COMCO finds that a company with relative market power is in breach of competition law, this primarily leads to a ban on the respective behavior. In addition, civil law actions are possible, on the one hand for damages, and on the other hand for supply or for the cancellation of discriminatory terms and conditions. Not to mention the damage to the company's reputation.

Unlike the case of dominant companies, abusive behavior of a company with relative market power does entail a direct sanction for the company (art. 49a para. 1 revCartA). A sanction rather becomes due in case of breaches of an administrative decision or an amicable settlement (art. 50 CartA).

In contrast, the new prohibition of geoblocking in e-commerce is enforced exclusively through civil courts. This raises questions in connection with the enforcement of this prohibition against online sellers based abroad.

8. Need for action for national and international companies

The new provisions on relative market power will initially lead to legal uncertainty for companies. This is particularly valid with regard to the definition of relative market power. In addition, despite the case law that has been developed in Germany for decades, the criteria for determining when one company qualifies as having relative market power compared to another are still unclear. Companies on both the supplier and the demander side will have to examine whether they have or have not (yet) relative market power; and this with regard to each individual product or service group.

In particular, the aforementioned lock-in effect will result in far-reaching effects and a need for advice in connection with distribution agreements, especially to the extent that distributors integrate themselves into a distribution system and align their business operations and business model with this system. Such distributors can become dependent on further supply.

Most companies will not be aware that they have relative market power. Moreover, the fact that cases of relative market power are assessed on a bilateral relationship-level makes prevention and compliance even more difficult for a company with relative market power. As a reminder, the assessment of whether a situation of relative market power exists must be carried out with reference to each individual business partner and with reference to each product or service.

In case such existence of relative market power is confirmed, the concerned company must review its conduct towards the relevant business partner in terms of compliance with article 7 of the CartA. In particular, the equal treatment of the dependent companies with regard to prices, discounts or other business conditions must be ensured. Grounds of factual justifications for unequal treatment or exclusivity must be documented.

In short, the new regulations leads to increased competition law risks and challenges that domestic and foreign companies are faced with. These risks in particular exist before the COMCO issues first leading decisions.

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