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Monthly
Newsletter
March 2022

Competition and Antitrust

Schellenberg Wittmer

Relative Market Power and Geo-Blocking: Behavioral Adjustments are Necessary

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Key Take-aways

1.
New rules for companies with relative market power are introduced into the Cartel Act. Relative market power is assumed when other companies are dependent and have no alternatives.

2.
Companies with relative market power have special obligations, e.g. regarding delivery to Swiss customers abroad, discrimination between business partners and the termination of contracts.

3.
Geo-blocking measures that disadvantage Swiss customers when purchasing online can be unfair. Exceptions exist for certain services and if there is objective justification.

1 New Competition Law in Switzerland

Important changes to Swiss antitrust and unfair competition law enter into force on January 1, 2022, namely, in antitrust law, rules of conduct for companies with so-called **"relative market power"** and, in the Unfair Competition Act, a **ban on geo-blocking**. The legislator, by way of an indirect counter-proposal, has therewith met key requirements of the Fair-Price-Initiative, whose authors primarily intended to combat "Swiss surcharges" to domestic customers. In December 2021, the Secretariat of the Competition Commission published a factsheet with a notification form regarding relative market power. Initial guidelines on geo-blocking are still pending. Both of these legal institutions, however, are modelled after foreign law concepts, which will likely guide application in practice to a certain extent.

Relative market power exists when there is a lack of alternatives.

2 Relative Market Power

2.1 The New Rules

The new rules in the Swiss Cartel Act apply to **companies with relative market power**. Relative market power is assumed in particular when a specific supplier or buyer lacks **alternatives** for its business activities, so that it has to rely and is dependent on the current business partner (Article 4 para. 2bis CA). Unlike market dominance, relative market power is thus a bilateral-individual, not a market-wide phenomenon. In order to avoid relative market power, alternatives must be an objectively sufficient and subjectively reasonable fallback option for the company concerned, for example with regard to individual switching costs. **Dependence** on a company can arise, for example, if that company manufactures a product which the customers of the dependent company expect to find in the dependent company's product range (product range-related dependence), or if an established business relationship can only be replaced at high cost or with other disadvantages to business (company-related dependence). The factsheet clarifies that companies reporting an infringement must also explain to the authority to what extent they have actively evaluated alternatives.

In addition, the same **behavioral requirements** that already exist for market-dominant companies also apply to companies with relative market power (Art. 7 para. 1 CA). In this respect, Swiss law goes significantly further than its neighboring legal systems, which only apply certain behavioral obligations to companies with relative market power. To what extent legal practice will correct this overreaching legislation by not applying certain behavioral requirements because they do not fit to companies with relative market power remains to be seen.

A new ban will be introduced applying both to companies with market dominance and companies with relative market power, prohibiting that buyers are restricted from being **supplied abroad at local prices/terms and conditions**, provided that the sought-after product is offered abroad as well as in Switzerland (Art. 7 para. 2 lit. g CA). In turn, buyers cannot demand delivery to Switzerland at foreign local conditions and, as such, the setting of different prices and business conditions in Switzerland and abroad also remains permissible.

In principle, the abuse of relative market power does **not trigger any direct sanctions**. However, it is threatened with a fine if the company with relative market power violates a **consensual agreement** or a **decision** by which an abuse has already been established at one point. Caution and precise analysis will therefore be required, for example, if the authority imposes – in potentially rather unspecific terms – behavioral obligations with regard to a group of dependent companies in order to create a basis to directly impose fine in case of insufficient compliance.

Finally, in addition to proceedings before the administrative authorities, dependent companies can also take **legal action before the civil courts**, allowing in particular to request termination of the abusive conduct or damages. This way of action is even supposed to become the main enforcement mechanism in the medium term. Both in case of decisions rendered in administrative and in civil proceedings, practical difficulties with enforcement against foreign companies – in case of judgments by the civil courts, for example, under the Lugano Convention – can arise.

Far-reaching behavioral requirements for companies with relative market power.

2.2 Case Groups and Problems of Practical Relevance

The changes in the law entail a large number of unresolved legal issues and difficult challenges for companies. Some constellations and questions of practical relevance are highlighted here:

- **Termination of a business relationship:** For cases in which a company with relative market power wishes to terminate the business relationship with, for example, a supplier, the question which grounds for such termination are consistent with antitrust law will have to be answered. Notably, breaches of contract by the dependent company or a failure to meet the criteria for participation in a qualitative selective distribution system may be considered. Even if there are such reasons for legitimate termination, the assessment under antitrust law depends on the weighing of interests and overall circumstances. For example, the granting of an appropriate transition period or how severe-

ly the termination of the business relationship ultimately affects a company can be decisive. Also, it must be considered whether a company has become dependent by its own doing and choice, for example by focusing on the products of a particular manufacturer.

Obligation to supply abroad at local conditions.

- **Discrimination between different business partners:** If the company with relative market power grants different contractual conditions to its business partners (for example, different prices or discounts), a dependent business partner could potentially argue that it was abusively discriminated against. In such case, a key element of the legal assessment is whether a difference in treatment can be objectively justified. If an excessively restrictive approach is adopted in this respect, there is a risk that an – ultimately anti-competitive – equal treatment or most-favored-conditions rule would be created. Representatives of the authorities have already stated that they intend to avoid such an outcome, but this intention has yet to prove itself in practice.
- **Demand for supply abroad on foreign terms (Art. 7 para. 2 lit. g CA):** If a domestic customer demands supply abroad on local terms and conditions customary in the industry, it must first be verified if the foreign supplier has market dominance or relative market power vis-à-vis the customer. If there is relative market power and provided that an obligation to supply applies in principle, the specific nature of this obligation will depend, among other things, on how the "customary terms and conditions" in the foreign country can be determined and who bears the burden of allegation and proof in this respect. Furthermore, it seems possible that the approached foreign supplier may refer the dependent company to other adequate sources of supply for its product. Such an option would make it easier for manufacturers to maintain multi-level distribution structures. Companies should also keep an eye on the geo-blocking ban in these constellations, since these two regulations potentially overlap.
- **Other business practices covered:** The WEKO Secretariat has clarified in its factsheet that other practices, too, may constitute an abuse of relative market power. Tying/bundling practices and the forcing of additional (unjustified) services as a condition for entering into a business relationship ("no-tapping") are explicitly mentioned.

2.3 Action Required for Companies

Despite the existing ambiguities, companies can and should take measures to adapt to the new legal situation. These include:

- **Screening of current and future business relationships:** Companies should get an overview of business partners in relation to which they may have relative market power or be dependent on, and whether there are proposals to entering into such a business relationship. This helps to assess legal risks as well as opportunities (for example: right to be supplied) brought about by the new legal situation.
- **Contract adaptation:** The screening mentioned above may reveal a need to adapt existing contracts, for example, in order to avoid accusations of discrimination, and to adapt sales structures to the new framework that previously complied with antitrust law. It is also to be expected that arguments based on the new rules will be raised in contract negotiations as means of attack or defense.
- **Competence and structures for response:** Especially in the initial phase after introduction of the new rules, ill-considered responses to proposals from customers or (potential) business partners can cause problems. This also and particularly applies to the areas of foreign delivery and geo-blocking. For this reason, it may be advisable to bundle responsibilities to respond at corporate units that have the appropriate legal and technical expertise, so that potential problems can be identified and resolved at an early stage.

Unfair discrimination in remote trade based on the location of customers.

3 The Ban on Geo-Blocking

The rules of conduct on relative market power have been supplemented by the ban on **geo-blocking in internet commerce** to ensure that Swiss customers are not discriminated against when purchasing goods and services online (Art. 3a para. 1 UCA). The EU already introduced a ban on private geo-blocking practices in 2018 (EU Geo-blocking Regulation).

According to the new provision, anyone who, in remote trade, unjustifiably discriminates against a customer in Switzerland on the basis of his nationality, place of residence, the location of his payment service provider or the place of issue of his means of payment (i) in terms of price or payment terms, (ii) by blocking or restricting access to an online portal, or (iii) by forwarding the customer without consent to a version of the online portal other than the one originally visited, is acting **unfairly**. This provision does not apply to certain service offerings such as financial services, health services, gambling and lotteries, private security services and audiovisual services (e.g. streaming services).

The application of geo-blocking measures and price discrimination practices are **not considered unfair** if they are **objectively justified**. It depends on the circumstances in the individual case. Price discrimination may be justified, for example, if higher shipping costs or customs duties are

incurred by the supplier when selling to a Swiss customer. Geo-blocking, too, may be justified if the publication of a work in Switzerland would infringe the intellectual property rights of a third party. For example, a Dutch court recently held that geo-blocking measures to prevent copyright infringement in the Netherlands were permissible. Finally, geo-blocking measures may also be permissible if an offer to Swiss customers (e.g., online offers of pharmaceutical products) would violate Swiss law (e.g., regulatory law).

The ban on geo-blocking measures only aims at preventing discrimination against Swiss customers, but should, as a rule, not create an obligation for foreign providers to actually deliver goods to Switzerland or to provide services in Switzerland. It is therefore questionable whether the geo-blocking ban will have a pro-competitive effect, especially if foreign companies try to discriminate against Swiss consumers. Although Swiss consumers and Swiss consumer organizations can file lawsuits, it is to be expected that they will only do so in selected cases.

Nevertheless, international companies offering goods and services to Swiss customers are well advised to check if they are compliant with the new rules under Swiss law.

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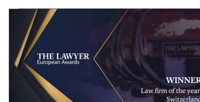

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