

New Swiss unilateral conduct rules significantly broadened

Parliament revises the Cartel Act and adopts the concept of "relative market power". Under the new law, prohibitions previously applicable only to dominant companies will be extended to companies with only "relative market power". At the same time, it introduces a geo-blocking ban.

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Introduction

Parliament has adopted the counter-proposal to the Fair Price Initiative in today's final vote. The following amendments will be introduced:

Introduction of the Concept of "Relative Market Power"

The revision of the Cartel Act ("**CartA**") extends the prohibitions previously applicable only to dominant companies, such as the abusive refusal to supply goods or the abusive discrimination between trading partners in relation to prices (see para. 7 of the CartA), to companies with "relative market power". A company is considered to have "relative market power" if other companies depend on it with respect to the supply of or demand for a product or service in such a way that there is no sufficient and reasonable possibility to switch to other companies.

In contrast to the traditional determination of market dominance (see Art. 4 para. 2 CartA), it is irrelevant whether the allegedly "relatively dominant" company can behave independently of other market participants to a significant extent. Whether a company has "relative market power" must always be determined in relation to a **specific bilateral business relationship**.

In addition to the concept of "relative market power", a further type of abusive practice is added to Art. 7 para. 2 of the CartA, prohibiting companies with "relative market power" and dominant

companies to restrict customers from purchasing goods or services offered in Switzerland and abroad at local prices and conditions.

Whether a contractual partner is dependent is likely to be assessed by the Competition Commission ("**ComCo**") on the basis of the following German practice:

- **Brand Importance:**
Due to the importance of the supplier's brand, the reseller is required to carry it in its product range.
- **Company Specific Dependence:**
Company is depended as a result of aligning its business operations in a long-term contractual relationship.
- **Scarcity:**
Dependency due to the sudden loss of supply options, without having alternatives.
- **Purchaser Relevance:**
A supplier is dependent because of a lack of alternative purchasers.

Introduction of Geo-Blocking Ban

The revision of the Act against Unfair Competition ("**UCA**") introduces in Art. 3a, in line with the EU, the prohibition of discrimination in distance commerce (geo-blocking). Under the new law, it will be deemed unfair competition if an online retailer demands higher prices from Swiss customers, restricts their access to an online portal or redirects them to a Swiss website with higher prices.

However, it is important to mention that Art. 3a para. 2 of the UCA contains various exemptions (e.g. for financial services, public transport or gambling) and that the regulation does **not establish an obligation to deliver to Switzerland**. The goods that may be available at a lower price must eventually be picked up abroad.

Since the new prohibition is part of the UCA, civil courts and not the ComCo will be responsible for the enforcement.

Practical Consequences for Companies

The introduction of the concept of "relative market power" in Art. 7 of the CartA will extend the rules on the prohibition of abusive behaviour to a large number of domestic and international companies. The ComCo has already announced that it intends to create leading cases for the various case groups and sectors as soon as possible. It remains to be seen to what extent civil claims will simultaneously be filed.

Companies shall check individually whether a particular contractual partner is dependent on them. This is particularly relevant **prior** to the conclusion of the business relationship. Under the new law, it is likely that medium-sized and smaller enterprises will also be increasingly confronted with Art. 7 of the CartA by their contractual partners.

Direct penalties for an abuse of "relative market power" (ie. for a first offence) are not envisaged. However, in the event of a violation against a final decision prohibiting a certain abusive behaviour of a company with "relative market power", such company may be fined up to 10% of the turnover achieved in Switzerland in the preceding three financial years. In addition, there is also a threat of civil damage claims.

Regarding the prohibition of geo-blocking, companies are required to ensure, that Swiss customers are not charged with higher prices. Infringements of this provision may result in civil proceedings.

Please do not hesitate to contact us in case of any questions.

Legal Note: The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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