

# Kluwer Competition Law Blog

## Switzerland: Successful Fair-Price Initiative introduces new rules on relative market power

David Mamane (Schellenberg Wittmer) · Wednesday, March 24th, 2021

In 2016, a public initiative was launched in Switzerland, requesting amendments to the Cartel Act in order to enforce non-discriminatory procurement of goods and services abroad by Swiss purchasers. Furthermore, the initiative requested the introduction of rules against geo-blocking in the Unfair Competition Act. This so-called “*Fair-Price Initiative*” is backed by various consumer, hotel, gastronomy and tourism associations and based on the perception that Switzerland is a “*high-price island*” when compared to the price levels in neighbouring countries. This has led to political accusations that international producers of goods and services are imposing surcharges on goods and products in Switzerland in order to profit from the high purchasing power of Swiss consumers. Looking at the facts, it remains unclear whether the perceived price differences are due mainly to price differentiation by the producers themselves or whether it is the high costs of doing business and the significantly higher wages in Switzerland, as well as barriers to cross-border trade (e.g., different rules and regulations relating to goods and services) that contribute to or even justify such differences.

On March 19, 2021, the Swiss parliament approved a counterproposal to the Fair-Price-Initiative, which includes almost all amendments requested by the initiative. The parliament adopted the Cartel Act and the Unfair Competition Act accordingly and established various new behavioural obligations for “*relatively powerful*” companies prohibiting discrimination while procuring goods and services abroad, as well as certain geo-blocking measures. Provided no referendum is called against the new law, these changes would result in significant additional competition law risks for companies in Switzerland and abroad. The new rules are expected to come into force in the current year 2021 or at the beginning of 2022.

### The concept of relative market power

The new law introduces the concept of relative market power in order to tackle the perceived issue of high prices in Switzerland. Relative market power targets situations of dependency below the threshold of an actual dominant market position. While the current definition of a dominant market position applies to a limited number of companies with generally high market shares, which are able to behave independently from all their counterparts, the concept of relative market power mainly relies on the individual supply relationship between two parties.

The concept of relative market power will apply to companies on which other companies are dependent in terms of supply or demand. Such dependence will be deemed to exist if the counterparties do not have “*sufficient or reasonable possibilities to switch*” to other companies. The market shares or size of the company would in such cases no longer be of relevance. The assessment is made in each individual case on the basis of the dependency relationships existing between two companies with regard to specific products or services. The individual assessment will, therefore, heavily rely on the interpretation of the terms “*sufficient*” (no alternative offers are available which objectively satisfy needs in the same way) and “*reasonable*” (use of alternative options is disproportionately burdensome or jeopardises competitiveness) alternatives. While not explicitly stated, it is to be expected that such dependency would only apply in vertical supply relationships and that it would, therefore, be difficult for horizontal competitors to rely on the concept of relative market dominance (unless they are dependent on an input supplied by their competitors).

The concept of relative market power is inspired by the similar concept used in German competition law, however, the manner in which the concept is used in Switzerland diverges from German practice. While the German practice developed certain case groups where relative market power can exist (e.g. for example, in the case of important brands that qualify as “*must-in-stock*” products, or if the business model of a counterparty is geared to specific products (“*lock-in*”), none of them concern the enforcement of cross-border supply of goods and services at the prices and conditions used outside of the country in which the purchaser is based. Therefore, the relevance of the German practice for Swiss competition law is likely to be limited and it will be up to the Swiss Competition Commission (the “ComCo”) and the Swiss civil courts to develop their own practice when applying the new rules introduced by the new law.

Finally, the introduction of the concept of relative market power will lead to potentially a large number of currently non-dominant companies newly being deemed as having relative market power. In many cases, companies are not likely to be able to predict whether they actually have such relative market power, which raises concerns regarding compliance and legal certainty.

### **New obligation to supply abroad at local prices and conditions**

In order to address the specific concern of perceived discriminatory pricing and high prices for Swiss purchasers, the Swiss Parliament has extended the catalogue of potentially abusive conduct in the new law by including a new example for an abuse of a dominant market position and relative market power (the new rule, therefore, also applies to dominant companies). The new rule deems abusive the restriction of the possibility for customers to purchase goods or services abroad at the applicable foreign market prices and customary conditions in this foreign country provided that the relevant products or services are offered both in Switzerland as well as in the said foreign country. This obligation to supply abroad is aimed at price discrimination by companies with relative market power to the detriment of companies or consumers from Switzerland. The new supply obligation also applies to re-imports of Swiss products that are sold abroad at lower prices than in Switzerland, e.g. due to the existing competitive situation or the price level abroad. Accordingly, Swiss companies must potentially permit such re-imports at lower prices in the future.

The new wording gives rise to many questions: For example, it is not clear whether country-specific versions (e.g. due to national technical or product safety standards) of a product could

prevent supply obligations. Also, the term “*customary conditions*” is ambiguous. It is, for example, debatable whether marketing payments provided by a supplier of goods or services for activities of a purchaser in the country of supply would be paid to an exporting company, given that no marketing activities would be carried out by the buyer in the country where the supply is requested. Finally, it seems unclear how these rules are to apply to pre-existing distribution agreements, which might have lawfully allocated certain product or service exclusivities for specific regions or countries. Direct supplies by a manufacturer to a third party could in such cases possibly infringe binding pre-existing agreements. All these points must be taken into consideration when assessing whether legitimate business reasons could justify the refusal of a supplier abroad to supply a Swiss purchaser under the new rules introduced by the Swiss Parliament.

### **Significant consequences for purely national situations**

The concept of relative market power is not limited to the cross-border supply situation as mentioned above, but also encompasses the entire catalogue of abusive conduct contained in the Cartel Act. This means that all abuses listed for dominant companies will now also apply to companies deemed to have relative market power. It could be that such cases will be more common than cases of cross-border supply refusals. Companies with relative market power will, therefore, be restricted from terminating ongoing contracts, rejecting business inquiries, or denying access to intellectual property rights etc.

This is a significant legal change for many Swiss companies with potentially much more far-reaching consequences than the obligation to supply from abroad. It is, therefore, possible that the new rules will be used in ways that were not foreseen in the Fair-Price-Initiative or by the Swiss Parliament. It is conceivable that medium-sized and national companies, in particular, will be deemed to be relatively market-dominant, thus, significantly increasing compliance costs of such companies.

### **Complex enforcement of the new rules**

The new rules introduced by the Swiss Parliament do not provide for direct sanctions against abusive conduct of companies with relative market power, but there will be an indirect sanction risk. In the event of violations of conduct orders issued by the ComCo, sanctions (of up to 10% of the Swiss turnover in the last three years) can be imposed on both the companies with relative market power and their responsible officers.

In addition, civil actions are possible, so that actions for supply or for the cancellation of terminations or discriminatory conditions cannot be ruled out in the future. The sponsors of the Fair-Price-Initiative have noted, for example, that should be possible to enforce supply requests on an international level based on the Lugano Convention and the International Private Law Act by requesting the enforcement of a Swiss civil court decision in the foreign country where the supplier refused to supply the Swiss purchaser.

In contrast, on the administrative law level, the ComCo is likely to be heavily constrained in conducting investigations abroad or enforcing its orders outside of Switzerland. Hence there will be a focus on companies with subsidiaries or other group companies in Switzerland.

## **New rules on geo-blocking**

In addition to the new rules in the Swiss Cartel Act, the Swiss Parliament also opted to include new rules on geo-blocking in the Unfair Competition Act. The enforcement of these rules is generally limited to the civil courts and the Swiss ComCo cannot investigate such cases. Accordingly, in relation to e-commerce, the amended Unfair Competition Act deems it unfair if customers in Switzerland are discriminated, based on their country of residence, nationality, the legal seat of their payments services provider or place of issuance of a payment method, with regards to prices or payment conditions and access to online portals, or if they are forwarded to another version of the online portal without consent. Exceptions apply for non-economic services of general interest, financial services, electronic communications services, services in the field of public transport, services of temporary work agencies, healthcare services, gambling activities that involve wagering a stake with pecuniary value in games of chance, private security services, social services, activities which are connected with the exercise of official authority, services provided by notaries and bailiffs, as well as audiovisual services (the Swiss Parliament has copied these exceptions from the applicable EU rules on geo-blocking). Furthermore, the new rules do not foresee any legal right of Swiss customers to have physical products delivered in Switzerland.

On the basis of the new amendments to the Unfair Competition Act, there is a risk that “*discriminatory*” differentiations or treatment in international (but also national!) online offers could be deemed unfair. This will likely be applied to services that are provided abroad, such as e.g. hotel bookings, car rentals, concert tickets, etc. The scope of the new amendments has not been verified in the normal legislation procedure and there is a high risk that the expectations of the sponsors of the Fair-Price-Initiative as well as the Swiss Parliament with respect to these new rules will not be fulfilled.

## **Outlook and Comment**

In summary, the behavioural obligations for both Swiss and foreign companies will become significantly stricter in the future. Due to the need to interpret the new rules, it is to be expected that, there will be considerable legal uncertainty after the new rules come into force until enough leading cases have been litigated. It is to be expected that the Swiss ComCo will initiate certain leading cases after the rules come into force in order to provide such clarity in particular for the new rule on the obligation to supply products and services abroad. Nonetheless, companies are recommended to already adapt their compliance measures to the new rules now, before they come into force, in order to proactively reduce the risks of administrative proceedings or civil litigation.

As for the aims of the legal amendments, the ultimate effects of the Fair-Price-Initiative on the overall price level may prove to be limited. In particular, the new regulation does not provide for any obligations of Swiss importers to pass on lower purchasing prices to Swiss consumers. The new rules also do not address the issue of state-imposed import barriers or regulated prices. Finally, Swiss manufacturers will likely have to cope with increased competition from lower-priced imports, putting them at a competitive disadvantage. Ultimately, it seems doubtful whether there will be an overall positive effect on the Swiss economy.

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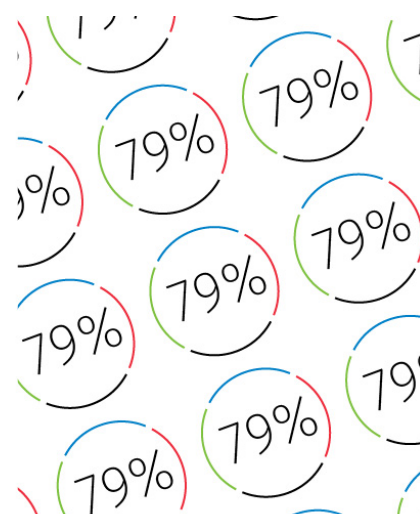
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