

NEWS

REVISION OF COMPETITION LAW: EXTENSION OF THE PROHIBITION OF ABUSIVE PRACTICES UNDER CARTEL LAW AND INTRODUCTION OF A BAN ON GEO-BLOCKING

BACKGROUND TO THE REVISION

In 2017, the so-called Fair Price Initiative was submitted, the aim of which was to guarantee the freedom of Swiss companies to procure goods and services at home and abroad, thereby lowering the prices of imported goods and services. The Parliament has opposed the initiative with an indirect counter-proposal which takes up the main demands of the initiative. If no referendum is held and the parliamentary proposals are implemented accordingly, the initiative might be withdrawn.

CONCEPT OF RELATIVE MARKET POWER

Until now, there has been disagreement as to whether the definition of a dominant market position in Swiss law also includes relative market power. This ambiguity is to be eliminated with the revision. The relevant Art. 4 para. 2 of the Cartel Act ("CartA") is to be expanded by a paragraph and describe relatively market-dominant undertakings as those on which "other undertakings are dependent for the supply of or demand for a good or service in such a way that there are no sufficient or reasonable possibilities to switch to other undertakings" (Art. 4 para. 2bis revCartA).

The definition is modelled on doctrine and case law in Germany, where the concept of relative market power has been known for some time. While the traditional concept of market power refers to the horizontal level and the relationship of the potentially dominant company to (all) other market participants, relative market power concerns the individual relationship of the company to a - vertically related - buyer or supplier with regard to a specific good or service.

The assessment is therefore based on the individual circumstances of the respective buyer or sup-

plier with regard to any alternative options. Whether alternative options exist and whether such option is reasonable should be clarified in each individual case. Such dependency may, for example, relate to goods which a retailer must have in his range in order to be able to carry out his business activities (must-in-stock products) or to the fact that the termination of a contractual relationship is accompanied by the loss of investments made (lock-in effects).

An undertaking with relative market power must apply the same rules to its contractual partners as undertakings with a dominant market position. Thus, the refusal or termination of business relations without an objective reason may be impermissible; the same applies to objectively unjustifiable different prices, terms and conditions or discounts for contractual partners.

In addition, a specific offence is added to the list of examples in Art. 7 para. 2 CartA. According to Art. 7 para. 2 lit. g revCartA, abusive conduct is deemed to be the restriction of demanders to purchase goods or services at the prices and conditions applicable abroad. In this way, dependent companies should be able to induce their contractual partners to supply them at the (more favourable) conditions applicable abroad.

PROHIBITION ON GEO-BLOCKING

The Unfair Competition Act ("UCA") has once again been amended to include a new provision. In accordance with the law applicable in the EU, Art. 3a Draft UCA states that it is unfair to discriminate against Swiss customers in distance selling without objective justification in terms of price or payment (lit. a), to restrict or block customers' access to an online portal (lit. b) or to forward cus-

tomers to a version of an online portal other than the one they originally visited without their consent (lit. c). This is intended to put a stop to any discrimination in distance trading.

However, the provision provides for a number of exceptions, for example for financial or electronic communications services, health services and certain gambling services.

ENTRY INTO FORCE AND ENFORCEMENT

It has not yet been determined when the new provisions will come into force. However, it can be assumed that this will already be the case in the current year or on 1 January 2022 at the latest.

A violation of the amended competition rules will not be subject to direct sanctions; an investigation by the Competition Commission can only lead to a ban on the conduct in question. However, a sanction is possible in the event of a repeat offence. Although administrative or civil proceedings are available against violations of competition law, the Competition Commission has already announced that it will refer any plaintiffs to civil proceedings after issuing relevant leading decisions, which means that claims for damages are likely to be in the foreground in this context. Infringements of the UCA must also be brought before the civil courts.

In general, the question arises as to the enforceability of claims against foreign companies; although, due to the effects doctrine anchored in the CartA and UCA, an action at the Swiss place where the harm arose would be possible in principle.

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NEED FOR ACTION FOR COMPANIES

The extension of the concept of market power means that even companies with small market shares can be regarded as having relative market power and are accordingly affected by the prohibition of abusive practices.

Swiss companies would therefore do well to analyse their position vis-à-vis contractual partners to determine whether they are potentially dependent on them. If relative market power exists, the conduct towards these contractual partners must be examined for compliance with the requirements of Art. 7 CartA. For example, any unequal treatment of business partners or the refusal or termination of contractual relationships should be justified as objectively as possible.

There is considerable legal uncertainty with regard to the new provisions. However, the Competition Commission has announced that it will quickly issue guidance decisions for certain sectors and case groups once the provisions come into force.



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