Extension of prohibition of abuse of dominance to companies with relative market power has far-reaching implications for domestic and foreign companies

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Introduction

On 19 March 2021, the Swiss legislature passed an indirect counter-proposal to the Fair Price Initiative. The counter-proposal takes up the concerns of the initiative committee and aims for non-discrimination of Swiss companies by enabling them to procure goods and services abroad at local prices and conditions. At the core of the revision is the introduction of the concept of relative market power into Swiss competition law. This has far-reaching consequences for companies and will lead to a certain degree of legal uncertainty, at least temporarily. Provided that no referendum is filed – which can be assumed at present – the initiative committee will withdraw the Fair Price Initiative and the new provisions are likely to enter into force in the course of 2021.

Revised market power model

Switzerland's current Cartel Act (CartA) prohibits market-dominant companies from abusing their market position. A company is considered dominant if it can behave to a significant extent independently of other market participants in a particular market, which is generally the case only if it has a high market share. However, companies can also be dependent on non-dominant companies due to individual economic circumstances or a lack of alternative options. The revision of the law intends to subject these cases to Art. 7 CartA and introduces the concept of relative market power (Art. 4 para. 2bis and Art. 7 para. 1 revCartA). Furthermore, a new type of abuse is introduced, which provides Swiss companies with a right of purchase abroad at the prices and conditions applicable there (Art. 7 para. 2 lit. g revCartA).

The concept of relative market power

Relative market power refers to the individual dependence of a company on another company. The dependent company lacks sufficient and reasonable alternative options to obtain a product or service from another company. For example, certain companies may be dependent on the supply of original spare parts or the provision of maintenance services from a particular company because there are no alternative options for the company in question.

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The concept of relative market power is entirely new to the Swiss legal system and will accordingly lead to some legal uncertainty, at least in the beginning. In introducing the concept of relative market power, the initiative committee has taken orientation from Germany, which has known this concept since the 1970s. In order to assess whether an individual dependence exists, the Swiss Competition Commission is therefore likely to be guided by the case law existing in Germany: An assortment-related dependency exists if retailers are dependent on carrying certain products from certain suppliers in their assortment in order to be competitive (so-called must-stock products). A company-related dependency exists if the customer is committed to a particular contractual partner for a longer period of time and is practically unable to switch to other suppliers in the event of a unilateral refusal to supply (lock-in effect). If suppliers of a product are dependent on customers of these products, there is a demand-related dependency.

New right to purchase abroad at local prices and conditions

Art. 7 para. 2 lit. g revCartA also introduces a further type of abuse, which grants Swiss companies a purchase right abroad at the prices and conditions applicable there. As a result, market-dominant companies as well as companies with relative market power must supply the companies dependent on them at the foreign and thus more favorable prices and conditions.

Enforcement

Since relative market power relates to an individual contractual relationship and is not subject to direct sanctions, the enforcement is likely to focus primarily on the civil courts. However, the Competition Commission has announced that it will seek initial leading judgments relatively quickly in the beginning in order to counteract legal uncertainty.

In domestic cases, a complaint can be filed with the Competition Commission or an action can be brought against a company with relative market power at its headquarters in Switzerland. In cross-border situations, the Swiss company has to sue the foreign company and claim the supply of goods or services at the prices and conditions applicable there. Based on the effects doctrine, an action can be brought against the foreign company at the place where the conduct that violated antitrust law has taken its effects. Accordingly, the Swiss courts will apply the Swiss Cartel Act in cases where Swiss customers are refused supply abroad.

Prohibition of geo-blocking

In addition, an explicit ban on geo-blocking is enshrined in Art. 3a of the Unfair Competition Act (UCA) – in line with the legal situation in the European Union. This new provision aims to ensure non-discriminatory shopping in online commerce. Accordingly, an online dealer acts unlawfully if it discriminates against customers in Switzerland with regard to price or payment terms, restricts their access to an online portal or redirects them to a Swiss website without their consent. However, there are numerous exceptions in Art. 3a (2) revUCA, such as for financial or health services.

Consequences for companies and next steps

The introduction of relative market power in the Cartel Act expands the scope of application of the prohibition of abusive behavior under Art. 7 CartA to numerous domestic and foreign companies. Companies should therefore check their existing as well as new contractual relationships for dependencies. In order to comply with Art. 7 CartA, it is necessary, among other things, to treat dependent companies equally, for example in terms of prices, discounts and other conditions. Although there are no direct sanctions in the event of an abuse of relative market power, the Competition Commission can prohibit the conduct and, if this prohibition is violated, the company faces a fine of up to 10% of the sales generated in Switzerland in the last three financial years. In addition, the company could also face claims for damages in civil proceedings.

However, it is also worthwhile for any dependent companies to assess the opportunities arising from the introduction of the new type of abuse.

Companies active in online commerce are advised to implement the new provision on geo-blocking on their sales channels in Switzerland.

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No legal or tax advice

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