

## Briefing March 2021

# Switzerland Extends the Prohibition of Abuse of Market Position to Relative Market Power and Prohibits Geo-Blocking Expectedly in 2022. These are the Consequences for Swiss Companies.

Switzerland introduces the concept of relative market power into its competition law. The main purpose of this amendment is to force foreign suppliers to supply Swiss customers abroad at the (more favourable) local market conditions. A second purpose is to introduce a general prohibition on companies with relative market power to abuse their market position. Furthermore, geo-blocking is prohibited.

### Extension of the prohibition to abuse its own market position to companies with relative market power

The Swiss Parliament has adopted an [amendment to the Act on Cartels](#). Under the amended Act on Cartels, not only dominant companies but also companies with relative market power are prohibited from restraining other companies from exercising or entering into competition or placing trading parties at a disadvantage. This means that the rules that previously only applied to dominant companies now also apply to companies with relative market power.

A company has relative market power if another company depends on it for the supply or procurement of a product or service in such a way that there are no sufficient and reasonable opportunities to switch to other companies. While a dominant position generally requires a market share above 40%, relative market power can exist at significantly lower market shares. In determining whether a company has relative market power, the individual dependencies of the respective buyer or supplier in relation to the

company in question are relevant. The notion of relative market power extends the scope of the rules governing the abuse of the own market position to significantly more companies. Many of them may not even be aware that the new rules apply to them because they do not see themselves as dominant. With the introduction of the notion of relative market power, the Swiss legislator follows the example of other jurisdictions such as Austria, Belgium, France and Germany which regulate the unilateral conduct of companies that are not dominant in the classic sense.

Unlike the abuse of a dominant position, however, the abuse of relative market power is **not subject to fines**.

### Right to get supplied at the lower foreign prices

The main objective of the amendment of the Act on Cartels is to compel foreign suppliers **to supply Swiss customers abroad at the applicable (lower) local prices and conditions**. In other words, companies with relative market power will no longer be in a position unilaterally to refuse to supply Swiss

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customers abroad at the local prices and conditions.

### Extension of prohibition on abusing market position to companies with relative market power

As mentioned above, the amended Act on Cartels extends the rules that formerly only applied to dominant companies to include companies with relative market power. In effect, this will mean that a variety of practices will become unlawful unless they can be objectively justified by legitimate business reasons, among others:

- Unequal treatment of similar customers or suppliers, e.g. in terms of prices, discounts, and terms and conditions; however, also the amended Act on Cartels arguably does generally not require an equal treatment of every and each trading partner, in particular if the discrimination does not restrict competition.
- Termination of supply or procurement relationships; for example, to the extent that a distributor or retailer claims to be dependent on the supply of a certain product or brand, a supplier may need to carefully assess the justification for terminating such distributor or retailer.
- Tying, i.e. making the conclusion of a contracts subject to buying or supplying supplementary goods or services.

### Prohibition on geo-blocking

The Swiss Parliament has also introduced a ban on geo-blocking in [Act against Unfair Competition](#). The amendment makes it unlawful (also for foreign traders) to discriminate against Swiss customers in any distance trade if there is no objective justification. Under the amendment it is unlawful to:

- discriminate in terms of price or terms of payment;
- block or restrict access to an online portal; and

- to redirect him/her without his/her consent to a version of the online portal other than that originally visited

on the basis of the customer's nationality, place of residence, place of establishment, registered office of his/her payment service provider, or place of issue of his/her means of payment.

This prohibition does not apply to non-economic services of general interest; financial services; electronic communications services; public transport services; services of temporary employment agencies; health services; games of chance requiring a monetary stake, including lotteries, games of chance in casinos and betting; private security services; social services of all kinds; services linked to the exercise of public authority; activities of notaries and court officials appointed by public authorities; and audiovisual services.

### Entry into force

The date on which the amendments enter into force has not yet been determined. However, it is expected that the amendments will come into force in 2022.

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to Relative Market Power and Prohibits Geo-Blocking**

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