



# Obligation to contract based on relative market power

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## Key Take-aways

- 1.** The Fair-Price-Initiative and the counter-proposal by the Federal Council will lead to new restrictions for companies with "relative market power", if other companies are dependent on them.
- 2.** The counter-proposal by the Federal Council would enable Swiss companies to purchase abroad at local purchasing conditions. Enforcement might, however, be difficult.
- 3.** While the implications of both proposals are significant, the effects of implementing the Initiative would go farther by covering Swiss domestic transactions as well.

## 1 Introduction

The federal public initiative "Stopping the High-price Island – for Fair Prices (Fair-Price-Initiative)" and the indirect counter-proposal by the Federal Council request the introduction of the **concept of relative market power** into the Swiss Cartel Act ("CartA"). Their purpose is to lower purchasing prices in Switzerland. The effects for Swiss and foreign companies could be far-reaching.

## 2 Background

The so-called "Fair-Price-Initiative" aims to eliminate **cross-border price differentiation** to the detriment of Swiss companies. On May 29, 2019, the Federal Council presented his corresponding explanatory report, as well as an indirect counter-proposal. The counter-proposal was made because the Federal Council considered the market intervention resulting from the Fair-Price-Initiative as excessive. The counter-proposal takes a more selective approach and protects, in particular, companies which have **higher purchasing costs** or are at a disadvantage vis-à-vis foreign competitors due to **refusals to supply**.

## 3 The Fair-Price-Initiative

The Initiative results from the perception that, currently, **private import restrictions** have a negative impact on trade between Switzerland and other countries. This assumption is based on the fact that the prices in Switzerland are generally higher than abroad. However, the discourse triggered by the Initiative has also shown that price differences and procurement difficulties are sector-specific. Furthermore, price differences can be to a large extent attributed to different salary levels, as well as other factors (e.g. technical or regulatory trade barriers or higher costs) relevant for the respective purchasing conditions. The Initiative nevertheless requests to include in the Federal Constitution a legal basis for measures **ensuring non-discriminatory purchases** of goods and services abroad, and preventing companies with market power from unilaterally applying discriminatory measures regarding purchases.

### 3.1 Is the concept of "relative market power" the solution?

The problem identified by the authors of the Initiative shall be solved by extending the rules of conduct for market dominant companies to companies which are not dominant, but on whom other companies "depend" (so-called "companies with relative market power"). Companies are "dependent" if they lack adequate alternative transaction partners. As a result, it shall be possible to tackle, through administrative procedures or civil claims, price discrimination by companies with relative market power. In particular, suppliers outside of Switzerland could be forced to supply goods and services to Swiss and non-Swiss buyers at identical conditions. This approach is **inspired by the German concept of relative market power**. However, the Initiative's version of this concept is significantly different from the present - an impending revision may render the legal framework more restrictive - legal situation in Germany: § 20 of the German Act against

Restrictions of Competition (GWB) protects small and medium sized companies lacking adequate transaction alternatives in a vertical relationship. There is no specific cross-border component as § 20 GWB is not tailored to fight territorial segmentation of pricing conditions. Furthermore, the German rules are primarily of relevance in private enforcement litigation resulting from specific types of cases. This concerns, for example, the "dependence on a product portfolio" for leading products which customers expect to find in stock, as well as the "company-related dependence", where the resellers are included in a distribution chain, have adapted their business model accordingly ("lock-in") and become, hence, dependent on future supplies. There is some sharp criticism against this concept in Germany, in particular because an overly rigid competition law scrutiny of vertical relationships can ultimately have a **chilling effect on competition**, hindering "hard bargaining" and optimization of distribution. This may petrify the distribution channels and is conducive to inertia of the "dependent" market participants.

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**Relative market power  
will be subject to more  
restrictive rules – business  
models must be reassessed.**

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### 3.2 Effects

Should the Initiative be accepted, it would become unlawful for a dominant company or a company with relative market power to limit possibilities to purchase goods or services, which are being offered in Switzerland and abroad, in **any country at the local prices**. This will lead to a supply obligation for companies of differing sizes. It would be prohibited to discriminate by offering different prices/business conditions to different companies. Furthermore, companies would be prohibited from implementing exploitative abuses, in particular by way of excessive pricing, regardless of whether they result in a competitive disadvantage for the business partner.

However, the concept of relative market power would not be limited to cross-border discriminations, it would apply to the entire catalogue of abusive behavior under article 7 para. 2 CartA. Under this new concept, companies considered to hold relative market power will, **even regarding Swiss domestic transactions**, no longer be allowed to e.g. freely determine rebate systems, refuse supply enquiries, terminate contracts, give significant price reductions or refuse access to intellectual property rights. This will potentially lead to a very far-reaching change of the legal framework for many companies in Switzerland. This is being alleviated by the fact that there will be no direct sanctions; private damages claims will be possible, however.

### 3.3 International enforcement

According to the authors of the Initiative, it would 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. The Competition Commission (ComCo) would, on the contrary, have only very limited possibilities to conduct investigations or to enforce measures outside of Switzerland.

The Initiative provides one **exception** allowing Swiss companies to restrict supplies of their own products from abroad into Switzerland if these products are **only reimported and will be sold without any further processing**. This means that Swiss companies can charge lower prices for their products outside of Switzerland and can prevent reimports of such lower priced products. It would seem questionable whether this is in line with the international obligations of Switzerland (WTO, GATT, and GATS).

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## The Initiative will also apply to transactions undertaken exclusively within Switzerland.

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### 3.4 Geo-Blocking

"Geo-blocking" is a distribution practice by which sellers implement **different web interfaces and business conditions** for different territories, preventing customers from using the interfaces/conditions of another territory. The Initiative requests measures to address geo-blocking and ensure discrimination-free online purchases, in particular by introducing a new rule against unfair competition. According to the Federal Council, however, such measures would be difficult to effectively enforce in the absence of corresponding international treaties. As a result, the rule would mainly affect Swiss companies.

## 4 Counter-proposal

### 4.1 Content

The indirect counter-proposal includes **additional conduct rules** for companies with relative market power as well. However, the newly proposed article 4 para. 2<sup>bis</sup> of the draft CartA considers companies to have relative market powers only if other companies are dependent on them for the purchasing of products or services. Therefore, companies with relative buying power are excluded from the scope.

With regard to the potentially problematic behavior, a newly introduced article 7a of the draft CartelA states that a company with relative market power behaves unlawful if a dependent company is "impeded in taking up or engaging in competition, by refusing to supply products or services to such companies abroad at the prices and business conditions applied there, without having an objective reason for doing so". This proposal **only applies to cross-border purchasing** by Swiss companies, and not to purely domestic transactions. The indirect counter-proposal aims in particular to prevent local purchasers from being supplied exclusively by local distribution channels and from being, therefore, at a disadvantage when competing at downstream market levels. Article 7a of

the draft CartA is limited to discriminatory practices regarding purchase conditions. Purely exploitative abuses are not included in order to prevent authorities and courts from having to judge whether a specific price is adequate. Differing conditions for different transactions would infringe article 7a of the draft CartA only, if the differences are **above a certain appreciable minimum threshold**, so that they trigger an actual restriction of competition, and if the company with relative market power cannot show any grounds for objective justification. Direct sanctions are not foreseen.

In a first committee discussion of the Swiss Parliament on 8 October 2019, a small majority has requested an amendment of the counter-proposal. The counter-proposal is to be brought more in line with the original Initiative and should, in particular, be applicable to all types of behaviors also within Switzerland.

### 4.2 Consequences

Compared to the Initiative, the effects of the counter-proposal would be **much more limited** since it only applies to cross-border discriminations against Swiss purchasers. However, reimports into Switzerland are treated more restrictively because there is no exception in this regard. For the involved companies it would be easier to foresee whether a specific constellation falls under article 4 para. 2<sup>bis</sup> and article 7a of the draft CartA based on the counter-proposal. Overall, the indirect counter-proposal seems to be the approach more clearly targeted against the phenomenon that lies at the heart of the Initiative, i.e. the (alleged) refusal to offer more attractive foreign purchasing conditions when supplying to Swiss purchasers. Nevertheless, the counter-proposal is likely to give rise to fundamental discussions, too. In particular, the explanatory report of the Federal Council envisages an objective justification if the production costs in Switzerland "can be lowered due to higher utilized capacity following success in export markets and if sales in such foreign markets are possible only at lower prices". Proving these economic factors will open much room for debate.

There will be **no rule against geo-blocking**, in particular due to fears of significant additional administrative costs, legal uncertainty and enforcement problems. Nevertheless, Swiss dealers will, in any case, have to review their online sales policy carefully in order to prevent legal actions or sanctions. This is because the EU geo-blocking rules are also applicable to dealers outside of the EU insofar as they have transactional relationships with EU customers.

### 4.3 Parliamentary proposals

In a first committee discussion of the Swiss Parliament on 8 October 2019, a small majority has requested an amendment of the counter-proposal, aligning it more closely with the original Initiative. In a motion dated 4 November 2019, Parliament's commission in charge proposes, in particular, to introduce a new type of abuse into Art. 7 CartelA, applicable to both dominant undertakings and undertakings with relative market power, namely the preclusion of buyers from sourcing products at the prices and conditions charged abroad. Furthermore, a minority of commission members requests the introduction of a geo-blocking provision into Art. 3 of the Swiss Unfair Competition Act. In its proposed wording, this provision would actually be more restrictive than EU law by obliging companies to supply Swiss customers at conditions applied abroad.

## 5 Final comments

The Swiss Parliament will have to decide until 12 June 2020 on the Initiative and the counter-proposal, provided the deadline is not extended. It can be expected that the Cartel Act will be amended or the Initiative will be going for a public vote of the electorate. **The legal framework will change for Swiss and foreign companies in any event.** A high number of Swiss companies will have to significantly change their behavior, in particular in case of an application to purely domestic Swiss relationships.



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