

LIDC / CLA / AFEC Webinar on Geo-blocking

Geo-blocking in Switzerland

David Mamane, LL.M. (Bruges)



1. Application of the Geo-blocking Regulation in Switzerland
2. Application of Swiss competition law to Geo-blocking measures
3. Democratisation of competition law

- > Territorial scope of the regulation
 - > Applies to traders offering their goods or services to consumers in the EU, regardless of whether they are established in the EU or in a non-EU country
 - > Traders “*established in non-EU countries that operate in the EU*” (official Q&A by EC) → lack of definition in the regulation

- > Directing activities towards a EU/EEA member state
 - > Mere accessibility in such a member state should not be sufficient
 - > Indications that the trader was envisaging making doing business in a member state? (e.g. language, currency, international phone numbers, top-level-domain, international reference projects/customers, etc.??)
 - > Possible to make a negative declaration (“This offer is limited to customers in Switzerland”)? Risk of a Liechtenstein gap?

- > Enforcement against Swiss traders?
 - > Regulation of activities outside of the EU/EEA
 - > No direct criminal or administrative measures, unless there is a local subsidiary in a member state
 - > Limited investigation possibilities → outside of the scope of the Cooperation agreement on competition law matters
 - > Civil litigation by consumers with a possibility to enforce based on the Lugano convention?

- > Reciprocity: Regulation in non-EU countries against geo-blocking by EU-companies should be accepted

1. Application of the Geo-blocking Regulation in Switzerland
- 2. Application of Swiss competition law to Geo-blocking measures**
3. Democratisation of competition law

- > Geo-blocking can also be seen as a potential competition law issue

- > Similar legal basis, as in art. 101/102 TFEU:
 - > Prohibition of restrictions of passive sales in distribution agreements
 - > Prohibition of restrictions of active and passive sales in selective distribution
 - > Prohibition of unilateral discrimination without justification

- > Focus on distribution agreements and currency exchange rate differences
 - > Strong political pressure to intervene
 - > Very active enforcement
 - > Upcoming public initiative against international price discrimination

- > Regulation of extraterritorial geo-blocking?
 - > Effects doctrine based on the Swiss Cartel Act
 - > New Practice: Sufficient if a behaviour outside of Switzerland "has an effect in Switzerland or could have an effect"
 - > Additional appreciability or foreseeability is not necessary
 - > Prohibition of exports into other countries from the contractual territory → prohibition of direct or indirect import into Switzerland
 - > On a global level all license and distribution agreements fall within the jurisdiction of the Swiss Cartel Act if such agreements *could* in any way (even only minimal, hypothetically, or indirectly) have an effect in Switzerland, i.e. if a hypothetical effect (e.g. an indirect delivery into Switzerland) cannot be excluded

Geographic scope of application

- > For example clauses in US agreements hindering parallel imports into Switzerland

“Customer [retail dealer, internet dealer] shall not, directly or indirectly, transmit, send or export any product or software to any foreign country (i) in violation of any of the US export control laws or regulations, and (ii) without first obtaining the express written consent of [Manufacturer]. In no event shall customer directly or indirectly, transmit, send, or export any product outside the territory”

- > Swiss competition law can regulate all EU distribution systems
- > Any obligation in a EU (or other non-Swiss) distribution agreement on geo-blocking measures will potentially be problematic, such as e.g. contractual obligations on
 - > preventing customers from accessing websites in other territories, e.g. preventing all non-EEA users from accessing a website
 - > terminating transactions once customers from other territories or non-EEA countries are identified
 - > Direct/indirect contractual measures hindering purchases abroad
- > Also applicable to unilateral behaviour in case of a dominant position (discrimination, refusal to supply, etc.)

1. Application of the Geo-blocking Regulation in Switzerland
2. Application of Swiss competition law to Geo-blocking measures
- 3. Democratisation of competition law**

Democratisation of competition law

“Fair price initiative”



Democratisation of competition law

“Fair price initiative”

- > Initiative calling for an amendment of the Swiss Constitution and the Swiss Cartel Act (need for 100'000 signatures)

- > Introduction of the concept of «relative market dominance»:
 - > Non-discriminatory procurement of goods and services abroad
 - > Abusive behaviour if dominant / relative market dominant companies restrict possibilities for Swiss purchasers to buy goods or services in the country of their choice and at the prices charged in that country

- > Non-discriminatory online purchasing, to be enforced on the basis of the Unfair Competition Act

- > Possible implementation of the initiative
 - > Counter-proposal by the Swiss government takes up most of the concepts, but rejects measures against geo-blocking due to difficulties in enforcing such rules in the absence of a bilateral agreement with the EU
 - > Proposed changes to the Swiss Cartel Act in order to prohibit “relatively dominant” companies from refusing to sell abroad on the basis of the local prices and conditions
 - > Imitative committee insists that actions to ensure non-discriminatory online purchasing can be enforced on the basis of the Lugano convention on “jurisdiction and the recognition and enforcement of judgments in civil and commercial matters“

Thank you for your attention.

David Mamane, LL.M. (Bruges)

Partner and Head of the Schellenberg Wittmer Competition Team

david.mamane@swlegal.ch

Schellenberg Wittmer Ltd / Attorneys at Law

Löwenstrasse 19 / P.O. Box 2201 / 8021 Zurich / Switzerland

T +41 44 215 5252 / F +41 44 215 5200

www.swlegal.ch

ZURICH / GENEVA / SINGAPORE
