COMMENTS OF THE AMERICAN BAR ASSOCIATION
SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW
ON THE SWISS FEDERAL COUNCIL’S INDIRECT COUNTERPROPOSAL
FOR RULES AGAINST PRICE DISCRIMINATION
AND RELATIVE MARKET POWER

November 21, 2018

The views stated in this submission are presented on behalf only of the Sections of Antitrust Law and International Law of the American Bar Association. These comments have not been approved by the ABA House of Delegates or the ABA Board of Governors and therefore do not state the views or policy of the American Bar Association.

The American Bar Association Sections of Antitrust Law and International Law ("Sections") welcome the opportunity to provide comments on the counterproposal proposed by the Swiss Federal Council (the "Federal Council") as an alternative to the Swiss People’s Initiative “Stop the island of high prices – for fair prices” (“Fair Price Initiative”). Both the Fair Price Initiative and the counterproposal address discrimination in pricing of goods and services purchased within and outside Switzerland. These comments are submitted in response to the Federal Council’s request for consultation on its counterproposal. The views expressed here reflect the experience and expertise of the members of the Sections with competition and consumer protection law in the United States and other jurisdictions, including Switzerland. The Sections are available to provide additional comments or to participate in further consultation with the Federal Council as appropriate.

I. Background on the Fair Price Initiative and the Federal Council’s Indirect Counterproposal

The Fair Price Initiative was submitted on December 12, 2017 and proposed changes to the Federal Constitution of Switzerland, with view to amending (1) the Swiss Cartel Act of 6 October 1999 (the “Act”) to extend the abuse of dominance provisions to entities with “relative market power” (control over goods or services for which there are no reasonable and sufficient alternatives), and (2) the Federal Act of 19 December 1986 against Unfair Competition to ban private “geoblocking” (price discrimination in online commerce based on the location of the purchaser).

The Fair Price Initiative’s stated goal is to combat inflated or artificially high prices from importers and foreign suppliers on goods and services sold in Switzerland, including sales conducted over the Internet. It calls for a guarantee of non-discriminatory procurement of goods and services abroad from dominant entities and

1 BBI 2018 5134, Amendment to the Cartel Act as an indirect counterproposal to the Federal People's Initiative "Stop the high-price island - for fair prices (Fair Price Initiative)" (Aug. 22, 2018).
those with “relative market power”, as well as a prohibition on price discrimination in online commerce that does not appear to be limited to entities with relative market power.

The Federal Council considers that the Fair Price Initiative goes too far and will recommend to Parliament that it be rejected. In the Federal Council’s view, the Fair Price Initiative would require the competition authorities and courts to investigate pricing policy between two Swiss entities even if neither of them is dominant, which would endanger legal certainty, economic freedom, and – ultimately – employment.2

In place of the Fair Price Initiative, on 22 August 2018 the Federal Council issued for consultation an indirect counterproposal designed to combat cross-border price and other discrimination by both domestic and foreign entities to avoid foreclosures or distortions of competition in the Swiss market.

The Federal Council agrees that it is appropriate to prevent unjustifiably high prices that result from private restrictions of competition or state trade barriers in Switzerland as compared to foreign markets. The counterproposal addresses the Fair Price Initiative’s core concern by providing that entities should in principle be able to purchase goods and services abroad at the prices and other conditions applicable there from entities with “relative market power” as to those goods and services. This rule would apply only where the Swiss market would be foreclosed or competition distorted absent such non-discriminatory purchases. The counterproposal does not cover pricing practices involving two Swiss entities within Switzerland.

The Federal Council’s counterproposal proposes two amendments to the Act:

• The first amendment would add a new paragraph 2bis to Article 4 (Definitions) of Chapter 1 (General Provisions) providing that an entity (the prospective seller) has “relative market power” when another entity (the prospective buyer) is dependent on the seller’s good or service in the sense that there are no sufficient or reasonably adequate “alternative possibilities” available from other sellers.

• The second amendment would add a new Article 7a (Unlawful practices by undertakings with relative market power) to Chapter 2 (Substantive Provisions) making it unlawful for an entity with relative market power to hinder the ability to compete of other entities dependent on it by refusing, without “objective reasons,” to sell goods or services to such dependent entities abroad at the prices and conditions that apply there.

2 The Federal Council also considers that a unilateral Swiss ban on geoblocking would not be enforceable or effective without corresponding treaty provisions with other countries. This comment does not address issues relating to geoblocking.
II. Executive Summary of the Sections’ Comments

The Sections take note of the Federal Council’s goal of preventing unjustifiably high prices and other restrictive terms in Switzerland as compared to foreign markets due to private restrictions on competition and state trade barriers. For the reasons explained in Section VIII below, the Sections suggest careful evaluation of any proposed legislation to circumscribe differential pricing, particularly based on geography, because based on the experience in the U.S. and other jurisdictions, the potential harm to competition and the Swiss economy from regulating international price differences is likely to outweigh any potential benefits.

In these Comments, the Sections also address several concerns they believe the counterproposal raises.

- Enforcing the new proposed provisions of the Act would be burdensome and difficult, such that the counterproposal might not only fail to accomplish the Federal Council’s goals but could result in unintended negative consequences on the Swiss market (see Section III).

- The counterproposal also does not appear to take into account how it would interact with other regulations and bodies of law that affect pricing and distribution. Regulatory restrictions may significantly affect product prices in some jurisdictions (e.g., with respect to pharmaceuticals), requiring uniform pricing across jurisdictions may impact patent holders’ intellectual property rights, and other jurisdictions differing tort and other bodies of law may also impact pricing (see Section IV).

- The Sections’ Comments also include discussion of the text of the proposed amendments to the Act, in particular, the lack of guidance on how to determine when “relative market power” exists (see Section V.) and whether foreign sellers have “objective reasons” justifying their refusal to sell to Swiss entities on the same terms as others (see Section VI).

- Finally, the Sections provide some general comments based on the experience of the U.S. and other jurisdictions on policy issues related to international price discrimination and refusal to supply (see Sections VII and VIII).
III. Issues Relating to Enforcement and Effectiveness

In the Sections’ view, as a practical matter, implementation of the counterproposal is likely to be burdensome and require intensive factual and economic analysis. Competition authorities and courts would have to consider complex issues such as how to compare pricing given different currencies and fluctuating exchange rates, international trade agreements that might be implicated, the existence of alternative goods and services and whether they are reasonable substitutes and sufficiently available, and the extent to which Swiss competition is distorted. Each of these issues would necessitate in-depth analysis and investigation. Competition authorities would also need to assess sellers’ potential justifications for their pricing. Substantial resources and expertise would therefore be required for enforcement. Moreover, as discussed more fully below, the counterproposal would significantly increase legal uncertainty for all potentially targeted companies; addressing this uncertainty would require further significant resources.

Additionally, enforcement of the counterproposal would require Swiss regulators and courts to exercise jurisdiction over foreign entities. This raises both administrative and substantive questions such as how to gather information outside of Switzerland, the means by which and the extent to which Swiss authorities and courts have the power to assert jurisdiction over foreign entities, how to avoid or resolve jurisdictional conflicts that could give rise to public international law issues, and the legal and practical enforceability of decisions against foreign entities.

These enforcement issues raise a broader question, i.e., whether the counterproposal would effectively address the concerns that prompted it, namely, the perception of unjustifiably higher prices in Switzerland. It might also result in unintended counteractions by foreign governments that could adversely affect Swiss entities and markets. The attendant uncertainty and risk might have a chilling effect on justifiable and procompetitive price differences across jurisdictions that could lead to higher prices in some countries (or everywhere).

Further, the counterproposal might create incentives for foreign suppliers to abandon or choose not to enter the Swiss market, resulting in fewer choices for consumers and less inter-brand competition there. In addition, foreign suppliers with existing distribution subsidiaries could opt to close down their Swiss subsidiaries and instead serve Swiss customers only from abroad in order to save distribution costs.

Likewise, Swiss companies with relative market power that currently sell their goods and services at lower prices abroad might opt out of or be constrained in their ability to compete in certain foreign markets. Swiss companies that are successful in their home market could be curbed in their ability to expand into territories where lower prices may be a key to success. In particular, such Swiss companies would potentially be the main target of requests based on the counterproposal, given that
there are lower hurdles for conducting investigations into their conduct and enforcing decisions against them.

IV. Issues Concerning Interaction with Other Laws and Regulations

The Sections observe that the counterproposal would not exist in a vacuum but would be one of a series of Swiss and international laws and regulations that affect pricing and distribution. We are uncertain as to whether the impact of these other legal rules and how the counterproposal might interplay with them has been considered.

First, the counterproposal does not on its face take into account regulatory differences across jurisdictions that affect product prices. For example, in many jurisdictions, pharmaceutical pricing is constrained by regulatory restrictions rather than market forces. These regulations presumably were enacted for the benefit of the consumers in those jurisdictions. Swiss entities that assert rights under the counterproposal may be viewed as taking advantage of governmentally restricted pricing not intended to benefit Swiss consumers.

Nor does the counterproposal seem to take into due consideration sellers’ intellectual property rights (IPR) with respect to affected products. Based on Article 9a of the Federal Act on Patents for Inventions (Patents Act), the exhaustion of patent rights is generally limited to the region of the European Economic Area (Article 9a paragraph 1 Patents Act) or, in the case of governmental price regulation, to a specific country (Article 9a paragraph 5 Patents Act). The legitimate interest of the patent owner and the basic rules of the Patent Act would be circumvented if the manufacturer were obliged to sell patent-protected products to Swiss entities abroad without regard to whether patent rights had been exhausted. Even though the Patent Act would allow prohibiting such imports, the counterproposal seems to oblige the manufacturer to sell the product abroad and to allow imports into Switzerland of these products. This could in particular be problematic for pharmaceutical companies subject to regulated prices. Additionally, requiring foreign pricing and terms to apply with respect to these sales would not permit the patent owner to determine the value of those products (particularly where patent protection varies across jurisdictions) and thus the price it could charge in the Swiss market.

Further, there may be substantial differences in the tort, contract, and other substantive laws that could apply to cross-border sales and the products involved. The counterproposal does not appear to consider these differences, how to resolve them, or how they might affect pricing. For example, it is unclear which country’s tort law would apply to a particular product – the law of the country where the purchase occurred or the law of Switzerland, where the product will be used or resold. As a general rule, the law applicable to a tort is the law of the country in which the events constituting the tort in question occur. However, many jurisdictions (including the
U.S.) hold that the law of the country in which the harm arises may also apply. Another potential complicating factor is that manufacturers and distributors may attempt to predetermine the law by which their conduct will be judged in order to limits their potential liability. Jurisdictions also follow different approaches as to the effectiveness of such provisions. All of these factors might affect product pricing, but the counterproposal does not appear to address them.

V. Issues Relating to Determining “Relative Market Power”

The proposed new Article 4 paragraph 2bis of the Act would define an entity with “relative market power” ("relativ marktmächtiges Unternehmen") to be “an undertaking from which other undertakings are dependent regarding the demand of a good or service in such a way that there are no sufficient and adequate possibilities to switch to other undertakings” (“Unternehmen, von dem andere Unternehmen bei der Nachfrage einer Ware oder Leistung in einer Weise abhängig sind, dass keine ausreichenden und zumutbaren Möglichkeiten bestehen, auf andere Unternehmen auszuweichen”). In the Sections’ view, this definition leaves numerous questions unanswered. For example it is not clear – and still a topic of debate in German courts, which have dealt with the concept of relative market power for some years now – in what circumstances an undertaking is “dependent” ("abhängig") on a product or service that is merely desired as opposed to being essential. It is equally unclear under what circumstances other entities’ goods or services would be considered alternative “possibilities” ("Möglichkeiten") or when those goods or services would be deemed “sufficient” ("ausreichend") and “reasonable” ("zumutbar"). The amendment does not state whose view determines the answers to these questions (i.e., a regulator or court, the dependent entity, or a hypothetical rational entity).

There is a body of established law concerning market definition and the analysis and measure of market power, but that law was developed largely in cases involving claims of (absolute) market dominance, which is defined differently from the new concept of relative market power introduced by the counterproposal. One overarching question is the extent to which existing precedents should be applied here. For example, should the product market be determined in the same manner for relevant market power purposes as in market dominance cases? What role (if any) should geographic market precedents involving market dominance play in a relative market power case? In the Sections’ view, legitimate business conduct may be chilled absent some additional guidance as to when the new provisions are likely to apply.

This is particularly the case with respect to entities that do not have significant market power in the traditional sense but could now come within the Act if it is amended as proposed. The mere fact that the German competition rules include a similar concept is not persuasive in the Sections’ view. As far as the Sections are

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3 Restatement (Second) of Conflict of Laws § 145 cmt. d (“A state has an obvious interest in regulating the conduct of persons within its territory.”).
aware, Germany is an exception, and a controversial one at that given that its relative
market power rule continues to be the object of intense debate and has been reformed
several times.\footnote{The complexity of the corresponding German norm is quite striking:}
Moreover, Germany’s rule is hardly ever applied to geographic price

§ 20 ARC - Prohibited Conduct of Undertakings with Relative or Superior Market Power

(1) § 19(1) in conjunction with paragraph 2 no. 1 shall also apply to undertakings and associations of
undertakings to the extent that small or medium-sized enterprises as suppliers or purchasers of a certain type of
goods or commercial services depend on them in such a way that sufficient and reasonable possibilities of switching
to other undertakings do not exist (relative market power). A supplier of a certain type of goods or commercial
services is presumed to depend on a purchaser within the meaning of sentence 1 if this supplier regularly grants to
this purchaser, in addition to discounts customary in the trade or other remuneration, special benefits which are not
granted to similar purchasers.

(2) § 19(1) in conjunction with paragraph 2 no. 5 shall also apply to undertakings and associations of
undertakings in relation to the undertakings which depend on them.

(3) Undertakings with superior market power in relation to small and medium-
sized competitors may not
abuse their market position to impede such competitors directly or indirectly in an unfair manner. An unfair
impediment within the meaning of sentence 1 exists in particular if an undertaking

1. offers food within the meaning of § 2(2) of the German Food and Feed Code [Lebensmittel- und
Futtermittelgesetzbuch] below cost price, or

2. offers other goods or commercial services not just occasionally below cost price, or

3. demands from small or medium-sized undertakings with which it competes on the downstream market in the
distribution of goods or commercial services a price for the delivery of such goods or services which is higher than
the price it itself offers on such market,

unless there is, in each case, an objective justification. Cost price within the meaning of sentence 2 shall be the price
agreed between the undertaking with superior market power and its supplier for the provision of the good or
service; general discounts that can be expected with reasonable certainty at the time the offer is made shall be
proportionally deducted from the agreed price unless otherwise explicitly agreed with regard to specific goods or
services. The offer of food below cost price is objectively justified if such an offer is suitable to prevent the
deterioration or the imminent unsaleability of the goods at the dealer’s premises through a timely sale, or in equally
severe cases. The donation of food to charity organisation for use within the scope of their responsibilities shall not
constitute an unfair impediment.

(4) If, on the basis of specific facts and in the light of general experience, it appears that an undertaking
has abused its market power within the meaning of paragraph 3, the undertaking shall be obliged to disprove this
appearance and to clarify such circumstances in its field of business which give rise to claims and which cannot be
clarified by the competitor concerned or by an association within the meaning of § 33(4), but which can be easily
clarified, and may reasonably be expected to be clarified, by the undertaking against which claims are made.

(5) Business and trade associations or professional organisations as well as quality mark associations may
not refuse to admit an undertaking if such refusal would constitute an objectively unjustified unequal treatment and
place the undertaking at an unfair competitive disadvantage.

Note: § 20(3) in the version of the 8th Amendment to the Act against Restraints of Competition was intended to be
valid until the end of 2017. Paragraph 3 in the version of the 9th Amendment to the Act against Restraints of
Competition shall henceforth be valid for an unlimited period, see official explanation to § 20(3).
discrimination, as would be the case for the Swiss counterproposal. Disagreement as to when a company has relative market power, or is dependent on a supplier, is the source of costly disputes that have required several medium-sized companies to litigate all the way up to the German Federal Court of Justice (Bundesgerichtshof).

VI. Issues Relating to “Objective Reasons” for Refusal to Supply

The proposed new Article 7a of Chapter 2 of the Act would make it unlawful for an undertaking with relative market power to refuse “without objective reasons” to supply dependent entities with goods or services abroad at the prices and conditions that apply there. The amendment itself contains no guidance as to the meaning of the term “objective reasons” ("sachliche Gründe").

The Federal Council’s summary and explanation state that “customary commercial practices” ("kaufmännische Grundsätze") would qualify and gives as examples “linear quantity discounts” ("lineare Mengenrabatte") and an “exclusive distribution” ("Alleinvertrieb") system that is lawful under Article 5 of the Act. In the Sections’ view, further amplification is required in an international setting, including guidance on which Swiss and international manufacturers can rely when designing and setting up their distribution systems. In particular, it should be clarified whether a supplier may still allocate territories exclusively or set up selective distribution systems, as it is permitted to do under the law of the EU and other jurisdictions. If a manufacturer has contractually allocated Switzerland to a specific distributor, that distributor would breach its contractual obligations by selling outside of its territory or to non-authorized resellers.

The Sections suggest that, if the counterproposal is enacted, additional guidance be provided in the amendment itself as to what may be considered “objective reasons,” e.g., on the basis of the EU Vertical Block Exemption Regulation and the corresponding Guidelines on Vertical Restraints. If the distribution system of a manufacturer with relative market power is in line with such guidance, it must be ensured that the implementation of this system is objectively justified and does not infringe the rules in the counterproposal. This would help to inform business conduct and avoid creating an impediment to existing practices that some entities might fear would now become questionable.

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5 Even German Federal Court (Bundesgerichtshof) decisions in this area are sometimes difficult to reconcile. For example, on access to vehicle manufacturer spare parts or repair networks, compare BGH, 30.03.2011 - KZR 6/09 (Weilbacher) with BGH, 06 October 2015 - KZR 87/13 (Porsche Tuning).


Ultimately, a prohibition on undertakings with a comparative, but not market dominant, advantage vis-à-vis their trading counterparties, with vague and undefined terms such as “objective reasons,” may deter companies from doing business with small- or medium-sized counterparties or suppliers in Switzerland that the law ostensibly seeks to protect. This could reduce economic efficiency and consumer welfare, and potentially harm the small businesses that the proposed law may be intended to protect.

VII. General Comments on International Price Discrimination

As a general principle, flexibility in pricing is crucial to competition in any market-based economy. Differential pricing does not necessarily reflect a lack of competition or anticompetitive conduct. To the contrary, it can be an indication of robust competition.8

In particular, price differentiation based on geography is often beneficial for competition and consumers. It is widely accepted under competition law principles that distinct supply and demand conditions may result in the existence of separate geographic markets, in which different prices are to be expected. Differing prices may be a response not only to different costs (e.g., shipping, raw materials, and other inputs), but also to other market conditions such as different supply or demand levels, consumer demographics, culture, local competition, regulatory risk or requirements, and distribution structures.9 Allowing companies to set different prices taking into account such conditions in different countries or geographic markets is generally procompetitive.10

The U.S. experience with the Robinson-Patman Act, which prohibits certain forms of price discrimination shows that regulation of price discrimination “has had the unintended effect of limiting the extent of discounting generally.”11

Indeed, the Antitrust Modernization Commission, which recommended repeal of this U.S. law, asserted that it “inhibit[s] entry” and “requires price rigidity that

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imposes costs on consumers through higher prices, lower quality, and less choice than would be the case in its absence.”

For the reasons noted above, the Sections suggest careful evaluation of any proposed legislation of differential pricing, particularly based on geography because the potential harm of regulating international price differences could outweigh any potential benefits.

VIII. General Comments on Refusal to Supply and Discriminatory Treatment

The Sections believe, as recognized by a number of other jurisdictions, that an entity’s discretion to determine whether to trade, and to determine the prices, terms, and conditions upon which it will engage in trade, is at the core of the free-market system. Based on extensive experience with the application of antitrust law to unilateral refusals to supply, U.S. courts, enforcers, and scholars have identified significant policy considerations that counsel restraint regarding law enforcement intervention with regard to unilateral refusals to supply:

- Imposing adverse legal consequences upon a firm that engages in a unilateral refusal to supply implies a legal compulsion to supply. Firms operating under legal jeopardy for declining to deal – or declining to deal on certain terms – are entitled to clear, objective, and consistent guidance regarding the type of dealings that will be compelled or permitted by enforcement authorities.

- Competition authorities are ordinarily not well equipped to define and enforce compulsory terms of dealing, especially over a lengthy period of time while conditions of demand, supply, and technology evolve. Supervision of this nature is generally more appropriate for and characteristic of administrative agencies designed to exercise such oversight, especially with regard to specific regulated industries.

- Additional issues arise when a company is legally compelled to deal with an entity that may be in competition with that company. There is an increased risk that such cooperation may weaken the independence and competitive vigor that would otherwise exist between the entities. This risk

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12 Id. at 320.

13 See, e.g., European Commission, Guidance on the Commission’s enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings, Section IV.D. (December 3, 2008).

must be balanced against the anticipated gains from compulsory dealings. And where competitors are afforded mandatory access to the superior products of another firm, they are more likely to lose the incentive to innovate or become more effective competitors in their own right. This potential loss must also be balanced against the perceived benefit from challenging unilateral refusal to supply.

The Sections respectfully suggest that these policy considerations be taken into account in assessing whether the proposed legislative process should proceed, as well as when the Federal Council seeks to investigate, proceed against, or impose remedies with regard to entities that refuse to supply other entities.

IX. Conclusion

The Sections appreciate the opportunity to provide comments on the Federal Council’s indirect counterproposal. We would be pleased to respond to any questions the Federal Council may have, or to provide any additional comments or information that may be of assistance.