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COMCO sets the framework for assessing the abuse of relative market power in Switzerland in two recent decisions

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Executive summary

The Swiss Competition Commission (COMCO) has clarified the interpretation of relative market power for the first time in two decisions taken in June and November 2024. In the first decision (Galexis vs. Fresenius Kabi), COMCO rejected the existence of relative market power because the alleged victim of the abusive conduct, Galexis, was a large pharmaceutical wholesaler. Therefore, Galexis would only suffer a minor loss of sales if it removed Fresenius Kabi's products from its catalogue. Consequently, COMCO found that the necessary element of a clear imbalance of market power between the two parties was missing. In the second decision (Payot vs. Madrigall), COMCO confirmed the existence of relative market power on the part of the French publishing house Madrigall vis-à-vis the Swiss bookseller Payot. Madrigall's pricing was considered abusive.

In both decisions, COMCO applied the following three-step framework to assess the existence of relative market power:

- **First, it must be assessed what options the potentially dependent company has and if these options are reasonable and viable.**
- **Second, there must be an imbalance of power between the companies with regard to the transaction in question.**
- **Third, if a dependency exists, COMCO assesses whether the dependent company bears any responsibility for it.**

In addition, both decisions clarify the new type of abuse under Swiss competition law. According to the new provision, it is unlawful for a dominant company or a company with relative market power to prevent other companies from purchasing goods offered both in Switzerland and abroad on the same terms as those prevailing in the foreign market.

Introduction

The new provisions on relative market power entered into force on 1 January 2022 (Art. 4 para. 2bis and Art. 7 para. 1 Cartel Act, “CartA”). A company is deemed to have relative market power if another company is dependent on it for the supply or demand of goods or services in such a manner that there are no sufficient or reasonable alternatives to turn to other suppliers or customers. The abuse of relative market power is, unless justified, unlawful. However, in contrast to the abuse of a dominant position, the abuse of relative market power is not directly sanctioned by COMCO.

Together with the introduction of the concept of relative market power, Parliament also introduced a new provision in CartA to combat international price discrimination against Swiss companies. According to the new Art. 7 para. 2 lit. g CartA, a company with a dominant position or relative market power abuses this position if it restricts the possibility for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.

Typically, cases of relative market power are bilateral in nature and, therefore, fall within the competence of the civil courts rather than COMCO. However, COMCO expressed its willingness to examine a limited number of cases of relative market power during an initial period in order to develop a certain body of case law. With the two recent decisions, which are discussed in more detail below, this promise has been kept and some clarity has been provided on how the new law will likely be applied by the competition authorities in the future.

Galexis vs. Fresenius Kabi

Complaint by Galexis against Fresenius Kabi

In July 2022, Galexis filed a complaint against the German group Fresenius Kabi for allegedly abusing its relative market power vis-à-vis Galexis.

Galexis is the largest pharmaceutical wholesaler operating in Switzerland. Slightly more than one fifth of the enteral nutrition sold in Switzerland is distributed through wholesalers and pharmacies.

The Fresenius Kabi group is a global healthcare company with national subsidiaries in important markets, offering drugs and medical technology for infusion, transfusion and clinical nutrition. Fresenius Kabi’s products are used in the treatment and care of critically and chronically ill patients.

Reasonableness and insignificance of the disadvantages

In its decision of 24 June 2024, COMCO found that for most of the enteral nutrition products sold by Galexis, switching to products from other manufacturers would be difficult due to the need for specific medical prescriptions. However, considering the financial strength of the Galenica Group, the disadvantages resulting from the termination of the supply relationship with Fresenius Kabi for enteral nutrition, tube feeding and related medical aids, as well as the relatively small losses resulting from the reduced attractiveness as a wholesaler, were deemed insignificant and therefore acceptable.

For this reason, COMCO rejected the dependency as defined in Art. 4 para. 2bis CartA.

No lack of countervailing power

COMCO found that there was no clear imbalance between the consequences of terminating the supply relationship for Galexis and Fresenius Kabi. Therefore, it did not consider Fresenius Kabi as having relative market power within the meaning of Art. 4 para. 2bis CartA over Galexis in the areas of enteral nutrition, tube feeding and aids for the administration of tube feeding.

No abuse of relative market power

Furthermore, COMCO concluded that there was no abuse of relative market power. Although Fresenius Kabi restricted Galexis' sourcing options abroad within the meaning of Art. 7 para. 2 lit. g CartA, COMCO found that the conditions offered by comparable companies in Germany or the Netherlands for the disputed products were, if at all, only slightly better than those offered by Fresenius Kabi Switzerland to Galexis. This marginal price difference was not considered to be exploitative. Therefore, even if Fresenius Kabi had relative market power with respect to Galexis (which was not the case), its pricing behaviour would not have been considered abusive.

As a result, COMCO closed the investigation against Galexis in June 2024 without taking any measures.

Payot vs. Madrigall

Complaint by Payot against Madrigall

In the autumn of 2022, the Swiss bookshop chain Payot filed a complaint against the French publishing group Madrigall, alleging a potential violation of the rules on relative market power.

Payot's dependence on Madrigall

COMCO examined whether Payot was dependent on Madrigall by examining Payot's alternatives for sourcing. It concluded that both sourcing from wholesalers and the grey market would have significant disadvantages for Payot. Neither wholesalers nor other booksellers could supply Payot with the required volume of Madrigall books. Furthermore, the conditions, including purchase prices, delivery times and payment terms, would be significantly worse than the current situation, as wholesalers and other booksellers would only act as additional intermediaries. By ceasing to sell Madrigall books, Payot would therefore suffer a significant loss of revenue, resulting in significantly lower contribution margins and profits. In addition, the removal of Madrigall books from Payot's range would result in a substantial loss of attractiveness for Payot as a general bookseller. Both sourcing Madrigall books from wholesalers or the grey market and ceasing to sell them would be either impossible for Payot or at least involve substantial financial disadvantages, making these options unreasonable.

COMCO therefore concluded that Payot was dependent on Madrigall.

Clear imbalance of disadvantages

On the question of countervailing power, COMCO considered that there was a clear imbalance in the disadvantages that would arise for both companies if the supply relationship were terminated. In particular, Madrigall has numerous alternative possibilities for distributing its books in French-speaking Switzerland. In contrast, Payot can only obtain Madrigall books directly from Madrigall.

COMCO considered the question of whether Payot was responsible for its dependency on Madrigall as irrelevant in this case, as generalist booksellers are required to offer Madrigall's books to their customers, and procurement is generally only possible through the exclusive distribution system.

Abuse of relative market power by Madrigall

Madrigall did not categorically refuse to supply to Payot directly. However, it charged Payot significantly higher purchase prices than French booksellers.

Madrigall's arguments that it incurred higher costs in supplying books to Payot in Switzerland were rejected. According to COMCO, Madrigall could only provide evidence for a small part of the additional costs it claimed. Madrigall was only able to demonstrate that higher labour costs were incurred in Switzerland for local distribution activities, as well as the additional costs for potential damage to books returned by Payot due to the need to remove price labels before returning them. For all the other additional costs claimed, COMCO found that Madrigall had not provided convincing evidence to substantiate the claims.

Remedies

In its decision, COMCO required Madrigall to offer Payot the same conditions for direct deliveries in France as those offered to French booksellers. However, Madrigall is free to adjust the purchase prices or to reduce the discount to take account of any additional costs it can demonstrate.

The rules on relative market power are generally applicable to all publishing houses, so further proceedings cannot be ruled out. With this decision, COMCO outlines how it interprets and applies the new provisions, thus providing guidance to other publishing houses. In this respect, the decision may have a preventive effect.

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