IN-DEPTH

Dominance And Monopolies

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LEXOLOGY

Dominance and Monopolies

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In-Depth: Dominance and Monopolies (formerly The Dominance and Monopolies Review) provides an accessible and easily understandable summary of global abuse of dominance rules. Each jurisdiction-specific chapter – authored by specialist local experts – highlights the most consequential legal and regulatory provisions; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments.

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Switzerland

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Summary

Introduction

Swiss law regulates the abuse of a dominant position by a dominant undertaking in the Cartel Act (CartA). It is thereby to a large extent modelled after Article 102 of the Treaty on the Functioning of the European Union. Hence, according to Article 4(2) CartA, companies are considered dominant if they are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.

Conceptually different, however, and as of 1 January 2022, Swiss law also captures relative market power in its Article 4(2 *bis*). This provision defines relative market power as dependency for supply or demand without adequate and reasonable opportunities for switching.

Article 7 CartA clarifies what conduct is prohibited for undertakings that are considered dominant or have relative market power. According to the general clause in Article 7(1) CartA, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete or disadvantage trading partners. This general clause is supplemented by a non-exhaustive list of types of conduct that are particularly considered unlawful:

1. refusal to deal (e.g., refusal to supply or to purchase goods);
2. discrimination between trading partners in relation to prices or other conditions of trade;
3. imposition of unfair prices or other unfair conditions of trade;
4. undercutting of prices or other conditions directed against a specific competitor;
5. limitation of production, supply or technical development;
6. conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services; and
7. restriction of the opportunity 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.

Furthermore, the Federal Price Surveillance Act and the Federal Act against Unfair Competition have parallel jurisdiction in the context of excessive prices.

Year in review

On 23 January 2025, the Federal Supreme Court (FSC) issued a landmark decision that specified the requirements of Article 7 Cartel Act (CartA) for proving harm to competition in cases of abuse of a dominant position. In December 2016, the Swiss Competition Commission (ComCo) fined HCl Solutions AG (HCI) approximately 4.5 million Swiss francs for abuse of a dominant market position. HCI, a subsidiary of Vifor Pharma Participations AG (Vifor), operates, among other things, the 'Compendium' of electronic

drug information and user-specific INDEX databases (e.g. medINDEX for doctors), which are used via corresponding software solutions from third-party providers. In this context, ComCo accused HCI of having systematically used contractual clauses with software companies for several years that were aimed at hindering competing database providers. In addition, the inclusion of drug information in the INDEX products was only offered to pharmaceutical companies in a package ('bundled') with additional services. In January 2022, the Federal Administrative Court (FAC) confirmed the abuse of a dominant market position, but reduced ComCo's fine. In its ruling of 23 January 2025 (2C_244/2022), the FSC partially upheld the appeal filed by Vifor and HCI and referred the case back to the FAC for a new assessment and determination of the fine. Although the FSC confirmed that HCI held a dominant position on the relevant markets, it clarified that Article 7(2) CartA is not an endangerment offence: The FSC specified that, in accordance with the 'effects-based approach', a particular conduct must actually be potentially capable of causing harm to competition. The risk of adverse competitive effects must actually exist based on all the specific circumstances; a merely hypothetical risk of harm to competition is not sufficient. With this decision, the FSC is following the European Court of Justice's recent case law, which also pursues an effects-based approach.[1]

Against this background, the FSC ruled as follows on the four types of conduct by HCI in question:

1. Exclusive purchasing clause in a single contract (clause A): The FSC denied an effective capability of this clause to exclude competitors, as it only occurred in one of 176 contracts with software houses and, according to the statement of the (one) software house concerned, was of little practical significance. Moreover, it did not completely exclude third-party providers. According to the FSC, the clause is therefore not abusive.
2. Prohibition on feeding third-party data with the same or essentially the same structure as HCI's XML structure into software (clause B): Insofar as this clause B, which was contained in 83 of around 176 contracts, went beyond the protection permitted under copyright law and also prohibited permissible imitation, the FSC qualified it as abusive within the meaning of Article 7(2)(e) CartA.
3. Bundling the publication of drug information with editorial and technical quality control: The FSC concluded that this clause was not abusive, as it did not concern not separate goods. The quality control is part of the publication service in the 'Compendium' or in the INDEX databases and is typically requested jointly by pharmaceutical companies.
4. Tying the publication of drug information with (optional) free upload to AIPS:[2-] The FSC ruled that this clause was not abusive, as the upload was an incidental additional service with no independent economic significance. There was neither a separate market nor an independent demand for it.

In 2024, the FSC rendered two notable decisions concerning Swisscom, Switzerland's incumbent telecoms service provider. The first decision concerned an alleged abuse of a dominant position of Swisscom with regard to an offer for the construction and operation of a 'wide area network' (WAN) for Swiss Post. In 2015, ComCo concluded that Swisscom had abused its dominant position with regard to this offer. According

to ComCo, Swiss Post and Swisscom's competitor Sunrise, which purchased upstream products from Swisscom, had to pay excessively high prices. In addition, in ComCo's view, Swisscom also squeezed Sunrise out of the market (margin squeeze). ComCo therefore imposed a fine of approximately 7.9 million Swiss francs. Swisscom appealed ComCo's decision to the FAC, which upheld it. On appeal, the FSC overruled both ComCo's and the FAC's decision, lifted the sanction in its entirety and clarified several important questions regarding the imposition of unfair prices according to Article 7(2)(c) CartA, the relevant market assessment methods, and the requirements for a margin squeeze.[3]

In the second decision, the FSC upheld ComCo's and the FAC's sanction of 71.8 million Swiss francs against Swisscom and Blue Entertainment (formely Cinetrade) for abuse of a dominant position on the market for pay-TV broadcasting of soccer and ice hockey games of the Swiss major leagues (sports in pay-TV). The FSC agreed with the FAC that the full supply of Swiss soccer and ice hockey matches was objectively an essential component of a TV platform's broadcasting content. Withholding this content and discriminating between TV platforms by differentiating the scope of the sports programmes were likely to hinder the competitiveness of Swisscom TV's rival TV platforms. Furthermore, according to the FSC, unfair conditions of trade were forced on competitors, which had to undertake to refrain from acquiring certain content.

As regards the enforcement activities of ComCo, the following decisions have been issued: In April 2024, ComCo has sanctioned Swisscom with a fine of 18 million Swiss francs and has imposed requirements on the construction of the fibre optic network. This decision follows a modification in the configuration of Swisscom's fibre optic network. According to ComCo, the revised network design will prevent competitors from having direct access to the network and will only allow them to sell Swisscom services under their own name. In the interest of maintaining competitive balance, ComCo has taken the precautionary measure of prohibiting Swisscom from implementing this design modification in late 2020. This prohibition was deemed necessary to prevent Swisscom from altering the prevailing market structure, thereby establishing a de facto monopoly. This change would have resulted in significant restrictions on competitors' ability to innovate and pursue new business opportunities. Additionally, consumers and business customers would have faced considerable constraints in their choice of service providers and the diversity of products available to them. Swisscom rationalises the departure from the previous structure, primarily on the grounds of lower costs and accelerated growth. ComCo rejects this, as these savings are not sufficient to justify the elimination of competition for generations. Swisscom has challenged this order with an appeal to the FAC.

In October 2024, ComCo decided to discontinue its investigation against Novartis. Both Comco and the European Commission had initiated proceedings in 2022 in order to investigate whether Novartis had illegitimately deployed 'blocking' patents for its immunosuppressant Cosentyx , thereby unlawfully limiting production, supply or technical development in the market within the meaning of antitrust law. ComCo's investigation revealed that Novartis' actions were common practice in the field of patent law and did not confirm an unlawful conduct by Novartis. Therefore, ComCo discontinued its investigation. In this investigation, ComCo cooperated with the European Commission on the basis of the Bilateral Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws in force since 2014.

With regard to abuses of relative market power, ComCo has issued its first decision confirming abusive conduct since the introduction of the new legal provision in 2024. The case involved the French publishing group Madrigall's (one of the largest publishing groups in France) refusal to allow the Swiss bookseller Payot, which is known for its focus on French-speaking markets, to purchase books under standard conditions in France. Prior to this, Swiss booksellers had relied on the official Swiss distribution channel to procure Madrigall books. However, Payot sought to import Madrigall's books directly from France. ComCo found that Madrigall demanded higher purchase prices from Payot than in France, and that there were no adequate and reasonable alternative sources of supply for Payot. ComCo further held that not selling Madrigall books was not a realistic option, leaving Payot dependent on Madrigall. In light of these circumstances, ComCo considered Madrigall's conduct to be an abuse of its relative market power. Madrigall appealed the decision to the FAC.

Moreover, in its decision of 24 June 2024, ComCo examined whether the Fresenius Kabi Group (Fresenius Kabi) was abusing its relative market power with regard to Galexis AG. This investigation arose from Fresenius Kabi's refusal to supply Galexis AG with drinking and tube feeds in Germany and the Netherlands. ComCo concluded that Fresenius Kabi lacked relative market power in relation to Galexis AG. Even under the assumption of relative market power, ComCo found that Fresenius Kabi's actions did not meet the criteria for abuse. This assessment was based on the premise that the foreign conditions were marginally more favorable. Consequently, ComCo closed the investigation.

Finally, in July 2025, ComCo decided to discontinue its investigation against BMW. ComCo had opened its investigation in January 2024 against BMW for unexpectedly terminating cooperation with an authorised BMW dealer and service centre without providing an appropriate interim solution. BMW had held out the prospect of expanding its business relationship with the authorised dealer, that subsequently invested millions. BMW then unexpectedly terminated the cooperation. The authorised dealer reported this conduct to ComCo and claimed that it was dependent on the continuation of its business relationship with BMW in order to amortise its investments. In the course of ComCo's investigation, BMW and the authorised dealer agreed on a temporary extension of their business relationship, eliminating ComCo's antitrust concerns. ComCo has therefore decided to discontinue its investigation. However, ComCo held that BMW would presumably have violated antitrust law if it had not changed its conduct and agreed to provide an appropriate solution for the authorised dealer. BMW would presumably have had relative market power with regards to the authorised dealer and abused this position by terminating the business relationship without an appropriate transitional solution.

Significant decisions and cases 2024–2025

Sector	Investigating authority	Conduct	Fine levied
Pharma	FSC (judgement dated 23 January 2025)	The FSC ruled that HCI had only abused its dominant position to a very limited extent. Regarding the four types of	Referred back to the FAC for a new assessment and determination of the sanction

		conduct by HCI in question, the FSC concluded that solely 'Clause B' in the contractual relationship with the software companies was abusive within the meaning of Article 7(2)(e) CartA. This was because it prohibited the software companies from feeding third - party data into their software programs that are structured similarly to HCI's data, also prohibiting imitation permitted under the Federal Act on Unfair Competition (UCA). The FSC ruled that the exclusive purchasing obligation contained in only one contract (Clause A) was not sufficient to hinder competitors and that the alleged tying arrangements lacked the element of separate goods. The FSC specified the requirements of Article 7 CartA in terms of an effects - based approach.	
Telecoms			

	FSC (judgement dated 5 March 2024)	The FSC ruled that Swisscom had not abused its dominant position with regard to an offer for the construction and operation of a WAN for Swiss Post. Swisscom did not squeeze Sunrise out of the market (margin squeeze). The FSC overruled both ComCo's and the FAC's decision, lifted the sanction of approximately 7.9 million Swiss francs in its entirety and clarified several important questions regarding imposing unfair prices according to Article 7(2)(c) CartA, the relevant market assessment methods and the requirements of a margin squeeze.	7.9 million Swiss francs
Telecoms	FSC (judgement dated 23 April 2024)	The FSC decided that full access to Swiss soccer and ice hockey broadcast is objectively necessary for every TV platform to be able to compete in Switzerland. Because Swisscom had successfully acquired such rights on an exclusive basis, the FSC qualified	71.8 million Swiss francs

		Swisscom to be dominant in the national markets for such sports broadcasting and was therefore obligated to grant access to them to competing TV platforms.	
Pay - TV	FAC (judgement dated 31 October 2023)	The FAC confirmed ComCo's fine against UPC Schweiz GmbH (now Sunrise GmbH) for anti - competitive behaviour regarding the supply of live ice hockey broadcasts of the top Swiss hockey leagues, the NLA and NLB (now the National League and the Swiss League). UPC's refusal to supply Swisscom constituted, according to the FAC, an abuse of UPC's dominant position, as a broadcaster must be able to offer a limited range of Swiss ice hockey matches, in order to compete effectively in pay TV. However, the FAC reduced the fine from 30 million to 29.1 million Swiss francs.	29 million Swiss francs
Hotel booking platforms		The price surveillance	–

	Price surveillance authority	authority ordered Booking.com to lower its prices in Switzerland. An analysis showed that the company's commission rates for Swiss hotels are abusively high. According to the ruling, Booking.com must reduce its commission rates for Swiss hotels by nearly 25 per cent. The reduction must be implemented three months after the order becomes legally binding and will apply for three years.	
Pharma	ComCo	Investigation against Novartis concerning blocking patents. According to ComCo, there were indications that Novartis had tried to protect one of its drugs by using a patent to block a competing drug. The investigation was supposed to clarify whether this is a case of a 'blocking patent', which could constitute a potential abuse of a dominant position. The investigation showed that Novartis exercised its patent rights within the	—

		usual framework and acted in compliance with antitrust law, which is why ComCo closed the investigation on 7 October 2024 without any consequences.	
Cars	ComCo	Investigations against BMW concerning its relative market power with regard to an authorised BMW dealer and service centre. The authorised dealer accused BMW of offering it the prospect of expanding its business relationships and inducing it to invest millions. BMW then unexpectedly terminated the co - operation without providing an appropriate interim solution. In the course of ComCo's investigation, BMW and the authorised dealer agreed on a temporary extension of their business relationship, eliminating ComCo's antitrust concerns. ComCo has therefore decided to discontinue its investigation.	–

Current cases

Sector	Investigating authority	Conduct	Case opened
Books	ComCo	Investigation against Madrigall	January 2023

		on the allegation that Swiss booksellers are hindered from purchasing French books abroad at cheaper, foreign conditions. This behaviour is unlawful for companies with relative market power with regard to the Swiss bookseller. Madrigall appealed to the FAC.	
Payment solutions	ComCo	In June 2023, ComCo opened two separate investigations against Visa and Mastercard on interchange fees for new debit cards for transactions carried out in Switzerland. ComCo authorised an interchange fee only for the market introduction phase of the new Visa and Mastercard debit cards. This phase is now over, as they have each achieved a 15 per cent market share. The amount of the interchange fee is the subject of these two separate investigations. In May 2024, ComCo and Mastercard settled and agreed interchange fees	June 2023

		of 0.12 per cent for card present transactions in Switzerland. The investigation of the interchange fees of Visa continues.	
Payment solutions	ComCo	Following a complaint from SIX that Mastercard was obstructing the market entry of its new ATM scheme (NCS), ComCo opened an investigation. The obstruction was said to be Mastercard's refusal to co - badge the NCS on the new debit Mastercard. ComCo is now investigating whether Mastercard engaged in abusive conduct by a dominant company. Precautionary measures to grant access to Mastercard's ATM that were initially imposed by ComCo have been withdrawn as the legal grounds for precautionary measures were no longer met due to changed circumstances.	February 2021
Telecoms	ComCo	Investigation against Swisscom AG concerning the expansion of the fibre optic network. According to ComCo, there are	December 2020

		indications that Swisscom is abusing a dominant position by changing the construction method during expansion in such a way that competitors no longer have direct access to the network infrastructure. ComCo took precautionary measures to prohibit Swisscom from denying competitors access during the expansion of the fibre optic network. The FAC confirmed these measures, and the FSC confirmed the interim measures. The proceeding is pending at ComCo. In April 2024, ComCo fined Swisscom 18 million Swiss francs for the abuse of a dominant position. Swisscom has challenged this order with an appeal to the FAC.	
Telecoms	ComCo	Investigation against Swisscom for alleged Abuse of a Dominant Position that concerns allegedly	August 2020

		charged excessive prices of Swisscom in various tenders for projects to network company locations. Furthermore, according to the Competition Commission, Swisscom (ComCo) charged its competitors excessive prices for accessing its network infrastructure preventing them from submitting a competitive bids for these projects.	
Steel	ComCo	Investigations against three steel producing undertakings. According to ComCo, there are indications that the three undertakings had increased prices if customers ordered certain steel materials. ComCo will also verify if the undertakings concerned have a combined dominant position.	November 2023
Ticketing	ComCo	Investigation against Ticketcorner and Hallenstadion, Zürich for alleged Abuse of a Dominant Position in 2009 to 2011 by linking the rental of	—

		the Hallenstadion Venue for pop and rock concerts to the requirement that at least 50 percent of the tickets for the respective concerts must be distributed via Ticketcorner. In its decision of 12 February 2020, the FSC upheld Ticketcorner's appeal stating that no dominant position and no abuse by Ticketcorner has been proven. By contrast, Hallenstadion Zürich was held to have abused its dominant market position. The case was referred back to the Competition Commission in order to determine the sanction against Hallenstadion Zürich and to investigate if Ticketcorner held a dominant position and abused such position.	

Market definition and market power

Undertakings

Only undertakings may achieve a dominant position. According to Article 2(1 *bis*) of the Cartel Act (CartA), undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form. This concept of an undertaking is very broad and follows – similarly to other antitrust laws in Europe – a functional approach, based on the economic activity of an entity. Both undertakings governed by public law and private undertakings that are part of a public body (e.g., the federal government, cantons or communes) are considered as undertakings within the meaning of the CartA.[4] Furthermore, an undertaking in this sense may act on the supply side or on the demand side of a market. For the purpose of the CartA and therefore for assessing dominance, a group of companies is considered as one single economic entity or undertaking, respectively. The Federal Supreme Court (FSC) did not decide whether the control principle under which the mere possibility of controlling another company, or the management principle, which requires exercised and decisive influence, is sufficient to create group liability.[5]

The relevant market

To determine whether an undertaking enjoys a dominant position or monopoly power, the relevant market has to be defined. In cases concerning abuse of a dominant position, the rules applicable in merger control cases are being used analogously. Due to the partial reform of the CartA, ComCo will use the internationally recognised significant impediment to effective competition test (the SIEC test) in the future. Pursuant to Article 11(3) of the Merger Control Ordinance, the relevant product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. The relevant geographic market comprises the area in which consumers purchase and in which suppliers sell the goods or services that constitute the product market.

As for the definition of the relevant product market, Swiss authorities generally rely on the demand-side-oriented market concept.[6] According to this concept, the relevant product market consists of all goods and services that have the same characteristics or the same intended use as the product under investigation. Accordingly, goods or services that are regarded as functionally interchangeable by the opposite market side fall within the same product market. The good has to be substitutable for another good. Other methods used by the Swiss authorities to determine the relevant market are the test of cross-price elasticity and the small but significant and non-transitory increase in price test.[7] These methods serve to assess whether the allegedly disadvantaged opposite side of the market could switch to alternative offers with regard to product, geographical and temporal terms.

Dominant position

Single dominance

According to the legal definition in Article 4(2) of the CartA, 'dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market'. Based on this definition, dominance may exist on the demand side as well as on the supply side of a market.

Under Swiss law, there are no hard criteria to assess whether an undertaking has a dominant position.[8] The Federal Administrative Court (FAC) ruled that, to assess single dominance, an in-depth analysis of the market characteristics, such as the current competition (market shares), potential competition (market entry barriers), the position of the other side of the market (countervailing market power) and the influence of interrelated markets have to be performed. Moreover, it held that the structure of the undertaking as well as the specific market conduct has to be taken into account.[9] ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It takes the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers into consideration. With regard to market shares, there is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. Whereas according to the former practice of the authorities, market shares of 50 per cent and more were considered as an 'indicator' for dominance, the FAC now holds that market shares of 50 per cent or more 'at least' give rise to a presumption of the existence of a dominant position. The presumption is further strengthened for market shares above 60 or 70 per cent. The requirements for rebutting the presumption increase accordingly.[10] Finally, ComCo analyses the vertical relationships by assessing the competitive pressure due to the negotiating strength of the other side of the market.

To establish market dominance, the Swiss competition authorities satisfy themselves on the balance of probability.[11]

Collective dominance

According to the wording of Article 4(2) of the CartA, one or more undertakings may hold a dominant position. In cases of collective dominance, several undertakings together hold a dominant market position. In the context of merger control, ComCo introduced the concept of collective dominance to Swiss antitrust law in 1998[12] and later also applied this concept to cases of abuse of market dominance.[13] Collective dominance is assumed if at least two undertakings deliberately adopt a parallel (i.e., collusive) market conduct (collusion). Because parallel behaviour is a normal reaction of competitors to exogenous market developments, collective dominance is only assumed in cases of deliberate collusion.

There are no hard criteria for the existence of collective dominance. ComCo bases its assessment primarily on the following indicators:

1. market concentration (number of companies active in the market and their market shares. The fewer companies that are active in a certain market, the more likely it is for collusion to occur);
2. symmetries in cost structure, products offered and interests (price remains the sole competitive factor);
3. market growth, potential competition and market-entry barriers; and
4. market transparency.[14]

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive situation on the relevant market as well as on the upstream and downstream markets to determine whether the relevant market offers sufficient incentives for durable collective dominance.

In 2020 ComCo applied the aforementioned criteria to the planned merger between Sunrise Communications AG and Liberty Global Europe Financing BV.[15] The target company of this merger was UPC GmbH, Switzerland's largest cable company. However, in the case at issue, ComCo found it unlikely for the newly created entity to hold a collectively dominant position together with Swisscom. When assessing the planned merger between Ticketcorner and Starticket, Switzerland's two largest ticketing providers, ComCo considered potential collective dominance. However, ComCo did not find sufficient evidence for the existence of a collectively dominant position.[16]

In another case, ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it found strong indications of a single dominant position for Booking.com, it considered the existence of collective dominance to be unlikely.[17]

In November 2023, ComCo initiated another investigation regarding the collective dominance of steel producers.

Relative market power

The revised CartA, which introduced the concept of relative market power, entered into force on 1 January 2022. In December 2021, shortly before the revised CartA came into force, ComCo published a guidance paper on how it intends to interpret and enforce the new rules. The guidance paper was revised in February 2024 in light of the first finding of abuse of relative market power. The amendments relate particularly to ComCo's detailed description of the conditions for relative market power and the elements of abuse. It is also clarified that the barriers to actual participation by interested third parties in an investigation concerning the abuse of relative market power are high. This is because such proceedings usually concern a purely bilateral dispute between two companies. There are no other alleged victims apart from the notifying company.

Under the revised CartA, the prohibitions previously applicable only to dominant undertakings (Article 7 CartA) are extended to companies with relative market power. A company is considered to have relative market power if other companies depend on it with respect to the supply of or demand for a product or service to which there is no sufficient and reasonable alternative. According to ComCo's guidance paper, alternatives are sufficient if other offers are available that can also adequately satisfy the undertaking's needs. In this regard, a number of factors are taken into account, such as product characteristics, purchasing conditions, brand reputation, brand loyalty of consumers and the market share of the undertaking with relative market power. Further, an alternative can be considered unreasonable as a result of individual characteristics of the dependent undertaking, such as specific investments in connection with an existing business relationship, the contractual relationship itself, switching costs, affected turnover in relation to total turnover and the occurrence of the alleged dependency (e.g., cause of the dependency). As a general rule, and according to ComCo, an undertaking can only invoke the allegation of relative market power after it has unsuccessfully tried to

find reasonable alternative sources of supply. Contrary to a conventional assessment of market dominance, it is irrelevant whether the allegedly relative dominant company can behave independently of other market participants to a significant extent. The relative market power of a company must always be determined with respect to a specific bilateral commercial relationship.

Unlike dominant undertakings, relatively dominant undertakings cannot be sanctioned directly for abusing their relative market power (i.e., for a first offence). However, such undertakings may face an investigation of ComCo or civil lawsuits from private plaintiffs, or both. If ComCo finds a violation, it can impose behavioural remedies (e.g., an obligation to supply or non-discriminatory pricing). Already before the new rules entered into force, ComCo announced that it is determined to decide leading cases to provide guidance on the scope of application of the new rules. In the third year following the introduction of the relative market concept, one finding of abuse of relative market power and one order of discontinuation regarding Fresenius Kabi exist. In the cases concluded to date, ComCo has not carried out any material harmonisation with the case groups in accordance with the practice of the German Federal Cartel Office.

Abuse

Overview

Given a dominant position or relative market power of an undertaking, the application of Article 7 of the Cartel Act (CartA) requires that the undertaking hinders other undertakings from starting or continuing to compete, or disadvantages trading partners by abusing its dominance or market power. Article 7 of the CartA is only applicable if there are no legitimate business reasons for the abusive behaviour of the undertaking. These preconditions have to be met cumulatively.

Article 7(2) of the CartA contains a non-exhaustive list of examples of types of conduct that may be considered abusive. However, if a certain behaviour is listed in Article 7(2) of the CartA, it is not unlawful per se, because to constitute abusive behaviour, the preconditions pursuant to Article 7(1) of the CartA have to be met additionally. In other words, Paragraph 2 has to be applied in conjunction with Paragraph 1.[18] Conversely, conduct not covered by one of the examples listed in Paragraph 2 but meeting the preconditions mentioned in Paragraph 1 falls within the scope of this umbrella clause and is, therefore, unlawful. This is, for example, the case for margin squeeze behaviour.[19]

Regarding abuse of a dominant position, the CartA does not contain any per se prohibitions. It is therefore necessary to consider the specific circumstances and market conditions of the case at issue when assessing potentially abusive behaviour.[20] In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship diverge significantly from those that could be expected in the context of effective competition. In practice, the authorities analyse both the competitive and anticompetitive effects of a certain conduct on the market, in particular when the conduct does not fall under at least one of the listed abuses in Article 7(2) of the CartA.

However, the Federal Administrative Court (FAC) held that where a certain conduct fell under Article 7(2) of the CartA, no economic theory of harm had to be examined as this conduct was generally perceived to be unlawful.[21]

Nevertheless, even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits to maintain its leading market position. Consequently, if the purpose of a certain practice is simply to improve the quality of a product (e.g., by requiring suppliers to respect a certain standard), this practice has to be considered legitimate even if it may eliminate certain suppliers or competitors from the market.

Article 7 of the CartA covers exclusionary as well as exploitative practices. While the first mainly concern competitors, the latter aim at harming commercial patterns or consumers.

With the introduction of the concept of relative market power, a further type of abusive practice was added to Article 7 of the CartA. Under the revised CartA, undertakings with relative market power as well as dominant undertakings are prohibited from restricting the opportunity of buyers to purchase goods or services offered both in Switzerland and abroad at local prices and conditions.

Exclusionary abuses

Refusal to deal

Refusal to deal is one of various forms of exclusionary abuse. According to Article 7(2)(a) of the CartA, any refusal to deal (e.g., refusal to supply or to purchase goods) may constitute an abuse of a dominant position. The concept of refusal to deal takes various forms, such as refusal to supply, termination of supply, refusal to access, refusal to licence or exclusion of sales. However, this provision does not constitute a general obligation to contract for dominant undertakings.[22] The refusal to deal is only unlawful if it has (or is likely to have) an anticompetitive foreclosure effect and if it cannot be justified by legitimate business reasons. In particular, a refusal to deal is likely to be held unlawful if a dominant undertaking intends to boycott its business partners or aims at forcing them to behave in a certain way. Under certain circumstances a refusal to deal may also be considered unlawful if a dominant undertaking refuses to grant access to an essential facility. The essential facility doctrine was recently used by the Federal Supreme Court (FSC).[23]

One of the major cases in which ComCo applied the essential facilities doctrine concerned the SIX Group. ComCo imposed a fine of approximately 7 million Swiss francs on the SIX Group for refusing to supply interface information to competitors and thus rendering their products incompatible with SIX card payment terminals.[24] The FAC and the FSC upheld this decision.[25] However, the latter did not examine whether there was a refusal to deal.

In 2013, ComCo approved an amicable settlement between the Secretariat and Swatch Group, under which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.[26] Swatch Group had undertaken to supply certain minimum amounts per year to third-party customers and to treat all customers equally. The supply obligation ended on 31 December 2019.

ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having only granted access to a reduced range of sport content to others.[27] The FAC and FSC upheld this decision.[28] In a similar case, in 2020, ComCo fined UPC 30 million Swiss francs after finding that UPC abused its market dominance by refusing to supply Swisscom with broadcasts of certain live ice hockey games. The FAC upheld the decision while lowering the fine to 29.1 million Swiss francs.[29] The decision was appealed to the FSC.

In addition, in the ongoing investigation against Mastercard for refusing to co-badge, a refusal to deal allegation is at stake. In its interim measure, ComCo held that Mastercard had prima facie abused its dominant position by not allowing the requested co-badging. With its interim measure, ComCo created the possibility for banks to issue Mastercard debit cards during the ongoing investigation, which would have been technically capable of processing NCS transactions. However, ComCo has since lifted these interim measures, as the card-issuing banks were not utilising this option and SIX had therefore postponed the market entry of NCS. Accordingly, the legal grounds for the interim measures were no longer met.

As far as refusal to license is concerned, such refusal is only considered abusive if standard essential patents are concerned. It is, in fact, inherent to IP rights that their holders enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Accordingly, Article 3(2) of the CartA explicitly exempts the effects on competition that result exclusively from the legislation governing IP from the scope of the CartA. Only the modalities to exercise an IP right may be considered abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the distinction is difficult to make.

Exclusive dealing

Another form of exclusionary abuse is exclusive dealing, a conduct that is not listed in Article 7(2) of the CartA. However, cases of exclusive dealing may fall within the umbrella clause of Article 7(1) of the CartA.

Rebates

Fidelity rebates are considered to be financial benefits, granted to customers for purchasing all or a certain percentage of their demand exclusively from the dominant undertaking. The rebates are granted irrespective of the actual quantity purchased.[30] Such rebate systems are considered to impede the market entry of potential competitors, as customers are reluctant to switch from the dominant undertaking granting fidelity rebates to other undertakings.[31] Consequently, fidelity rebates are considered unlawful under Article 7(2)(e) of the CartA.

Target discounts have a comparable effect. Target discounts are unlawful under the CartA if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking.[32]

However, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflect these cost efficiencies correctly.

In a 2017 decision, ComCo found that the Swiss Post rebate system unlawfully hindered its competitor Quickmail. Swiss Post granted additional monthly discounts to those customers who had reached a certain sales target. According to ComCo, because of the complication of Swiss Post's rebate system, customers were almost unable to assess the impact of outsourcing parts of their mail delivery to Quickmail.[33] This decision became binding and enforceable in 2021.

Predation

Even if set by a dominant undertaking, low prices are generally desirable and not illegal per se under cartel law. However, if a dominant undertaking deliberately sets particularly low prices to drive current competitors out of the market or to deter a potential new competitor from entering the market, Article 7(2)(d) of the CartA is fulfilled (predatory pricing).

In cases of predatory pricing, a dominant undertaking would first undercut prices of competitors until they leave the market; eventually, it would re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the competition authority is likely to assume that prices below average variable costs are aimed at driving competitors out of the market or preventing new competitors from entering the market.[34]

According to the practice of the authorities, predatory pricing occurs when the following conditions are cumulatively met:

1. predatory strategy: the dominant undertaking deliberately and intentionally attempts to drive a weaker current competitor out of the market or to keep a potential new competitor out of the market; and
2. recoupment: the dominant undertaking is able to raise prices as soon as the competitor has left the market, the threat of market entry has been prevented or the competitor has been disciplined.[35]

Price or margin squeeze

Price or margin squeeze is a particular form of discrimination between trading partners and may be inferred as abusive market behaviour of a dominant undertaking.

According to the FSC, price or margin squeeze can only occur if the following characteristics are present: a dominant undertaking, vertical integration of the dominant undertaking and competitors depending on the good or service provided by the dominant undertaking on the wholesale market. It further defines price or margin squeeze as a situation where the wholesale price for competitors is set above the price the dominant undertaking sets as retail price on the downstream market. Price squeeze shall also occur if the margin between the wholesale price for competitors and the market price of the dominant undertaking is not sufficient to cover an as-efficient competitor's product-specific costs. In both scenarios, price squeeze occurs if an equally efficient competitor on the retail market could not meet the retail price of the dominant undertaking. To assess whether an efficient competitor could meet the price of the dominant undertaking, a cost-price comparison has to be carried out (as-efficient competitor test).-[36]

In 2009, ComCo imposed a fine of approximately 200 million Swiss francs on the Swiss telecommunications provider Swisscom for abusing its dominant position in the market for broadband internet through margin-squeeze behaviour.[37] ComCo held that because of the high prices set by Swisscom on the wholesale market competitors, with which Swisscom competed on the retail market by offering its asymmetric digital subscriber line broadband internet services to end customers, were unable to profitably offer their services on the retail market. The abusive behaviour would have been corroborated by the fact that while Swisscom generated large profits on the wholesale market, its subsidiary active on the retail market incurred losses. The FAC confirmed ComCo's decision in substance, but reduced the fine imposed to approximately 186 million Swiss francs.[38] Ultimately, the FSC upheld this decision.[39]

More recently, ComCo has been focusing on the behaviour of Swisscom in the wide area network (WAN) sector. In 2015, ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for, inter alia, a margin squeeze (and other abusive practices).[40] A WAN is a telecommunications or computer network that extends over a large geographical distance. In 2008, Swiss Post organised a public tender for WAN services. Swisscom offered a price for its WAN services to Swiss Post that was – according to ComCo – approximately 30 per cent below the price offered by its next competitor, the latter having to acquire prior facilities from Swisscom at a wholesale price before being able to offer its WAN services. Swisscom's wholesale price for these facilities was allegedly above the price at which Swisscom won the public tender. Hence, the price offered by Swisscom on the wholesale level would not have allowed any competitor to compete on the retail market. In 2021 the FAC confirmed ComCo's decision,[41] thereby reducing the fine. Notably, the FAC accepted a reasonably efficient competitor test by ComCo (as opposed to an as-efficient competitor test). Said test focuses on the cost of an actual competitor because, according to the court, the product-specific costs of Swisscom (i.e., also of an as-efficient competitor) were not available.[42]

However, Swisscom successfully appealed the decision before the FSC, which overruled both ComCo's and the FAC's decision, lifting Swisscom's sanction in its entirety. In its decision, the FSC clarified that the primary purpose of the CartA is to prevent economically and socially harmful effects on competition. The goal is to protect competition as an institution by ensuring effective competition. However, it is 'not the task of the CartA to protect undertakings [that] are unable to assert themselves on the market primarily due to their own behaviour, by means of the CartA'. Against this background, the FAC uses the 'as efficient competitor test' and clarifies that equally efficient competitors are protected by competition law 'whereas it is not objectionable if a less efficient competitor is driven out of the market'. Accordingly, a competitor cannot avoid necessary investments to run its business efficiently. Otherwise, according to the FAC, 'a [competitor] would be enabled to forego its own investments and (constantly) accuse the dominant company of imposing unfair prices'. The FAC clarifies that fundamental concerns exist on the control of abusive pricing and that the respective provision of Swiss competition law should 'only be applied as a last resort or subsidiary measure'. The purpose of the CartA is precisely not to regulate prices, but to protect against restrictions of competition.

Hence, the court sets a high standard in assessing whether a dominant undertaking has imposed unfair prices. 'Imposing' requires that the affected trading partners 'may not oppose or cannot evade' the economic pressure of the dominant undertaking otherwise.

This is only the case, if the price is set unilaterally by the dominant undertaking. By contrast, if a price is the result of negotiations, the price is generally not imposed. 'Unfairness' is not the same as high margins. Very high prices or margins can reflect superior or innovative performance. Taking measures against such prices 'would contradict the incentive desired in a market economy to invest and develop innovative products'. For this reason, the CartA must only intervene if there is 'a blatant disproportion between costs and sales price'.

For assessing this disproportion, the FSC refers to the 'as if method', 'comparative market concept' and 'cost method'. In the case at hand, the court found that the method of the lower court comparing Swisscom's prices for its upstream products and the price that Swisscom received in the tender of Swiss Post was unsuitable and did not correspond to any of the established tests.

With regard to sector regulations, present the Swiss Telecommunications Act (TCA), the FSC clarifies that these must be taken into account when applying the CartA and that both form a 'closed and integrated legal framework'. In the specific circumstances, ComCo had failed to take into account the legislator's intention to promote investments in the telecommunication sector. The fact that Sunrise had not made these investments and therefore was reliant on (unregulated) upstream products from Swisscom was not Swisscom’s fault. Rather, both ComCo and the lower court should have recognised these investments as a potential alternative for Sunrise. Hence, the prices for Swisscom‘s respective upstream products were not 'imposed' under the CartA. The FSC emphasises that a margin squeeze is only possible if the following three structural conditions are met: (1) vertical integration; (2) dependence on the upstream services of the dominant undertaking; and (3) dominance on the upstream market together with a 'certain' dominant position on the downstream market.

Additionally, abusive conduct must be proven by ComCo. According to the FSC, this requires a 'pursued strategy, by which a vertically integrated dominant undertaking reduces or completely eliminates the potential profit margins of its competitors in the downstream market . . . in such a way that they are no longer competitive, i.e. ultimately the competitor will have to abandon the market and competition in the downstream market is impaired as a result'. In the absence of such an exclusionary strategy, an unlawful margin squeeze is excluded from the outset. It is likely that, based on this judgement, an exclusionary strategy will now be a requirement at least for a number of abuse cases. Even if such an exclusionary strategy had been proven, the lower court was required to carry out the as efficient competitor test and assess the costs of the dominant undertaking. A 'reasonably efficient competitor test', which assesses the costs of the competitor, may only be used if, exceptionally, the costs of the dominant undertaking cannot be assessed.

The judgement of the FSC is convincing and sends an important signal against ComCo's (price) interventionism, which has been rubber-stamped by the FAC. The court rightly emphasises that the CartA's primary purpose is not to protect individual competitors or to regulate prices, but rather to protect effective competition. It remains to be seen how ComCo and the FAC will implement this leading case in their own rulings and judgements. However, the purely form-based analysis of market abuse cases, as constantly carried out by the FAC in particular, is likely to be strongly questioned.

In 2020, ComCo opened a follow-on investigation in the WAN sector. The accusations of price squeeze against Swisscom are similar to those of the 2015 decision, but this time Swisscom allegedly pursued a strategy of price squeezing not only in the Swiss Post public

tender but also in the WAN sector in general. In addition, ComCo focuses more on the alleged price discrimination. ComCo has not yet rendered a decision in this regard.

The purpose of the provision on tying transactions[43] is to prevent a dominant undertaking from disadvantaging or hindering other undertakings by making a transaction dependent on another transaction with no reasonable connection to the underlying transaction. Tying practice is generally understood to occur when the dominant undertaking induces a trading partner (supplier or customer) to provide or accept an additional service in the form of goods or services that has no factual connection to the main good or service.[44] Such tying can occur on both the supply side and the demand side.

Tying / Bundling

According to the FSC, tying practices within the meaning of Article 7(2)(f) of the CartA occur if the following criteria are met:

1. separate goods;
2. tying;
3. restriction of competition; and
4. lack of objective justification.

Goods are considered to be separate if the additional good or service has no factual connection to the main one. Whether a factual link exists can be assessed based on the market of the additional good or service. The fact that both the main product or service and the tied one belong to the same product market indicates a factual link. Conversely, if separate product markets exist, a factual link between both products or services is unlikely. Tying occurs when the supplier of the tying good makes its supply conditional on the purchase of an additional service. Hence, the customer has no choice but to purchase the tied good as well.

A tying practice is – in principle – only relevant under antitrust law if it results in a restriction of competition. This is particularly the case if the dominant undertaking uses its position to induce its suppliers or customers to supply or purchase a good that they either do not want to sell or purchase at all, or at least not under the terms and conditions stipulated by the dominant undertaking, or if the dominant undertaking uses its dominance on one market to transfer its market power to the market of the tied good on which it is not yet dominant.[45]

Based on the FSC's most recent case law regarding the *Vifor* case, which clarifies the *SIX* judgement, it is not sufficient to merely state that the conduct of the dominant company is covered by one type of conduct in the list of examples in Article 7(2) CartA. The risk of harm to competition must not be merely abstract. A course of conduct is not abusive solely due to its form or per se, but must actually be capable of displacing other competitors. A merely hypothetical risk or a merely hypothetical or theoretical potential of harm to competition is not sufficient for proof.

Discrimination

According to the CartA, a dominant undertaking is not allowed to treat its trading partners differently with regard to prices and other conditions of trade.[46] However, the prohibition to discriminate trading partners does not imply a general obligation to treat trading partners equally. Unequal treatment is considered unproblematic from an antitrust point of view as long as it can be objectively justified (e.g., quantity rebates, justified by corresponding economies of scale). According to the authorities, a dominant undertaking is unlawfully discriminating its trading partners if the following criteria are met:

1. unequal treatment;
2. the unequal treatment concerns trading partners;
3. the unequal treatment results in restriction of competition; and
4. there are no legitimate business reasons for treating trading partners differently.

With regard to discriminatory pricing, rebates are of special importance. Rebates may be considered as practices discriminating trading partners and therefore be unlawful under Article 7(2)(b) of the CartA. This is the case when only larger customers above a certain turnover threshold may benefit from more favourable conditions.[47]

In contrast, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflect these cost efficiencies correctly.

In a 2017 decision, ComCo fined Swiss Post approximately 23 million Swiss francs for, inter alia, allegedly having discriminated against some of its business customers by granting discounts and special conditions for mail delivery to some but not all customers. Thus, different customers with comparable mailing characteristics would have received different conditions, resulting in some of them being better off than others.[48] Discriminatory pricing may also appear in the form of margin or price squeezes (see under 'Exclusionary abuses').

According to the law, discriminatory practices of dominant undertakings may not only concern prices but also other conditions of trade. The term 'other conditions of trade' is interpreted broadly and covers any actual or contractual obligations entailing an economic advantage or disadvantage for trading partners (e.g., terms of delivery, terms of sale and purchase or terms of payment).[49]

Exploitative abuses

It is unlawful for dominant undertakings to impose unfair prices or other unfair conditions of trade.[50] According to this provision, a dominant undertaking behaves unlawfully if it benefits from unfair prices or unfair trading conditions towards the opposite market side through coercion. It is still unclear whether it is necessary under Article 7(2)(c) of the CartA to prove the 'imposition' as being coercive, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.[51]

However, based on the case law of the FSC, ComCo assesses the existence of coercion according to the following criteria:

1. during the period under investigation, alternative options existed for the trading partner in question; and
2.

given the negotiating power, the trading partner in question was able to object to the imposition of the prices or other terms and conditions in question.[52]

A price is unreasonable if it is disproportionate to the economic value of the service provided. Conditions of trade, on the other hand, are unreasonable if they are unfair, disproportionate or excessively binding in terms of time or content. Conditions of trade are disproportionate if they do not serve a legitimate interest or are not necessary for this purpose because more moderate means are available. According to ComCo, a price set by a dominant undertaking is unreasonable if it is disproportionate to the consideration and is not an expression of performance competition but of a monopoly-like dominance on the relevant market.[53]

In the above-mentioned WAN sector ComCo decision (see under 'Exclusionary abuses'), ComCo not only held the price or margin squeeze practice of Swisscom as an abuse of its dominance but also the imposition of excessive prices on Swiss Post. ComCo found that Swiss Post had no alternatives to those telecommunications service providers that had submitted an offer but, rather, would have had to either accept an even more expensive offer or forego a WAN connection for its sites. As Swiss Post would have had no alternative options available to avoid Swisscom's offer, the element of coercion would have been fulfilled.[54] In 2021 the FAC confirmed ComCo's decision;[55] however, it did lower the fine. As mentioned above, Swisscom successfully appealed the decision.

In addition to ComCo, the price supervisor, a federal government office, has parallel jurisdiction in the context of excessive pricing. Under the Federal Price Surveillance Act, the price supervisor has the power to prohibit abusive price increases and to order price reductions. Unlike ComCo, the price supervisor does not have the power to impose fines for past conduct.

Restrictions on purchases of goods and services abroad

With the introduction of the concept of relative market power, a further type of exploitative abuse was added to Article 7 of the CartA. According to the new Article 7(2)(g) of the CartA, besides dominant undertakings, undertakings with relative market power may also not restrict buyers from purchasing goods or services offered both in Switzerland and abroad at local prices and conditions customary in the foreign country. The legislative purpose of this amendment is to lower the prices charged to companies in Switzerland (the 'Swiss surcharge') by allowing Swiss buyers to purchase products at cheaper prices abroad. However, it is not required that a foreign supplier specifically tailors purchase conditions to a Swiss buyer's needs (e.g., there is no obligation to arrange for shipment to Switzerland).

ComCo's initial finding on the abuse of relative market power states that a three-step analysis must be applied to determine whether relative market power exists.

Dependency: Does the undertaking concerned have sufficient and reasonable alternative options?

ComCo examines this question in three steps:

1.

determination of the alternative options; determination of the possible implications of alternative options; and assessment of the proportionality of the implications;

2. lack of countervailing power of the dependent company: is there an uneven distribution of power between the companies with regard to the business in question?; and
3. gross negligence: is the dependency due to the dependent company's own misconduct?

When determining alternatives to specific products or services, other providers and alternative products or services must be considered. Furthermore, foregoing the service must also be considered as an alternative. If there are alternatives, ComCo examines their consequences for the company. For example, ComCo's analysis relates to how the company's turnover, profits and costs would change if it used the alternatives compared to the current situation. Finally, the consequences of an alternative option for the affected company must be examined to determine if they are reasonable and acceptable. In this context, a company is not considered dependent, even if the alternative options result in disadvantages, as long as those disadvantages are minor. Regarding the lack of countervailing power of the dependent company, it can be said: the more significant the consequences of the non-conclusion or termination of the legal transaction in question for the presumed company with relative market power, the greater the countervailing power of the presumed dependent company.

Even though both companies with relative market power as well as dominant undertakings are captured by the new rule, different sanctions apply. Dominant undertakings can be fined directly for violating Article 7(2)(g) of the CartA, as for any other type of abusive conduct. In contrast, undertakings with relative market power are not subject to direct penalties for their first violation: only subsequent violations directly trigger fines. However, behavioural remedies (e.g., delivery obligations) may be ordered directly.

Remedies and sanctions

Sanctions

Any undertaking that abuses its dominant position may be charged with a sanction of up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behaviour. Additionally, the profit resulting from the unlawful behaviour is taken into account.[56]

The sanctioning of undertakings is more thoroughly regulated by the CartA Sanctions Ordinance,[57] which also sets out the aggravating and mitigating factors in more detail.

Aggravating factors may be the repetition of an infringement, the amount of the profits, as well as a lack of cooperation with the competition authorities or even attempts to obstruct the investigation. In contrast, a premature termination of the infringement or cooperation with the competition authorities are examples of mitigating factors. Furthermore, the

conclusion of an amicable settlement or a leniency application can lead to a partial or full waiver of the sanction (see under 'Procedure').

In contrast to other jurisdictions, Swiss cartel legislation does not provide for the sanctioning of natural persons for first-time infringements of the provisions (i.e., individuals acting on behalf of an undertaking abusing its dominant position). However, individuals may be fined up to 100,000 Swiss francs in other cases, such as infringement of amicable settlements or a binding decision of ComCo.[58]

Unlike dominant undertakings, relatively dominant undertakings cannot be sanctioned directly for abusing a position of relative market power (i.e., for a first offence).

Behavioural remedies

In addition to the possibility of imposing sanctions on undertakings, ComCo has extensive decision-making and remedial powers. According to Article 30(1) of the CartA, ComCo decides the appropriate measures (i.e., issuing orders to eliminate restraint on competition). Measures therefore may prohibit an undertaking from continuing the practice that has been found unlawful or may oblige an undertaking to conduct specific measures aimed at eliminating an unlawful behaviour. As such, ComCo can also oblige an undertaking to enter into a business relationship with another undertaking if it has judged the refusal to deal to be unlawful.

Under certain conditions, interim measures may be ordered for the duration of the proceedings. As such, ComCo may issue injunctions to change specific business practices (i.e., compelling an undertaking to grant access to a certain facility). However, interim measures require, among other conditions, that in their absence, competition would suffer a disadvantage that could not easily be rectified. Interim measures allow ComCo to impose behavioural remedies even before completion of its investigation. In recent years, ComCo demonstrated an increased tendency to impose interim measures, as illustrated by the following two cases.

The first case concerns the expansion of the fibre optic infrastructure of Swisscom. In late 2020, ComCo issued an interim measure prohibiting Swisscom to continue with the fibre roll-out without guaranteeing layer 1 access. On appeal, the FAC upheld the interim measure and confirmed ComCo's assessment finding that the network construction strategy of Swisscom constituted a prima facie restriction of technological development. In 2022, the FSC confirmed that the measures were not arbitrary and upheld the decision of ComCo.[59]

The second case concerns an investigation into ATM schemes in Switzerland. ComCo accused Mastercard of hindering market entry of a competitor by refusing to co-badge new debit cards of its competitor with Mastercard's existing products. Even though the investigation on the merits is still ongoing, in February 2021, ComCo issued various interim measures ordering Mastercard to technically prepare its debit cards for co-badging. Mastercard appealed this decision and the FAC. The measures have been lifted by ComCo since the legal grounds for precautionary measures were no longer met due to changed circumstances.

In 2024, the FSC upheld ComCo's decision against Visa's[60] request for interim measures in the interchange fee investigation.[61][61] In an interim measure, Visa requested ComCo to

declare Visa's interchange fees to be legal and to allow Visa to use its current interchange fees. Both ComCo and the FAC found the request to be unlawful. Both found that Visa was simply trying to evade the risk of being sanctioned, which is, however, a risk for the private undertaking to bear. The FSC did not accept Visa's appeal against the FAC's judgment[62] due to lack of standing.

Structural remedies

Apart from corporate merger control, the CartA does not provide for structural remedies (i.e., in abuse of dominance cases, ComCo does not have jurisdiction to order structural measures).

Procedure

In general, the investigation of restraints of competition, under which abuse of dominance cases fall, starts with the preliminary investigation. According to Article 26 (1) of the CartA, the Secretariat of ComCo (Secretariat) may conduct preliminary investigations *ex officio*, at the request of undertakings involved or in response to a complaint from a third party. At this stage, the information is usually gathered through questionnaires sent to the undertakings. Undertakings have no right to inspect the files. Measures to eliminate or prevent restraints of competition may be proposed by the Secretariat.

Where there are indications of an unlawful restraint of competition, the Secretariat opens an investigation, in consultation with a member of the presiding body of ComCo.[63-] Regarding the publication of the opening of an investigation, the Secretariat has and uses various means to give notice of the purpose of and the parties to the investigation. Along with the publication in the Swiss Official Gazette of Commerce, in many cases a press statement is released. Depending on the public interest, the Secretariat may also comment on news coverage. Third parties are invited by the Secretariat to come forward within 30 days if they wish to participate in the investigation.[64]

The investigative powers of the competition authorities within an investigation are broad, and the far-reaching investigative measures include the conduct of searches (dawn raids) and the seizure of evidence (documents and electronic data).[65] Additionally, the competition authorities may hear third parties as witnesses and require the parties to an investigation to give evidence.[66] Regarding the duty to provide information, undertakings subject to an investigation are obliged to provide all the information required and produce the necessary documents to the competition authorities.[67] Failure to act accordingly may entail an administrative fine. Concerning dawn raids in particular, undertakings must answer questions that are related to them and must provide the competition authorities with documents and grant access to any premises for which this is requested. The duty to provide information is limited by the *nemo tenetur* legal principle (right against self-incrimination). However, in recent case law, the FSC has restricted this principle in a way that only current formal and de facto organs may invoke the company's right to silence. Former organs of undertakings under investigation can be questioned as witnesses without restriction.

The competition authorities can order interim measures for the duration of the proceedings. They may also be applied for by third parties provided that public interests such as the protection of competition are affected. Decisions concerning interim measures can be challenged independently of the main proceedings before the FAC.

An investigation can be terminated with an amicable settlement reached between an undertaking and the Secretariat.[68] Although there is no obligation to conclude an amicable settlement, it may be a reasonable measure to avoid lengthy and costly procedures. The conclusion of an amicable settlement is considered as cooperation, which leads to a reduction of a possible sanction of up to 20 per cent, depending on the timing of the settlement. A partial or even a full waiver of sanction may be reached if a leniency application is filed and if the undertaking assists in the discovery and elimination of the abuse of dominance.[69]

The Secretariat has published various notes on the procedure, including on the conduct of investigations, amicable settlements and deadlines.

Private enforcement

The CartA explicitly provides for civil proceedings in addition to administrative proceedings. Regarding rights arising from a hindrance of competition, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request the following before a civil court: the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Code of Obligations (CO) or surrender of unlawfully earned profits in accordance with the provisions on agency without authority.[70] Hindrances of competition include in particular the refusal to deal and discriminatory measures.[71]

Additionally, the CartA explicitly provides for further instruments for the civil courts to enforce the right to elimination and desistance. In this regard, the courts may, at the plaintiff's request, rule that any contracts are null and void in whole or in part or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard.[72] Furthermore, civil courts also have the possibility to order interim measures.

With respect to case law, in the *Etivaz* decision,[73] the FSC found a dominant position of a cooperative and awarded the plaintiff an antitrust claim for admission to the cooperative. There is no specific case law with regard to contracts concluded by dominant undertakings. However, in the *Allgemeines Bestattungsinstitut/Kanton Aargau* decision, a hospital only contracted one funeral company, which was, according to the court, an abuse of a dominant position.[74]

Additionally, the FSC held that a contract constituting an unlawful agreement affecting competition according to Article 5 of the CartA is void *ex tunc* (i.e., from the start) under Article 20 of the CO, as the purpose of the CartA requires this sanction.[75]

Having said this, private antitrust enforcement against unlawful practices of dominant undertakings has not yet played a significant role in Switzerland. The main reasons are considered to be consumers' lack of standing to sue, the short limitation period and the high burden of proof to claim damages. In mid-May 2025 over 36 companies have filed

a lawsuit against Mastercard and Visa for damages. The complaint is about excessive 'interchange fees', transaction fees charged with every card payment. These would be set by Mastercard and Visa unilaterally and without any real opportunity for negotiation. It remains to be seen how the court will rule on this issue.

So far, the introduction of the concept of relative market power does not seem to have increased the importance of private enforcement. To date, only one decision concerning a request for precautionary measures due to abuse of relative market power has been issued by the Cantonal Court of Basel-Landschaft. The request was rejected. Even today, civil court proceedings may be preferable in refusal to deal cases.

In 2019, ComCo tried to promote private antitrust enforcement by lowering fines for companies that pay damages to cartel victims. The cartel involved 12 construction companies that regularly allocated road construction projects among themselves and jointly determined their offer prices. ComCo's Secretariat offered the parties the opportunity to settle with the cartel victims following its request for a decision. The Secretariat promised to request that ComCo reduce the fines if damages to the cartel victims were paid. Subsequently, nine out of the 12 companies agreed to pay the cartel victims approximately 6 million Swiss francs in compensation. As a result, ComCo followed the Secretariat's request and reduced the fines of the respective nine companies by approximately 3 million Swiss francs, taking into account 50 per cent of the settlement payments made. Although this case concerned a cartel, it is likely that ComCo will extend this new practice to abuse of dominance cases in the future.

Outlook and conclusions

The Swiss Parliament is currently debating a partial revision of the Cartel Act (CartA). The aim of this revision is to improve the effectiveness of the CartA in general and private enforcement in particular.[76] The main changes to the CartA that are proposed can be summarised as follows.

Standing to sue

With regard to the enforcement of competition law claims, the proposed amendment of the CartA provides for a strengthening of the civil law remedies for anyone whose economic interests are threatened or violated by an unlawful restriction of competition. Thus, consumers and public authorities may also seek civil law remedies against market-dominant undertakings under the proposed rules.

Statute of limitations

The statute of limitations will be suspended from the start of an investigation by ComCo until a legally binding decision is rendered. The purpose of this suspension is to ensure that the potentially long duration of administrative competition law proceedings does not preclude the civil enforcement of claims, including against dominant undertakings.

Time frames

With the aim of speeding up competition law proceedings, the new CartA entails specific time frames for competition authorities as well as courts deciding competition law cases. The overall time frames are 60 months (from the time an investigation is formally initiated), 30 months for ComCo, 18 months for the FAC and 12 months for the FSC. These time frames are proposed to be merely indicative and not enforceable. Competition authorities only bear the burden of giving reasons as to why the time frames have not been met (comply or explain principle).

Consultation procedure

The new CartA also contains certain improvements (i.e., shortened time frames, reduced risk of sanctions) with regard to the consultation procedure. The consultation procedure allows an undertaking to notify contemplated conduct to ComCo prior to implementation, thereby avoiding sanctions.

Endnotes

1 European Court of Justice, decision of 19 January 2023, C-680/20, *Unilever Italia*. ^ Back to section

2 AIPS is a drug information publication system, which is used for the mandatory online publication of professional and patient information approved by Swissmedic. ^ Back to section

3 FSC, decision of 5 March 2024, 2C_698/2021. ^ Back to section

4 FSC, BGE 137 II 1999, c. 3.1. ^ Back to section

5 FSC, decision of 2 November 2022, 2C_596/2019. ^ Back to section

6 See, e.g., FSC, decision of 5 March 2024, 2C_698/2021, E.6.3; FAC, RPW 2015/3, p. 619, *Sanktionsverfügung – Preispolitik Swisscom*. ^ Back to section

7 See FSC, RPW/DPC 2013/1, p. 114, *Publigroupe*. ^ Back to section

8 The FSC held that the evaluation of a dominant position requires the assessment of all relevant aspects, decision of 5 March 2024, 2C_698/2021, E.6.4. ^ Back to section

9 FAC, decision of 18 December 2018, B-831/2011, c. 404, DCC. ^ Back to section

10 id., c. 442. ^ Back to section

11 id., c. 405. ^ Back to section

12 RPW 1998/3, p. 408, *Bell AG/SEG-Poulets AG*. ^ Back to section

13 e.g., RPW 2003/1, pp. 134 et seq., *Kreditkarten-Akzeptanzgeschäft* (collective dominance affirmed); RPW 2016/1, p. 122, *Online-Buchungsplattformen für Hotels* (collective dominance ruled out). ^ Back to section

14 See, e.g., RPW 2020/2, p. 808 et seq., *Sunrise/Liberty Global*. ^ Back to section

15 ibid. ^ Back to section

16 RPW 2018/3, p. 672 et seq., *Ticketcorner/Starticket*. ^ Back to section

17 RPW 2016/1, p. 123, *Online-Buchungsplattform für Hotels*. ^ Back to section

18 FSC, RPW 2013/1, p. 114, *Publigroupe*. ^ Back to section

19 e.g., FSC, decision of 9 December 2018, 2C_985/2015, c. 5.1. ^ Back to section

20 FSC, decision of 5 March 2024, 2C_698/2021, E.6.4. ^ Back to section

21 FAC, decision 18 December 2018, B-831/2011, c. 1124 et seq., DCC. ^ Back to section

22 id., c. 797. ^ Back to section

23 FSC, decision of 5 March 2024, 2C_698/2021, E.6.5.2. ^ Back to section

24 RPW 2011/1, p. 96 et seq, *Six/Terminals mit Dynamic Currency Conversion*. ^ Back to section

25 FSC, decision of 2 November 2022, 2C_596/2019; FAC, decision of 18 December 2018, B-831/2011, DCC. ^ Back to section

26 RPW 2014/1, p. 215 et seq., Swatch Group *Lieferstopp*. ^ Back to section

27 RPW 2016/4, p. 920 et seq., *Sport im Pay-TV*. ^ Back to section

28 FAC, decision of 10 May 2022, B-4003/2016; FSC, decision of 23 April 2024, 2C_561/2022. ^ Back to section

29 FAC, decision of 31 October 2023, B-5819/2020. ^ Back to section

30 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027; RPW 1997/4, p. 514, *Telecom PTT-Fachhändlerverträge*. ^ Back to section

31 RPW 1998/4, pp. 675 and 676, *Beschwerdeentscheid der REKO/WEF*. ^ Back to section

32 ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027. ^ Back to section

33 ibid. ^ Back to section

34 RPW 2020/3a, p. 1212, *Kommerzialisierung von elektronischen Medikamenteninformationen*. ^ Back to section

35 RPW 2002/3, p. 432 et seq., *Radio- und TV-Markt St. Gallen*; RPW 2003/1, p. 62 et seq., *Espace Media Groupe/Berner Zeitung AG/Solothurner Zeitung*. ^ Back to section

36 FSC, decision of 9 December 2019, 2C_985/2015, c. 5.e et seq. ^ Back to section

37 RPW 2010/1, p. 116 et seq., *Preispolitik Swisscom ADSL*. ^ Back to section

38 FAC, decision of 14 September 2015, B-7633/2003. ^ Back to section

39 FSC, decision of 9 December 2019, 2C_985/2015. ^ Back to section

40 RPW 2016/1, p. 128, Swisscom WAN-Anbindung. ^ Back to section

41 FAC, decision of 24 June 2021, B-8386/2015. ^ Back to section

42 FAC, decision of 24 June 2021, B-8386/2015, c. 8.4.2.2. ^ Back to section

43 Article 7(2)(f) of the CartA. ^ Back to section

44 FSC, decision of 12 February 2020, 2C_113/2017, c. 6.2.1. ^ Back to section

45 id., c. 6.2.2.FSC, decision of 2 November 2022, 2C_596/2019. ^ Back to section

46 RPW 2012/1, p. 74 et seq., *Vertrieb von Tickets im Hallenstadion Zürich*. ^ Back to section

47 Article 7(2)(b) of the CartA. ComCo, decision of 30 October 2017, *Geschäftskunden Preissysteme für adressierte Briefsendungen*, c. 1027. ^ Back to section

48 id., c. 1018. ^ Back to section

49 See FSC, BGE 139 I 72, c. 10.2.3. ^ Back to section

50 Article 7(2)(c) of the CartA. ^ Back to section

51 In decision BGE 137 II 199, c. 4.3.4, the FSC held that 'imposition' as a coercive element was a separate requirement under Swiss law that needed to be established. However, in later case law there have been some implications that the FSC may amend this statement and focus more on EU competition law in terms of this question (BGE 139 I 72, c. 8.2.3). ^ Back to section

52 RPW 2014/2, p. 403, *ETA Preiserhöhungen*. ^ Back to section

53 RPW 2016/1, p. 186, *Swisscom WAN-Anbindung*; RPW 2008/4, p. 579, *Tarifverträge Zusatzversicherung Kanton Luzern*. ^ Back to section

54 RPW 2016/1, p. 187 et seq., *Swisscom WAN-Anbindung*. ^ Back to section

55 FAC, decision of 24 June 2021, B-8386/2015. ^ Back to section

56 Article 49a(1) of the CartA. ^ Back to section

57 Ordinance of 12 March 2004 on sanctions imposed for unlawful restraints of competition. ^ Back to section

58 Articles 54 to 55 of the CartA. ^ Back to section

59 FSC, decision of 29 November 2022, 2C_876/2021. ^ Back to section

60 FSC, decision of 4 December 2024, 2C_170/2024. ^ Back to section

61 FSC, decision of 4 December 2024, 2C_170/2024. ^ Back to section

62 FSC, decision of 4 December2024, 2C_170/2024. ^ Back to section

63 FAC, decision of 28 February 2024, B-5972/2023. ^ Back to section

64 Article 27 of the CartA.
^ Back to section

65 id., at Article 28(2). ^ Back to section

66 id., at Article 42(2). ^ Back to section

67 id., at Article 42(1). ^ Back to section

68 id., at Article 40. ^ Back to section

69 id., at Article 29. ^ Back to section

70 id., at Article 49a(2). ^ Back to section

71 id., at Article 12(1). ^ Back to section

72 id., at Article 12(2). ^ Back to section

73 id., at Article 13. ^ Back to section

74 BGE 139 II 316. ^ Back to section

75 Commercial Court of the Canton Aargau, of 13 February 2003, RPW 2003/2, 451. ^ Back to section

76 BGE 134 III 438. ^ Back to section

77 Message on the partial revision of the CartA. ^ Back to section

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