

# The Swiss Competition Commission publishes its first decision finding an abuse of relative market power

The Swiss Competition Commission (COMCO) has published its September 23, 2024 decision in the Madrigall case. In this decision, COMCO has concluded for the first time that an undertaking had abused its relative market power. This decision, which is under appeal and therefore not final, raises important questions regarding the scope of application of the new rules.

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## Facts of the case

The case underlying COMCO's decision concerns an alleged abuse of relative market power by Madrigall vis-à-vis Payot.

Madrigall is a French family-owned group comprising publishing houses such as Gallimard, Flammarion, Casterman and brands such as La Pléiade and Folio. Payot is a Swiss bookstore chain with more than a dozen stores in French-speaking Switzerland, making it the market leader. To date, Payot purchases books distributed by Madrigall through Madrigall's official distribution system *in Switzerland*.

In September 2022, Payot filed a complaint with COMCO against Madrigall for alleged abuse of relative market power. In substance, Payot has claimed that it wanted to buy directly from Madrigall *in France*, but considered that the terms and conditions proposed for such supply were not appropriate.

After approximately two years of investigation, COMCO issued its decision finding that Madrigall had relative market power vis-a-vis Payot in relation to books in French edited and/or distributed by Madrigall and that Madrigall abused this power by asking higher prices from Payot than those offered to bookstores in France.

Madrigall has appealed this decision to the Federal Administrative Court.

## Relative market power

The concept of abuse of relative market power was formally introduced into Swiss law in 2022.

An undertaking with relative market power is an undertaking on which other undertakings are dependent for the supply of or demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other undertakings. The analysis relates to the bilateral relationship between two undertakings, i.e. *in casu* between Madrigall and Payot.

COMCO assessed the existence of relative market power of Madrigall vis-a-vis Payot by carrying out a three-step analysis:

**(i) Dependency relationship.** In assessing whether an undertaking has adequate and reasonable alternatives, COMCO's practice is to (a) identify the alternatives, (b) analyze the consequences of those alternatives and (c) assess the reasonableness of the consequences.

- When identifying the *alternatives* to a particular good or service, other suppliers and alternative goods or services must be considered, and not using a product or service is also considered an alternative.
- If there are alternatives, COMCO examines the *consequences* of an alternative for the undertaking. In this respect, COMCO's analysis pertains, for example, to the turnover, earnings and expenses of the undertaking when using the alternatives in comparison with the current situation.
- Finally, it has to be examined whether the consequences of an alternative are *reasonable / acceptable* for the undertaking concerned. In this regard, even if the alternatives bring along disadvantages, the undertaking is not dependent as long as such disadvantages are insignificant.

In its decision, COMCO considered that Payot has no reasonable or even objectively practicable source of supply other than a direct procurement from Madrigall.

**(ii) Absence of countervailing market power.** COMCO considered that Payot had no countervailing market power vis-à-vis Madrigall since the termination of the commercial relationship between them would cause a very modest decrease of Madrigall group's turnover while the consequences would be far more serious for Payot.

**(iii) No gross negligence on the part of the company presumed to be dependent.** Finally, COMCO considered that Payot's dependency did not result from commercial choices made by Payot, but was inherent to the system and market.

Based on the above, COMCO found that Madrigall had relative market power vis-à-vis Payot in relation to Madrigall books.

## Abusive behavior

If an undertaking has relative market power vis-à-vis another, its behavior may be abusive and thus unlawful if it hinders other undertakings from starting or continuing to compete, or

disadvantages trading partners.

In particular, Swiss competition law prohibits the 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. This new provision has also been introduced in 2022, along with the provisions on the abuse of relative market power.

COMCO has identified four cumulative requirements for this prohibition to apply:

- **Goods or services are offered in Switzerland and abroad.** This requirement is met in the case at hand.
- **Restriction of the possibility to purchase goods or services at the market prices and conditions customary in the industry.** In the Madrigall decision, COMCO held that market prices are transparent given the standardized calculation. Also, it considered that the prices offered by Madrigall to Payot restricted Payot in purchasing Madrigall books at the market prices and conditions customary in the industry in France.
- **Abusive nature of the restriction.** Madrigall had put forward a number of justifications for the price difference (e.g. labor costs of Madrigall to meet its legal obligation to promote books in Switzerland and increased debt collection risk resulting from a cross-border commercial relationship). COMCO has only partially followed this line of argument and has accepted only a small additional cost in comparison to the prices in France.
- **Absence of objective justification.** Other than the additional cost considered in the context of the analysis of the abusive nature of the restriction, COMCO's decision did not accept any justification for the remaining price differences.

Based on the above, COMCO considered that a part of the price difference between Madrigall's offer to Payot and the price resulting from the French state price framework was not justified and thus abusive.

Hence, COMCO concluded that Madrigall abused its relative market power towards Payot. It should be noted, however, that the provisions relating to the abuse of relative market power do not allow for the imposition of a competition law fine.

## Open questions and comments

COMCO had denied the existence of an abuse of relative market power in its Fresenius Kabi decision of June 24, 2024. The Madrigall case is therefore the first decision in which COMCO finds an abuse of relative market power. The Madrigall decision, however, raises major questions with respect to the scope of application of the new law and its consistency with the Fresenius Kabi decision.

Although this is not an exhaustive list, some of the questions that are worth mentioning are the following:

- The Madrigall case relates to the French book market which is characterized by regulated market prices. It is therefore doubtful whether it is lawful to consider that parts of the French legal framework (i.e. provisions on wholesale prices) have to be applied in Switzerland when determining the so-called market prices, while other relevant aspects of this French legal framework are left aside.
- When private undertakings are at the beginning of negotiations, e.g. on prices, it is questionable whether COMCO should intervene (e.g. by opening an investigation) or not be

- obliged to wait until such negotiations are either terminated or failed.
- With respect to the question of relative market power, COMCO did not define the relevant product markets based on established case law. The question, therefore, arises whether in cases of relative market power, COMCO should not be obliged to define relevant markets in order to avoid application of the concept in cases where in effect no such relative market power exists. In particular, COMCO did not define relevant markets and did – accordingly – not consider a segmentation of the wholesale book market consistent with the practice of other competition authorities which affected the assessment of Madrigall's market position.
  - What are the intervention thresholds in relative market power cases, both in relation to the notion of relative market power and the notion of abuse? These thresholds have been set very low in the Madrigall case, which raises questions about legal certainty.

The decision is currently under appeal before the Swiss Federal Administrative Court.

Madrigall is represented by Lenz & Staehelin in these proceedings.

Please do not hesitate to contact us in case of any questions.

**Legal Note:** The information contained in this Smart Insight newsletter is of general nature and does not constitute legal advice.

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Benoît Merkt	Managing Partner, Head of Competition, Geneva benoit.merkt@lenzstaehelin.com Tel: +41 58 450 70 00
Marcel Meinhardt	Partner, Head of Competition, Zurich marcel.meinhardt@lenzstaehelin.com Tel: +41 58 450 80 00
Astrid Waser	Partner, Head of ESG, Zurich astrid.waser@lenzstaehelin.com Tel: +41 58 450 80 00
Valentin Muller	Associate, Geneva valentin.muller@lenzstaehelin.com Tel: +41 58 450 70 00

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