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SWISS FEDERAL SUPREME COURT RAISES REQUIREMENTS FOR PROVING COMPETITION RESTRICTION IN ABUSE OF DOMINANCE CASES

The Swiss Federal Supreme Court (*Federal Court, FSC*) has clarified that a restriction of competition is a prerequisite for the finding of an abuse of a dominant position in the sense of Article 7 of the Cartel Act (CartA). It further clarified that for a conduct to constitute an abuse of a dominant position, the conduct must be *effectively potentially capable* of causing a restriction of competition respectively foreclosure effects. A mere hypothetical potential for competitive harm is not sufficient.

Background

The previous case law of the Federal Court was unclear as to whether a finding of an abuse of dominance under Article 7 CartA requires a restriction of competition and, if so, what standard of proof is required to establish such restriction of competition.

In the *Hallenstadion/Ticketcorner* judgement of 2020 (a tying case, i.e. a case in which the dominant undertaking makes the purchase of one of its products dependent on the purchase of a second product), the Federal Court appeared to require that the dominant firm's conduct has objectively anticompetitive effects.[1]

In the *SIX Group/DCC* judgement of 2022 (also a tying case), the Federal Court appeared to consider that a tying agreement (that could not be objectively justified) was in itself sufficient to constitute a restriction of competition. The Federal Court concurred with the lower court's view that there was no need to prove a restriction or distortion of competition. The Federal Court stated that an "effects-based analysis" was not necessary and that the "risk of the disapproved outcome" was sufficient.[2] The *SIX Group/DCC* judgement could be read to mean that a restriction of competition was not required for a finding of an abuse. It was therefore met with some criticism.

Clarification of Case Law

In the *Vifor Pharma Participations/HCI Solutions* judgement published in April 2025, the Federal Court clarified its case law. It noted two things:

RESTRICTION OF COMPETITION AS A PREREQUISITE OF AN ABUSE

The Federal Court first clarified that a restriction of competition is a prerequisite for a finding of abuse. The only question is what requirements must be met to prove such restriction of competition.[3]

[1] FSC, judgement of 12 February 2020, 2C_113/2017, cons. 6.1 (2C_113/2017 12.02.2020 - Schweizerisches Bundesgericht).
[2] FSC, judgement of 2 November 2022, 2C_596/2019, cons. 8.6 (2C_596/2019 02.11.2022 - Schweizerisches Bundesgericht).
[3] FSC, judgement of 23 January 2025, 2C_244/2022, cons. 10.1 (2C_244/2022 23.01.2025 - Schweizerisches Bundesgericht).

REQUIREMENTS FOR PROVING THE RESTRICTION OF COMPETITION

As regards the requirements for proving a restriction of competition, the Federal Court first referred to the case law of the European Court of Justice (**ECJ**).[4]

Effective potential capability

Based on this reference, the Federal Court held that, in accordance with the "effects-based approach", a conduct must be "**effectively potentially capable**" of causing a restriction of competition or a foreclosure effect. The risk of adverse effects on competition must actually exist based on all specific circumstances of the case. Overall, considering all the specific circumstances of the individual case and on the basis of a comprehensive assessment, it must be plausible that the conduct in question (such as certain contractual clauses) would foreclose competitors.[5]

This also means that competition authorities must specifically examine evidence provided by the dominant undertaking that would invalidate the finding of any anti-competitive effects.

In addition, there should be an analysis of whether the dominant undertaking is pursuing a strategy to foreclose competitors.

The Federal Court delineated the requirement of effective potential capability on two sides:

No actual foreclosure required

On the one hand, the Federal Court held that the competition authorities are **not required to prove** that a given **conduct** has **in fact** or successfully **foreclosed competitors** from the market, or the specific extent (e.g. by reference to loss of market share or revenue) to which the competitor—or rather, competition—has been harmed. In this sense, an actual effects analysis is not necessary.

Hypothetical potential is insufficient

On the other hand, it is **not sufficient** to show only a **hypothetical** risk or merely hypothetical or **theoretical** potential for competitive harm.

For example, it is not enough merely to point out that the conduct of the dominant undertaking is covered by one of the examples of abuse listed in Article 7(2) CartA. A conduct is not abusive solely by its form or per se, but must in fact be capable of foreclosing competitors.

Outlook

The clarification of the Federal Court's case law is to be welcomed. The judgement at least clarifies that the prohibition of abuse of a dominant position does not constitute an abstract offence of endangerment, as had been argued by some.

It remains to be seen, however, how high the threshold of the "effective potential capability" will be in practice. In that regard, it is notable that the ECJ requires a capability to foreclose, while the Federal Court considers an "effective potential" capability as being sufficient.

[4] FSC, judgement of 23 January 2025, 2C_244/2022, cons. 10.2 (2C_244/2022 23.01.2025 - Schweizerisches Bundesgericht).

[5] FSC, judgement of 23 January 2025, 2C_244/2022, cons. 10.3 (2C_244/2022 23.01.2025 - Schweizerisches Bundesgericht).

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