ZURICH
Brandschenkestrasse 24
CH-8027 Zurich

GENEVA
Route de Chêne 30
CH-1211 Geneva 6

LAUSANNE
Avenue de Rhodanie 40C
CH-1007 Lausanne

Swiss Federal Supreme Court redefines abuse of dominant market position

In last week's leading case on the abuse of a dominant position (2C_698/2021), the Federal Supreme Court sweepingly redefines the interpretation of abusive pricing and margin squeezes as well as the interplay between competition law and sector regulation. The court rules that Swisscom had not acted abusively and, therefore, lifts the sanction of around CHF 8m in its entirety. The Federal Supreme Court also sends a clear signal against the increasing (price) interventionism of the Competition Commission (ComCo).

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AUTHORS	Marcel Meinhardt	Partner, Head of Competition
	Astrid Waser	Partner
	Ueli Weber	Associate
	Benoît Merkt	Managing Partner

Facts of the case

In 2015, ComCo concluded that Swisscom, Switzerland's largest telecom service provider, had abused its dominant position with regards to the construction and operation of a "Wide Area Network" (WAN) for Swiss Post. According to ComCo, Swiss Post and Swisscom's competitor Sunrise, which purchased upstream products from Swisscom, had to pay excessively high prices. Swisscom should also have squeezed Sunrise out of the market (margin squeeze).

Swisscom appealed ComCo's decision to the Federal Administrative Court, which, however, upheld it. Last week, the Federal Supreme Court overruled both that judgment and ComCo's decision entirely. This decision will reshape the assessment of many abuse cases in Switzerland.

Swiss Cartel Act does not protect Inefficient Competitors

The judgement of the Federal Supreme Court clarifies that the primary purpose of the Swiss

Cartel Act (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, which are unable to assert themselves on the market primarily due to their own behavior, by means of the CartA*".

Against this background, the Federal Supreme Court uses the "asefficient 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 Federal Supreme Court, "*a [competitor] would be enabled to forego its own investments and (constantly) accuse the dominant company of imposing unfair prices*."

Control of Unfair Prices as Last Resort

The Federal Supreme Court 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, such 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 Federal Supreme Court refers to the "asif 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.

Sector Regulation Relevant

With regard to sector regulations, present the Swiss Telecommunications Act (TCA), the Federal Supreme Court 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 recognized such investments as a potential alternative for Sunrise. Hence, the prices for Swisscom's respective upstream products were not "imposed" under the CartA.

Margin Squeeze requires Exclusionary Strategy and Protects Equally Efficient Competitors

The Federal Supreme Court emphasizes that a margin squeeze is only possible if the following three structural conditions are met: (i) vertical integration, (ii) dependence on the upstream services of the dominant undertaking, and (iii) 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 Federal Supreme Court, 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 judgment, 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 "asefficient competitor test" and assess the costs of the dominant undertaking. A socalled "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.

Comment

The judgement of the Federal Supreme Court is convincing and sends an important signal against ComCo's (price) interventionism, which has been rubber stamped by the Federal Administrative Court. 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 Federal Administrative Court 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 Federal Administrative Court in particular, is likely to be highly questioned. Swisscom was represented by Lenz & Staehelin in these proceedings.

CONTACTS	Marcel Meinhardt	Partner, Head of Competition, Zurich marcel.meinhardt@lenzstaehelin.com Tel: +41 58 450 80 00
	Astrid Waser	Partner, Zurich astrid.waser@lenzstaehelin.com Tel: +41 58 450 80 00
	Ueli Weber	Associate, Zurich ueli.weber@lenzstaehelin.com Tel: +41 58 450 80 00
	Benoît Merkt	Managing Partner, Geneva benoit.merkt@lenzstaehelin.com Tel: +41 58 450 70 00