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Federal Supreme Court judgment Vifor/HCI Solutions: Art. 7 para. 2 CartA is not an endangerment offense

Marcel Meinhardt, Jannick Koller, Lorenz von Arx (Lenz & Staehelin) · Thursday, May 8th, 2025

The proceedings against Vifor Pharma/HCI Solutions

In December 2016, the Swiss Competition Commission (ComCo) fined HCl Solutions AG (HCI) around CHF 4.5 million 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 confirmed the abuse of a dominant market position in principle, but reduced the sanction.

In its ruling of 23 January 2025 (2C_244/2022), the Federal Supreme Court partially upheld the appeal filed by Vifor and HCI and referred the case back to the Federal Administrative Court for a new assessment and determination of the sanction. The Federal Supreme Court's comments on Art. 7 para. 2 CartA[1] and the sanction are particularly interesting. Here are the most important points:

No abuse of a dominant market position under Art. 7 CartA in the case of a purely hypothetical threat to competition

Although the Federal Supreme Court confirmed that HCI held a **dominant** position on the relevant markets, it clarified **that Art. 7 para. 2 CartA is not an endangerment offense:** It 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. Similarly, the mere fact that a contractual clause corresponds to an element of Art. 7 para. 2 CartA is not sufficient. The Federal Supreme Court thus follows the more recent case law of the ECJ, which also follows an "*effects-based approach*" (see judgment of the ECJ of 19 January 2023, C-680/20, Unilever Italia).

Against this background, the Federal Supreme Court ruled as follows on the four types of conduct

by HCI in question:

- Exclusive purchasing clause in a single contract (clause A): The Federal Supreme Court 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. In the opinion of the Federal Supreme Court, the clause is therefore not abusive.
- 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 Federal Supreme Court qualified it as abusive within the meaning of Art. 7 para. 2 lit. e CartA.
- Bundling the publication of drug information with editorial and technical quality control: In the opinion of the Federal Supreme Court, this clause is not abusive, as these are 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.
- Tying the publication of drug information with (optional) free upload to AIPS: The Federal Supreme Court also 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.

Reduction of the sanction and no consideration of intra-group sales

The Federal Supreme Court confirmed the sanction only with regard to the partially abusive clause B. However, the remaining findings of the lower court were to be set aside and the sanction reduced accordingly.

Furthermore, according to the Federal Supreme Court**, the intra-group sales should not have been taken into account when determining the sanction**. **In contrast to a margin squeeze** (BGE 146 II 217), the pharmacies and wholesalers of the Galenica Group were not involved in the abusive behavior. There was therefore no abuse of the vertical group structure.

[1] Federal Act on Cartels and other Restraints of Competition (Cartel Act, CartA) of 6 October 1995, SR 251.

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