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Dominance – Case Law in Switzerland

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Swiss Federal Supreme Court (FSC) Rulings on Art. 7 of the Swiss Cartel Act (CartA):

- The following **rulings of the Swiss Federal Supreme Court from the past 3 years** are particularly insightful:
 - FSC ruling of 2 November 2022, access to the dynamic currency conversion service (**FSC SIX DCC**), 2C_596/2019
 - FSC ruling of 5 March 2024, Swisscom WAN connectivity (**FSC WAN**), 2C_698/2021
 - FSC ruling of 23 April 2024, sports in pay-TV (**FSC Pay-TV**), 2C_561/2022
 - FSC ruling of 23 January 2025, commercialization of electronic drug information (**FSC KEMI**), 2C_244/2022
- These four rulings address the **assessment of abuse** of a dominant market position as one important issue.

FSC SIX DCC has been clarified by more recent FSC rulings:

- **FSC SIX DCC** sparked considerable **debate**, particularly regarding the **criteria** and **requirements** for **assessing abuse** of a dominant market position.
- Water under the bridge: **The FSC has since clarified the principles established in FSC SIX DCC** in its 3 more recent rulings, esp. with respect to the assessment of abuse.
- A key issue is the **demonstration of actual harm to competition**.
- Accordingly, the following 3 **recent FSC rulings** should be examined in more detail:
(i) **FSC KEMI**, (ii) **FSC WAN**, (iii) **FSC Pay-TV**.
- It is also important to consider **references** in these more recent decisions **to earlier case law**, notably **FSC 139 I 72 – Publigroupe** (see, e.g., in FSC KEMI reference to Cons. 10.1.2: assessment must be made on a **case-by-case basis** to determine whether the conduct constitutes obstruction or discrimination).

Reference to Case Law of the ECJ (1):

- **FSC KEMI refers to case law of the ECJ:**

"The ability to produce an exclusionary effect does not depend on the form, but on whether, in practice and taking into account all relevant circumstances, the conduct produces an exclusionary effect." (Cons. 10.2.1, with reference to the judgment of the ECJ in Servizio Elettrico Nazionale SpA, 12 May 2022; emphasis added).

"Since the ability to foreclose must not be merely hypothetical, the competition authority had to demonstrate by means of behavioural studies that an exclusionary effect exists." (Cons. 10.2.1, with reference to the judgment of the ECJ in Servizio Elettrico Nazionale SpA, 12 May 2022; emphasis added).

Reference to Case Law of the ECJ (2):

- **FSC KEMI refers to case law of the ECJ:**

"The question as to when a certain conduct is capable of restricting competition has been answered by the ECJ as follows: **"However, such proof must in principle be based on tangible evidence which, *going beyond a mere assumption*, demonstrates the *actual capacity* of the practice in question to produce such effects, whereby, if there is doubt about this, it must benefit the undertaking applying such practice"** (Judgment Unilever, para. 42; emphasis [italics] by the FSC)." (E. 10.2.2; emphasis added).

FSC KEMI refers to FSC Pay-TV / FSC WAN (1):

- **FSC KEMI refers to FSC Pay-TV** in direct connection with the "demonstration of an actual, potential harm to competition.":

"The risk of a restriction of competition [in the KEMI case] was therefore merely abstract in nature. This does not yet constitute a restraint of competition. In this regard, the Federal Supreme Court recently ruled similarly in judgment 2C_561/2022 of 23 April 2024 (see judgment [FSC Pay-TV] 2C_561/2022 [...] Cons. 10.2 and 10.4.2). [...] The demonstration of an actual, potential harm to competition caused by Clause A [...] in the sense of an effects-based approach (see above) is therefore not satisfied." (Cons. 10.5; emphasis added).

- **FSC KEMI also refers to FSC WAN**, including in relation to case-by-case analysis (Cons. 9.4) and harm to competition (Cons. 10.5). – However, with one exception (Cons. 7.3), the relevant passages in FSC WAN do not explicitly address the issue of harm to competition.

FSC KEMI refers to FSC Pay-TV / FSC WAN (2):

- FSC Pay-TV states in the passages referenced by FSC KEMI:

"The refusal then had to have a **restrictive effect on competition** (see Cons. 10.4.2 below), whereby the refusal to enter into the business relationship **had to be the cause** of the restrictive effect [...]." (Cons. 10.2; emphasis added).

"**Due to the outstanding importance** of [...] in pay-TV, **as established by the lower court**, they suffered a **sufficiently significant disadvantage**, such that effective participation in the pay-TV platform market was not possible for them." (Cons. 10.4.2; emphasis added).

"The decisive factor is that the **abusiveness** (including the **harm to competition**) of the contested conduct is established based on a **case-by-case analysis**." (Cons. 6.2; emphasis added; no direct reference in FSC KEMI).

FSC KEMI refers to FSC Pay-TV / FSC WAN (3):

- **FSC WAN addresses competitive harm less explicitly but also covers the issue:**
"The decisive factor is that the **abusiveness** (including the **harm to competition**) of the contested conduct is established based on a **case-by-case analysis**."
(Cons. 7.3; emphasis added; essentially the same as FSC Pay-TV, Cons. 6.2)
- Substantively, **all 3 decisions** concern **harm to competition**.
- All 3 rulings set **high standards for establishing abuse**.

Case Law in EU / Draft Guidelines of the EC on the application of Article 102 TFEU:

- Coming from a Swiss perspective, in particular the following would interest me with respect to the EU:
 - My understanding is, that in the **case law of the Union Courts** there is at least a "**minimal standard**": If evidence is brought forward, the evidence must be considered.
– How do the **Draft Guidelines of the EC** address this?
 - More generally: There is **a lot of case law of the Union Courts**. – How do the **Draft Guidelines of the EC** set out the **principles of the case law** of the Union Courts?
 - Are the Draft Guidelines of the EC **still up to date**?
 - What is the **debate**? What **developments** do you expect?

Thank you for your attention



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