

NKF Client News

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Competition Commission (COMCO) rules for the first time in a case on relative market power – COMCO denies relative market power

1. Background – Subject matter of the proceedings

"No evidence of 'rip-offs' by foreign undertakings" is the headline on the front page of the *Neue Zürcher Zeitung* on 5 July 2024, one day after COMCO's press release.

With this first decision, COMCO clarifies important questions regarding the application of the new provisions on relative market power that have been in force since 2022. COMCO has published a press release and press background material. The decision will be published later.

In a complaint to COMCO, Galexis AG (Galexis) accused the Fresenius Kabi Group (Fresenius Kabi) of refusing to supply Galexis with sip and tube feed nutrition products and corresponding aids in Germany and the Netherlands. COMCO investigated whether Fresenius Kabi had relative market power towards Galexis in the field of these products and whether it was abusing this alleged power.

2. Relative market power – New legal provisions and their application

The concept of relative market power refers to the bilateral relationship between two undertakings. Each individual case must be examined separately.

According to the press background material that has been published, COMCO examines (i) in a first step whether an undertaking has relative market power towards another undertaking with regard to the products in question and, if it has relative market power, (ii) in a second step whether it is behaving abusively.

(i) Relative market power: In a first step, COMCO examines whether relative market power exists on the basis of the following criteria:

1. Dependence: Does the undertaking concerned have sufficient and reasonable alternative options? COMCO assesses this question in three steps:
 - Assessment of the alternative options (question of facts).
 - Determination of the potential consequences of the alternative option (question of facts).
 - Assessment of the reasonableness of the consequences (legal question).
2. Lack of countervailing power of the dependent undertaking: Is there an unequal distribution of power between the undertakings in relation to the transaction in question?
3. Severe self-inflicted fault: Is the dependency due to own mistakes of the dependent undertaking?

(ii) Abuse: If an undertaking has relative market power, COMCO examines in a second step whether it is behaving abusively. This would be the case if it hinders or disadvantages another undertaking in competition and if there are no economic justifications for this.

3. Lack of relative market power of Fresenius Kabi

In the present case, COMCO examined whether Galexis is dependent on Fresenius Kabi as follows:

1. Alternative options: In COMCO's view, the most advantageous alternative option for Galexis is to persuade as many customers as possible to switch to comparable sip nutrition products from other manufacturers and otherwise no longer offer these products.
2. Consequences of the option: COMCO concluded from the investigation that Galexis would suffer certain losses in sales as a result of the termination of the supply relationship with Fresenius Kabi. This would result in somewhat lower profits and contribution margins. According to COMCO, there would also be other disadvantages, in particular such as a loss of attractiveness of Galexis as a result of the loss of Fresenius Kabi's sip nutrition products from its product range as a wholesaler. Overall, however, these losses are likely to be rather small according to COMCO.
3. Reasonableness of the consequences: Considering the financial strength of the Galenica Group, to which Galexis belongs, the disadvantages resulting from the loss of the supply relationship with Fresenius Kabi would be minor and therefore reasonable.

COMCO thus came to the following conclusion:

1. Galexis is not dependent on Fresenius Kabi.
2. Sufficient countervailing power. There is no clear imbalance in the disadvantages that the two undertakings would suffer if the supply relationship was terminated.
3. The question of severe self-inflicted fault does not need to be assessed in this case.

Accordingly, COMCO ruled that Fresenius Kabi does not have relative market power towards Galexis with regard to sip and tube feed nutrition products and corresponding aids.

In the absence of relative market power, an infringement of the provisions on relative market power is ruled out.

4. Contingent reasoning: Lack of abuse by Fresenius Kabi

Even if Fresenius Kabi had relative market power towards Galexis, Fresenius Kabi's behavior in the present case would not be abusive. It cannot be proven that the foreign conditions are more than slightly better than the conditions of Galexis when purchasing in Switzerland from Fresenius Kabi Switzerland.

At a public event, it was expressed that price differences are difficult to determine, especially when they are negotiated individually. Different factors can be applied, which are constantly changing due to the circumstances. There are also fluctuations in exchange rates. In order to not expose itself to the risk of illegality, an undertaking would have to grant its customers in Switzerland, that potentially depend on it, substantially better conditions than customers abroad in the sense of a safety margin. This cannot be the rationale and purpose of the provisions on relative market power. Minor price differences must be possible and are not the point, as there is no such thing as *the one price*.

5. Legal force – Information

COMCO's decision is not yet legally binding. For the sake of good order, it should be disclosed that Niederer Kraft Frey represented Fresenius Kabi in these proceedings.

If you have any further questions or suggestions on this topic, please do not hesitate to contact your regular NKF contact.

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