**Swiss National Report – LIDC Question A (Vienna 2025)**

**Question A: Is the concept of the abuse of relative market power beyond market dominance necessary for a functioning competition and what criteria should be used to assess it?**

**Relative Market Power in Switzerland: Combating the “Island of High Prices” or a Mere Token?¨**

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# INTRODUCTION

This paper examines the recent codification of relative market power in Swiss competition law and analyses the legal framework, including the conditions for establishing dependency and the practical application by Swiss Competition Commission (ComCo) in Switzerland.

On 1 January 2022 the Swiss legislator has enacted four new provisions on relative market power in the Swiss Federal Cartel Act (CartA)[[1]](#footnote-1):

1. Article 4 para. 2bis CartA defines relative market power as a situation in which an *undertaking* lacks “*sufficient and reasonable*” alternatives;
2. the general provision on the abuse of dominance has been extended to undertakings with relative marked power (art. 7 para. 1 CartA);
3. additionally, a new art. 7 para. 2 lit. g CartA specifically targeting so-called “Swiss surcharges” has been enacted, applicable to undertakings with relative market power, as well as to companies with market dominance; and
4. *direct* sanctions against undertakings for the abuse of relative market power have been excluded (art. 49a para. 1 CartA).

The ComCo has since applied these new provisions and within three years published two landmark rulings – *Madrigall / Payot*[[2]](#footnote-2) and *Fresenius Kabi / Galexis*[[3]](#footnote-3) and has concluded a third investigation into *BMW[[4]](#footnote-4) concerning a potential abuse of relative market power*:

1. In its first investigation into the new legal provisions on the abuse of relative market power, the ComCo examined the alleged refusal by the *Fresenius Kabi Group* to supply the complainant *Galexis AG*, a Swiss pharmaceutical wholesaler, with drinking and special nutrition products from its subsidiaries in Germany and the Netherlands, thereby impeding *Galexis’ access* to more favourable foreign prices. The ComCo closed the investigation into *Fresenius Kabi* on 24 June 2024 concluding that *Fresenius Kabi* did not have relative market power vis-à-vis *Galexis* in relation to these products. Following extensive investigation, ComCo concluded that the conditions for establishing a dependency relationship under Swiss competition law were not sufficiently met. Specifically, *Galaxis’* purchase volume of the relevant products from *Fresenius Kabi* was minimal (< 0.2% of its total procurement), and the competitive impact of the refusal to supply was limited. The fact that *Galexis* could not assess the exact same prices as in Germany and the Netherlands did not amount to dependency under Swiss competition law. Furthermore, the ComCo rejected a lack of countervailing power. Given the minor scale of the disputed transaction and *Galexis’* general market position, ComCo determined that the wholesaler had sufficient countervailing power. Since the dependency requirement was not met, the ComCo did not analyze whether *Gelexis* had contributed to its own situation through gross negligence. Moreover, ComCo emphasized that in light of the limited competitive relevance, further investigative measures would have required disproportionate efforts, incompatible with the principle of proportionality. Since the abuse of relative market power is not subject to direct fines under Swiss competition law and the insufficient evidence, ComCo discontinued the proceedings.
2. In its second ruling however, the ComCo affirmed the abuse of relative market power. It concluded that the French publishing group *Madrigall* had abused its relative market power vis-à-vis the Swiss bookseller chain *Payot* by refusing direct imports on the terms customary in France and therefore obliged *Madrigall* to allow *Payot* to import directly under French conditions. Specifically, ComCo concluded that *Madrigall* held relative market power over *Payot* as *Payot* had no sufficient and reasonable alternative for sourcing *Madrigall* book titles which are critical to its offering as a generalist book retailer. *Payot* lacked countervailing power, as the termination of the business relationship would have had serious consequences for *Payot*, while it would have had only marginal impact on *Madrigall*. Moreover, ComcCo concluded that there was no gross negligence on *Payot’s* part; the dependency resulted from *Madrigiall’s* market position and exclusive distribution model. A key element in ComCo’s analysis was the French book price regulation, which mandates fixed retail prices (“*Loi Lang*”) and an industry agreement on structured discounts (“*Protocole Cahart*”) for booksellers in France, providing a transparent reference to ComCo to assess whether the prices offered to the Swiss bookseller *Payot* were unjustifiably higher than those available to French retailers. ComCo concluded that *Madrigall’s* pricing restricted *Payot’s* ability to purchase at French market conditions without sufficient objective justification for the price premium. Although ComCo accepted limited additional costs specific to Swiss distribution, e.g. higher labour costs and logistical adjustments, most of *Madrigall’s* claimed justifications for the price difference were rejected. Consequently, ComCo prohibited restriction on *Payot’s* right to source abroad at market prices and terms, as protected under Swiss law since 2022 and ordered *Madrigall* to offer *Payot* commercial conditions equivalent to those available to French booksellers, apart from justified deviations. *Madrigall* has lodged an appeal against this ComCo ruling with the Swiss Federal Administrative Court.
3. On 10 July 2025, ComCo closed its latest investigation concerning a potential abuse of relative market power involving *BMW* and a long-standing *authorized dealership and service provider for BMW and MINI vehicles*. The dealership had made multi-million franc investments based on *BMW*’s indications of a planned expansion of the business-relationship. *BMW* subsequently terminated the cooperation without offering a reasonable transitional agreement. However, due to the fact that *BMW* granted the dealership a time-limited extension of their business relationship during the investigation, ComCo closed the investigation without a formal finding. However, ComCo’s preliminary assessment supported the dealership’s complaint that it lacked viable alternatives and was dependent on *BMW* in a way that could qualify as relative market power under Swiss competition law and that the dealership lacked sufficient countervailing power. The dependency was not deemed self-inflicted. Consequently, the ComCo imposed the procedural costs on *BMW*. The ComCo’s ruling can be appealed to the Swiss Federal Administrative Court.

Furthermore, the ComCo’s Secretariat published a form for notifications regarding abuse of relative market power and a Notice on relative market power, which it updated based on the aforementioned rulings in February 2025, providing practical information on the criteria applied by the ComCo to assess whether an undertaking is to be regarded as having relative market power, on the abusive restriction of supply options and on the participation of third parties in proceedings.

Cantonal civil courts have dealt with the issue of relative market power in initial rulings[[5]](#footnote-5), but there has not yet been a ruling by the Swiss Federal Administrative Court or the Swiss Federal Supreme Court.

While the concepts of relative market power and of a classic dominant market position are intertwined, there are fundamental differences, in particular:

1. The provisions relate to the individual relationship (*inter partes*) between an undertaking with relative market power as the addressee of the prohibition and a dependent undertaking as the addressee of the protection under the CartA rather than protecting residual competition alongside an undertaking’s market dominance.[[6]](#footnote-6) In principle, this also includes one-off legal transactions such as a specific real estate transaction.[[7]](#footnote-7) The decisive factor, however, is whether there is a dependency in relation to *specific goods and services*, not necessarily in relation to the entire business relationship between the undertakings.[[8]](#footnote-8)
2. Undertakings are defined as all buyers or suppliers of goods or services active in commerce regardless of their legal or organisational form (art. 2 para. 1 CartA). *Consumers* can therefore not invoke the provisions on relative market power, unlike in the concept of a classic dominant position.[[9]](#footnote-9)
3. The abuse of relative market power cannot be sanctioned *directly* (art. 49a para. 1 CartA), while the abuse of a dominant market position can be sanctioned directly. Unlike sanction proceedings under antitrust law, proceedings concerning relative market power are therefore not administrative proceedings with a character similar to criminal law, but purely administrative proceedings. The guarantees of Art. 6 and 7 ECHR and Art. 30 and 32 of the Swiss Federal Constitution applicable to criminal or quasi-criminal proceedings are therefore not applicable.[[10]](#footnote-10)

Although the provisions on relative market power are inspired by § 20 of the German Act against Restraints of Competition (ARC), the Swiss legislator deliberately refrained from adopting the German provision safeguarding Swiss economic interests.[[11]](#footnote-11) The provisions must therefore be interpreted in the Swiss context.[[12]](#footnote-12) Originating from the indirect counter-proposal from the Swiss Parliament to the so-called "Fair-Price Initiative", these provisions aim to dismantle unjustified price premiums for Swiss companies. As a further measure against unjustified price premiums, Swiss Parliament enacted a geo-blocking ban in the Federal Act against Unfair Competition (UCA) to prohibit geo-discrimination together with the provisions on relative market power in the CartA.

Under both Swiss and German law, dependence is analysed whether there are sufficient and reasonable alternatives so that an undertaking can turn to other undertakings for the needed products or services. However, Swiss law departs from German §20 ARC by comprehensively extending abuse prohibitions to relatively powerful undertakings, cautioning against the mechanical transposition of foreign jurisprudence.[[13]](#footnote-13) For example, contrary to German law, art. 4 al. 2bis CartA does not include the criterion of ‘clear imbalance’ to the countervailing power of other undertakings, which was introduced in Germany by the tenth amendment of the ARC. Furthermore, the abuse of relative market power provided for in Swiss law under art. 7 para. 2 lit. g CartA has no equivalent in German law, so that relative market power and its abuse must be assessed and interpreted in the light of the context in which it was adopted by the Swiss legislator.[[14]](#footnote-14)

# THE LEGAL FRAMEWORK

## Definition of an undertaking with relative market power

The Swiss CartA expressly defines an undertaking with relative market power as, “*an undertaking on which other undertakings are dependent for the supply of or demand for a good or service, because it has no sufficient and reasonable alternative but to turn to other undertakings*” (art. 4 para. 2bis CartA).

According to this definition, an undertaking's relative market power is assessed from the *perspective of the alleged* *dependent undertaking*.[[15]](#footnote-15) Furthermore, the definition links relative market power to dependency in relation to *specific goods and service*, dependency therefore does not have to relate to the entire business relationship between the undertakings.[[16]](#footnote-16) Nevertheless, an undertaking may also depend on another undertaking for several products or services, entire products categories or even an entire product range.[[17]](#footnote-17)

Undertakings are defined as all buyers or suppliers of goods or services active in commerce regardless of their legal or organisational form (art. 2 para. 1 CartA). Consumers can therefore not invoke the provisions on relative market power.[[18]](#footnote-18)

## Conditions for Establishing Relative Market Power

According to ComCo practice, the existence of relative market power under art. 4 para. 2bis CartA requires cumulatively[[19]](#footnote-19):

1. the dependence of an undertaking on another undertaking for goods or services (see Section 2.2.1);
2. the absence of countervailing power for the alleged dependent undertaking (see Section 2.2.2); and
3. the absence of gross negligence on the part of the undertaking allegedly dependent (see Section 2.2.3).

### Dependency criterium

To determine whether an undertaking is *dependent* from another for specific goods and services within the meaning of Art. 4 para. 2bis CartA, ComCo applies a case-by-case three stage examination, based on the specific circumstances of each case, as an undertaking can have relative market power vis-à-vis a specific or individual undertaking while not being in such a position vis-à-vis another undertaking.[[20]](#footnote-20)

1. First, ComCo considers the possibilities for the potentially dependent undertaking to take evasive action, considering the specific market conditions including feasibility, cost, and time required to switch suppliers or customers (see Section 2.2.1.1 below).
2. Second, it considers the expected consequences of switching to the identified alternatives, e.g. loss of sales, coverage and profits, cost increases and loss of customers (see Section 2.2.1.2 below).
3. Third, it assesses the reasonableness of these consequences, considering the undertaking's individual economic situation (see Section 2.2.1.3 below). If the expected consequences are negligible, the undertaking can reasonably be expected to switch. Unreasonableness, however, is not only assumed when the existence of the dependent undertaking is threatened.

Because such circumstances may change over time the ComCo principally considers the current conditions at the time of its decision to be decisive.[[21]](#footnote-21) The ComCo is obliged to investigate the correct facts of the case ex officio in accordance with the principle of investigation in these purely administrative proceedings. However, the authorities' burden of proof is supplemented by the undertaking’s duty to cooperate pursuant to art. 13 APA.

#### Alternatives

In its examination of the possible alternatives, the ComCo focuses on the possibility for the alleged dependent undertaking to obtain the same or alternative goods or services from another supplier, or to renounce to said goods and services.[[22]](#footnote-22) In its assessment, the ComCo may include the attempts of the allegedly dependent undertaking to find alternatives. If these attempts fail, the ComCo considers it to constitute evidence in indicating that there is no alternative or that these are particularly limited.[[23]](#footnote-23) In its decisions, the ComCo rightly points out that “failed attempts” is not a condition provided by art. 4 para. 2bis CartA. However, this authority correctly holds that the absence of attempts to find alternatives can still be considered in assessing evidence.[[24]](#footnote-24)

#### Disadvantages of the alternatives

Once the existing alternatives are identified, the ComCo calls for assessing the consequences of disadvantages that would result for the dependent undertaking in using these alternatives.[[25]](#footnote-25) These disadvantages may come from a decline in sales, a decrease in profit or an increase in expenditure.[[26]](#footnote-26) Nevertheless, the ComCo notes that because of their hypothetical characters and the fact that their scale depends on a multitude of factors, such as the specific market conditions and the characteristics of the undertaking concerned, but also the possible change in circumstances over time, the existence of disadvantages is difficult to prove and must be conducted concretely *on a case-by-case* basis.[[27]](#footnote-27)

#### Assessing the sufficiency and reasonableness of alternatives

An undertaking depends on an undertaking when it does not have sufficient and reasonable alternatives in the sense of art. 4 al. 2bis CartA. The criterion of reasonableness is not further specified in the CartA; in particular, the legislator has not categorized constellations of relative market power into certain case groups (e.g. based on German law into product range-related, undertaking-related, deficiency-related and demand-related dependence.[[28]](#footnote-28)

In its practice, the ComCo considers that the wording “*sufficient*” and “*reasonable*” alternatives does not constitute two distinct criteria.[[29]](#footnote-29) Rather, the assessment of whether “sufficient and reasonable” alternative options are available must be carried out in one step.[[30]](#footnote-30) What is decisive is whether the disadvantages are reasonable for the allegedly dependent undertaking.[[31]](#footnote-31)

For the ComCo, the sufficiency of an alternative is based on a concrete reference value, such as alternatives that would allow the alleged dependent undertaking to economically survive[[32]](#footnote-32). However, the ComCo rightly points out that this reference value is not provided by art. 4 al. 2bis CartA leaving it to the authority to assess the disadvantages of the alternatives on a case-by-case basis.[[33]](#footnote-33) Consequently, the ComCo considers that the criterion of sufficiency contains nothing that should not be examined in the context of the reasonableness criterion[[34]](#footnote-34). For the ComCo, the latter is also an indeterminate legal concept, which requires the enforcement authorities to assess the consequences of the alternative for the concerned undertaking on a case-by-case basis[[35]](#footnote-35).

For example, in its *Madrigall* decision, the ComCo considered the consequences to be unreasonable for a bookshop which generates between 10 and 20% of its sales and less than 10 million francs in contribution margins from the books of *Madrigall*, to suffer additional customer losses due to the high quality of *Madrigall’s* books. Conversely, it its *Fresenius Kabi* decision, the ComCo confirmed the reasonable consequences of the alternatives for an undertaking that generated a profit of around 165 million Swiss francs, and which, by abandoning the products concerned, would have suffered a reduction in profit and contribution margins of less than CHF 400,000, as well as rather small additional losses. Moreover, the products concerned in this case represented less than 0.2% of the sales of the alleged dependent undertaking.[[36]](#footnote-36)

Art. 4 al. 2bis CartA gives a wide margin of discretion to the enforcement authorities. In this respect, the ComCo considers that categorising constellations of relative market power - as it is the case in German law - is no substitute for a case-by-case analysis.[[37]](#footnote-37) As already mentioned, (cf. 1), the Swiss legislator did not aim for complete harmonisation with the German provisions on relative market power. Moreover, under German law, the introduction of a reasonableness criterion came subsequently to the sufficiency criterion and was intended to broaden the application of §20 ARC.[[38]](#footnote-38) Consequently, according to the latter, even if an undertaking has sufficient alternatives, a relationship of dependence exists as it would otherwise be unreasonable to require from this undertaking to turn to these alternatives.[[39]](#footnote-39) In view of the subsequent introduction of this criterion, the German legislator may have therefore expressly wished to carry out a formal two steps assessment of dependence that is not provided by art. 4 para. 2bis CartA.

While conducting this assessment, the ComCo does specify that not all disadvantages must be qualified as being unreasonable.[[40]](#footnote-40) The relative market power provisions are only designed to protect undertakings from abuses in situations where there is a clear imbalance of power between trading partners and not to introduce an extended obligation to contract.[[41]](#footnote-41) Conversely, the undertaking existence does not need to be threatened to admit that an alternative is unreasonable.[[42]](#footnote-42)

### Absence of Countervailing Power

The absence of countervailing power condition involves assessing the interest of the undertaking presumed to hold a relative market power for the counter-performance of the undertaking allegedly dependent.[[43]](#footnote-43) The greater the disadvantage suffered by the alleged dependent undertaking, the greater the countervailing power must be. Consequently, if the undertaking presumed to hold relative market power has an equal or similar interest for the counter-performance, the undertaking presumed to be dependent is not in a weaker position. In this case, the power relation is balanced.

Even if this condition is not provided for in art. 4 para. 2bis CartA, the aim of the relative market power provisions is to protect undertakings in a weak position from abuses.[[44]](#footnote-44) Consequently, if there is no imbalance of power in the bilateral relationship, the alleged dependent undertaking does not fall under the protection conferred by art. 4 para. 2bis CartA.[[45]](#footnote-45) Furthermore, the extent of this imbalance of power depends on the circumstances of the individual case, and a minimal difference is not sufficient to trigger this need for protection.[[46]](#footnote-46)

In its *Fresenius Kabi* decision, the ComCo denied the imbalance required to establish relative market power because it did consider the disadvantage arising for *Galexis* from terminating the supply relationship with *Fresenius Kabi* for liquid nutrition, tube feeding and medical devices as reasonable.[[47]](#footnote-47)

### Absence of Gross Negligence

Finally, the ComCo considers that the allegedly dependent undertaking must not have caused the situation of dependence by committing a gross negligence.[[48]](#footnote-48) Even though art. 4 para. 2bis CartA does not expressly address this issue, the ComCo admits interpreting this provision in the light of this condition.[[49]](#footnote-49) On this point, the Message is quite straightforward as it expressly considers that a dependency situation only exists if an undertaking has not put itself in an impasse.[[50]](#footnote-50)

In its *Madrigall* decision, the ComCo adds to this extent that it is important to avoid that the CartA encourages undertakings to place themselves in situations of dependence that would entail risks far outweighing the benefits of a commercial relationship.[[51]](#footnote-51) Indeed, an undertaking which finds itself in a situation of dependence, despite a clear disproportion between the risks and opportunities, must not be able to rely on the rules on protection against the abuse of relative market power.[[52]](#footnote-52) Otherwise, the antitrust rules would encourage commercial models allowing to take such unreasonable risks, competition would be distorted and generate constellations contrary to the goals of the CartA[[53]](#footnote-53) which are to promote competition in the interests of a free market economy (art. 1 CartA). In other words, the abuse of relative market power presupposes that the dependence situation is not due to the gross negligence of the alleged dependent undertaking.

### Prior Market delimitation?

The analysis of dependence for products or service raises the fundamental and preliminary question of the need or not to delimit the relevant market. This question was for the first time expressly addressed by the ComCo in its *Madrigall* decision.[[54]](#footnote-54) Given the recent nature of the provisions on relative market power, the ComCo stresses the lack of practice in Switzerland on whether the relevant market must be delimited or not.[[55]](#footnote-55) In German law, certain authors highlight the need to formally process with such a delimitation.[[56]](#footnote-56) Nevertheless, despite this practice in German law, the ComCo expressly considers in its *Madrigall* decision that a formal delimitation of the relevant market would be superfluous for assessing the relative market power of an undertaking.[[57]](#footnote-57) For the ComCo, the assessment of an abuse of relative market power must focus on the repartition of power between two parties in bilateral relationship – i.e. a “relatively dominant” undertaking and a dependent undertaking.[[58]](#footnote-58) This assessment cannot be compared with the analysis of an abuse of a dominant position in the sense of art. 4 para. 2 CartA which, as it constitutes a unilateral conduct of an undertaking, requires to delimit the relevant market for assessing the market power of the concerned undertaking.

This interpretation of the ComCo is convincing and must be followed. First, as stated above, defining the relevant market must make it possible to determine the market power of one or several undertakings on a given market. Such an analysis must therefore be carried out to conclude that an undertaking holds a dominant position in the sense of art. 4 para. 2 CartA or that an agreement between undertakings leads to a significant restriction of competition within the meaning of art. 4 para. 1 and art. 5 para. 1 CartA, without being justified on grounds of economic efficiency in the sense of art. 5 para. 2 CartA, and provided that it does not concern a parameter enshrined in art. 5 para. 3 or para. 4 CartA.[[59]](#footnote-59) Second, a delimitation of the relevant market is also necessary when assessing a merger of undertakings. In this case, it is indeed required to analyse and predict the structure of a market on a forward-looking basis.[[60]](#footnote-60)

As stated by the ComCo, the situation is quite different in the context of relative market power, since such an instrument, in our view, seeks above all to protect an undertaking that is dependent on another undertaking for the supply of goods or services and is therefore focused on the case-by-case relationship that binds two undertakings. There is then no need to process with a formal delimitation of the relevant market allowing to determine the *erga omnes* market power of an undertaking in relation to the other competitors on the market.

Furthermore, the fact that the relative market power provision protects a given undertaking in a given relationship does not contradict the overall objective of the CartA which is to “[...] *prevent the harmful economic and social consequences of cartels and other restrictions on competition, and thus to promote competition in the interests of a liberal market economy*”. (art. 1 CartA). The relative market power and its abuse provisions do not make the individual interests of an undertaking take precedence over the proper functioning of competition as an institution enshrined in art. 1 CartA. To this extent, the individual protection of an undertaking falls fully within the scope of the aim set out in art. 1 CartA, when this protection contributes to preventing harmful economic or social consequences attributable to restrictions on competition.[[61]](#footnote-61) In this way, CartA can perfectly well pursue a dual individual and institutional dimension, so that both are closely linked and ultimately form a whole[[62]](#footnote-62). To this end, the prevention of the behaviors envisaged in art. 7 al. 2 let. g CartA also has macroeconomic effects on the overall functioning of the market. These effects aim at suppressing the limitations for Swiss undertakings to obtain direct supply for goods or services at prices and under customary conditions practiced abroad. By qualifying these limitations as an example of abuse, art. 7 para. 2 let. g CartA aims to open up markets, stimulate price competition in Switzerland and create a deterrent effect for undertakings that would limit the direct sourcing possibilities for their partners. In the light of these various objectives, preventing the abuse of relative market power therefore goes beyond the mere protection of the individual interests of an undertaking, by preventing the harmful economic or social consequences of such abuse and thus promoting competition in its institutional dimension. Moreover, this simultaneous protection of individual interests and competition as an institution is not a new feature of the CartA that appeared with the adoption of the relevant provisions on the abuse of relative market power. This “individual aspect” already stems from the definition of the dominant position provided by art. 4 para. 2 CartA which encompasses the notion of economic dependence[[63]](#footnote-63) (see Section 3.3 below). The latter does require to include the position of possible dependent suppliers and purchasers in the assessment of a dominant position of an undertaking on the market.

Nevertheless, this absence of requirement to delimit the relevant market does not mean that the concerned products or services for which there is a dependence relationship must not be determined. In its *Madrigall* decision, the ComCo recalls that, as it concerns a contractual relationship, the analysis must be based on the specific features of the undertakings at stake and the products concerned by this contractual relation.[[64]](#footnote-64) The concerned products, being here the *Madrigall’s* books, are therefore determined within the assessment of the dependency itself without having to proceed with a formal market delimitation.

# ABUSE OF RELATIVE MARKET POWER

## Abuse prohibition extended to relative market power

Detaining a relative market power is not *per se* unlawful. An undertaking detaining a relative market power behave unlawfully only when it abuses of this power by hindering access for other undertakings to competition or its exercise as well as by placing commercial partners at a disadvantage (art. 7 para 1 CartA). To this extent, art. 7 para. 2 lit. a-g CartA provides an exemplative list of abusive behaviour.

As for the abuse of dominant position, the ComCo recalls that according to the case law of the Swiss Federal Supreme Court, a behaviour may potentially affect competition and already fall under the scope of art. 7 para. 1 CartA.[[65]](#footnote-65) The risk that such behaviour may affect competition must be concretely proven in the case at hand.[[66]](#footnote-66) It is therefore required to demonstrate that the behaviour of the undertaking holding a relative market power creates a concrete risk and not only theoretical, to affect competition.[[67]](#footnote-67)

## Direct supply restriction

In parallel to the introduction of the relative market power at art. 4 para. 2bis CartA, the legislator amended the exemplative list of art. 7 para. 2 CartA with a new lit. g. According to this new provision, it is deemed unlawful for an undertaking holding a dominant position or a relative market power “ […] *to restrict the ability of purchasers to obtain abroad at market prices and under customary conditions of a given economic sector, goods or services proposed in Switzerland and abroad*”. In line with the 2022 revision of the CartA The aim of this provision is to combat Switzerland's “island of cost”, and to prosecute as abuses the behaviours that allow to partition the Swiss market. The aim is to prevent an undertaking with relative market power from applying the notorious “Swiss surcharge” to the companies that depend on it.[[68]](#footnote-68)

For example, a refusal to supply abroad or a supply abroad on less favourable terms than those offered to local companies could be considered abusive in the sense of art. 7 para. 1 and para. 2 lit. g CartA.[[69]](#footnote-69) An abusive behavior may also exist when the undertaking with relative market power refuses to enter into business relations, discriminates against business partners with regard to price or other business conditions, or only agrees to enter into or continue business relations on condition that the business partner accepts or provides additional services.[[70]](#footnote-70)

In the *Madrigall* case, the ComCo qualified as abusive, within the meaning of art. 7 para. 1 and para. 2 lit. g CartA, *Madrigall's* behavior in restricting *Payot's* ability to obtain its books directly in France at market prices and under customary conditions of this sector. In France, the book market is regulated in that the resale price of a book on the retail market is set by the publisher and is identical for all booksellers in France, who cannot deviate from it. Payot was however unable to obtain the calculated discounts on the wholesale price which were offered to other equivalent French booksellers.[[71]](#footnote-71) Within the meaning of art. 7 para. 2 lit. g CartA, Payot was thus limited in its ability to obtain these supplies proposed abroad at market prices and under customary conditions. Furthemore, the ComCo concludes that *Madrigall* was abusing its relative market power position vis-à-vis Payot by imposing higher prices than that of French booksellers.[[72]](#footnote-72) These higher prices resulted from discounts that were lower than the ones granted to French booksellers due to allegedly higher costs linked to the specific characteristics of the Swiss market.[[73]](#footnote-73) The ComCo nevertheless considered them as abusive, as these additional costs did not, in its view, allow to reduce the discount rate offered to Payot.

Conversely, in some cases, this comparison can be difficult, particularly when conditions abroad are negotiated individually and depend on several factors like purchase volume, delivery times, right of return and other considerations. Moreover, as stated by the ComCo in its *Fresenius Kabi* decision, the fact that a dependent undertaking only obtains slightly less favourable conditions in Switzerland is generally not abusive.[[74]](#footnote-74)

## Economic dependence?

Despite the novelty of the abuse of relative market power, the idea of combating the “Swiss island of costs” is not a new feature of the CartA. As with the objective of relative market power, the 2003 revision of the CartA already had this objective. Apart from the abovementioned revision of art. 4 para. 2 CartA (see Section 2.2.4 above), the Swiss legislator amended the CartA on 20 June 2003 with a new art. 5 par. 4, which presumes that an agreement vertically tying prices or imposing exclusive territories hinders competition and is punishable by direct sanctions under art. 49a CartA.

As for the abuse of relative market power, the aim of art. 5 para. 4 CartA is to prevent foreclosure of the Swiss market and the concomitant rise in prices. Consequently, a producer using an exclusive distributor for Switzerland cannot prevent a reseller located in Switzerland from obtaining supplies from another distributor located abroad. The latter must in fact respond to unsolicited orders from territories under exclusivity such as Switzerland. This incentive for passive sales must enable Swiss resellers to seek out the best possible offers and buy where they seem most favourable.

However, the protection offered by art. 5 para. 4 CartA has given rise to certain limitations. First, in the *Flammarion* case, the Swiss Federal Supreme Court recalled that a producer's undertaking not to compete with its distributors is not covered by art. 5 para. 4 CartA.[[75]](#footnote-75) In this case, *Flammarion* located in France had in fact undertaken not to sell its own books in Switzerland, thus prohibiting itself from competing with its distributor in this territory. In other words, it follows from this ruling that art. 5 para. 4 CartA does not cover cases of direct supply of a Swiss retailer from a producer located in another country.

Second, the application of art. 5 para. 4 CartA comes up against the group privilege. In this respect, agreements between undertakings belonging to the same group and over which a parent company exercises effective control are not subject to the CartA. All the entities in question thus constitute a single undertaking, and vertical agreements on prices or territorial protection are not qualified as competition agreements within the meaning of art. 4 para. 1 CartA, or agreements contrary to art. 5 para. 1 CartA. Consequently, the practice of certain commercial groups of refusing to supply Swiss customers at foreign prices and commercial conditions practiced abroad, and referring them to Swiss-owned distribution undertakings so that these Swiss clients buy at the higher prices and conditions prevailing in Switzerland, does not necessarily constitute a competition agreement within the meaning of art. 4 para. 1 CartA and art. 5 para. 1 CartA.[[76]](#footnote-76)

In the same vein, it is finally worth mentioning that the abuse of a dominant position expressed under art. 7 para 2 let. a CartA by the unlawful refusal to supply a trading partner, may apply if an undertaking whose products a Swiss company wishes to obtain abroad dominates the market.[[77]](#footnote-77) However, this abuse remains exceptional as the CartA does not establish a general obligation to contract.[[78]](#footnote-78) This type of abuse has notably prevailed in cases where a refusal to sell to undertakings active in an upstream, downstream or neighbouring market has made it possible to extend the dominant position in these markets, or to prevent the remaining competitors in these markets from entering or competing.[[79]](#footnote-79) This type of abuse also makes it possible to prevent refusals of access to essential facilities held by the dominant undertaking and which are necessary for a competitor to carry out its economic activity.[[80]](#footnote-80) In view of the threshold required for a dominant position and its exceptional nature, this type of abuse does not seem suitable for properly covering the behaviours provided in art. 7 para. 2 let. g CartA.

Consequently, the introduction of relative market power has made it possible to circumvent the issue of group privilege when a Swiss reseller wishes to source directly from abroad. It is therefore no longer possible for a producer to hide behind this privilege and refer a Swiss customer to the group's distributor located in Switzerland. Furthermore, a producer who refuses to compete with the distributors of its products can no longer refer to its distributors in the event of a request for direct supply and thus escapes the presumption of art. 5 para. 4 CartA.

# RELATION TO OTHER FEDERAL ACTS

## 4.1 Federal Act on price surveillance

The abuse of relative market power, as evidenced in particular by the impossibility for a dependent undertaking to obtain goods or services abroad, under market prices and standard conditions practices abroad, raises the question of coordination with the Federal Act on Price Supervision (PSupAct). According to art. 1 and art. 4 para. 1 and para. 2 of the PSupAct, this act applies to prices of goods and services including credits. To this extent, the Price Supervisor monitors price trends and prevents abusive price increases and the maintenance of abusive prices.

Article 3 para. 3 CartA states that the procedures laid down in this Act for assessing restrictions on competition take precedence over the procedures laid down in the PSupAct, unless otherwise decided by mutual agreement between the ComCo and the Price Supervisor. In parallel, art. 16 par. 1 PSupAct states that the ComCo may investigate competition agreements or undertakings with significant market power, even if the Price Supervisor has reduced the abusive price or suspended proceedings. Article 16 par. 2 PSupAct specifies that the Price Supervisor is responsible for examining whether agreed prices or those of undertakings with significant market power are abusive.

In the light of these coordination rules, we believe that the ComCo should remain competent for assessing an abuse of relative market power. The Price Supervisor is generally competent if the case only concerns unfair pricing.[[81]](#footnote-81) In this case, this authority could intervene and prevent an abusive price increase within the meaning of art. 4 para. 2 PSupAct. However, relative market power and its abuse do not only concern the assessment of an unfair price. Rather, these instruments seek to assess whether a dependent undertaking located in Switzerland is prevented from obtaining goods or services from abroad at market prices and under standard conditions practiced abroad. As it may include questions related to practiced prices, it may also concern a “simple” refusal to supply from abroad or a supply which is granted under commercial conditions which do not correspond with what is practiced abroad. Moreover, before assessing the abuse, the dependence of an undertaking must be established by determining if the latter lacks sufficient and reasonable alternatives for obtaining the concerned products or services. Consequently, as it encompasses other parameters than pure abusive price questions, and is mainly focused on behaviours practiced outside of Switzerland, the ComCo is better equipped to deal with cases treating the abuse of relative market power as provided in art. 4 para. 2bis and art. 7 para. 2 let. g CartA.

## 4.2 Federal Act on unfair competition (UCA)

The Federal Act on Unfair Competition (UCA) aims to ensure fair and undistorted competition in the interests of all parties concerned (art. 1 UCA). According to art. 2 UCA, any commercial conduct or practice that is misleading or otherwise contravenes the rules of good faith and affects relations between competitors or between suppliers and clients is unfair and unlawful. The fairness of a behavior or practice is related to the absence of deception or any other violation of the rules of good faith.

Like the CartA, the UCA protects the competition as an institution.[[82]](#footnote-82) Whereas the CartA aims to ensure sufficient competition, the UCA is concerned with the quality of competition.[[83]](#footnote-83) Since relative market power and its abuse are focused on a relationship between supplier and customer, it would have been perfectly possible to place these provisions within the UCA and to qualify the abuse provided for in art. 7 al. 2 let. g CartA as being unfair in the sense of the sense of art. 2 UCA. Moreover, as previously stated (see Section 2.2.4 above), this behaviour also affects competition as an institution which is protected by the UCA.

Furthermore, as the abuse of relative market power primarily focuses on a contractual relationship between two undertakings, it is undeniable that its assessment mainly concerns civil aspects. To this end, the UCA provides civil remedies for a company to assert its rights against its contractual partner (art. 9 ff UCA). To this extent, the civil courts have already had occasion to hand down judgments in which they applied the CartA provisions on relative market power.[[84]](#footnote-84)

This being the case, we consider it correct to have placed the provisions on abuse of relative market power within the CartA and granting the competence to investigate its abuse to the ComCo. Firstly, it must be recalled that the abuse of relative market power, as it stands in the CartA, is a counterproposal to the “Island of costs” initiative. Within this context, both the initiative and the counterproposal are aimed at lowering prices in Switzerland by easing direct supply abroad. In our view, such objectives go beyond the sole focus on ensuring the qualitative aspects of a contractual relationship between a supplier and its customer(s) in the sense of the UCA.

Furthermore, to achieve the "island of costs” objectives, the ComCo must prove an abuse caused by the limitation to obtain supplies from abroad at prices and standard commercial conditions practiced abroad, but above all assess the sufficiency and reasonableness of the alternatives for the concerned products. Except for certain particularly clear and limited cases,[[85]](#footnote-85) it would be in our view very difficult for a given undertaking to provide the appropriate evidence before the civil courts. Consequently, if such an assessment is not undertaken by administrative authorities, the public interests of countering the Swiss “island of costs” by easing the supply abroad for Swiss undertakings, would be impaired and could not be guaranteed. In any event, from a civil law point of view, a ComCo decision finding an abuse of relative market power, even though it cannot impose direct sanctions, undoubtedly helps a dependent undertaking victim of an abuse to bring a civil action for damages. In addition, such a decision ensures the elimination of this abuse in future commercial relations with the undertaking on which it depends and therefore reaches the objective pursued by the law.

# CONCLUSION

The introduction of relative market power into Swiss competition law represents a profound expansion of the law’s scope beyond traditional market dominance. Yet, vigilant application, careful judicial calibration, and nuanced regulatory refinement are essential to ensure that the new rules foster, rather than hinder, market innovation.

While inspired by German competition law, the Swiss legislator tailored the concept to national priorities – notably the goal of combating unjustified price premiums (the so-called “Swiss surcharge”) and facilitating direct procurement abroad. This shift, rooted in the political compromise around the Fair-Price Initiative, has created a new avenue of protection for Swiss businesses in economically asymmetrical relationships.

The first ComCo decisions applying the new provisions have clarified key legal criteria. In *Fresenius Kabi*, ComCo rightly emphasized the need for concrete economic dependency and rejected a finding of relative market power where the business relationship lacked sufficient weight. By contrast, in *Madrigall*, ComCo applied the new rules robustly and without requiring formal market definition, compelling a foreign supplier to grant cross-border access under standard conditions when no reasonable alternative existed. The preliminary findings in the *BMW* case further illustrate that even one-off or structurally atypical dependencies may fall within the law’s scope.

Still, important questions remain open. The role of foreign price regulation (as in the *Madrigall* case), the absence of sanctions for abusive conduct, and the lack of clear thresholds for dependency assessments all leave room for legal uncertainty. In practice, the concept may empower Swiss undertakings with effective procedural leverage – but whether it will consistently dismantle the structural causes of the “island of high prices” remains to be seen.

Ultimately, the new rules mark a shift toward protecting individual commercial dependencies, with a hybrid regulatory logic that merges public enforcement with private remedial potential. Their long-term impact will depend on consistent enforcement, judicial interpretation, and businesses’ strategic adjustments to this evolving compliance landscape.

1. P. Picht, Relative Marktmacht, Geoblocking und Digitalisierung, SZW/RSDA 2022(4), pp. 315-32, p 315; ComCo, *Fresenius Kabi* decision of 24 June 2024; N 268 et seq.  [↑](#footnote-ref-1)
2. ComCo, *Madrigall* decision of 23 September 2024. [↑](#footnote-ref-2)
3. ComCo, *Fresenius Kabi* decision of 24 June 2024. [↑](#footnote-ref-3)
4. ComCo, relative market power in the automotive sector, media release dated July 10, 2025, german version available at: <https://www.news.admin.ch/de/nsb?id=99731>. Accessed 10 July 2025. [↑](#footnote-ref-4)
5. Decision of the Cantonal Court of Basel-Landschaft, Civil Law Division dated 13 December 2023 (case number 430 23 144), published in RPW 2024/2 pp. 588-607; Decision of the Cantonal Court of Vaud, Civil law court dated 30 December 2024, published (MP/2024/7). [↑](#footnote-ref-5)
6. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 272. [↑](#footnote-ref-6)
7. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 277. [↑](#footnote-ref-7)
8. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 275. [↑](#footnote-ref-8)
9. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 272. [↑](#footnote-ref-9)
10. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 21. [↑](#footnote-ref-10)
11. Message on fair prices initiative and CartA modification, Swiss official federal gazette, FF 2019 4665, p. 4695; D. Mamane, Die relative Marktmacht im Schweizer Kartellrecht – von der Relativitätstheorie in die

Praxis, SZK 2022(2), pp. 59-67, p. 61; ComCo, *Fresenius Kabi* decision of 24 June 2024, N 270; P. Picht, Relative Marktmacht, Geoblocking und Digitalisierung, SZW/RSDA 2022(4), pp. 315-325, p. 315 f; Luwarso, Relative Marktmacht im Wirtschafts- und Konsumrecht, recht 2024, pp. 51-61, p. 55 ff; R. Zäch/F. Schraner/L. Stäuble, SIWR V/2 – Kartellrecht, 2nd ed., 2023, pp. 195-201, N 12. [↑](#footnote-ref-11)
12. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 271. [↑](#footnote-ref-12)
13. P. Picht, Relative Marktmacht und Geo-Blocking, WuW 2021(6), 1366704, pp. 336-342, p. 339. [↑](#footnote-ref-13)
14. P. Picht, Relative Marktmacht und Geo-Blocking, WuW 2021(6), 1366704, pp. 336-342, p. 339. [↑](#footnote-ref-14)
15. ComCo, *Madrigall* decision of 23 September 2024, N 387 ff ; ComCo, Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 9 ff. [↑](#footnote-ref-15)
16. Message on fair prices initiative and CartA modification, Swiss official federal gazette, FF 2019 4665, p. 4727; ComCo, *Fresenius Kabi* decision of 24 June 2024, N 275. [↑](#footnote-ref-16)
17. Message on fair prices initiative and CartA modification, Swiss official federal gazette, FF 2019 4665, p. 4727. [↑](#footnote-ref-17)
18. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 272. [↑](#footnote-ref-18)
19. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 278 ff. [↑](#footnote-ref-19)
20. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 273. [↑](#footnote-ref-20)
21. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 277. [↑](#footnote-ref-21)
22. ComCo, Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11. [↑](#footnote-ref-22)
23. ComCo, *Madrigall* decision of 23 September 2024, N 405. [↑](#footnote-ref-23)
24. ComCo, *Madrigall* decision of 23 September 2024, N 405; ComCo, *Fresenius Kabi* decision of 24 June 2024, N 280 ff. [↑](#footnote-ref-24)
25. ComCo, *Madrigall* decision of 23 September 2024, N 407 ff ; ComCo, Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11. [↑](#footnote-ref-25)
26. Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11. [↑](#footnote-ref-26)
27. ComCo, *Madrigall* decision of 23 September 2024, N 410; Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 9; ComCo, *Fresenius Kabi* decision of 24 June 2024, N 284 f. [↑](#footnote-ref-27)
28. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 287. [↑](#footnote-ref-28)
29. ComCo, *Madrigall* decision of 23 September 2024, N 411.  [↑](#footnote-ref-29)
30. Comco, *Fresenius Kabi* decision of 24 June 2024, N 286. [↑](#footnote-ref-30)
31. ComCo, *Madrigall* decision of 23 September 2024, N 411; Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11. [↑](#footnote-ref-31)
32. ComCo, *Madrigall* decision of 23 September 2024, N 411.  [↑](#footnote-ref-32)
33. ComCo, *Madrigall* decision of 23 September 2024, N 411.  [↑](#footnote-ref-33)
34. ComCo, *Madrigall* decision of 23 September 2024, N 411.  [↑](#footnote-ref-34)
35. ComCo, *Madrigall* decision of 23 September 2024, N 411.  [↑](#footnote-ref-35)
36. Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11, footnote 3. [↑](#footnote-ref-36)
37. ComCo, *Madrigall* decision of 23 September 2024, N 412.  [↑](#footnote-ref-37)
38. K. Markert/R. Podszun, In: Immenga/Mestmäcker, Wettbewerbsrecht, ad §20 GWB, 7th ed 2024, N 16. [↑](#footnote-ref-38)
39. K. Markert/R. Podszun, In: Immenga/Mestmäcker, Wettbewerbsrecht, ad §20 GWB, 7th ed 2024, N 16. [↑](#footnote-ref-39)
40. ComCo, *Madrigall* decision of 23 September 2024, N 413; Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 11. [↑](#footnote-ref-40)
41. ComCo, *Madrigall* decision of 23 September 2024, N 413. [↑](#footnote-ref-41)
42. Message on fair prices initiative and CartA modification, Swiss official federal gazette, FF 2019 4665, p. 4727. [↑](#footnote-ref-42)
43. Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 12. [↑](#footnote-ref-43)
44. ComCo, *Madrigall* decision of 23 September 2024, N 441.  [↑](#footnote-ref-44)
45. ComCo, *Madrigall* decision of 23 September 2024, N 441; Cf. B. Zirlick/J. Bickel, Regeln zur relativen Marktmacht und Geoblocking in der Schweiz, WRP 2002, N 26. [↑](#footnote-ref-45)
46. ComCo, *Madrigall* decision of 23 September 2024, N 442.  [↑](#footnote-ref-46)
47. ComCo, *Fresenius Kabi* decision of 24 June 2024, N 306. [↑](#footnote-ref-47)
48. Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 14 et seq. [↑](#footnote-ref-48)
49. ComCo, *Madrigall* decision of 23 September 2024, N 453.  [↑](#footnote-ref-49)
50. Message on fair prices initiative and CartA modification, Swiss official federal gazette, FF 2019 4665, p. 4722. [↑](#footnote-ref-50)
51. ComCo, *Madrigall* decision of 23 September 2024, N 454.  [↑](#footnote-ref-51)
52. ComCo, *Madrigall* decision of 23 September 2024, N 454.  [↑](#footnote-ref-52)
53. ComCo, *Madrigall* decision of 23 September 2024, N 454.  [↑](#footnote-ref-53)
54. ComCo, *Madrigall* decision of 23 September 2024, N 398 et seqq. [↑](#footnote-ref-54)
55. ComCo, *Madrigall* decision of 23 September 2024, N 399. [↑](#footnote-ref-55)
56. Cf. K. Markert/R. Podszun, In: Immenga/Mestmäcker, Wettbewerbsrecht, ad §20 GWB, 7th ed, 2024, N 13. [↑](#footnote-ref-56)
57. ComCo, *Madrigall* decision of 23 September 2024, N 400. [↑](#footnote-ref-57)
58. ComCo, *Madrigall* decision of 23 September 2024, N 399. [↑](#footnote-ref-58)
59. Cf. Judgment of the Swiss Federal Supreme Court, ATF 143 II 297 consid. 5.6. In the latter case, the Swiss Federal Supreme Court considers that such agreements significantly affect competition, without it being necessary to assess their quantitative aspects and therefore being required to proceed with a formal market delimitation. [↑](#footnote-ref-59)
60. R. Zäch/F. Schraner/L. Stäuble in: SIWR V/2 – Kartellrecht, 2nd ed., 2023, N 82, p. 225. [↑](#footnote-ref-60)
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62. V. Martenet/P. Tercier, in: Martenet/Bovet/Tercier, CR - Droit de la concurrence, 2nd ed., 2013, ad Intro. LCart, N 118. [↑](#footnote-ref-62)
63. Message of 2 November 2011 on the CartA revision, Swiss official gazette, FF 2002 1911, p. 1933. [↑](#footnote-ref-63)
64. ComCo, *Madrigall* decision of 23 September 2024, N 400. [↑](#footnote-ref-64)
65. Cf. Judgment of the Swiss Federal Supreme Court of 2 November 2022, TF 2C 596/2019 consid. 8.6 ; ComCo, *Madrigall* decision of 23 September 2024, N 468.  [↑](#footnote-ref-65)
66. Judgment of the Swiss Federal Supreme Court of 2 November 2022, TF 2C 596/2019 consid. 8.2.1 and the case law cited. [↑](#footnote-ref-66)
67. ComCo, *Madrigall* decision of 23 September 2024, N 469.  [↑](#footnote-ref-67)
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70. Note explicative et formulaire du Secrétariat de la ComCo: pouvoir de marché relatif, N 14 f. [↑](#footnote-ref-70)
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74. Note explicative et formulaire du Secrétariat de la ComCo : pouvoir de marché relatif, N 17, footnote 4. [↑](#footnote-ref-74)
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83. R. Hilty, In: Hilti/Arpagus, BSK– Bundesgesetz gegen den unlauteren Wettbewerb (UWG), 2013, ad art. 1 UWG, N 4, p. 10 [↑](#footnote-ref-83)
84. Cf. Decision of the Cantonal Court of Basel-Landschaft, Civil Law Division dated 13 December 2023 (case number 430 23 144), published in RPW 2024/2 pp. 588-607; Decision of the Cantonal Court of Vaud, Civil law court dated 30 December 2024, published (MP/2024/7), consid. V. [↑](#footnote-ref-84)
85. Cf. Decision of the Cantonal Court of Vaud, Civil law court dated 30 December 2024, published (MP/2024/7), consid. V. [↑](#footnote-ref-85)