



Europe, Middle East and Africa Antitrust Review

2025

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IN SUMMARY

The partial revision of the Cartel Act is currently treated in the Swiss parliament. The bill aims to introduce the SIEC test as part of the modernisation of the merger control procedure and aims at strengthening civil antitrust law. Furthermore, the Federal Council has instructed the responsible department to prepare a consultation draft for the revision of the competition authorities. The Competition Commission is to be reduced in size, a procedural officer is to monitor compliance with party rights and the appeals body is to be strengthened by specialised judges. This article gives insight into judicial practice by discussing recent cases that contribute to the further development of the law.

DISCUSSION POINTS

- Legal developments
 - Partial revision of the Cartel Act
 - Vertical agreements
 - Recent cases
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REFERENCED IN THIS ARTICLE

- Revision of the Cartel Act
- COMCO's 2022 annual report
- Motion 16.4094 Fournier
- Motion 18.4282 Français
- Motion 21.4189 Wicki
- COMCO's investigation, fragrance market
- Secretariat's preliminary investigation, electrical products
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- FAC decision, ice hockey on pay-TV
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LEGAL DEVELOPMENTS

Competition law is governed by the Federal Act on Cartels and Other Restraints of Competition of 6 October 1995 (the Cartel Act). The regulatory framework is complemented by numerous federal ordinances and general notices, as well as communications by the Federal Competition Commission (COMCO).

The Federal Council has appointed Laura Melusine Baudenbacher as the new president of COMCO. The lawyer took over office on 1 January 2023, following Andreas Heinemann who had reached the term limit.

Mauro Nicoli was appointed as a new member of the Competition Commission COMCO in December 2023. He has been elected for the 2024–2027 term of office.

General recent developments in Swiss competition law are set out below.

PARTIAL REVISION OF THE CARTEL ACT

The Federal Council published a revised draft bill and the Federal Council dispatch in May 2023. The bill is now being discussed by the Swiss parliament.

The project of partial revision of the Cartel Act entails several objects, such as modernisation of the merger control procedure with the introduction of the significant impediment to effective competition (SIEC) test, the strengthening of civil antitrust law to make the civil procedure more attractive to relieve COMCO, improvements to the opposition procedure and the introduction of deadlines and indemnities. In this context, the Motions 16.4094 Fournier and 18.4282 Français were integrated into the project. Regarding the former, the Federal Council proposed to limit the length of competition procedures to strengthen legal certainty and reduce financial and reputation costs for the undertakings. Regarding the latter motion, the Federal Council further proposed a modification of article 5 of the Cartel Act, stating that when assessing the significance of the effects of agreements on competition, qualitative and quantitative criteria must be considered. This much-debated change would mean that COMCO would have to carry out an effects analysis and could not sanction companies merely on the basis of a form-based approach. The Motion aims to amend the jurisprudence by the Federal Supreme Court (FSC) first established in the Gaba/Gebro case regarding restrictions on parallel imports.

Alongside the project of partial revision, Motion 21.4189 Wicki was adopted by the Council of State in December 2021 and by the National Council in June 2022. The proposal aims to implement into the Cartel Act the principle of the presumption of innocence and to strengthen the maxim of investigation.

Finally, the results of the consultation procedure reveal that several participants have expressed their wish for an institutional revision of the competition authorities. Several approaches have been mentioned, and there is no consensus on how to proceed. The Federal Council has decided not to include a proposal for an institutional revision in the ongoing revision. Instead, the Federal Council has mandated a group of experts to develop proposals for a possible reform of the institutions. The expert group examined various reform options in its final report of 1 December 2023. Consequently, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research to draw up a consultation draft for a reform. However, these changes will be implemented in a separate legislative procedure.

RECENT CASES

FSC's Decision SIX DCC: Is It Necessary To Prove That Competition Has Been Harmed?

In its judgment 2C_596/2019 of 2 November 2022, the FSC dismissed an appeal lodged by SIX Group. SIX Group refused to cooperate with other manufacturers of payment card terminals regarding its dynamic currency conversion (DCC) function. The DCC function allows international customers at payment card terminals to choose whether they want

to pay in their home currency or in local currency. By technically linking the DCC service to the purchase of payment card terminals, SIX Group abusively extended its dominant position on the acquiring markets to the non-dominated market for payment card terminals. The FSC examined whether this behaviour by SIX Group was an offence of abusive tying according to article 7, paragraph 2, letter (f) of the Cartel Act. According to the FSC, in cases of tying offences, it is not necessary to prove that competition has been harmed or distorted in a certain way – an impact-related analysis is not required. Rather, it is the inevitable consequence of a combination of separate products without the existence of a legal defence. This form-based approach by the FSC is controversial among legal scholars.

COMCO Investigates Possible Collusions In The Fragrance Market

On 8 March 2023, COMCO opened an investigation in the fragrance sector on suspicions of collusion by the producers. The companies involved in the investigation are domiciled in Switzerland, Germany and the United States, which is why COMCO is coordinating with other competition authorities, namely the European Commission, the US Department of Justice Antitrust Division and the UK Competition and Markets Authority. As part of the investigation, it must be examined whether there are in fact any unlawful restrictions of competition under antitrust law. The proceedings are still ongoing.

Preliminary Investigation Of Electrical Products Due To Possibly Unauthorised Competition Agreement

On 16 March 2022, the Secretariat opened a preliminary investigation due to a suspected bid-rigging agreement. The evaluation of the bids submitted revealed that the price calculation of two firms was exactly identical.

As became apparent during the preliminary investigation, both offers were prepared by the same person, who on the one hand was the managing director of one company and on the other hand was responsible for preparing the offer for the other company on a mandate basis. Although they used different figures in the parts lists, they accidentally filled in the same figures for both companies on the quotation sheet. In this case, the Secretariat emphasised that the exercise of a dual mandate by companies that are fundamentally in competition with each other entails at least the risk of a restriction of competition. Whether a restriction of competition is actually the object or effect, however, must be assessed on a case-by-case basis. For the time being, the Secretariat has decided not to initiate an investigation if the companies implement the suggested measures.

Advice Regarding Online Comparison Of Fuel Prices At Gas Stations

Last year, the Secretariat dealt with a request for advice on the transmission of data from gas station operators for an online comparison platform.

In November 2022, the Touring Club Switzerland (TCS) launched the TCS Fuel Price Radar. It can be used to call up the fuel prices at gas stations in Switzerland. The data is obtained via price reports from end customers. To obtain up-to-date data, TCS planned to conclude data transmission contracts with petrol station operators.

The Secretariat came to the conclusion that the transmission of current fuel prices with full publication on the TCS comparison platform would lead to an exchange of competitively sensitive data. This entailed a certain risk of collusion, which could lead to unlawful price agreements in individual cases. The Secretariat, on the other hand, considered the transmission of prices to be permissible under antitrust law if only a limited publication of

the current fuel prices of the petrol station operators, namely the cheapest fuel prices in the region, was made on the TCS comparison platform. This compromise would create the possibility of a price comparison for the end customer without creating too high a risk of unlawful price agreements.

Vehicle Leasing And Financing

In its judgment B-4596/2019 of 5 June 2023, the Federal Administrative Court (FAC) ruled on CA Auto Finance's appeal against COMCO's approval and sanction order in the matter of vehicle leasing and financing. The subject of the investigation was the question of whether leasing and financing companies of vehicle manufacturers and importers were involved in an unlawful competition agreement by exchanging information, including information on leasing interest rates, at meetings approximately three times a year and in electronic form.

The FAC examined whether there was coordination, whether this influenced market behaviour and whether there was causality. Due to the high density of information exchange, coordination was affirmed. The court also found that this had influenced market behaviour and that causality existed. The parties involved in the car leasing market compete, as the end customer opts for a complete package of vehicle and leasing conditions. The discussions between the parties were therefore qualified as a restriction of competition.

Deponie Höli Liestal: Abuse Of A Dominant Position By Favouring Shareholders

In its decision of 3 July 2023, COMCO fined Deponie Höli Liestal, a regional landfill company, with approximately 1 million Swiss francs. In the present case, Deponie Höli Liestal has favoured its shareholder over other companies. In particular, it allowed its shareholders to deposit waste material at significantly lower prices than non-shareholders. In addition, the company at times refused to accept material from non-shareholders. As Deponie Höli Liestal has – according to the assessment of COMCO – a dominant position in the market for non-recyclable construction waste within a radius of around 40 minutes' drive, this unequal treatment allegedly hindered non-shareholders in competition and constituted an abuse. COMCO considered the fact that the landfill site has applied for leniency when determining the amount of the sanction. This was the first time that the authority reduced a sanction due to a voluntary disclosure in a case of an abuse of a dominant market position.

Ice Hockey Matches As A Necessary Input To Competition On Neighbouring TV Platforms

In 2016, UPC (now Sunrise) acquired exclusive broadcasting rights for the top Swiss ice hockey leagues, NLA and NLB, for the 2017/18 to 2021/22 seasons. Following a complaint from its competitor Swisscom, COMCO decided in autumn 2020 that UPC had abused its dominant position by refusing to enter into business relationships with Swisscom. COMCO argued that the broadcasting rights for ice hockey were necessary for Swisscom to compete effectively with UPC. It thus obliged UPC to offer in a non-discriminatory way all interested TV platforms access to ice hockey matches. Furthermore, UPC was fined almost 30 million Swiss francs. The appeal against this decision was largely dismissed by the FAC in its judgment of 31 October 2023. The FAC noted that Swiss ice hockey broadcasts are objectively necessary to a limited extent (ie, certain matches) to compete on the neighbouring TV platform market. The FAC confirmed its disputed practice, according to which it is not necessary to prove the actual effects of the restriction of competition. The proof of a potentially detrimental effect is already sufficient, as long as it is not of a purely hypothetical nature. As UPC was unable to assert that it had legitimate business reasons for its conduct, the fine imposed by COMCO was for the most part confirmed.

Building Cartels In The Engadin

In three decisions of 28 November 2023 (B-3096/2018, B-3097/2018 and B-3290/2018), the court dismissed the appeals of three construction companies, the Foffa Conrad Group, Lazzarini AG and Resgia Koch SA, against COMCO orders regarding sanctions for various violations of the Cartel Act, only reducing the sanctions due to company cooperation. Before that, COMCO had conducted a series of proceedings against construction companies in the Engadin since 2012 and in 2018 had ordered the sanctions against which the three companies then lodged an appeal with the FAC. In its decision, the FAC concluded that since 1997 at the latest, there had been an (overall) consensus between the construction companies in the Engadin, including all of the appellant companies, on the cross-project determination of the intended award recipients and the respective bid prices in the context of preliminary discussions. In addition, the FAC affirmed that there was a bilateral (overall) consensus between the companies of the Foffa Conrad Group and Lazzarini AG from 2008 until October 2012 at the latest regarding the consensus concerning the cross-project coordination of market conduct. With the (overall) agreements unlawful under competition law, serious and in principle directly sanctionable violations of antitrust law were affirmed. Furthermore, the FAC upheld COMCO's ruling on the immutability of infringements in the case of changes of company owners. As a result, the Foffa Conrad Group was fined 2,463,674 Swiss francs; Lazzarini AG 2,031,676 Swiss francs; and Resgia Koch SA 184,510 Swiss francs by the FAC.

Declined Request For Interim Measures Concerning Visa's Interchange Fees

In June 2023, COMCO opened an investigation against Visa regarding interchange fees because Visa wanted to introduce slightly higher fees than the Secretariat considered appropriate. With the intention of having legal certainty for the duration of the investigation, Visa requested COMCO to issue interim measures. Precisely, Visa submitted that the rate of its interchange fees should be allowed for the duration of the investigation. COMCO declined this request, arguing primarily that such an interim measure would contradict the Cartel Act. The risk of a sanction according to the Cartel Act could not be undermined by such a motion. Subsequently, Visa appealed this decision to the FAC. In its judgment B-5972/2023 of 28 February 2024, the FAC upheld COMCO's findings. It argued that Visa's application is solely concerned with being exempted from the risk of sanctions for the duration of the investigation. However, this attempt contradicts the sanctions regulation under the Cartel Act. Companies such as Visa, which implement reported conduct, must also bear the corresponding risk of sanctions. According to the court, the preliminary assessment of the COMCO Secretariat provides sufficient legal certainty.

FSC Denies Abuse Of Market Power By Swisscom

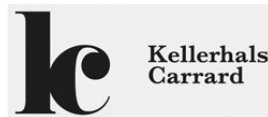
In its ruling 2C_698/2021 of 5 March 2024, the FSC upheld an appeal by Swisscom in connection with a COMCO decision from 2015. It thereby annulled not only the COMCO sanction ruling but also overturned the FAC's judgment, which largely confirmed COMCO's decision.

In 2008, Swisscom was awarded the contract for the installation and operation of a wide area network (WAN) for around 2,300 post office locations following a public tender. Sunrise then filed a complaint against Swisscom with COMCO. In a decision dated 21 September 2015, COMCO concluded that Swisscom had violated the Cartel Act by abusing its dominant market position by imposing unreasonable prices on Sunrise and Swiss Post and by

maintaining a price squeeze on Sunrise. Swisscom was fined almost 8 million Swiss francs for this. In its ruling of 24 June 2021, the FAC confirmed the main points of COMCO's decision, but reduced the sanction to 7.5 million Swiss francs.

In the FSC's decision overruling the one issued by the FAC, the FSC held that, while it is in principle irrelevant whether a certain behaviour of a dominant company can be categorised as hindering or disadvantaging, it is decisive that the abusive nature (including the harm to competition) of the disputed behaviour is established on the basis of a case-by-case analysis.

The judgment contradicts the FSC's judgement SIX DCC of November 2022. In the SIX DCC decision the FSC held that the harm to competition did not need to be examined. The tying offence under article 7, paragraph 2, of the Cartel Act shall be understood as an abstract offence. As the FSC has not stated in the new decision whether it intends to weaken the very strict case law of the SIX DCC decision, it remains to be seen how the legal situation will develop in this respect. It is to be hoped that the problematic SIX DCC case law becomes history, as it would no longer be possible for companies to predict what behaviour would be deemed abusive within the meaning of article 7 of the Cartel Act.



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