



# EUROPE, MIDDLE EAST AND AFRICA ANTITRUST REVIEW 2024

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# Preface

Global Competition Review is a leading source of news and insight on competition law, economics, policy and practice, allowing subscribers to stay apprised of the most important developments around the world.

GCR's *Europe, Middle East and Africa Antitrust Review 2024* is one of a series of regional reviews that deliver specialist intelligence and research to our readers – general counsel, government agencies and private practitioners – who must navigate the world's increasingly complex competition regimes.

Like its sister publications covering the Americas and the Asia-Pacific region, this review provides an unparalleled annual update from competition enforcers and leading practitioners on key developments in both public enforcement and private litigation. In this latest edition, we have significantly expanded coverage of the European Union, with a specific focus on competition law enforcement under the new EU digital market regime, a deep dive into trends in cartel enforcement in Germany and an economist's take on the UK's collective proceedings and unfair pricing. This features alongside updates on various aspects of the antitrust landscape in Cyprus, Denmark, Egypt, the European Union, France, Germany, Greece, Israel, Switzerland, Turkey and the United Kingdom.

GCR has worked closely with leading competition lawyers and government officials to prepare this report. Their knowledge and experience – and above all their ability to put law and policy into context – are what give it such special value. We are grateful to all the contributors and their firms for their time and commitment.

Although every effort has been made to ensure that all the matters of concern to readers are covered, competition law is a complex and fast-changing field of practice, and therefore specific legal advice should always be sought. Subscribers to Global Competition Review will receive regular updates on any changes to relevant laws during the coming year.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact [insight@globalcompetitionreview.com](mailto:insight@globalcompetitionreview.com).

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# Switzerland: new COMCO president and revised legislation signify change of gear in competition regulation

[Daniel Emch](#), [Corinne Wüthrich-Harte](#) and [Stefanie Karlen](#)

[Kellerhals Carrard](#)

## In summary

The consultation procedure regarding the partial revision of the Cartel Act has come to an end. Most cantons, business and consumer representatives, as well as political parties, support the bill, which introduces the SIEC test as part of the modernisation of the merger control procedure and aims at strengthening civil antitrust law. The Federal Council is expected to publish its draft bill mid-2023. This article gives insight into judicial practice by discussing recent cases that contribute to the further development of the law.

## Discussion points

- Revision of the Cartel Act
- New notice and guidelines on vertical agreements
- Challenges in times of crisis
- Recent cases

## Referenced in this article

- Revision of the Cartel Act
- Motion 16.4094 *Fournier*
- Motion 18.4282 *Français*
- Motion 21.4189 *Wicki*
- Notice and guidelines on vertical agreements
- COMCO's 2022 annual report
- COMCO decision, *Abreden im Bereich Luftfracht*
- Report of the Secretariat, *Vertriebssystem von Yamaha-Produkten*
- COMCO decision, *ASCOPA*
- FAC decision, *ASCOPA*
- COMCO decision, *Concessionari Volkswagen*



## 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). Currently, the Federal Council is working on the partial revision of the Cartel Act (see below).

The Federal Council has appointed Laura Melusine Baudenbacher as new the President of COMCO. The lawyer took over office on 1 January 2023, following Andreas Heinemann who had reached the term limit. While there have been no major policy changes so far, it remains to be seen how COMCO will set its priorities under the new presidency.

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

### Partial revision of the Cartel Act

The consultation procedure for the bill of the Federal Council on the partial revision of the Cartel Act has ended and its results were published on 17 March 2023. While a minority of business and consumer representatives, the association *economiesuisse* and the liberal party FDP reject the proposal, most of the participants assessed the bill positively. The Federal Council is expected to publish a revised draft bill and the Federal Council dispatch in mid-2023.

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.

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. Even though the Federal Council had initially recommended to reject the Motion, it is now tasked with amending the Cartel Act to anchor the principle



of the presumption of innocence and to strengthen the maxim of investigation. According to this maxim, the competition authorities are obliged to investigate with equal care the circumstances that may be incriminating and exculpatory for the undertakings.

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. However, these changes would be implemented in a separate legislative procedure.

## Vertical agreements

Following a consultation procedure by the Secretariat of the Competition Commission (the Secretariat), on 12 December 2022 COMCO adopted the revised Vertical Notice. The Notice provides for congruence with European regulations, reflecting the will of the Secretariat to avoid the isolation of the Swiss market and guarantee legal certainty. However, the Secretariat still deviated from European regulations in some instances, thus allowing the consideration of the legal and economic differences between Switzerland and the European Union.

Regarding changes corresponding to that of the European regulations, the following four provisions should be highlighted: first, an exclusive distribution system can also exist if a supplier allocates a territory or a customer group exclusively to itself or to a maximum of five distributors. Second, regarding online services, a ban on the use of all price comparison services or all search engine advertising services is prohibited. In contrast, it is generally permissible to prohibit the use of certain price comparison and search engine services unless the remaining services in this advertising channel de facto prohibit the reseller from operating its online business. Third, regarding online intermediation services, the Notice differs between narrow retail parity obligations and wide parity obligations. Narrow retail parity obligations refer to conditions offered on the direct sales channels of sellers of goods or services. These obligations are not considered qualitatively severe. In contrast, wide retail parity obligations that refer to the conditions offered on all other sales channels are considered qualitatively severe. Finally, dual pricing (ie, setting different wholesale prices depending on whether the reseller sells online or offline) may be permissible, provided that the price differences reasonably reflect the differences in investment and costs incurred by the reseller between online and offline retailing and that these differences are not aimed at restricting sales into certain territories or to certain customers.



More importantly, however, the differences between Swiss and European regulations should be highlighted. Indeed, the Secretariat adopted stricter thresholds than those contained in the European regulations in some instances, thus conserving the 'Swiss finish' in the revised Vertical Notice. In this regard, price recommendations without pressure or incentives may be qualified as unlawful price agreements if there is '*particularly intensive communication about recommended prices*'. Moreover, the new dispositions also cover indirect export bans to Switzerland and export bans that may have a potential effect on the Swiss market.

The revised Vertical Notice entered into force on 1 January 2023. Existing contracts must be adapted to the new rules within a transition period of one year.

## Challenges in times of crisis

In its 2023 annual press conference and its annual report, COMCO outlined its activities in the context of the energy and covid-19 crises.

To deal with the energy crisis, a task force was set up to secure gas supplies in Switzerland. The Secretariat was invited to participate in the task force. In its annual report, COMCO highlighted that the Cartel Act makes it possible to deal with special constellations, if Parliament adopts statutory provisions that do not allow for competition in a market or if the Federal Council, in exceptional cases, authorises agreements affecting competition or behaviour by dominant undertakings that are necessary for compelling public interest reasons.

In relation to the covid-19 pandemic, the competition authorities informed the public via press releases about their activities to demonstrate that they intervened quickly to ensure that companies did not take anticompetitive advantage of the situation. While the Swiss population was able to obtain covid-19 self-tests free of charge from pharmacies as of 7 April 2021, the Secretariat received a complaint that an attempt was made to pressure a distributor into adjusting the prices of its tests to those of its competitors. The Secretariat of the Competition Commission opened a preliminary investigation. As the investigations showed that the attempt had failed and no indications of further collusion could be found, the Secretariat closed the proceedings.

## Recent cases

### First investigations relating to relative market power

In August 2022, COMCO opened an investigation against the pharmaceutical company Fresenius Kabi, which allegedly hindered the Swiss wholesaler Galexis AG from purchasing various products offered in and outside of Switzerland



cheaper from abroad. The authority is currently investigating whether Fresenius Kabi has relative market power over Galexis and whether it abused its position by refusing direct supply from its entities in the Netherlands and in Germany.

In addition, at the end of January 2023, COMCO launched an investigation against Madrigall, a French publishing group, to examine whether Madrigall unlawfully restricts the purchasing options of Payot, a Swiss bookseller, by preventing it from acquiring books in France at French market price. The investigation was launched after Payot filed a complaint against Madrigall.

These two investigations are the first use cases of the new relative market power rules introduced by the indirect counterproposal to the Fair Price Initiative entered into force on 1 January 2022. It is hoped that COMCO will provide much-needed clarification and practice relating to these new rules.

## **Investigation of the labour market in the banking sector**

In December 2022, the Secretariat opened a preliminary investigation against 34 banking institutions in six regions of German-speaking Switzerland, as those banks allegedly regularly exchanged information about the salaries of certain categories of employees. The purpose of the procedure is to examine whether exchanges of information on the salaries of certain categories of employees constitute illegal price agreements within the meaning of Cartel Act. The investigation can be extended to other geographical regions and companies.

The labour market is becoming increasingly important for competition authorities worldwide. In Switzerland, COMCO is analysing possible labour market agreements and the extent to which they may fall within the scope of competition law for the first time.

## **Investigation of the payment card market**

In February 2021, COMCO opened an investigation against Mastercard on the ground of a potential obstruction to the National Cash System (NCS). The investigation was triggered by a complaint from SIX, the developer of the NCS system. SIX argued that, by refusing the 'co-badging' of its new debit card with the NCS system, Mastercard was preventing the NCS from establishing a presence on the market. The co-badging system combines multiple applications of payments on the same debit card; without this system, the NCS system cannot be used by Mastercard debit card holders. COMCO issued provisional measures and Mastercard appealed those measures to the Federal Administrative Court (FAC).



The provisional measures taken by COMCO were intended to give banks the opportunity to issue Mastercard debit cards that are technically capable of processing NCS transactions, without waiting for the closure of the current investigation. This way, the NCS system could have been affixed to the cards, without being activated, in addition to the Mastercard system (this dual functionality is co-badging). As card-issuing banks did not make use of this possibility, SIX postponed the introduction of the NCS system until the end of the investigation. Thus, COMCO lifted the provisional measures, which were no longer necessary. The investigation continues without prejudging the outcome.

## **Valuu platform in the financial sector**

COMCO announced at its annual press conference in 2022 that it will continue to pay special attention to competition in the digital economy. Responding to a request for advice, the Secretariat assessed a digital application in the financial sector from PostFinance, called Valuu. This application can be used by personnel of the finance and real estate industries to advise clients on mortgages and provides high-level access to offers made by competitors through Valuu. The Secretariat's analysis is a good reminder of the criteria for assessing information exchanges. Several technical and organisational measures restrict the access of PostFinance personnel to sensitive business information. The Secretariat found that it could, in principle, be problematic that current information on the price of rather homogeneous products is exchanged via Valuu. However, according to the Secretariat, the level of aggregation, the randomness of the frequency of the exchange and the uniform access to the information by all market participants, as well as the market structure, reduce the anticompetitive effects. The Secretariat concluded that the business model was unobjectionable from a competition law perspective and could even have a pro-competitive effect.

## **COMCO's decision in the air freight sector**

This decision of the COMCO was taken in December 2013 but was only published in 2022. In this case, the COMCO investigated the exchanges between several companies providing air freight services regarding various components of the price of their services during the period 2000–2006. Several international air transport agreements provide for the possibility of tariff coordination, some of which take precedence over Swiss competition law. Owing to the specific sector regulations, COMCO interpreted the EU Air Transport Agreement and found that it had jurisdiction, so that both article 8 and article 5 of the Cartel Act would apply to potentially unlawful agreements. However, the EU Air Transport Agreement would apply in parallel and prevail over the Cartel Act. If conduct was permitted under the EU Air Transport Agreement, no prohibition based





on the Cartel Act could be imposed. In the framework of its application of the EU Air Transport Agreement, the COMCO took into consideration EU case law. In the end, part of the exchanges under investigation were found to qualify as horizontal agreement infringing competition law.

The FAC upheld COMCO's findings in six cases regarding both jurisdiction and the overlap between EU and Swiss law, that is the prevailing of the EU Air Transport Agreement over Swiss competition law and the possibility to impose a sanction based on the Cartel Act if both regulations provide for the same prohibitions. In its decision of 16 November 2022, the FAC also addressed key concepts such as single and continuous infringement, exchange of information and concerted practice. These six decisions are currently pending before the Federal Supreme Court.

In three decisions, the FAC upheld the appeal by the undertakings, as the undertakings first transported their freight by land to an EU country and then by air to a third country. The relevant EU Air Transport Agreement only provides for Swiss jurisdiction for routes between Switzerland and third countries, which is why the FAC does not consider COMCO to be competent to judge these information exchanges.

## **COMCO's decision regarding Yamaha products**

In May 2022, the Secretariat published its final report closing the preliminary investigation regarding the distribution system of Yamaha products with recommendations. The Secretariat investigated the agreements between the general importer of Yamaha products (HAG) and the producer of Yamaha products as well as HAG and Yamaha product distributors. This final report was of interest not only because it recalled the applicable rules regarding different types of vertical restraints that may violate competition law, but also because it showed that the Secretariat sometimes prefers to negotiate with the companies under investigation to modify their distribution agreements to prevent future anticompetitive behaviour instead of entering into formal investigations that usually lead to sanctions.

The Secretariat raised numerous issues in the case at hand, including issues relating to price recommendations that could be characterised as resale price maintenance. Moreover, it concluded that the obligation on distributors to purchase exclusively from the general importer should, in principle, be considered absolute territorial protection. In addition, minimum purchase obligations can indirectly lead to the same result.



## **ASCOPA decision on information exchange**

COMCO rendered a decision on 31 October 2011 regarding an information exchange by 27 companies in the cosmetics and perfumes sector and related to wholesale price lists, gross turnover figures and details of advertising investments, as well as the recommendations from the association ASCOPA on the general terms and conditions of business. COMCO found that the exchange allowed the companies to adapt their market behaviour to each other and led to significant restrictions of competition in the market for perfumery and cosmetic products. The companies were not sanctioned, as the authority at the end of the procedure came to the conclusion that the information exchanges were not hardcore agreements.

More than 11 years later, the FAC confirmed the decision of COMCO. In the long-awaited decision, the FAC repeated the by now established rules applying to information exchanges. In particular, the FAC found that when assessing agreements under article 5 paragraph 1 of the Cartel Act, both qualitative and quantitative elements must be considered but no actual impact on the market must be established. This finding, of course, faced justified criticism in doctrine.

## **AMAG case: cartel in the automobile trade**

On 26 June 2018, COMCO initiated investigations against AMAG Automobil und Motoren AG (AMAG) and six other dealers of VW-brand vehicles in the canton of Ticino. Among other things, dawn raids were carried out at two AMAG sites in Lugano. The investigations have now been closed, and seven dealers have been fined a total of around 44 million Swiss francs. Five companies have agreed to enter into an amicable settlement.

COMCO concluded that, between 2006 and 2018, the dealers formed an illegal cartel in Ticino to restrict competition among car dealers and to keep the sales prices of new vehicles for private individuals and the public sector at an excessive level. They colluded on all sales activities in Ticino. The cartel included collusion on public sector bids, an agreement on the pricing policy for the sale of new cars to private individuals and territorial allocation. In calculating the sanction, the Competition Commission took into account the nature and gravity of the infringement, the role of the individual parties to the proceedings and the degree of their involvement. The companies' willingness to cooperate had a mitigating effect. AMAG, which had to bear the largest part of the fine owing to its strong position, states that it has accepted the fine and has taken personnel and organisational measures to ensure consistent implementation of proper business activities in the future.

Two dealers have appealed COMCO's decision to the FAC. For the other dealers, the decision has become final.

**Daniel Emch**

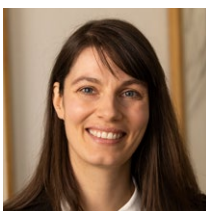
Kellerhals Carrard

Daniel Emch is a partner at Kellerhals Carrard, where he is head of the competition and antitrust law practice group. He has extensive experience in antitrust investigations (cartel and abuse of dominance investigations), dawn raids, merger control filings and compliance and leniency procedures. He also represents clients in antitrust law matters before civil courts and arbitral tribunals. Daniel is the author of various publications in the field of competition law.

**Corinne Wüthrich-Harte**

Kellerhals Carrard

Corinne Wüthrich-Harte is an associate at Kellerhals Carrard. Her practice focuses on competition, antitrust and corporate law, general commercial and contract law as well as administrative procedure and civil procedure law. She is dedicated to her clients in an advisory capacity as well as in her role as a litigator.

**Stefanie Karlen**

Kellerhals Carrard

Stefanie Karlen is a senior associate at Kellerhals Carrard, whose practice focuses on competition, antitrust and corporate law, and general commercial and contract law. She is dedicated to her clients in an advisory capacity and in her role as a litigator. She also regularly publishes in academic and business journals in her major fields.



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Effingerstrasse 1

PO Box 6916

3001 Berne

Switzerland

Tel: +41 58 200 35 00

[www.kellerhals-carrard.ch](http://www.kellerhals-carrard.ch)

[Daniel Emch](#)

[daniel.emch@kellerhals-carrard.ch](mailto:daniel.emch@kellerhals-carrard.ch)

[Corinne Wüthrich-Harte](#)

[corinne.wuethrich@kellerhals-carrard.ch](mailto:corinne.wuethrich@kellerhals-carrard.ch)

[Stefanie Karlen](#)

[stefanie.karlen@kellerhals-carrard.ch](mailto:stefanie.karlen@kellerhals-carrard.ch)

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