



Europe, Middle East and Africa Antitrust Review

2026

Switzerland: landmark decision to clarify labour market jurisprudence as further guidelines awaited

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Switzerland: landmark decision to clarify labour market jurisprudence as further guidelines awaited

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Summary

[IN SUMMARY](#)[DISCUSSION POINTS](#)[REFERENCED IN THIS ARTICLE](#)[LEGAL DEVELOPMENTS](#)[INSTITUTIONAL REFORM OF THE COMPETITION AUTHORITIES](#)[LABOUR MARKET GUIDELINES AWAITED](#)[RELATIVE MARKET POWER](#)[RECENT DEVELOPMENTS REGARDING THE ABUSE OF A DOMINANT MARKET POSITION](#)[RECENT DEVELOPMENTS IN MERGER CONTROL](#)[ENDNOTES](#)

IN SUMMARY

The Competition Commission (COMCO) and the courts issued a number of interesting decisions in the past year, further developing competition law practice. For example, COMCO dealt for the first time with an antitrust case in the labour market and announced its intention to publish guidelines in this area. In addition, COMCO issued the first rulings on the new provision of relative market power, thereby establishing practice on the conditions under which a company is deemed to have relative market power. Furthermore, COMCO prohibited a merger, which is rare due to the current high intervention threshold under the Swiss merger control regulation. Finally, contrary to previous practice, the Federal Supreme Court (FSC) ruled that the conduct of a dominant company can only be abusive if it is likely to restrict competition, whereas an abstract threat to competition is not sufficient.

DISCUSSION POINTS

- Legal developments
- Institutional reform of the competition authorities
- Labour market guidelines awaited
- Relative market power
- Recent developments regarding the abuse of a dominant market position
- Recent developments in merger control

REFERENCED IN THIS ARTICLE

- Partial Revision of the Cartel Act^[1]
- COMCO Secretariat's final report on wage agreements^[2]
- COMCO Secretariat's fact sheet on relative market power^[3]
- COMCO decision on *Fresenius Kabi*^[4]
- COMCO decision on *Madrigall*^[5]
- FSC decision on *HCI*^[6]
- COMCO decision on *Interchange fees of Mastercard's debit cards*^[7]
- COMCO decision on *Post/Quickmail*^[8] merger
- COMCO opinion on *UBS/Credit Suisse*^[9] merger
- Swiss Financial Market Supervisory Authority decision on *UBS/Credit Suisse*^[10] merger

LEGAL DEVELOPMENTS

Fees For Merger Control Proceedings Before COMCO Substantially Increased

On 6 November 2024, the Federal Council amended the Ordinance on Fees pursuant to the Cartel Act.^[11] The fee for the preliminary examination of mergers will now be calculated

based on the work involved and no longer as a flat fee of 5,000 Swiss francs. Consequently, from 1 January 2025, all proceedings before COMCO and its Secretariat will be charged at cost. This will lead to a substantial increase of the fees.

Partial Revision Of Cartel Act

The Swiss Cartel Act is under revision. The Federal Council published a revised draft bill and dispatch in May 2023, now under parliamentary discussion.^[12] The partial revision of the Cartel Act includes modernising merger control by introducing the significant impediment to effective competition test (SIEC test), strengthening civil antitrust law and improving opposition procedures. Furthermore, three parliamentary initiatives were integrated, aiming to: limit competition procedure durations;^[13] requiring COMCO to conduct effects-based rather than form-based analyses when assessing agreements by revising the *Gaba* case jurisprudence;^[14] and enshrining the presumption of innocence and strengthening the investigation maxim.^[15]

The revision was first examined by the Council of States. The deliberations confirmed the desire to improve merger control by switching to the SIEC test. On the question of the assessment of unlawful agreements, the Council of States did not follow the recommendation of the competent committee, which wanted to replace the current form-based analysis of agreements by an effects-based approach. Regarding civil actions in antitrust law, the Council of States has voted in favour of introducing the right of action for consumers and public authorities in civil cases, in accordance with the Federal Council's proposal. This will enable all parties affected by a restriction of competition to claim damages.

The bill has been discussed by the competent committee of the National Council. The committee has voted against the introduction of a specific exemption for professional sports, thus proposing that the National Council depart from the opinion of the Council of States on this point. Furthermore, the committee disagrees with the decision of the Council of States and proposes a new solution to introduce an effects-based approach for the evaluation of agreements and abuses of dominance. The proposal is aligned with the current case law of the European Court of Justice in the *Intel*, *Super Bock* and *Unilever* cases.

Evaluation Of The Introduction Of Sector Inquiries

In its statement on the merger between UBS and Credit Suisse, COMCO proposed that the competition authorities be given the power to conduct sector inquiries along European lines (see the '*UBS/Credit Suisse* merger' section, below). This idea was subsequently taken up in a parliamentary motion.^[16] The sector inquiry would enable the competition authorities to analyse structural competition problems in certain sectors without the need for a specific suspicion of a competition law infringement. In its response to the motion, the Federal Council stated that the advantages and disadvantages of a sector inquiry are currently being examined in the context of another political initiative in connection with the *UBS/Credit Suisse* merger. A report is expected by the end of 2025. The Federal Council will await this report before deciding on the further course of action.

INSTITUTIONAL REFORM OF THE COMPETITION AUTHORITIES

The Federal Council defined the broad outlines of a reform of the competition authorities in March 2024. The main objectives of this reform project are, in particular, to establish a more effective separation between the COMCO Secretariat, which is responsible for investigations,

and COMCO itself, which is responsible for taking decisions, to professionalise COMCO and to strengthen the Federal Administrative Court (FAC).

To achieve this, greater independence would be granted to the COMCO Secretariat. It would have to conduct its investigations completely independently, without involving COMCO. This would guarantee the independence of COMCO when making its decisions. In addition, the number of COMCO members would be greatly reduced, from the current 11 to 15 members down to five to seven members. On the other hand, the occupancy rate of the remaining members would be increased, which would lead to a professionalisation of COMCO. However, it would remain a part-time authority.

The idea of appointing a procedural officer is also being considered. This person would be responsible for ensuring that the rights of the parties in the proceedings are respected, which would allow COMCO to concentrate on substantive legal issues. The COMCO Secretariat would be obliged to communicate the preliminary findings of the evidence, the statement of objections and the intended legal consequences to the offending companies as soon as the essential investigation has been completed.

Finally, the appeal procedure before the FAC would be strengthened by the use of specialised judges, acting on an ad hoc basis, in cartel cases. In particular, this would make it possible to speed up the cartel procedures before the FAC, which are currently remarkably long, and to strengthen the economic expertise of the appeal authority. The time limits for the parties to appeal could also be made more flexible in the case of lengthy COMCO decisions.

LABOUR MARKET GUIDELINES AWAITED

In August 2022, the COMCO Secretariat launched a preliminary investigation on the exchange of information in the labour market in the banking sector. The investigation revealed that wage-related information was being shared, and that this practice was not limited to one sector but rather widespread across many sectors. Despite evidence of unlawful wage fixing, the COMCO Secretariat decided that instead of opening formal proceedings, it would be more effective to develop best-practice guidelines. As a result, the preliminary investigation was closed.

A comprehensive final report has been published. It confirms the opinion of the authority that the labour market falls within the scope of the Swiss Cartel Act. Therefore, agreements relating to wages, no-poach agreements and non-solicitation agreements are subject to competition law scrutiny. This also applies to internships and apprenticeships. However, the Cartel Act does not apply to agreements between social partners, in particular collective employment agreements, that serve to improve working conditions.

The guidelines are expected by mid-2025 and are intended to clarify key issues relating to labour market agreements, thus providing legal certainty quickly and efficiently.

RELATIVE MARKET POWER

In Swiss antitrust law, the abuse of relative market power was introduced in article 4, paragraph 2 *bis* and article 7 of the Cartel Act on 1 January 2022. This new legal provision led to a few investigations, with opposing outcomes.

The concept of relative market power refers to the bilateral relationship between two companies. A company has relative market power when other companies are dependent on it either in the supply of or in the demand for a product or service because there are no

sufficient and reasonable alternatives. COMCO examines the situation in two steps, first by determining whether the company in question has relative market power and, if so, whether there is an abuse of that power.

The first investigation led to the denial of the existence of relative market power (see the 'Examination of the existence of relative market power in the healthcare sector' section, below). The second led to a finding of both relative market power and abuse (see the 'Abuse of relative market power confirmed on French-language book market' section, below). The third is currently in progress (see the 'After the books and the healthcare sectors, the automotive sector is confronted with the provision on relative market power' section, below).

On 6 December 2021, the COMCO Secretariat published a fact sheet on relative market power to provide an overview of the new legislation. This fact sheet was updated on 4 February 2025 on the basis of the first decisions by COMCO. The fact sheet specifies in particular the criteria used by COMCO to assess the existence of relative market power (see the 'Examination of the existence of relative market power in the healthcare sector' section, below) and the conditions under which it considers the criteria to be fulfilled or not fulfilled (see the 'Abuse of relative market power confirmed on French-language book market' section, below). The fact sheet also explains that because relative market power is a bilateral relationship, it is difficult to keep the identity of the notifying company secret and there are high hurdles for third parties to participate in the procedure.

Examination Of The Existence Of Relative Market Power In The Healthcare Sector

The very first investigation on the subject of relative market power concerned the Fresenius Kabi group. This company, which markets, among other things, oral and tube-feed nutritional products, refused to allow Galexis, a pharmaceutical wholesaler, to purchase these products from Fresenius Kabi entities abroad.

In this context, COMCO examined the question of whether Fresenius Kabi had relative market power in relation to Galexis. Galexis is a pharmaceutical wholesaler that supplies pharmacies and doctors with medicines several times a day. Galexis has argued that Fresenius Kabi's products are prescribed by doctors and that Galexis must have them in its product range because a pharmaceutical wholesaler is required to be able to offer the entire range of products demanded by pharmacies. COMCO did not follow this view. It examined this based on the criteria of dependence, lack of countervailing power of the dependent undertaking and gross negligence. COMCO analysed the dependence in three steps: (1) determination of the possibilities of circumvention; (2) determination of the possible consequences of circumvention; and (3) assessment of the reasonableness of the consequences.

COMCO concluded that Galexis could stop offering Fresenius Kabi's oral nutrition products. The termination of the supply relationship with Fresenius Kabi would result in direct losses of less than 400,000 Swiss francs for Galexis and a slight reduction in its attractiveness as a wholesaler. Given the financial strength of the group (net profit of 165 million Swiss francs and earnings before interest and taxes of 200 million Swiss francs), these disadvantages were considered acceptable. Furthermore, the criterion of lack of countervailing power was not met as, in COMCO's view, there is no clear imbalance between the disadvantages that would arise for the two companies if the supply relationship were terminated.

Finally, COMCO stated that even if relative market power had been recognised, there would have been no abuse because the conditions of sale abroad were only slightly better than the

Swiss conditions, which was not sufficient to establish the existence of an abuse of relative market power.

Abuse Of Relative Market Power Confirmed On French-language Book Market

In its second investigation concerning relative market power, COMCO concluded for the first time that relative market power had been abused.

Madrigall is a large French publishing group comprising a significant number of publishing houses and recognised publishing brands. Swiss bookshops generally obtain Madrigall books through official channels. However, one of the largest bookshops in French-speaking Switzerland, Payot, wanted to be supplied directly from France, under French conditions. Madrigall refused to accept these conditions and demanded prices significantly higher than those charged in France.

COMCO concluded that Payot did not have sufficient and reasonable alternative supply options. Moreover, in view of Madrigall's importance in the French-language book market, it was not realistic to expect Payot to stop selling these books. In detail, the competition authorities considered that this was the case because Payot achieved between 10 and 20 per cent of its turnover (and less than 10 million Swiss francs in contribution margins) with Madrigall books. Due to the very high quality of these books, not selling them would have led to additional customer losses. Thus, it was not reasonable for Payot to stop selling Madrigall's products. Consequently, COMCO found that Payot was dependent on Madrigall and that the purchase prices offered by Madrigall to Payot were abusive. Therefore, COMCO ordered Madrigall to allow Payot to source directly from France, under the usual conditions practised there.

COMCO's decision is the subject of an appeal to the FAC. It will be necessary to remain attentive to the decision rendered in this case.

In summary, following the first decisions, COMCO denies that it is reasonable for a company to refrain from selling the products of the company with relative market power if the company generates between 10 and 20 per cent of its turnover with these products and additional customer losses are to be expected (see above). If, on the other hand, the company suffers a loss of less than 0.2 per cent of its turnover by not selling the products in question and if only minor further losses are to be expected, COMCO assumes that it is reasonable to refrain from selling the products (see above). The first decisions show that the share of turnover affected is not the only criterion. Future decisions will have to show where the threshold for unreasonableness lies.

After The Books And The Healthcare Sectors, The Automotive Sector Is Confronted With The Provision On Relative Market Power

After the healthcare sector and the French-language book market, COMCO is now investigating the car market.

COMCO opened an investigation against BMW on 15 January 2024. The subject of the investigation is whether BMW encouraged a garage to invest large sums of money by leading it to believe that the commercial relationship would be extended, before unexpectedly terminating the collaboration without offering an appropriate transitional solution. COMCO is specifically examining whether BMW has relative market power in relation to the garage in question and, if so, whether it has acted abusively within the meaning of the Cartel Act.

RECENT DEVELOPMENTS REGARDING THE ABUSE OF A DOMINANT MARKET POSITION

FSC States That Abuse Of Market Power Is Assessed Using An Effects-based Approach

The FSC held a public debate on the judgment in the *HCI Solutions* case. The case concerned HCI Solutions AG (HCI), which refines and processes drug information into a database. This data is made available to pharmacists, doctors and hospitals via software.

The FAC concluded that HCI held a dominant position in the market for refined machine-readable drug information and in the market for access to refined machine-readable drug information. This was confirmed by the FSC. The FAC also concluded that HCI had abused its position by imposing an exclusive purchasing obligation and a consent requirement in some contracts with software companies. The second allegation concerned tying, where the inclusion of drug information in the database was tied to other services (mainly quality control).

In examining the allegations, the FSC considered in detail the requirements that must be met to constitute an abuse of market power. In doing so, it unanimously referred to the case law of the European Union, in particular the decision of the European Court of Justice (ECJ) in the *Unilever Italia* case. According to the FSC, the effects-based approach advocated by the ECJ should be applied. According to this approach, a practice must actually be capable of restricting competition in the specific circumstances. A mere abstract threat is not sufficient.

The application of the effects-based approach in the *HCI Solutions* case was controversial among the federal judges. In the end, the majority of the federal judges held that there was only a minor violation of the Cartel Act with regard to the first allegation. This was due to the fact that the exclusive purchasing obligation appeared in only one of 176 contracts. Therefore, there was no concrete evidence that the clause was likely to have anticompetitive effects. There was a minor violation of the requirement of consent, as the clause could be partly based on copyright law.

The alleged quality control tying was found to be lawful because the necessary 'separate goods' criterion was not met. Rather, the alleged tying concerned a single product. Therefore, there is no separate market into which HCI allegedly sought to extend its dominant position.

In our view, this is a landmark decision as it clarifies the previous case law of the FSC and is likely to provide greater legal certainty.^[17] The FSC states that the assessment of unlawful conduct by dominant companies must be effects-based. COMCO must prove that a practice is actually capable of restricting competition. A purely hypothetical impairment or abstract threat to competition is not sufficient.

Fixing Of An Interchange Fee As Part Of An Amicable Agreement

During June 2023, two investigations were opened by COMCO against Mastercard and VISA in order to find a long-term solution in relation to domestic interchange fees of debit cards. Interchange fees are fees that a bank card issuing company receives when its debit cards are used.

An amicable agreement between Mastercard and COMCO allowing a reduction of these fees was reached in May 2024. For physical debit card use at the point of sale, a rate of 0.12 per cent with a cap of 30 centimes for transactions over 300 Swiss francs is authorised. The rate set is significantly lower than the European regulation, which is set at 0.2 per cent. The agreement is valid until 2033. For domestic payments via the internet and mobile devices, a

rate of 0.31 per cent is valid until 31 October 2025 due to a previous agreement. It will then be reduced to 0.28 per cent.

However, no agreement has been reached with VISA and the related investigation is continuing.

COMCO Terminates Two Investigations Without Consequences

On the one hand, COMCO has closed an investigation opened against Novartis in September 2022. The aim was to determine whether Novartis had engaged in behaviour constituting patent blocking by filing several lawsuits based on one of its patents relating to its dermatological medicines. The investigations conducted showed that the behaviour adopted by Novartis was not only common in patent law but above all compliant with competition law. As a result, the investigation was closed. It should be noted that this investigation was conducted in cooperation with the European Commission, which reached the same conclusion in its own analysis.

On the other hand, COMCO closed an investigation it had opened against Swisscom Directories in 2019. The background of the investigation was that Swisscom Directories had reorganised its offers for the registration of companies in digital address directories. Subsequently, numerous companies and customers complained to COMCO. The investigation revealed that Swisscom Directories is no longer dominant in the market for company directories, so that the conditions for intervention by COMCO are no longer met.

RECENT DEVELOPMENTS IN MERGER CONTROL

COMCO Bans Swiss Post From Buying Quickmail

In a decision of 15 January 2024, COMCO prohibited the takeover of the Quickmail group by Swiss Post because it would have eliminated effective competition in at least one market, specifically in postal items weighing more than 50 grams for business customers, and created or strengthened a dominant position for the Swiss Post in several other markets. The takeover would create a *de facto* monopoly for the Swiss Post.

The failing firm defence argument was not accepted by COMCO because there was at least one other potential buyer for the Quickmail group. Therefore, a takeover by this potential buyer would have been a more satisfactory solution from a competition point of view than a takeover by the Swiss Post, as it would have allowed the Quickmail group to remain on the market while maintaining existing competition.

UBS/Credit Suisse Merger

On 19 March 2023, the Swiss Financial Market Supervisory Authority (FINMA) approved the early completion of the merger between UBS and Credit Suisse for reasons of creditor protection and protection of the financial markets. Fifteen months later, on 19 June 2024, FINMA published its decision of 21 May 2024 on the competition law aspects of this rescue operation. As a reminder, merger control in Switzerland is in principle the responsibility of COMCO, but FINMA can assume responsibility for bank mergers for reasons of creditor protection (Cartel Act, article 10, paragraph 3). In such cases, it invites COMCO to submit an opinion.

In its opinion of 25 September 2025, COMCO recommended to FINMA, from a procedural point of view, not only to open a preliminary investigation following the declaration of completeness of the report but also to subsequently carry out an in-depth investigation of

the merger. COMCO therefore assumes that the two-step merger control procedure with the corresponding deadlines will continue to apply even if FINMA replaces it in the case of mergers between banks within the meaning of article 10, paragraph 3 of the Cartel Act. In substantive terms, COMCO concluded that the merger was not likely to eliminate competition. The high threshold for prohibiting the merger was therefore not met. However, COMCO found that the merger could create or strengthen a dominant position for the merged UBS in four submarkets. For these submarkets, COMCO recommended that FINMA monitors prices and fees and reports any irregularities to the price supervisor. Finally, COMCO recommended that the legislator provide legal clarification on the applicable procedure and on cooperation between authorities, and that the instrument of sector inquiries be introduced.

FINMA did not follow COMCO's procedural recommendation and conducted a *sui generis* procedure outside the steps and deadlines of competition law. In this procedure, FINMA came to the conclusion that the merger would strengthen UBS's position in certain submarkets but would not eliminate competition in any of them. The legal requirements for intervention were therefore not met. FINMA closed the procedure without any further investigations, conditions or requirements. The material recommendations of COMCO were not adopted by FINMA.

The *UBS/Credit Suisse* merger shows that there is a need for clarification with regard to the assessment of bank mergers under article 10, paragraph 3 of the Cartel Act (eg, applicable procedure, cooperation between authorities). In the interests of competition, it is to be hoped that this clarification will be made before the provision is applied again.

Special Notification Obligation Due To A Dominant Market Position

Switzerland provides for a turnover-independent notification requirement. This applies if, (1) in proceedings under the Cartel Act in a final and non-appealable decision, an undertaking has been held to be dominant and (2) the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof. In response to a request for advice, the COMCO Secretariat confirmed the principle that, in the event of the sale of the undertaking concerned, this specific notification obligation generally passes to the acquirer. However, the COMCO Secretariat stated that in certain circumstances, the special reporting obligation could (also) remain with the seller.

According to the COMCO Secretariat, the special notification requirement could continue to apply if the seller's activities are so closely linked to those of the divested business that the seller can in fact continue to benefit from the dominant position of the divested business. This could be the case, for example, if the seller is active in an adjacent market and offers goods and services on that market together with the divested business.

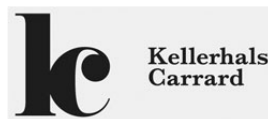
In our view, this relativisation of the principle according to which the obligation to notify is transferred upon the sale of the concerned undertaking may reduce legal certainty.

Endnotes

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