

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2023 – Switzerland

Marcel Meinhardt, Stephan Sigrist (Lenz & Staehelin) · Thursday, April 4th, 2024

The year 2023 was an eventful year from a Swiss Competition perspective. With the merger of the two Swiss banks UBS and Credit Suisse in March 2023, the Swiss financial market and Swiss merger control were immediately in the news around the world. However, there were also other important competition law developments in 2023. Namely, the Federal Administrative Court (“**FAC**”) issued several decisions in a major bid-rigging case in the construction industry and ruled on an abuse case involving exclusive sports rights. On the legislator side, the Swiss government pushed ahead with its Draft Legislation for a partial revision of the Swiss Cartel Act (“**CartA**”) in addition to various minor regulatory changes.

In the following, we give a brief overview of some of the main developments on cartels, abuse of dominance, merger control, regulatory changes and a brief outlook.

### Unlawful Agreements / Cartel Cases

The FAC issued several decisions on **bid-rigging agreements in the construction industry**.<sup>[1]</sup> Between 2017 and 2019, the Swiss Competition Commission (“**ComCo**”) issued decisions against several construction companies for various alleged violations of the CartA. Some companies appealed these decisions. In 2023, the FAC rejected most complaints.

According to ComCo, there had been a single and continuous infringement since 1997 among various construction companies regarding the respective designated award recipients and the respective bid prices of multiple projects. The FAC also confirmed that there was a multilateral (overall) agreement between certain companies over a period of approximately four years to coordinate market behaviour with regards to several projects. According to the FAC, these single and continuous infringements are subject to direct sanctions.<sup>[2]</sup>

The FAC also issued several relevant legal findings regarding the Swiss leniency regime. Even though some of the decisions have been appealed to the Swiss Federal Supreme Court (“**FSC**”), the following conclusions can already be drawn:

- Undertakings applying for immunity are obligated to fully cooperate with ComCo. Hence, if such immunity applicant raises factual or legal objections it jeopardizes its immunity status.<sup>[3]</sup>
- Undertakings filing for leniency should disclose as much as possible when submitting their

application. Implenia Switzerland AG (“**Implenia**”) was the first company to submit a leniency application in this initial investigation. After the investigation was divided into ten sub-proceedings, Implenia no longer met the criteria for full immunity in relation to one of the sub-proceedings, according to the FAC. Accordingly, Implenia was only granted partial immunity. If the undertakings concerned do not disclose as much as possible from the outset, they risk losing their status in the ranking of leniency applications at a later date if the proceedings are divided into sub-proceedings.[4]

- Under the Amnesty Plus-Regime, the newly notified potential competition law infringement may not to be linked to the already on-going.[5] The Amnesty Plus-Regime is a proactive antitrust enforcement strategy aimed at encouraging cooperating companies threatened with sanctions in a first infringement to report collusive agreements in other markets. With this rule, the companies can achieve an additional reduction of up to 80% for the first antitrust violation.

In the course of an investigation against several **leasing and financing companies of vehicle manufacturers** due to possible unlawful competition agreements, ComCo reached an amicable settlement with eight of the nine companies concerned and approved these settlements in an order dated June 26, 2019. CA Auto Finance has challenged this order with an appeal to the FAC.

In its decision of June 5, 2023, the FAC confirmed ComCo’s decision against CA Auto Finance.[6] It held that CA Auto Finance had engaged in anti-competitive behaviour by participating in an unlawful price agreement in which it and other companies exchanged information on interest rates, commissions, residual values and fees relating to car leasing as part of an information exchange system. The FAC also confirmed both the sanction of just under CHF 4.5 million imposed by ComCo and the amicable settlement, whereby the measures agreed between CA Auto Finance and the Secretariat of ComCo to remedy the antitrust infringement were formally included in the dispositive of the decision.

In 2023, ComCo opened an investigation into four undertakings active in the **production of fragrances** based on alleged coordination on pricing, prohibiting competitors from supplying certain customers and limiting the production of certain fragrances. As part of this investigation and in consultation with other competition authorities, namely the European Commission, the United States Department of Justice Antitrust Division and the United Kingdom Competition and Markets Authority, ComCo carried out a number of dawn raids at various locations.[7]

## Abuse of Dominance

In its decisions of October 31, 2023, the FAC confirmed ComCo’s sanction against UPC Schweiz GmbH (now Sunrise GmbH; “**UPC**”).[8] The case concerns the abuse of a dominant position of UPC in the **live pay-tv broadcasting market for ice hockey games** during the seasons 2017/18 to 2021/22. In 2016, UPC had acquired exclusive pay-tv broadcasting rights for the Swiss top ice hockey leagues.

In its decision of September 7, 2020, ComCo had ruled that UPC held a dominant position on the national pay-tv broadcasting market for Swiss ice hockey. After Swisscom (Schweiz) AG and its subsidiary Blue Entertainment AG (both together “**Swisscom**”) granted UPC access to the football

pay-TV broadcasting rights, Swisscom demanded the same access from UPC for the ice hockey pay-TV broadcasting rights. However, UPC has refused to provide Swisscom with Swiss ice hockey broadcasts. Not only did UPC inform Swisscom that it would not submit an offer for the provision of Swiss ice hockey broadcasts. In addition, UPC indirectly maintained this refusal by not negotiating, or at least not seriously negotiating, with Swisscom on the provision of Swiss ice hockey broadcasts. With this behavior, UPC thus fulfills the elements of a refusal to deal within the meaning of Art. 7 para. 2 lit. a CartA. As a consequence, ComCo sanctioned UPC with almost CHF 30 million and obligated it to grant access to this exclusive sports content to all TV platforms in Switzerland on non-discriminatory terms.

According to the FAC, a full range of Swiss ice hockey broadcasts for Swisscom, which already has a full range of Swiss football broadcasts, is not objectively necessary for a TV platform. Nevertheless, the FAC considers the broadcasting of Swiss ice hockey matches to be necessary to a limited extent in order to be able to compete effectively in the pay-TV market. Consequently, UPC's complete refusal to grant Swisscom access to Swiss ice hockey broadcasts for almost three years led to an impediment of competition. The FAC confirmed ComCo's decision, but reduced the sanction by around 3%.

In June 2023, ComCo opened two parallel investigations against Visa and Mastercard respectively. The investigation covers domestic interchange fees for debit cards for so-called "card present transactions" at the physical point of sale. The interchange fee is a fee that domestic card issuers receive when the debit cards it has issued are being used. ComCo has allowed Visa and Mastercard to implement an interchange fee of an average of CHF 0.12 per transaction for the launch phase of their new generation of debit cards Debit Mastercard and V Pay. This launch phase has now been completed as Debit Mastercard and V Pay have both exceeded the market share threshold of 15%. ComCo expects to reach an agreement with Mastercard on its debit interchange fees and conclude a respective amicable settlement soon. As regards Visa, ComCo will conduct an in-depth investigation. It remains to be seen whether ComCo will align its practice with that of the EU and allow an interchange fee beyond the launch phase and whether the amount of such an interchange fee will be equivalent to that of the EU.<sup>[9]</sup>

## Merger Control

With the announcement of the **merger of UBS Group AG ("UBS") with Credit Suisse Group AG ("CS")** on March 19, 2023, the Swiss financial market was immediately in the news around the world. For mergers of banks, as in the case of UBS and CS, the CartA provides for special rules. If the Swiss Financial Market Supervisory Authority ("**FINMA**") deems a merger of banks to be necessary for reasons of creditor protection, the interests of creditors can be given priority. Even if such a merger would have to be prohibited for antitrust reasons, FINMA may allow it under certain circumstances. In such a case, FINMA replaces ComCo and becomes responsible for conducting the antitrust proceedings and deciding the case. However, ComCo is invited by FINMA to comment on the banking merger. This gives ComCo the opportunity to e.g. propose conditions to FINMA. At UBS and CS's request, FINMA authorised the early closing of the merger on May 19, 2023. Only in November 2023, ComCo submitted its statement to FINMA.<sup>[10]</sup> ComCo's statement has not yet been published at this time. Even though FINMA has already approved the transaction, it will be interesting to see what proposals ComCo made to FINMA.

In May 2017, ComCo prohibited the transaction parties Ticketcorner Holding AG and Tamedia AG (trading as TXGroup AG since December 20, 2019) from merging Ticketcorner AG and Starticket AG (together the ” **Target Companies**“). Both Target Companies operate a ticketing organization, which essentially comprises the sale of tickets and other ticketing services. On July 10, 2017, Ticketcorner Holding AG (“**Appellant**“) filed an appeal with the FAC against ComCo’s prohibition order.

In its decision on the Ticketcorner and Starticket merger (“**merger**“), the court was faced with the question of whether the Appellant has a current and practical interest in legal protection, even though the second transaction party withdrew from the transaction agreement during the course of the court proceedings.<sup>[11]</sup> In its decision, the FAC states that the Appellant has no current and practical interest in legal protection and is therefore not entitled to appeal. The FAC is of the opinion that, on the one hand, even a decision in favor of the Appellant with regard to the disputed merger would not have any positive effects for the Appellant and, on the other hand, the present decision itself does not have any negative effects on future mergers. The Appellant appealed the decision to the FSC. It will be interesting to see whether the FSC will once again refer the disputed merger back to the FAC for a substantive assessment.

## Regulatory Changes

On November 29, 2023, the Federal Council adopted the Ordinance on the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade (“**Motor Vehicle Ordinance**“), which has entered into force on January 1, 2024.<sup>[12]</sup> The Motor Vehicle Ordinance will replace the ComCo’s Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade (“**Motor Vehicle Notice**“). It applies to vertical agreements regarding the distribution of new motor vehicles and spare parts as well as the provision of repair and maintenance services. The new Motor Vehicle Ordinance specifies the types of conduct that constitute significant restrictions of competition in automotive distribution. This conduct largely corresponds to one outlined in the old Motor Vehicle Notice. Only a few minor adjustments have been made to reflect technical developments in the automotive industry. Unlike the old Motor Vehicle Notice, the new Motor Vehicle Ordinance is now legally binding for both ComCo and the Swiss courts. ComCo’s explanatory notes to the Motor Vehicle Ordinance, however, are for guidance only and are not legally binding for the Swiss courts. In principle, the explanatory notes follow those of the EU.

## Outlook

The Swiss government aims at a partial revision of the CartA. Now that the consultation process is completed, the Federal Council has unveiled its draft legislation (“**Draft Legislation**“) on May 24, 2023.<sup>[13]</sup> The revision aims at modernizing merger control and strengthening private damage litigation. The Draft Legislation remarkably also provides for a re-introduction of the effects test for hardcore cartel agreements. The main changes to the CartA proposed by the Draft Legislation can be summarised as follows:

- As in the Federal Council’s proposal submitted for consultation in November 2021, the Draft

Legislation adopts the Significant Impediment to Effective Competition test (“**SIEC Test**”) as the relevant Revision of CartA: Federal Council unveils its Draft Legislation standard for Swiss merger control. The transition from the dominance test, on which merger control has been based until now (i.e., a transaction can only be prohibited or burdened if it creates or strengthens a dominant position that completely eliminates effective competition), to the SIEC Test brings Swiss law into line with European Union practice in this area. Under the SIEC Test, ComCo will be able to prohibit a transaction (or authorize it subject to conditions or obligations) if the following two cumulative conditions are met: the transaction significantly impedes effective competition, in particular by creating or strengthening a dominant position, or if; the transaction does not generate merger-specific efficiencies for buyers that are verifiable and justified by the notifying undertakings and that outweigh the disadvantages caused by the significant impediment to competition. The SIEC Test will lower the current threshold for intervention by ComCo, which will probably lead to the issuance of stricter decisions in the future, and even to a greater number of national merger bans.

- Transactions that meet the turnover thresholds of the current Article 9(1) of the CartA must be notified to ComCo. The Draft Legislation introduces an exception to this obligation for cross-border mergers if the following two cumulative conditions are met: First, the proposed transaction must not be focused to Switzerland, i.e. each of the product markets affected by the transaction can be delineated geographically in such a way that it includes Switzerland and at least the European Economic Area (“**EEA**”). If the transaction affects at least one market that is geographically limited to Switzerland, the notification obligation remains in force. And secondly, the proposed transaction must be assessed by the European Commission. If the transaction is not notified to the European Commission, the exemption does not apply. The Draft Legislation aims at avoiding a parallel double review by ComCo and the European Commission. However, in practice, it will certainly be difficult to answer in each case whether all relevant product markets also include the EEA, as ComCo often does not provide a fixed definition of the geographic market in its decisions.
- The Draft Legislation provides for an extension of capacity for civil claims to any person whose economic interests are threatened or affected by an unlawful restriction of competition, including consumers and public authorities. It then provides for the suspension of the statute of limitations applicable to civil claims arising from an unlawful restriction of competition between the initiation of an investigation by ComCo and the issuance of a legally binding decision. In addition, the Draft Legislation aims to promote voluntary compensation for victims of anti-competitive practices, thus reflecting ComCo’s recent practice in this area. Accordingly, voluntary damages and compensation for non-material harm as well as voluntary return of unduly realized gains may be taken into account in determining the amount of the sanction. It is to be expected that the strengthening of civil antitrust law will lead in the future to an increase in the number of claims for damages against targeted companies.
- As in the previous draft submitted for consultation, the Draft Legislation reintroduces the consideration of quantitative and qualitative aspects of agreements in order to assess the significant nature of restrictions of competition, thus restoring the de facto legal situation that prevailed before the judgement of the Swiss Federal Court in the GABA case, according to which all horizontal agreements on prices, quantities and territories (including for instance purchase organisations) as well as vertical hardcore agreements constitute a significant restriction of competition by object. Thus, it is proposed that in the future, such agreements will have to be examined in particular also from a quantitative perspective.
- The Draft Legislation introduces the principle of opportunity in cases of minor infringements in order to avoid that competition authorities have to deal with insignificant cases.

- Consultation procedure: The Draft Legislation strengthens the opposition procedure by allowing companies to notify ComCo of planned conduct and agreements before they are implemented. If the competition authorities do not initiate an investigation within the opposition period, the direct risk of sanction for the companies regarding the notified will definitively disappear. In addition, the opposition period will be reduced from 5 to 2 months.
- Regulatory time limits: The Draft Legislation introduces specific time limits for competition authorities and courts based on the “comply or explain” principle in order to speed up antitrust proceedings.
- Compensation: The Draft Legislation introduces an award of compensation to the parties for the first instance administrative proceedings before ComCo. If the investigation is closed (in whole or in part), it will now be possible to award compensation to companies that have been the subject of unfounded suspicions.

The Draft Legislation will now be deliberated in Swiss Parliament, which can still propose changes. The revised CartA is not expected to enter into force before 2025/2026.

In December 2023, the Federal Council has published a draft of the **Investment Screening Act**, which seeks to introduce a targeted sector-specific foreign investment control regime in Switzerland and aims to regulate acquisitions of domestic companies operating in particularly critical sectors by foreign state-controlled investors.<sup>[14]</sup> The “state-controlled” criterion is intended to include private investors, provided they are directly or indirectly controlled by a state. According to the draft of the Investment Screening Act, there would be two categories of acquisitions subject to investment control:

- A sector-specific review is proposed to be introduced, on the one hand, for acquisitions of domestic companies active in particularly critical sectors such as the defence industry or dual-use goods, the operation of energy infrastructure or water supply as well as security-related IT services. A general exemption (de minimis) is foreseen for acquisitions of small domestic companies (with less than 50 full-time employees and worldwide annual turnover of less than CHF 10 million in the past two business years).
- On the other hand, investment screening should also encompass companies in sectors in which risks to public order or security cannot be completely ruled out. This second category includes, for example, university hospitals, companies in the field of research, development, production and distribution of pharmaceutical products, medical devices and vaccines as well as in the area of central transport, distribution, telecommunications or financial market infrastructures. For this category of companies, only acquisitions exceeding a turnover threshold of CHF 100 million have to be notified, according to the proposal.

Transactions under review will be approved if there are no indications that they endanger or threaten public order or security. According to the draft legislation, an authorisation could be refused if the foreign state investor was or is involved in activities that have a detrimental effect on public order or security in Switzerland or other states, or if the takeover gives the foreign state investor access to important security-relevant information. The draft legislation is currently being debated in Swiss Parliament and still subject to change. It is not expected to enter into force before 2025/2026.

[1] Cf. Decisions of the FAC B-648/2018 dated December 7, 2023; B-697/2018 dated November 28, 2023; B-3096/2018 dated November 28, 2023; B-3097/2018 dated November 28, 2023; B-3290/2018 dated November 28, 2023; B-716/2018 dated November 23, 2023; B-5172/2018 dated October 26, 2023; B-645/2018 dated August 14, 2023.

[2] FAC media releases available at:  
<https://www.bvger.ch/de/newsroom/medienmitteilungen/kartellbusse-gegen-buendner-baufirma-bestaetigt-1175>;  
<https://www.bvger.ch/de/newsroom/medienmitteilungen/engadin-kartellrechtsverstoesse-im-baugewerbe-bestaetigt-1199>.

[3] Cf. Decision of the FAC B-645/2018 dated August 14, 2023.

[4] Cf. Decisions of the FAC B-716/2018 dated November 23, 2023; B-697/2018 dated November 28, 2023.

[5] Cf. Decisions of the FAC B-716/2018 dated November 23, 2023; B-697/2018 dated November 28, 2023.

[6] Cf. Decisions of the FAC B-4596\_2019 dated June 5, 2023.

[7] ComCo media releases available at:  
<https://www.weko.admin.ch/weko/de/home/medien/medieninformationen/nsb-news.msg-id-93502.html>.

[8] FAC media releases available at:  
<https://www.bvger.ch/de/newsroom/medienmitteilungen/eishockey-im-pay-tv-sanktion-bestaetigt-1193>.

[9] ComCo media release available at:  
<https://www.weko.admin.ch/weko/de/home/medien/medieninformationen/nsb-news.msg-id-96126.html>.

[10] Media reports available at  
<https://www.finanzen.ch/nachrichten/aktien/ubs-aktie-freundlich-wettbewerbskommission-hat-untersuchung-zur-cs-uebernahme-durch-die-ubs-abgeschlossen-1032776317>;  
[https://www.tippinpoint.ch/artikel/77048/weko\\_schliesst\\_kartelluntersuchung\\_zur\\_megafusion\\_von\\_ubs\\_und\\_credit\\_suisse\\_ab\\_.html](https://www.tippinpoint.ch/artikel/77048/weko_schliesst_kartelluntersuchung_zur_megafusion_von_ubs_und_credit_suisse_ab_.html).

[11] Cf. Decisions of the FAC B-3859/2019 dated December 12, 2023.

[12] Federal Council media release and Motor Vehicle Ordinance available at:  
<https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-99084.html>.  
 ComCo's explanatory notes of December 4, 2023 to the Motor Vehicle Ordinance will also enter into force on January 1, 2024.



[13] Federal Council media release and the Draft Legislation available at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-95384.html>.

[14] Federal Council media release and draft of the Investment Screening Act available at: <https://www.admin.ch/gov/de/start/dokumentation/medienmitteilungen.msg-id-99460.html>

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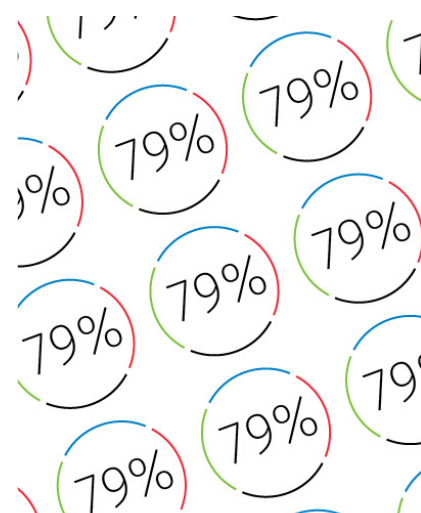
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