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Main Developments in Competition Law and Policy 2024 – Switzerland

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In 2024, Swiss competition law saw significant developments. The first instance of abuse of relative market power was determined based on the novel offense introduced in 2022. The Secretariat of the Swiss Competition Commission (**"ComCo"**) also determined that antitrust principles apply to labor markets, marking a pioneering stance among authorities in its detailed examination of the application of antitrust law in the labor sector. Noteworthy is the prohibition of a proposed merger by Swiss Post, a rarity in Swiss merger control due to the high notification and intervention thresholds. The Federal Supreme Court (**"FSC"**) issued rulings on horizontal price agreements and a case of abuse in a Swiss Post tender in 2008, overturning the ruling of the Federal Administrative Court (**"FAC"**). In addition to the partial revision of the Swiss Cartel Act (**"CartA"**) initiated by the Federal Council in 2023, Swiss competition law is now undergoing further institutional reform, with a minor regulatory change regarding the standardization of procedural fees.

In the following, we provide 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

In its decision of April 16, 2024, the FSC rejected the appeal in the *VPVW Stammtische/Projekt Repo 2013* case. The case concerned a sanction order issued by ComCo in 2015 affecting four companies belonging to the Association of Partners of the Volkswagen Group (**"VPVW"**). The subject matter was a list of conditions for maximum discounts and minimum delivery flat rates for the delivery of first materials for new vehicles of the VW Group brands, as well as the organization of regional regulars' tables to disseminate the agreed discount policy. At the time, ComCo ruled that the agreement of a common list of conditions constituted a price-fixing agreement. In 2022, the FAC dismissed an appeal against this decision by a sanctioned licensee. The licensee appealed to the FSC, primarily arguing that, given the brief duration of the agreement's implementation (three days), it should be regarded as a minor case. The FSC reasoned that the question of materiality was not influenced by the implementation of the agreement, and that potential competition should be equally protected. The FSC thus upheld the lower court's decision.

In April of 2024, the FAC issued a series of decisions regarding the ComCo investigations in the

"Engadin" case, which concerned bid-rigging agreements in the construction industry. This development signifies the culmination of the FAC's deliberations on all grievances pertaining to this matter. The FAC determined that ComCo's assumptions regarding price and business partner agreements in the "Engadin III" and "Engadin VIII" cases were valid. In contrast to the position of ComCo, the FAC assumes the presence of sufficient external competition, thereby rejecting the presumption of the elimination of effective competition as outlined in Art. 5 para. 3 CartA. However, it rejects a trivial case and affirms a significant impairment of competition with reference to the *Gaba* judgement (BGE 143 II 297). According to this, agreements pursuant to Art. 5 para. 3 KG are particularly harmful and generally fulfill the criterion of materiality. The court found no grounds for justification. Consequently, the FAC reduced the sanction imposed on the companies involved in the "Engadin III" case by one-fifth each. Notably, this decision marked the first occasion on which the FAC was tasked with elucidating its position on the implications of a reduction in sanction in instances where a self-indicator has raised legal or factual objections to the agreement in question and these objections subsequently prove to be unfounded. The FAC determined that such actions could, in principle, be regarded as hindering the objective of streamlining the procedural process. A complete waiver of the sanction would not be permissible under such circumstances. The exercise of elementary rights of defense would remain reserved. However, the FAC does not specify which procedural rights it considers fundamental and can be exercised without an objection being raised. Nevertheless, it is noteworthy that a self-reporter may have made an objective and substantive contribution to unveiling and substantiating the facts in question by submitting evidence without being formally requested to do so, despite having raised objections in response. In such a scenario, considering the stated objectives of the bonus regulation, it may be deemed necessary or at least appropriate to acknowledge this cooperation by reducing the sanction.

In the case of "Engadin VIII," the FAC upheld the sanction imposed by ComCo, asserting that the bonus scheme did not provide for a reduction in sanction in light of the severity of the complainant's involvement in the agreement. An appeal against this decision was lodged with the FSC. Additionally, appeals in the Engadin I and Engadin VI cases are currently pending before the FSC. Therefore, it remains to be seen how the FSC will rule on bid-rigging agreements in the canton of Graubünden.

In June 2023, ComCo initiated two parallel investigations with the objective of identifying long-term solutions for the domestic interchange fees associated with Visa and Mastercard debit cards. Mastercard could reach a settlement with ComCo providing for a long-term safe harbor applicable to such domestic debit card interchange fees. However, the investigation into Visa remains ongoing and is not prejudiced by this mutual agreement. ComCo's settlement decision concerning Mastercard qualifies the debit interchange fee as a vertical agreement to fix a resale price. However, ComCo concludes that the agreement is justified on grounds of economic efficiency.

In late August 2023, Visa Visa requested ComCo to issue interim measures preserving it from fines for its domestic interchange fees set. Both ComCo and the Federal Administrative Court rejected Visa's request. Visa appealed to the Federal Supreme Court, which The upheld ComCo's decision in its judgment of December 4, 2024.

ComCo imposed sanctions on Kies AG Aaretal (**"KAGA"**) and its shareholders, amounting to a total of CHF 5.3 million. The most recent of three legal proceedings against "Baustoffe und Deponien Bern (KAGA)" has thus been concluded. KAGA is the largest gravel and landfill pit in the Bern area. Its seven shareholders are also active in this sector. These shareholders have

allegedly entered into an agreement to collaborate in order to mitigate competitive pressures within the gravel and landfill sector of the Bernese Aare valley by establishing KAGA. According to ComCo, the agreements were predicated on the prevention of new competition in the gravel-rich Aare valley, the regulation of the competitive behavior of KAGA in a manner favorable to the shareholders, and the mitigation of competitive pressure among them. The unlawful practices included, among other things, the right of each shareholder to appoint one member to the Board of Directors of KAGA, whereby the appointees also held key positions at the appointing shareholder. Moreover, the shareholders were accorded preferential terms in comparison to their competitors. Additionally, a non-competition clause was included, prohibiting the acquisition of any mining rights within the KAGA area and the extraction of gravel. Furthermore, KAGA temporarily linked the dumping of excavated material to the purchase of gravel, which was at the expense of non-shareholders. ComCO found that the gravel mining and landfill industry is characterized by stringent regulations, substantial barriers to market entry, and limited competition. ComCo held that the prevalence of these unlawful practices has further exacerbated market competition, impeding competition within the gravel and landfill sector, and adversely affecting SMEs and the public sector.

ComCo investigated municipal procurement procedures in the waste disposal sector of Lower Valais, determining that two allocations had been illegally awarded through collusion. Furthermore, ComCo examined a particular type of collaboration between three waste disposal companies. The investigation found that the companies had collaboratively developed a platform designed to enhance the efficient management of waste transport. In the specific case, however, the companies exchanged confidential information beyond the actual cooperation, which is sensitive under antitrust law. In the wake of these findings, ComCo and all implicated entities reached a consensus to abstain from any future conduct deemed to be in violation. As a result, given their satisfactory cooperation and the minor infringements committed, three of the four implicated enterprises did not face a financial penalty. The sole sanction imposed amounts to approximately CHF 100,000.

As previously indicated, the ComCo Secretariat has stated that accords between employers on remuneration, other benefits, or non-solicitation agreements are subject to Swiss competition law and therefore may be considered anti-competitive agreements under the Cartel Act. Agreements between social partners, in particular collective employment contracts, and contracts between employees are exempt from the Cartel Act. A preliminary investigation, initiated following a voluntary disclosure by a Swiss bank, revealed that over 200 companies had been sharing wages, wage trends, and working conditions for years. The Secretariat decided against investigating up to 241 parties because it was expected to require a great deal of effort and would take a long time. The Secretariat’s objective is to establish a best practice for antitrust-compliant behavior in the labor market.

Abuse of Dominance

In its ruling of March 5, 2024, the FSC upheld Swisscom’s (Schweiz) AG (**“Swisscom”**) appeal in connection with a decision made by ComCo in 2015.

The following are the facts of the case: In 2008, Swiss Post issued a request for tenders for the construction and operation of a wide area network (**“WAN”**) for its approximately 2,300 postal

locations. Swisscom was awarded the contract. Sunrise Communications AG (**"Sunrise"**), the losing proponent, subsequently filed a complaint with ComCo. In 2015, ComCo determined that Swisscom had abused its dominant position. This determination was made on the basis of findings that Swisscom had imposed unreasonable prices on Sunrise and Swiss Post, as well as applied a margin squeeze on Sunrise. The sanction of CHF 7.9 million imposed by ComCo in this regard was appealed by Swisscom to the FAC. The FAC dismissed the appeal in 2021 on the primary issues, but reduced the sanction to CHF 7.5 million.
However, in 2024, the FSC reversed the decision of the FAC. The court initially confirmed that Swisscom held a dominant position in the relevant markets. Nevertheless, the Court concluded that Swisscom had not abused its position. There was no evidence of Swisscom enforcing unreasonable prices on either Sunrise or Swiss Post. The element of "forcing" is already absent in both cases. Swisscom's conduct towards Sunrise was appropriate when setting wholesale prices. The prices charged for the wholesale products were not excessive. In regard to Swiss Post, the surcharge price was the result of negotiations and was not set unilaterally by Swisscom. Additionally, the surcharge price, as well as Swisscom's profit margin, were determined to be within reasonable bounds. Moreover, there is no evidence of margin squeeze that would be detrimental to Sunrise. In this respect, there is already a lack of a two-stage abuse of a dominant position. Further, a margin squeeze would not exist from a calculatory point of view, since according to the scenario recommended by the Federal Office of Communications (**"OFCOM"**) and to be respected, Sunrise's wholesale costs are below Swisscom's surcharge price.

In its decision of April 23, 2024, the FSC rejected an appeal filed by Swisscom. The case pertains to the abuse of a dominant position by Swisscom in the transmission of football and ice hockey matches on pay television. In its decision of May 9, 2016, ComCo determined that Swisscom and Blue Entertainment (formerly CT Cinetrade AG) had engaged in abusive conduct, leveraging their dominant position in the provision of sports broadcasts during the period from 2006 to 2013. Swisscom's dominant position resulted from the fact that its subsidiary Blue Entertainment enjoyed long-term exclusive licensing rights for sports broadcasting in Switzerland. Swisscom was found to have abused this dominant position by i.a. refusing to offer its competitors the right to broadcast its live sports content on their own pay tv platforms and by differentiating between the scope of the live sports content offered to its competitors. . Consequently, ComCo imposed a fine of CHF 71.8 million on Swisscom. The FAC previously upheld ComCo's decision in a judgment on May 10, 2022. Swisscom appealed this judgment to the FSC, which rejected Swisscom's appeal with its judgment of April 23, 2024.

ComCo has sanctioned Swisscom with a fine of CHF 18 million and has imposed requirements on the construction of the network. This decision follows a modification in the configuration of Swisscom's fiber optic network. According to ComCo, the revised network design will prevent competitors from having direct access to the network and will only allow them to sell Swisscom services under their own name. In the interest of maintaining competitive balance, ComCo has taken the precautionary measure of prohibiting Swisscom from implementing this design modification in late 2020. This prohibition was deemed necessary to prevent Swisscom from altering the prevailing market structure, thereby establishing a de facto monopoly. This change would have resulted in significant restrictions on competitors' ability to innovate and pursue new business opportunities. Additionally, consumers and business customers would have faced considerable constraints in their choice of service providers and the diversity of products available to them. Swisscom rationalizes the departure from the previous structure, primarily on the grounds of lower costs and accelerated growth. ComCo rejects this, as these savings are not sufficient to justify the elimination of competition for generations. Swisscom has challenged this order with an

appeal to the FAC.

In the initial case concerning the French publishing industry (**"Marché du livre écrit en français"**), which ComCo concluded in 2013, various French publishing houses utilized contractual agreements to impede Swiss booksellers from sourcing directly in France, particularly from parallel imports into Switzerland. These agreements were determined to be illegal by ComCo, and ultimately by the courts, as they constituted unlawful territorial agreements. Subsequent to this decision, it has been established that direct procurement and parallel imports from foreign nations may not be prohibited. However, since January 1, 2022, the provisions on relative market power have also permitted dependent companies to purchase at the conditions applicable abroad. A company possesses relative market power if another company does not have sufficient and reasonable alternative options and is therefore dependent on that company. ComCo has now made the first finding of abuse of relative market power since the introduction of the new legal provision. The case in point involves the French publishing group Madrigall's (one of the largest publishing groups in France) refusal to allow the Swiss bookseller Payot, which is known for its focus on French-speaking markets, to purchase books under standard conditions in France. Prior to this, Swiss booksellers had relied on the official Swiss distribution channel to procure Madrigall books. However, Payot sought to import Madrigall's books directly from France. Madrigall demands significantly higher purchase prices from Payot than are usual in France, and there are no adequate and reasonable alternative sources of supply for Payot. ComCO found that not selling Madrigall books is also not a realistic option, leaving Payot dependent on Madrigall. In light of these circumstances, ComCo considers Madrigall's conduct to be an abuse of its relative market power.

ComCo opened an investigation into BMW in January 2024. The investigation will examine whether BMW possesses relative market power in relation to an individual garage and has engaged in abusive behavior as defined by the Cartel Act. The investigation will encompass the inquiry into whether BMW caused this garage to make substantial investments and then unilaterally terminated the cooperative relationship without providing adequate transitionary measures. The continued operation of the business relationship between the garage and BMW is crucial for the amortization of the aforementioned investments.

Moreover, in its decision of June 24, 2024, ComCo examined, whether a company, specifically the Fresenius Kabi Group (**"Fresenius Kabi"**), was abusing its relative market power vis-à-vis Galexis AG. This investigation arose from Fresenius Kabi's refusal to supply Galexis AG with drinking and tube feeds in Germany and the Netherlands. ComCo concluded that Fresenius Kabi lacked relative market power in relation to Galexis AG. Even under the assumption of relative market power, ComCo found that Fresenius Kabi's actions did not meet the criteria for abuse. This determination was based on the premise that the foreign conditions were marginally more favorable. Consequently, ComCo closed the investigation.

Merger Control

In May 2024, the Swiss Financial Market Supervisory Authority (**"FINMA"**) concluded the merger control proceedings with regard to UBS Group AG (**"UBS"**) and Credit Suisse Group AG (**"CS"**) without imposing any conditions or commitments. Concurrent with the publication of the FINMA ruling, the statement submitted by the ComCo to FINMA in September 2023, along with its recommendations, was also published. The following is a brief summary of ComCo's key

statements:

- ComCo found that the merger would possibly create a dominant position in individual markets. However, in the absence of the possibility of eliminating competition, ComCo held that this question could be left open. In the potentially affected markets, ComCo recommends that FINMA monitors prices and fees and reports any anomalies to the Price Supervisor.
- Additionally, ComCo rejected the parties' "failing company defense". According to ComCo, there would have been competitors with market power that could have taken over CS business areas. Furthermore, ComCo held that various state options would have ensured the continued market presence of CS, at least temporarily. This case demonstrates the significant challenges posed by the application of this legal concept. In contrast, FINMA deemed the criteria for failing company defense fulfilled. The absence of a concrete, binding offer from a competitor was a contributing factor to its decision. Consequently, the acquisition by UBS represented the most viable option.
- ComCo held that the entry of new market entities or the expansion of existing ones within Switzerland should not be impeded by regulatory measures.
- ComCo also advocated that a sector inquiry based on the European model should be introduced in Switzerland in the future.
- Furthermore, ComCo held that the cooperation between ComCo, FINMA, and the Swiss National Bank should be expanded, and a memorandum of understanding on informal cooperation should be formulated.

On January 19, 2024, ComCo issued a prohibition on the planned takeover of the Quickmail Group by Swiss Post. The Quickmail Group comprises two subsidiaries: Quickmail, which operates within the letter business sector, and Quickpac, which specializes in the parcel post service. Swiss Post is also active in these areas. The proposed merger had to be notified pursuant to Art. 9 para. 4 CartA, as according to ComCo, Swiss Post holds a dominant[17] position in the market for national addressed mass mailing items over 50 grams from business customers, while Quickmail operates within this market. ComCo's examination of the takeover revealed that the proposed merger would lead to a strengthening of Swiss Post's dominant position in the market for national addressed mass mailings over 50 grams from business customers, which would eliminate effective competition pursuant to Art. 10 para. 2 lit. a CartA. In this market, Swiss Post has a market share of 70-80%, while Quickmail has a market share of 20-30%. Moreover, Swiss Post's dominant market position would be consolidated or fortified in various segments of the letter and parcel post sector, as well as in the newspaper and magazine delivery market. According to ComCo, the acquisition would establish a de facto monopoly for Swiss Post, which would have a deleterious effect on competition, resulting in negative implications for consumers and business customers. In their defense, Swiss Post and Quickmail argued that this was a restructuring measure and that the merger was not the cause of these competitive effects. ComCo can authorize a merger even if it results in a deterioration of competition, under the "failing company defense" principle. This would be the case if the Quickmail Group were to disappear from the market within a short period without support and, as a result, a large proportion of customers would have to switch to Swiss Post anyway. Furthermore, there would be no more competitive alternative to the merger. ComCo's examination has revealed that the third requirement of the failing company defense had not been met. In addition to Swiss Post, there was an alternative prospective buyer with experience in the postal sector. The acquisition of the Quickmail Group by this entity would enable the Quickmail Group to maintain its presence in the market, thereby ensuring continued competition with Swiss Post. ComCo found that this outcome would be a more competition-friendly solution than the acquisition by Swiss Post.

Regulatory Changes

On November 6, 2024, the Federal Council amended the Ordinance on the Fees charged under the Cartel Act (**"CartA-FeeO"**). While the Swiss Competition Commission so far charged a flat fee of CHF 5,000 for a Phase I clearance (including Phase O), it will from now on apply a time-spent fee with hourly rates of up to CHF 400.

Outlook

ComCo is currently working on best practice guidelines for the labour markets. The guidelines will specifically address wage agreements, no-poach clauses, and exchanges of other HR-related information. The guidelines are expected to be published by mid-2025.

The Federal Council has announced its intention to initiate a reform of the competition authorities. In this regard, the Federal Department of Economic Affairs, Education, and Research (**"EAER"**) was instructed on March 15, 2024, to submit a consultation draft for such an institutional reform by mid-2025. The current configuration of ComCo entails a Secretariat responsible for conducting investigations and submitting proposals to the Commission. The commission, in turn, acts as the primary adjudicating entity. The objective of this reform is to enhance the effectiveness of the division between investigative and decision-making functions. In 2023, the EAER established a commission of experts independent of the Federal Administration to lay the foundation for a well-founded and widely supported reform of the competition authorities. The findings of this commission were published in its final report on December 1, 2023, and will serve the EAER as a basis for developing a strategic direction for the reform of the competition authorities. Based on this expert report, the Federal Council has the following recommendations:

- Reduction and professionalization of the Commission:
- The Secretariat should consistently conduct the investigation without involving ComCo.
- The Commission should have 5 or 7 members (up to 9 if necessary).
- If necessary, the members should have an increased workload.
- Introduction of a procedural officer attached to the Commission and elected by the Federal Council, who – like the hearing officer in the EU – examines on behalf of the Commission whether the general procedural guarantees were observed in the proceedings.
- Introduction of a statement of objection so that the parties' comments on the allegations made can be expressed and taken into account at an earlier stage of the proceedings.
- The use of specialist judges in antitrust cases at the FAC. This can speed up the proceedings and strengthen the economic expertise at the FAC.

In its final report, the Expert Commission recommended maintaining the current organizational structure, with the following additional modifications:

- Representation of interest groups in the Commission should be omitted.
- Competence of the Commission to determine the strategic focus of its activities in a general manner.
- Elimination of the ability for an Executive Committee member to engage in the investigative process.

Nevertheless, the critique regarding the inadequate delineation between ComCo and its secretariat warrants serious consideration, particularly in light of the potential for direct imposition of criminal or quasi-criminal sanctions. Addressing the perceived lack of independence could be mitigated by the removal of interest group representation within the Commission. A statement of objection would allow the involved parties to exert influence on the proceedings at an earlier stage, while the appointment of a hearing officer would allow the members of ComCo to focus more on the material legal issues. The length of cartel proceedings depends on several factors, not just the institutional framework. It is primarily associated with judicial proceedings, especially those led by the FAC. The Expert Commission has decided that the recommendation no longer requires a clearer separation of investigation and decision.

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