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**Annual Report 2023**

**Competition Commission (ComCo)**

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# 1 Overview of 2023

The Competition Commission (ComCo) and its Secretariat have been combating price fixing and market foreclosures for years, opening up markets and strengthening the internal market. They regularly comment on draft legislation and point out economic and competition-related problems in their opinions. The special topic in this year's annual report, which is also symbolic of our work in 2023, is the campaign against market foreclosures and excessive prices. With its important decision on **Swisscom's network expansion strategy**, ComCo ensured competition in the use of fibre-optic infrastructure for the next 50 years or so. ComCo ruled that Swisscom must build its fibre-optic network in such a way that third parties are provided with Layer 1 access from Swisscom's exchanges, thus allowing Swisscom's competitors to offer households and companies fibre-optic internet. It will give rise to competition, making products and services available at a good cost-benefit ratio.

In addition to the fibre optics sector, ComCo also dealt with the landfill sector. Construction and waste disposal companies that were not shareholders paid higher disposal fees than shareholders at the **Höli landfill**, which dominates the market. This made non-shareholders less competitive. ComCo judged this unequal treatment by Höli to be an abuse and unlawful.

As in the two previous years, ComCo had to review an above-average number of mergers. Although the merger between **UBS** and **CS** fell within FINMA's jurisdiction, it nevertheless kept ComCo busy for months. ComCo intensively analysed the effects of this merger and submitted its opinions to FINMA. It also drew up various recommendations for different authorities.

ComCo and its Secretariat have a broad range of **activities**: they conducted *25 investigations* and *17 preliminary investigations*. They dealt with around *50 market monitoring procedures*, over *30 mergers* and drafted *opinions* in around 330 official consultations and consultation procedures. These procedures and opinions affect a wide variety of markets, such as the automotive sector, the energy sector, the financial markets, agriculture and telecommunications.

The **Federal Supreme Court (FSC)** and, in particular, the **Federal Administrative Court (FAC)** ruled on a number of appeals against ComCo decisions in 2023. The courts normally uphold ComCo's decisions, their judgments confirming that the conduct dealt with by ComCo is unlawful. These court judgments show that ComCo investigates conduct that may violate competition law thoroughly, respects the procedural rights of the parties, takes account of incriminating and exculpatory evidence and always respects the presumption of innocence.

## 2 About ComCo and the Secretariat

The **Competition Commission** (the decision-making body) is what is known in Switzerland as a 'militia' authority.<sup>1</sup> Since 1 January 2024, it has comprised thirteen members elected by the Federal Council. The majority of the Commission members are independent experts - law and economics professors and lawyers. The remaining seats are shared by representatives of the major business associations and consumer organisations (a list of the members is provided in the Annex). ComCo meets every two to four weeks and makes important decisions in response to proposals made by the Secretariat, including with regard to fines. It held eleven full or half-day plenary sessions in 2023.

ComCo has a full-time **Secretariat** (the investigating body). This conducts proceedings under competition law, drafts ComCo's decisions and is the contact point for businesses, members of the public and authorities for all competition law questions. The Secretariat comprises four divisions, the Internal Market sector and a resources service (a list of members of the Executive Management is provided in the Annex). At the end of 2023, the Secretariat employed 73 persons (not including interns, previous year 76), most of whom are lawyers and economists and 38.3 per cent of whom are women (previous year 44.7 per cent). These 73 employees work full or part-time, occupying a total of 62.6 (previous year 65.3) full-time equivalents. The number of employees responsible for the application of the Cartel Act and the Internal Market Act (including the Executive Management) is 55 (previous year 57), corresponding to 48.4 full-time equivalents (previous year 50.7). Eighteen (previous year 19) employees work for the resources service, providing support for all the work that the authority does; this corresponds to 14.2 (previous year 14.6) full-time equivalents (these employees also work for the Federal Office for Housing and the Federal Office for National Economic Supply). The Secretariat also offered four (previous year 4) full-time positions to interns.

ComCo members completed their term of office at the end of 2023. **Armin Schmutzler** (Prof., University of Zurich) and **Winand Emons** (Prof., University of Bern) thus reached their maximum term of office at the end of 2023. **Henrique Schneider** (Swiss Union of Crafts and Small and Medium-Sized Enterprises) resigned before the end of his maximum term of office at the end of July 2023. The Federal Council elected **Igor Letina** (Prof., University of Bern), **Gerd Mühlheuß** (Prof., University of Hamburg) and **Mikael Huber** (Swiss Union of Crafts and Small and Medium-sized Enterprises) as their replacements. To ensure that Italian-speaking Switzerland is represented in ComCo, it also appointed **Mauro Nicoli** (a lawyer) as a member. Igor Letina takes over as Vice President from Armin Schmutzler, to whom special thanks are due.

**Armin Schmutzler** has been part of the three-member Executive Committee of ComCo since 2016. He fulfilled his vital role as Vice President with great commitment and motivation. He brought his extensive knowledge to bear in ComCo's proceedings and deliberations in a clear and comprehensible manner. He was adept at grasping complex and large dossiers and making them understandable for other committee members. As an economist, he also had the task of bridging the gap between theory and practice. He fulfilled this task with flying colours, contributing not only practical but also scientific knowledge to ComCo. He also used his excellent reputation in the scientific world to ensure that the competition issues in economics that were relevant to ComCo were discussed and researched in the scientific community. Armin Schmutzler has been a mainstay of ComCo.

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<sup>1</sup> Switzerland operates a 'militia' system of institutionalised public service on a part-time basis.

## 3 Key decisions in 2023

### 3.1 Decisions of the ComCo

In its decision of *4 December 2023*, ComCo concluded its *investigation* into **Swisscom's network expansion strategy**. With its 'Network Expansion Strategy 2025', Swisscom (Schweiz) AG changed the design of the network from the beginning of 2020 so that competitors would no longer have direct access to the network infrastructure (Layer 1 access) in areas that it is developing with fibre optics alone. In its decision, ComCo concluded that Swisscom has a dominant position in the market for access to the physical network infrastructure with fibre-optic-based transmission speeds in areas where the only fibre-optic connection is to the Swisscom network. Swisscom has abused its position by refusing layer 1 access to other telecommunications service providers, thereby restricting their technical development. Other than in objectively justified individual cases, the ComCo decision requires Swisscom within certain transitional periods to decommission or convert fibre-optic connections that are already in operation but which do not offer Layer 1 access. In addition, Swisscom is basically prohibited from building or expanding a fibre-optic network in the future in a way that makes it impossible for customers to use a Layer 1 connection from the Swisscom exchanges. In addition to these measures, Swisscom was fined around CHF 18 million. ComCo's decision can be appealed to the FAC. In this case, ComCo ordered precautionary measures when it opened the investigation in December 2020, prohibiting Swisscom from constructing its fibre-optic network in such a way as to make it impossible for third parties to obtain Layer 1 access from Swisscom's exchanges. The precautionary measures were confirmed in full by the FAC and later by the FSC (see 4.1.11).

At the end of August 2023, ComCo announced its decision of *3 July 2023* on the **Höli Liestal AG landfill**. It found that the Höli landfill had a dominant market position for non-recyclable waste within a radius of around 40 minutes' drive and had abused this position. Construction and disposal companies dispose of various types of construction waste and excavated soil in landfills, including the Höli landfill. The landfill charges and the transport costs to the landfill are decisive factors when choosing a landfill. The Höli landfill allowed its shareholders to deposit waste material on preferential conditions and thus at significantly lower prices than non-shareholders. Construction and waste disposal companies without shareholder status therefore had to pay higher charges to dispose of waste. As a result, they were made less competitive than shareholders. In addition, the Höli landfill site temporarily refused to accept material from non-shareholders. This unequal treatment prevented non-shareholders from competing with shareholders. The Höli landfill thus abused its dominant market position and was fined around CHF 1 million. The decision is legally binding.

### 3.2 Court judgments

In its decision on **builders' supplies** for windows and French doors of 18 October 2010, ComCo identified various sanctionable price-fixing agreements between distributors of builders' supplies. Three companies appealed to the FAC, which upheld all the appeals in 2014. In turn, ComCo filed an appeal against two of these judgments with the Federal Supreme Court. The Federal Supreme Court upheld both appeals in 2017 and referred the case back to the FAC for reassessment. In its judgments of *12 December 2023*, the FAC now supports the original decisions of the ComCo. The judgments are final.

ComCo conducted a total of 10 investigations into bid-rigging agreements in the canton of Graubünden. Three of these cases each dealt with a large number of construction projects, while the other seven cases dealt with up to ten rigged construction projects. The investigations include the ComCo decisions of *27 May 2019* on a multitude of unlawful agreements affecting competition involving three construction companies (**Engadin II**), of *26 March 2018* on several types of unlawful agreements between a large number of companies (**Engadin I**), and three

decisions dated 2 October 2017 on unlawful agreements affecting competition relating to one construction project, with each agreement involving either two companies (**Engadin IV**) or three companies (**Engadin VI** and **Engadin VIII**):

- Bezzola Denoth AG and Implenia Schweiz AG filed an appeal against ComCo's **Engadin VI** decision with the FAC, which dismissed the appeal in its decisions of 7 December 2023 and 23 November 2023. The FAC dealt with the existence of an unlawful agreement and several sanction issues. It confirmed its recent case law on bid rigging and, as a result, the ComCo decision. One company has filed an appeal with the FSC.
- Implenia Schweiz AG in particular filed an appeal against the **Engadin VIII** decision with the FAC. In its decision of 28 November 2023, the FAC primarily had to deal with sanction issues. It confirmed its recent case law on bid rigging and the ComCo decision. Implenia has filed an appeal with the FSC.
- In its **Engadin I** decision in 2018, ComCo identified various agreements restricting competition: preliminary meetings (1997-2008); cooperation between Foffa Conrad AG, Bezzola Denoth AG and Lazzarini AG (2008-2012); 11 individual agreements (2009-2012); and cooperation agreements between Foffa Conrad AG, Bezzola Denoth AG, Lazzarini AG and Alfred Laurent AG (1999-2008). It is conservatively estimated that over 400 public and private building and civil engineering construction projects with a procurement volume of over CHF 100 million were affected by these agreements. Three companies appealed against the ComCo decision. In its three decisions dated 28 November 2023, the FAC confirmed the illegality of all the agreements. It also confirmed the safeguarding of all party rights. The FAC reduced several sanctions, in some cases substantially. These reductions were primarily due to the reassessment of voluntary disclosures. ComCo demanded a higher level of cooperation from companies that reported their own unlawful practices than the FAC. In addition, the FAC took into account half of the compensation payment made retrospectively by a company to the canton. All the companies have filed an appeal with the FSC.
- Rocca + Hotz filed an appeal against the **Engadin II** decision, on which the FAC ruled in its decision of 26 October 2023. According to ComCo, the construction companies rigged bids in a total of ten construction projects. The FAC held that the evidence was too weak in relation to one construction project. Otherwise, the FAC comprehensively confirmed the ComCo decision, with regard to the presentation of evidence, the probative value of voluntary disclosures, the legal assessment, the calculation of sanctions and the assessment of the affordability of the fine. The judgment is final.
- Foffa Conrad AG filed an appeal against ComCo's **Engadin IV** decision with the FAC, which dismissed the appeal in its decision of 14 August 2023. The FAC comprehensively confirmed the ComCo decision. In particular, the FAC held that the agreement was proven and unlawful. According to the FAC, a company that reports its own unlawful conduct must co-operate throughout the proceedings before ComCo and the courts, otherwise the reduction in sanctions associated with the voluntary report will be lower. The judgment is final.

In its decision of 22 May 2017, ComCo prohibited the planned merger between **Ticketcorner** and **Starticket**, as this would potentially have led to the elimination of effective competition in a national market for third-party sales in the ticketing sector. In its decision of 12 December 2023, the FAC dismissed Ticketcorner's appeal due to the lack of any current and practical legitimate interest in the proceedings. This is because the TX Group, as the former owner of Starticket, withdrew from the relevant transaction agreement in 2020 and sold Starticket to See Tickets in the same year.

UPC acquired the television rights for Swiss Ice Hockey Championship matches in 2016. For years, it refused to allow Swisscom to **broadcast live ice hockey**. At the end of 2020, ComCo deemed this refusal illegal under competition law and fined UPC around CHF 30 million. In its judgment of *31 October 2023*, the FAC confirmed the ComCo decision against UPC. It first held that UPC had refused for almost three years to **offer** Swisscom (Schweiz) AG or its subsidiary Blue Entertainment AG terms for broadcasting live ice hockey matches. The court considered it necessary for Swisscom to offer at least a limited range of Swiss ice hockey broadcasts in order to be able to compete effectively in the pay-TV sector. Consequently, UPC's refusal to allow Swisscom to broadcast any matches led to a restriction of competition and UPC had abused its dominant market position. The court reduced the penalty to around CHF 29.1 million, as it considered the duration of the unlawful conduct to be 5 months shorter. UPC has filed an appeal with the Federal Supreme Court.

In 2019, ComCo approved the **Gateway Basel Nord (GBN)** merger project between SBB, Hupac and Rethmann. swissterminal AG requested ComCo under the Freedom of Information Act to grant access to the relevant unpublished documents. Although ComCo granted swissterminal access in principle, it redacted certain text passages and annexes and anonymised personal names to protect business secrets and personal data. After several intermediate stages and interim decisions, not to mention arbitration proceedings with the Federal Data Protection and Information Commissioner (FDPIC), swissterminal filed an appeal with the FAC in 2021, which the FAC dealt with in its judgment of *29 June 2023*. At issue was the redacting of several passages in various documents said to be trade secrets and the covering up of names and logos, i.e. personal data, of experts. The FAC held that the redacted passages were acceptable, with one exception, but disclosed the names and logos of the experts. Overall, ComCo won four fifths of its case. swissterminal has filed an appeal with the Federal Supreme Court.

In its judgment of *22 June 2023*, the Federal Supreme Court dismissed a **subsidiary constitutional appeal** by ComCo regarding the direct award of a contract for the expansion of a transformer station. The FSC held that ComCo is not entitled to file a subsidiary constitutional appeal on matters of internal market law, a legal issue that had hitherto not been decided. ComCo's constitutional appeal was directed against a judgment by the St Gallen Cantonal Administrative Court. This court rejected the original ComCo appeal against the award of the contract by a commune. In doing so, it did not consider in detail the breach of the procurement law rules on prior involvement and recusal rules alleged by ComCo, as the Administrative Court considered the grounds for objection to be limited in the case of such direct procedures.

On *5 June 2023*, the FAC issued its judgment on the appeal filed by CA Auto Finances Suisse SA (formerly FCA Capital Suisse SA, referred to below as 'Fiat') against ComCo's part-decision dated 26 June 2019 in relation to automobile leasing. ComCo imposed sanctions totalling CHF 30 million on ten **automobile leasing companies**. For several years, these companies exchanged information on promotional activities and the factors used in calculating leasing rates. Fiat filed both an action under administrative law and an appeal against this decision with the FAC. The action had already been rejected by the FAC. In its decision of 5 June 2023, the FAC rejected Fiat's appeal, confirmed the conclusions of the contested decision and validated ComCo's practice in relation to the exchange of confidential information between competing companies.

The FSC confirmed in a decision dated *9 May 2023* the FAC decision of *16 February 2021*, and the ComCo decision of 11 December 2017 against **Naxoo SA**. The FSC also concluded that Naxoo SA held a dominant position in the market for connecting to the telecommunications network in the city of Geneva. Naxoo had abused its position in relation to property owners, third-party system suppliers and end customers. It imposed inappropriate commercial conditions in its contracts for connecting properties, restricted opportunities to enter the market and limited technical developments. As Naxoo SA corrected certain data relating to its business figures following ComCo's decision and as these data formed the basis for calculating the

sanction, the FAC reduced the sanction imposed by ComCo from CHF 3.6 million to around CHF 3.26 million. Naxoo SA filed an appeal with the FSC against this decision. The FSC reduced the sanction from CHF 3.26 million to CHF 3.1 million because it considered that the unlawful conduct continued for 75 months instead of 85 months.

On *16 February 2023*, the FAC dismissed the appeal by Concepto Watch Factory SA (Concepto) and Manufacture 2824 SA (Manufacture 2824) against the ComCo decision of 28 June 2021. ComCo had imposed a sanction on the companies because they had breached their **duty to provide information**. The FAC assessed the sanction differently from ComCo, with the result that it reduced it by CHF 5,000 to CHF 35,000.



## 4 Activities

### 4.1 Activities in various markets

The Cartel Act and the Internal Market Act apply to all markets. As a result, the activities of ComCo and the Secretariat cover various sectors. Each year, the ComCo Secretariat receives several hundred reports and enquiries from members of the public, public authorities, businesses, federations, etc. On average, these reports and enquiries result in 80–90 cases each year. Around 75 per cent of these are small informal market monitoring procedures, some 18 per cent are medium-sized cases ('preliminary investigations') and about 7 per cent are larger cases ('investigations').<sup>2</sup> **The following remarks** present the most important findings from these proceedings and from cases in which advice was provided, opinions were submitted on national legislation or other forms of assistance were given, broken down by market sector. Information is also given on newly opened preliminary investigations and full investigations

#### 4.1.1 Automotive sector

On 1 January 2024, the Federal Council's **Motor Vehicle Ordinance** (MV Ordinance) replaced the ComCo's Motor Vehicle Notice (MV Notice). The Federal Council thus implemented the Pfister motion 'Effective enforcement of the Cartel Act in motor vehicle trading' (18.3898), which Parliament adopted in March 2022. In particular, the MV Ordinance regulates restrictions on parallel imports, access to spare parts and technical information for independent garages, multi-brand sales by garages and cancellation procedures for the protection of dealers. It does not contain any significant changes in content when compared with ComCo's MV Notice, but is binding not only on the competition authorities, but also on the courts. On 4 December 2023, ComCo issued its **Guidelines on the MV Ordinance**. These are intended to help companies understand the rules. The Guidelines also took effect on 1 January 2024 and replace the guidelines for the MV Notice.

In the automotive sector, certain vehicle suppliers are considering switching from sales through independent dealers (the dealer model) to sales through intermediaries (the **agency model**). Under the agency model, the vehicle supplier can fix the sales prices for the agents, provided the supplier covers all the agents' essential costs and risks (so-called genuine agency). In April 2023, a motor vehicle supplier notified ComCo of its planned agency model under the *opposition procedure*. ComCo analysed the agency model based on the test criteria set out in the EU vertical guidelines. Because it remained unclear whether the motor vehicle supplier is in fact going to bear all the agents' essential costs and risks and thus whether the motor vehicle supplier's price specifications could lead to unlawful vertical price-fixing agreements, the Secretariat opened a *preliminary investigation* in September 2023. The purpose of the preliminary investigation is to examine the allocation of costs and risks under the agency model in more detail.

In the *consultation* on an **online comparison platform for fuel prices at petrol stations**, the Secretariat assessed whether it is permissible under competition law not only for consumers but also for petrol station operators to report their fuel prices in real time to the TCS comparison platform. This platform can be used to check fuel prices, primarily for petrol and diesel, charged by petrol station operators in Switzerland. The ComCo Secretariat concluded that the provision

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<sup>2</sup> By way of explanation: Investigation proceedings are used to assess the legality or otherwise of restrictions on competition under the law on cartels, are comprehensive in their approach and take around 2-3 years. The decision is taken by the Competition Commission. A preliminary investigation is a preparatory procedure that is largely informal, in which enquiries are made into cases that are worth investigating and which normally take around one year. Market monitoring is informal administrative action under the law on cartels which, depending on the findings that the authorities make with regard to the market in question, may result in a preliminary investigation or a formal investigation or be terminated informally. Preliminary investigations and market monitoring are carried out and concluded by the ComCo Secretariat.

of current fuel prices from both consumers and operators on the TCS comparison platform leads to an exchange of competitively sensitive price data. In the Secretariat's view, this leads to a certain risk of collusion, which could lead to unlawful price-fixing agreements between the petrol station operators in certain cases. This risk of collusion can be significantly reduced if only the most favourable fuel prices of the petrol station operators are published, rather than all of them.

#### 4.1.2 Construction industry

In its decision against Deponie Höli Liestal AG, ComCo found that the company had abused its dominant market position in **the landfill sector** (see Section 3.1). This concluded the *investigation* opened in 2021.

In July 2021, the canton of Fribourg issued a call for tenders for some thirty contracts relating to clearing snow from and salting cantonal roads, and then suspended a number of procedures after receiving inexplicably high bids between March and April 2022. Six contracts were the subjects of appeals to the cantonal court. In its decision in December 2022, the cantonal court found that the prices in the bids submitted were manifestly excessive and that there may have been collusion between bidders. In April 2023, the COMCO Secretariat opened a preliminary investigation. The purpose of this investigation is to determine whether there is any evidence of collusion between certain companies in the canton of Fribourg with regard to the provision of **winter services**.

In February 2023, the Secretariat completed a *market monitoring procedure* on in the '**Objektschutz**' case relating to wall and floor coverings. In the case of larger properties, various building material suppliers send a notice known in German as an 'Objektmeldung' or 'Objektschutzmeldung' to the manufacturers of ceramic wall and floor coverings. In this way, the supplier notifies the manufacturer that it has advised the property owner and recommended the manufacturer's ceramic wall or floor tiles. At the same time, the supplier asks the manufacturer to provide it with a quote for the products and a delivery guarantee for the planned period. The manufacturer usually offers the building materials supplier an additional discount or a special price for advising the property owner and providing samples of the manufacturer's products. The supplier's notice to the manufacturer ('Objektmeldung') allows the manufacturer to plan production and supply capacities and to avoid reserving capacities for the same project multiple times. There were no indications that manufacturers were giving undertakings to building material suppliers to grant the best terms for the specific property to the building material supplier that was first to submit a notice. Furthermore, in this specific case, the wall and floor coverings from the various manufacturers were interchangeable. Overall, there were insufficient indications that suppliers' notices to manufacturers restricted competition between building materials suppliers.

In November 2023, the ComCo Secretariat opened two new *investigations*: one concerns alleged **bid rigging** in the canton of Neuchâtel. There are indications that several companies coordinated their bids and prices in public and private tenders for construction and civil engineering projects. The second investigation concerns the **steel trade**. It is suspected that three steel traders are linking the sale of reinforcing steel to the simultaneous purchase of spacer cages. In particular, the three companies appear to demand higher prices for reinforcing steel if construction companies want to purchase spacer cages and reinforcing steel from different dealers.

#### 4.1.3 Retail trade and consumer goods industry

In February 2023, the Secretariat concluded its *preliminary investigation* into the **Coop's payment processing** via Markant. The preliminary investigation revealed indications that the Coop holds a dominant position in certain procurement markets for everyday consumer goods. There were also indications that the Coop's conditions for processing payment transactions

with suppliers via Markant were unlawful. The Secretariat subsequently confronted the Coop with its concerns, recommending that the Coop allow the cost-neutral processing of payment transactions with suppliers as it did before 2021. The Coop decided to implement these proposals by cancelling the Markant contract at the end of 2023. The Secretariat therefore terminated the preliminary investigation. It decided not to continue its enquiries into whether and in which procurement markets Coop actually had a dominant market position and whether Coop abused this position. This would have been clarified if a full investigation had been carried out. Instead, the Secretariat considered it more expedient to resolve the competition law problems by making proposals.

In the *advice* that it provided on **data platforms in the sports industry**, the Secretariat assessed the exchange of data between manufacturers, wholesalers and retailers via a platform with optimised digital processes. The Secretariat recognised two problematic issues: firstly, the data platform must ensure that no competitively sensitive information can be exchanged between competitors - at supplier or retailer level. Secondly, (non-binding) electronic price recommendations from suppliers which are fed directly into the retailer's checkout system can lead to price-fixing agreements. However, the electronic transmission of individual cost prices is permitted if it is ensured that the traders set their own sales prices.

In March, ComCo opened an *investigation* into **perfumes**. It is suspected that producers of perfumes have been coordinating their pricing policy, preventing their competitors from supplying certain customers and restricting the production of certain perfumes. Perfumes are used in the manufacture of numerous products, in particular cosmetics and personal care products as well as detergents and cleaning agents.

In June, ComCo opened an *investigation* into the **online trade in printer accessories and office supplies**. There are indications that two wholesalers of printer accessories and office supplies have influenced the resale prices of various online retailers. As a result, the companies involved may have entered into vertical price-fixing agreements that are illegal under competition law.

#### 4.1.4 Energy

In the **gas sector**, the Secretariat had to deal with several informal enquiries regarding grid access requests from third-party suppliers in 2023 (see also Section 8.2). As part of *market monitoring procedures*, it ensured that third-party suppliers are granted grid access so that they can supply end customers. In spring 2023, the Secretariat also drafted an opinion in the *official consultation* on a discussion paper to the Federal Council with the key points of the new Gas Supply Act. In addition, the Secretariat commented on the 2023/24 concept report of the Winter Supply Task Force in relation to a partial revision of the Ordinance on Securing Supply Capacities in the Event of a Serious Shortage of Natural Gas. For further activities, see also Sections 8.2 and 8.4.

Due to the **energy crisis** that arose with the start of the war in Ukraine in spring 2022, various new legislative bills relating to the **electricity and gas sector** were also initiated at federal administration level in 2023 in order to ensure **security of supply** in winter. The competition authorities drafted a number of *opinions* on the electricity reserve in parallel legislative projects at primary and secondary legislative levels. The Secretariat also commented in *official consultations* with the Federal Office for National Economic Supply (FONES) regarding management measures during an electricity shortage and data monitoring in a partial revision of the Ordinance on the Organisation of the Gas Industry to Secure the National Economic Supply (VOGW). In all of these consultations, the Secretariat and ComCo advocated regulatory measures that are as competition-neutral and non-discriminatory as possible, and fair cost apportionment.

In the **electricity sector**, a new Federal Act on the Supervision and Transparency of Wholesale Energy Trading was drafted and submitted to Parliament. Its content largely corresponds to the requirements at EU level (REMIT Regulation). In order to effectively penalise system-damaging behaviour, the Secretariat and ComCo supported the creation of new criminal provisions in the Swiss law on insider trading and market manipulation. From a competition perspective, however, the competition authorities were critical of the obligation to publish insider information, also taken from EU law, particularly on the capacity and utilisation of facilities to generate, store, consume or transport electricity and gas. Due to the existing oligopolies in the markets for electricity production and trading in Switzerland, the increased transparency resulting from the publication obligations imposed on the major market players regarding the capacities and utilisation of their infrastructure could harm competition. In addition, the competition authorities drafted various *opinions* on several draft ordinances in relation to legislation on electricity supply and the energy sector.

#### 4.1.5 Financial markets

On 19 March 2023, the Swiss Financial Market Supervisory Authority (FINMA) approved the early completion of the *merger* between **UBS** and **Credit Suisse** on the grounds that there was good cause to do so. In the case of mergers between banks as defined in the Banking Act, FINMA may, in exceptional cases, exercise its decision-making powers under merger control law if it considers a specific merger to be necessary in order to protect creditors. In such cases, it invites ComCo to issue an *opinion*. In view of this, the Secretariat investigated the competition situation in the relevant markets on behalf of FINMA and, on this basis, ComCo assessed the effects of the merger on competition in its opinion dated 25 September 2023.

The Secretariat provided advice in relation to financial markets on several occasions. Sustainability was also a topic, for example when **advising the Swiss Bankers Association (SBA)**. The Secretariat reviewed the SBA's two self-regulatory documents in the area of sustainable finance ('Guidelines for financial service providers on the integration of ESG preferences and ESG risks into investment advice and portfolio management' and 'Guidelines for mortgage providers on the promotion of energy efficiency', in force since 1 January 2023). These guidelines on self-regulation, which were introduced in response to the Federal Council guidelines on sustainability in the financial sector, include obligations to inform customers about sustainability and to take the energy efficiency of properties into account during discussions with customers. The guidelines are binding for all SBA members and affiliation is possible for non-members. Because industry agreements of this kind regularly bind numerous players in a particular sector, there is often a certain tension with competition law. In this specific case, the Secretariat concluded that the two sets of guidelines on self-regulation are compatible with competition standards. Self-regulation will create minimum standards that apply to a significant part of the industry. However, the players retain their freedom to determine the relevant competition parameters. Customers also have the option of waiving this advice in advance.

On 29 June 2023, ComCo opened two *investigations* into **interchange fees for debit cards**. The aim is to find long-term solutions for the interchange fees for Visa and Mastercard debit cards. One investigation was opened against Visa and the other against Mastercard. The starting position in each case is different. A swift agreement and a decision in the form of an amicable settlement with Mastercard is on the horizon. There are differences with Visa that need to be clarified in more detail. The subject of the proceedings in both cases is the domestic interchange fee. This is the fee that a Swiss card issuer (usually a bank) receives from the payment processor (the acquirer) when the debit cards it issues are used. It is then deducted by the acquirer as part of its merchant commission from the sum received by the company that accepts the card during the payment process (typically a merchant), whereby the interchange fee is only one of numerous components of the merchant commission. The competition authority has only authorised an interchange fee for the market launch phase of the new Visa

and Mastercard debit cards. This phase was completed when each of the companies achieved a market share of 15 per cent.

#### 4.1.6 Healthcare

The canton of Zurich's decision to convert the **cantonal pharmacy** into a company limited by shares and then sell it to the University Hospital was the subject of a *market monitoring procedure*. The results of this market monitoring procedure are relevant for planned mergers involving a state-owned company and are therefore of interest to cantons and communes. In the case of *merger plans*, the question arises in certain cases as to whether companies belonging to a canton are to be regarded as autonomous entities and thus economically independent companies or as a single economic unit with the canton. The decisive factor here is whether the canton can exert a **decisive influence** on the business activities of the companies. If this cannot be ruled out, for example because the law permits it to do so, it should typically be assumed that there is a single economic entity. In cases such as the following four, it must be examined whether the canton is to be regarded as in control: 1) a canton decides to buy a company or part of a company from a private company or another canton, 2) a canton establishes a joint venture with another canton or with a private company, 3) a canton accepts a controlling interest by other companies or cantons in the ownership of a company formerly controlled by the canton. Mergers 4) involving state-owned companies are therefore treated in the same way as those involving private companies and are subject to the Cartel Act.

#### 4.1.7 Agriculture

The Secretariat assessed a **producer association for Swiss hops** made up of Swiss hop farmers as part of an *advisory procedure*. It concluded that the planned sale of all the hops by the managing director of the producer association could be regarded as a horizontal price-fixing agreement between the hop growers and that this agreement significantly restricts competition. However, this price-fixing agreement is justified for reasons of economic efficiency and therefore permissible if the sale of the entire hop crop by the managing director is necessary in order to market the hops more cost-effectively. The Secretariat did not consider the planned joint quality control of hops to be an agreement affecting competition and therefore it is permissible if it does not result in the exchange of sensitive data, for example by sharing data on individual production volumes. Although the planned joint processing of the hops qualifies as an agreement affecting competition, it is within the 'safe haven' for micro-enterprises under the SME notice and is therefore permissible.

#### 4.1.8 Media

In January 2023, ComCo opened an *investigation* into the French publishing group **Madrigall**. In September 2022, Payot, a bookseller operating in French-speaking Switzerland, reported Madrigall to the ComCo Secretariat for an alleged abuse of relative market power. It is alleged that Madrigall prevents the purchase of books in France at the customary prices and conditions there (see also 8.5).

The Secretariat conducted a *preliminary investigation* into **Google News** in response to allegations of unlawful behaviour. The substance of the allegations was that no articles from the news portal toggenburg24.ch could be found on Google News. In contrast, practically all articles from competitors were displayed on Google News. This non-listing on Google News allegedly puts toggenburg24.ch at a direct disadvantage compared with its competitors. Google argued that it had a considerable interest in providing Google News users with a broad and diverse range of news. However, in order to be recognised as a news site, certain minimum requirements had to be met, which toggenburg24.ch did not fulfil. Ultimately, it was accepted as a legitimate business reason that Google requires that certain minimum requirements be met for news sites to be listed on Google News, as long as these are not unreasonable. Overall, there were no indications of unlawful behaviour.

#### 4.1.9 Postal services

In November 2023, ComCo decided to conduct an in-depth investigation into the *plan announced for a merger* between **Swiss Post and Quickmail Holding AG** based on the results of the preliminary investigation. Through its two subsidiaries, Quickmail AG and Quickpac AG, the Quickmail Group delivers letters, unaddressed items (e.g. advertising flyers), newspapers, magazines and parcels throughout Switzerland. The preliminary review revealed indications that the takeover of the Quickmail Group by Swiss Post will create or strengthen a dominant position in various markets. Swiss Post argues that this is a restructuring takeover and that the negative effects on competition that may result from the merger would also result without the merger. ComCo prohibited the merger on *15 January 2024*, as it would strengthen or create a dominant position in various markets, eliminate competition in these markets and that there is a more competition-friendly alternative to the takeover by Swiss Post in the form of the takeover of the bankrupt Quickmail Holding AG by a different buyer.

The two *market monitoring procedures* opened in 2022 in connection with the business activities of **Swiss Post** were terminated in 2023. At the time of the assessment, there were insufficient indications of unlawful conduct on the part of Swiss Post that would have justified carrying out a preliminary investigation or a full investigation. It was also pointed out that it is not the responsibility of the Secretariat or ComCo to assess the regulatory issue of the extent to which state-owned companies are allowed to compete with private companies. The market monitoring procedures essentially concerned allegations of unlawful cross-subsidisation and tying transactions, as well as allegations of passing on data from the monopoly sector and discrimination against business partners.

#### 4.1.10 Sport

On 16 December 2022, the Fédération Internationale de Football Association (FIFA) adopted the **FIFA Football Agent Regulations** (FFAR). On 7 March 2023, a complaint against FIFA was filed with the supervisory authority in relation to the adoption of the FFAR. The FFAR introduces a cap on the remuneration of players' agents, as well as rules on being able to represent several parties at the same time. The complaint was accompanied by a request for interim measures, aimed at stopping the FFAR from coming into force, as scheduled for 1 October 2023, with regard to the contested provisions. After analysing the situation, the Secretariat decided not to request ComCo to order interim measures, as the requirements for doing so had not been met. However, it has opened a preliminary investigation, the aim of which will be to analyse the compatibility of some of the FFAR provisions with Swiss competition law.

#### 4.1.11 Telecommunications

In its decision of *4 December 2023*, ComCo concluded its *investigation into Swisscom's network expansion strategy* (see 3.1 and 8.2).

#### 4.1.12 Transport

In the areas of **passenger transport and freight transport**, the Secretariat and ComCo have issued several opinions on regulatory proposals within the framework of *official consultations* and *consultations* (see 8.4 below).

#### 4.1.13 Other activities

##### a. Relative market power

The new provisions on relative market power came into force on 1 January 2022. They are based on the Fair Prices Initiative and are intended to stop Switzerland from being an 'island of high-prices' (see Section 8.5 below). To make it easier for companies to report cases and

to enable the ComCo Secretariat to triage cases, the competition authorities published a fact-sheet on relative market power and provided a notification form to report abuses in December 2021.

The huge rush of reports discussed in Parliament failed to materialise in the second year after the provisions came into force: in 2023, the competition authorities received seven completed notification forms and around ten other reports and enquiries from citizens relating to relative market power. The notification forms, reports and citizens' enquiries submitted related to a wide variety of sectors. Very often, the issue was an alleged abuse of relative market power in the relationship between a manufacturer and a retailer.

The reports received in 2023 regarding the abuse of relative market power did not result in the opening of any *investigations* or *preliminary investigations* in 2023. There are various reasons for this: in the majority of cases, the information given by the companies and individuals making the reports did not contain sufficient evidence of an abuse of relative market power in violation of competition law. However, there were also cases where companies did not pursue their complaint after initially contacting the Secretariat and, for example, failed to submit a completed notification form despite being requested to do so by the Secretariat. This may be due in some cases to the fact that the notifying company was satisfied with the Secretariat's preliminary assessment and was able to reach an agreement with the company concerned.

## **b. Vertical agreements**

In December, the Secretariat terminated the *preliminary investigation* into **metal cutting tools** without consequences. The suspicion that the companies may have entered into sanctionable price, customer and territorial protection agreements was not substantiated in the preliminary investigation. The Secretariat considered it permissible for the Swiss distribution company of an internationally active manufacturer of metalworking tools to pass on certain of its previous customers to other dealers. In order to set up this dual distribution system, the distribution company was allowed to provide the dealers on a one-off basis with confidential information, primarily on sales prices that the distribution company had previously charged to these customers. When tools are shipped directly from the manufacturer's warehouse abroad to the dealers' customers, there is an exchange of information between the distribution company and the dealers about the dealers' customers and the products and quantities purchased. The Secretariat also judged this exchange of information to be permissible, as the scenario under investigation did not give rise to any fears of adverse effects on competition.

In December, the ComCo Secretariat opened a *preliminary investigation* into a distribution system for fire extinguishers. The supplier sells the fire extinguishers via agents as part of an agency model but also sells to end customers itself. It is suspected that this is not a genuine agency model (see 4.1.1) and that there are unlawful vertical price-fixing agreements and territorial protection clauses.

As part of *market monitoring procedures* following suspicions of vertical price-fixing agreements and foreclosure of the Swiss market, the Secretariat drew the attention of the companies concerned to the competition concerns and recommended sending circulars to sales partners and training for employees, making it clear that unsolicited orders from customers in Switzerland can be accepted without restriction and that distributors are free to set their own prices.

## **c. Investigations**

Four house searches were carried out in the report year. In the investigation into perfumes (see 4.1.3), the house searches and interrogations were coordinated with other competition authorities from the outset. Before and during the operation, exchanges took place with the European Commission, the US Department of Justice Antitrust Division (DoJ) and the UK Competition and Markets Authority (CMA). Practical aspects were coordinated, for example

with regard to the timing of the operation, the regulation of possible conflicts when securing the electronic data or the timing and content of the press release. Potential legal issues were also discussed and resolved (e.g. cautioning persons who are questioned as witnesses in Switzerland but who could face criminal prosecution in the USA). As the headquarters of two of the four major perfume manufacturers are located in Switzerland, the contribution of the Swiss authority was crucial to the organisational success of the entire operation. For the remainder of the investigation, the exchange with the European Commission can be continued on the basis of the bilateral cooperation agreement. Under this agreement, each side can also hand over evidence they find to the other.

The other house searches concerned investigations into online trading in printer accessories and office supplies (see 4.1.3), steel trading (see 4.1.2) and construction companies in the canton of Neuchâtel (see 4.1.2).

## 4.2 Internal market

The Internal Market Act (IMA) guarantees free and equal market access throughout Switzerland. In intercantonal cases, market access must be granted in accordance with the place of origin principle (the 'Cassis de Dijon principle'). On 5 June 2023, ComCo provided an *expert report* on the question of the conformity of the ban on **single-use plastic** in catering establishments in the canton of Geneva with the IMA. For non-cantonal providers, this ban may conflict with the right to market access in accordance with the Cassis de Dijon principle. ComCo considered the restriction of market access resulting from the ban to be justifiable in principle on the basis of a balancing of interests in application of the IMA.

The Cantonal Court in Vaud confirmed the application of internal market law to market access for an **out-of-canton Spitex organisation** in a final judgment dated 14 August 2023. The practice of the Vaud Department of Health did not comply with the IMA. The Cantonal Court followed the ComCo's *expert report* of 30 January 2023 in its deliberations.

The transfer of cantonal and communal monopolies to the private sector must be carried out on the basis of the Internal Market Act by means of a non-discriminatory public tender. The case law also considers limited exclusive rights of public authorities as monopolies under internal market law. The awarding of concessions by monopolies where it is in the public interest has been subject to the revised public procurement law since 1 January 2021. Accordingly, the Secretariat analysed these issues in *market monitoring procedures*. Further market monitoring procedures in the area of monopoly transfer concerned the letting of **catering facilities** in the city of Zurich as well as the **funeral** and **taxi industry** in several cantons and communes.

In 2021, ComCo recommended that the procurement of **electricity** by certain local authorities be put out to public tender. The Secretariat is carrying out several *market monitoring procedures* on this issue. The upcoming changes to electricity supply legislation also had to be taken into account. Due to the price situation in the electricity market, which is still tense, no further measures are being taken at present, but in the medium term, outstanding legal issues should be clarified by the courts. The Secretariat is committed to ensuring that the revised procurement law and the Intercantonal Agreement on Public Procurement (IVöB 2019) are implemented in accordance with internal market law.



## 5 International

**EU, UK, USA:** Based on the cooperation agreement between Switzerland and the EU, ComCo exchanged information with the EU Commission in parallel investigations in the healthcare and financial sectors. In relation to perfumes, ComCo coordinated house searches in consultation with the EU Commission, the Antitrust Division of the US Department of Justice and the UK Competition and Markets Authority (see 4.1.13 c).

**Germany:** The agreement on cooperation between ComCo and the German Bundeskartellamt (Federal Cartel Office) came into force on 1 September 2023. Modelled on the cooperation agreement concluded between Switzerland and the EU in 2013, the agreement with Germany allows, in particular, the coordination of proceedings and the exchange of confidential information in parallel proceedings. The possibility of exchanging information gives the agreement the character of a 'second generation' agreement. In one respect, the agreement with Germany goes even further than the agreement with the EU. This is because the issue of the service of official documents was settled with Germany: ComCo can serve official orders on companies in Germany via the Bundeskartellamt, without requiring a registered office or domicile for service in Switzerland. A solution of this kind was not possible with the EU, as the service of official orders on companies in EU member states is the responsibility of these states. If the addressee of the order has neither a registered office in the EU nor a domicile for service in Switzerland, service must be effected through diplomatic channels. The solution with Germany therefore represents considerable added value for ComCo.

**OECD:** The ComCo president attended the OECD Competition Week in Paris in June, and Secretariat staff took part online. The following topics were discussed, among others: assessing and measuring the benefits to competition achieved by competition authorities, the future of leniency programmes, the relationship between competition and innovation, theories of harm from digital mergers, algorithmic collusion and algorithmic competition, competition and sustainability considerations in the circular economy, and the pros and cons of the consumer welfare standard. The following topics were discussed at the OECD Competition Week in December, in which Secretariat staff took part online: competition and professional sport, the optimal organisation and powers of competition authorities, the role of innovation in competition law enforcement, serial acquisitions and industry roll-ups, consideration of out-of-market efficiencies in competition law enforcement, the use of economic evidence in competition cases and the ex-post assessment of merger conditions.

**ICN:** The ComCo president attended the 22nd ICN Annual Conference in Barcelona together with the Director and the ICN Coordinator. The Secretariat took part in various ICN surveys and contributed to various ICN reports in 2023. The Secretariat was particularly active in the area of challenges and opportunities in investigating cases using innovative digital means. In particular, employees of the Secretariat participate in the newly founded Technologists Group in order to take part in the exchange of information and knowledge in the digital field.

**UNCTAD:** The ComCo Secretariat took part in the UNCTAD Annual Conference in Geneva in July 2023. Participation in the working group on cross-border cartels continued in close cooperation with SECO. The mandate for this working group was extended by one year, and expanded to include combating bid rigging in public procurement as an item for discussion. The ComCo Secretariat shares the expertise it has acquired in the area of bid rigging with foreign competition authorities within the framework of the working group.

## 6 Legislation

On 24 May 2023, the Federal Council adopted a draft bill and the dispatch on the **partial revision of the Cartel Act**. The proposed revision is intended to improve the effectiveness of the Cartel Act and implement three parliamentary initiatives. Key elements are the strengthening of civil competition law, the improvement of the objection procedure and the modernisation of merger control. The change from the current qualified market dominance test to the significant impediment to effective competition test (SIEC test) is intended to bring the competition review standard for mergers into line with international practice. The project is also intended to implement the demands of the three motions 16.4094 Fournier, 18.4282 Français and 21.4189 Wicki. In the autumn of 2023, the Council of States Economic Affairs and Taxation Committee began detailed deliberations. The debate in the chambers of Parliament is planned for 2024. The GS-EAER and SECO are in charge of the partial revision of the Cartel Act in the Federal Administration. The ComCo Secretariat is involved in the work.

A **reform of the competition authorities** (institutional reform) is not part of this partial revision of the Cartel Act, but will be tackled in parallel. On 1 May 2023, the EAER, mandated by the Federal Council, appointed a commission of experts independent of the Federal Administration, which is chaired by Professor Hansjörg Seiler, a former federal judge. The commission has drawn up the fundamentals required for a well-founded and broad-based reform of the competition authorities. It assessed specific models for the organisation of the authorities and courts with regard to the duration of proceedings, the effective protection of competition and compatibility with the Federal Constitution and the ECHR. The commission's report will serve the EAER as a basis for developing a strategy for reforming the competition authorities. The EAER is to submit a detailed proposal to the Federal Council in the first quarter of 2024.

The current status of other **parliamentary procedural requests** relating to the Cartel Act and the Internal Market Act is as follows:

- **Motion 16.4094 Fournier** of 15 December 2016 ‘Improve the position of SMEs in competition proceedings’ was implemented by the Federal Council in the partial revision of the Cartel Act by proposing deadlines for administrative proceedings related to competition law and the reimbursement of party costs even in first instance administrative proceedings.
- To fulfil the **motion 18.4282 Français** of 13 December 2018 ‘The revision of the Cartel Act must take account of both qualitative and quantitative criteria in assessing the illegality of an agreement restricting competition’, the Federal Council submitted an amendment to Articles 4, 5 and 27 of the Cartel Act with regard to joint ventures, quantitative criteria of materiality and minor cases to Parliament as part of the revision of the Cartel Act.
- **Motion 21.4189 Wicki** of 30 September 2021 ‘Safeguard the inquisitorial principle – do not reverse the burden of proof in the Cartel Act’ will be implemented in the partial revision through corresponding declaratory provisions in the Cartel Act.
- Based on **motion 18.3898 Pfister** of 27 September 2018 ‘Effective implementation of the Cartel Act in the motor vehicle sector’, the Federal Council drafted an ordinance. This came into force on 1 January 2024.
- **Motion 22.3838 Gugger** of 17 June 2022 ‘Stop the unilateral introduction of the agency model in the motor vehicle market’ has not yet been dealt with in the Councils.
- **Motion 22.3885 National Council Economic Affairs and Taxation Committee Motion** of 15 August 2022 ‘Preliminary investigation of the Competition Commission Secretariat or Competition Commission investigation into competition issues in relation to thermal and motor fuels’ was rejected by the Council of States on 15 June 2023 and is therefore closed.

- **Motions 22.3976 Maitre** and **22.3977 de Quattro** of 22 September 2022 ‘Ban interchange fees for payments with debit cards’ have not yet been dealt with in the Councils.
- **Motion 22.4404 Rechsteiner** of 14 December 2022 ‘Speed up procedures - increase legal certainty’ calls for the investigation phase by the ComCo Secretariat (i.e. from the opening of proceedings until the Secretariat submits its proposed decision to ComCo) to take no more than one year, with the possibility of a one-year extension. The proposal has not yet been discussed in the Councils.
- **Motion 23.3069** of 8 March 2023 ‘Digital Markets Act for Switzerland’ by the **Social Democratic parliamentary group** wants to instruct the Federal Council to propose the legislative amendments required to implement the key objectives of the European Digital Markets Act (DMA) in Switzerland. The proposal has not yet been discussed in the Councils.
- **Motion 23.3224 Français** of 16 March 2023 ‘Institutional reform of the Competition Commission’ calls for a review of ComCo's structure, its prerogatives and resources, and for a functional separation of its roles as prosecutor and judge. The proposal will be dealt with by the Council of States as the first chamber.
- **Motion 23.3487 Romano** of 12 April 2023 ‘The Credit Suisse case. Examine all possible measures to safeguard jobs in Switzerland’ requires the Federal Council and FINMA to take all possible steps to ensure that ComCo initiates an in-depth inquiry under Article 33 of the Cartel Act. The proposal has not yet been discussed in the Councils.
- **Motions 20.3531 Caroni / 20.3532 Rieder** of 8 June 2020 ‘Fairer competition vis-à-vis state-owned companies’ aimed to propose the legislative amendments required to curb distortions of competition by state-owned companies. On 15 September 2023, the Federal Council announced that the demands of these two motions are to be implemented by amending the Corporate Governance Guidelines. Both motions were referred to the Federal Council.
- **Postulate 19.4379** of the **Economic Affairs and Taxation Committee of the Council of States** of 18 October 2019 ‘A fair procedure for access to closed cantonal markets’ instructed the Federal Council to analyse Article 2 paragraph 7 of the Internal Market Act and identify possible options for improvement. The Federal Council's report of 18 October 2023 concluded that the existing legal provisions had contributed to the opening of closed markets and saw no need for further legal action at that time.
- Mention should also be made of the **interpellations 22.3707 Estermann** of 16 June 2022 (‘Necessary corrections in the healthcare system? (4)'), **23.3469 Gigon** of 11 April 2023 (‘New megabank Credit Suisse/UBS. How must we adapt our legislation to ensure competition?’), **23.3736 Gigon** of 15 June 2023 (‘Extension and monitoring of the ban on geo-blocking’), **23.4114 Hess** of 27 September 2023 (‘Initial assessment of the implementation of the Fair Prices Initiative’), **23.4128 Gössi** of 28 September 2023 (‘Effectiveness of the reporting obligation for dominant companies pursuant to Art. 9 para. 4 of the Cartel Act’), **23.4299 Addor** of 29 September 2023 (‘Merger UBS-CS: And the Competition Commission?’), **23.4513 Gugger** of 22 December 2023 (‘Big Tech: Abuse of market power vis-à-vis SMEs and hospitals’) and **23.4416 Maitre** of 20 December 2023 as well as **postulate 23.3738 Gigon** of 15 June 2023 (‘Status and development of Switzerland as a high-price island - for consumers and SMEs’).

## 7 Statistics

The following statistics provide an overview of the work of ComCo and its Secretariat in 2023:

	2023	2022	2021
<b>Investigations</b>			
Conducted during the year	25	19	20
Investigations carried forward from the previous year	18	16	16
Newly opened investigations	7	3	4
Investigations resulting from splitting up existing investigations	0	0	0
<b>Final decisions</b>	2	1	4
Amicable settlements	0	1	3
Administrative rulings	1	1	2
Sanctions pursuant to Art. 49a para. 1 Cartel Act	2	1	4
Partial decisions	0	0	0
Procedural rulings	2	1	2
Other decisions (concerning publications, fees, access to files, etc.)	3	1	2
Interim measures	0	0	1
Sanctions proceedings under Art. 50 ff. Cartel Act		1	2
<b>Preliminary investigations</b>			
Conducted during the year	17	14	11
Investigations carried forward from the previous year	10	8	7
Newly opened investigations	7	6	4
Concluded preliminary investigations	8	5	3
Investigations opened	3	0	1
Modification of conduct	3	4	1
No consequences	2	1	1
<b>Other activities</b>			
Notifications under Art. 49a para. 3 let. a Cartel Act	2	5	1
Advice given	29	14	33
Market monitoring procedures concluded	48	52	48
Freedom of information applications	18	22	10
Other enquires dealt with	500	511	519
<b>Mergers</b>			
Notifications	33	49	31
No objection after preliminary investigation	32	49	31
Investigations	2	0	0
ComCo decisions after investigation	0	0	0
Authorisation refused	0	0	0
Authorisation with conditions / requirements	0	0	0
Authorisation without reservations	0	0	0
Early implementation	0	0	0
<b>Appeal proceedings</b>			
Total number of appeals before the FAC and FSC	31 (67)	35 (88)	39 (92)
FAC judgments	11 (16)	6 (31)	11 (15)
Success for the competition authority	9 (14)	4 (10)	8 (12)
Partial success	2 (2)	2 (6)	2 (2)
Unsuccessful	0 (0)	0 (3)	1 (1)

FSC judgments	1 (1)	5 (7)	5 (12)
Success for the competition authority	1 (1)	4 (4)	4 (11)
Partial success	0	1 (2)	1 (1)
Unsuccessful	0	0 (1)	0 (1)
Pending at the end of year (before FAC and FSC)	24 (56)	29 (69)	30 (71)
Expert reports, recommendations and statements etc.			
Expert reports (Art. 15 Cartel Act)	0	1	0
Recommendations (Art. 45 Cartel Act)	0	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	0	0	2
Follow-up checks	0	0	0
Notices (Art. 6 Cartel Act)	0	1	0
Opinions (Art. 46 para. 1 Cartel Act)	318	327	335
Consultation proceedings (Art. 46 para. 2 Cartel Act)	13	14	11
State aid assessments	0	0	1
Internal Market Act			
Recommendations / investigations (Art. 8 IMA)	0	0	1
Expert reports (Art. 10 IMA)	2	1	4
Market monitoring / consultations / other completed enquiries	52	62	68
Complaints (Art. 9 para. <sup>2bis</sup> IMA)	0	3	1

The following key findings emerge from the statistics for 2023 and a comparison with the figures for 2022 and 2021:

- Investigations: ComCo opened 7 new investigations and - as in the previous year - closed a small number when compared with other years.
- Preliminary investigations and market monitoring procedures: The number of preliminary investigations increased slightly. The market monitoring procedures carried out were in line with the average for the past 5 years.
- Mergers: As in the last two years, an above-average number of mergers were reported to ComCo. These reports tied up resources that would otherwise have been used primarily in investigations.
- Appeals<sup>3</sup>: As in the previous year, the courts, especially the FAC, issued an above-average number of decisions last year<sup>4</sup>. The courts thus made a decisive contribution to legal certainty. The courts largely confirmed the ComCo rulings.
- Expert reports, recommendations and opinions: While the number of expert reports and recommendations remained very low, the competition authorities continued to carry out

<sup>3</sup> COMCO decisions (rulings) are usually directed against several parties. They file individual appeals with the courts. As a rule, the courts deal with each appeal individually and issue several judgments on a single COMCO decision. Some of these court judgments are very similar in substance, but they can also deal with individual issues. From 2021, not only will parallel appeal proceedings before the courts be counted together as one case per COMCO decision, but the total sum of all separate and parallel appeals will also be listed in brackets. The same applies for statistics at court level: The judgments are counted as a single judgment, irrespective of the number of appeals against a COMCO decision, and the judgments on the individual appeals are also listed in brackets (e.g. the FAC judgments on the nine appeals against the COMCO decision on air freight are counted as one judgment and in brackets as nine judgments).

<sup>4</sup> The FSC referred a series of judgments back to the FAC regarding the restriction of parallel imports of French-language books (the most recent judgments date from 8.12.22). The related enforcement judgments of the FAC on the recalculation of sanctions and costs were not included in the statistics.

a great deal of regulatory work. Individual services invested a considerable proportion of their resources in commenting on draft laws and ordinances.

- IMA: As in previous years, the ComCo Secretariat dealt with a large number of internal market issues in view of the limited resources available. Accordingly, the number of consultations and market monitoring procedures remains high.

## 8 Special topic 2023: Combating market foreclosures and excessive prices

Prices in Switzerland are higher in various markets than in neighbouring countries. The price differences can be partly explained by higher wages and infrastructure costs, together with consumer behaviour. However, they are also due to market-restricting and anti-competitive laws (e.g. trade barriers) and unlawful behaviour on the part of businesses. ComCo advocates more competition and opposes restrictive regulations; it seeks to open up markets and combat unlawful behaviour. In recent years, ComCo has focused on combating agreements to foreclose the Swiss market as well as price maintenance and price fixing agreements.

### 8.1 Combating vertical foreclosure and resale price maintenance

As part of the 2003 revision of the Cartel Act, Parliament defined two types of vertical agreements for the first time, **territorial protection agreements** and **price maintenance agreements**, as particularly harmful (hard) agreements affecting competition. As a result, ComCo has regularly taken action against territorial foreclosures and price maintenance. The Gaba-BMW-Nikon decision trilogy kicked things off. In the BMW case, an export ban in the sales contracts of BMW dealers in the European Economic Area (EEA) prevented Swiss consumers from buying BMW vehicles in Germany with price savings of up to 25%. The courts upheld the three ComCo rulings. In its leading judgment in Gaba, the Federal Supreme Court also stated that hard agreements typically cause significant harm to competition and that no actual effects need to be proven. The introduction of a presumption of significant harm reduced the duration of proceedings and made it easier to enforce the Cartel Act in practice. ComCo concluded each of the cases against Eflare (2016, territorial protection), Husqvarna (2017, price maintenance), RIMOWA (2018, territorial protection), Stöckli Ski (2019, price maintenance), Bucher Landtechnik (2019, territorial protection) and Pöschl Tabakprodukte (2021, territorial protection) within 10-28 months (15 months on average), all with amicable settlements. These price maintenance and territorial protection agreements involved the following: Husqvarna influenced the prices charged by dealers who gave what it regarded as excessive discounts on the sale of Automower robot lawnmowers. Stöckli stipulated in its sales contracts with retailers that they were not allowed to undercut the ski prices of the Stöckli branches. Price-fixing agreements of this type reduce price competition and thus lead to higher prices. RIMOWA prohibited its German sales partners from exporting RIMOWA products to Switzerland. Swiss consumers were therefore unable to order RIMOWA suitcases online from Germany, where they were 20-30% cheaper. The ComCo decision in the Bucher Landtechnik case then led to the import of cheaper New Holland tractors and spare parts without restriction. Overall, ComCo's decisions encouraged parallel and direct imports as well as price competition in Switzerland.

ComCo's **notices on vertical agreements** and on the **automotive sector** (replaced by the Motor Vehicle Ordinance on 1 January 2024, see Section 4.1.1) have also contributed to the promotion of parallel and direct imports and to preventing the isolation of Swiss markets. They also provide companies with guidelines on sales and make it clear that the same rules apply to vertical agreements in Switzerland as in the EU. Clear and largely harmonised rules in international distribution promote competition in Switzerland.

In addition to the ComCo investigations, the Secretariat has conducted several **preliminary investigations** and over 100 **market monitoring procedures** in the last 10 years. For example, the Secretariat has analysed sales of Yamaha motorbikes, Costa cruises and laboratory reagents. In particular, it has assessed distribution contracts that include restrictions on exports to Switzerland, provisions that invalidate warranties on imported products, obligations imposed on Swiss suppliers to purchase from an exclusive source, allegations by sales staff that their supplier had forbidden them to grant discounts, and negative responses to orders from Switzerland on the grounds that dealers were not allowed to sell outside the assigned contract territory. By amending the contracts, sending circulars to sales partners and providing internal

training for employees of the companies concerned, competition concerns have been eliminated and competition strengthened. Certainty about pricing freedom increases the likelihood of discounts and price reductions; clarity about direct and parallel import options improves the negotiating position of buyers in dealings with Swiss suppliers and leads to increased competitive pressure in Switzerland. Direct imports have also become easier for consumers with the increasing importance of online shopping. Price comparison websites help consumers find the best offers. This increases the pressure on prices. Around ten years ago, the Secretariat was still regularly monitoring the market for bans and restrictions on online trading. With increasing digitalisation, the online sales channel has become established and it is rare that there is any reason for the competition authorities to intervene.

## 8.2 Opening up of markets

ComCo opens up markets through its decisions on infrastructure and by combating anti-competitive behaviour. In the notorious proceedings on the expansion of Swisscom's **fibre-optic infrastructure**, ComCo took the most important decision regarding the opening of markets this year. With its 'Network Expansion Strategy 2025', Swisscom (Schweiz) AG changed the design of the network from the beginning of 2020 so that competitors would no longer have direct access to the network infrastructure (Layer 1 access) in areas that it is expanding with fibre optics alone. ComCo required Swisscom to decommission fibre optic connections already in operation that do not allow Layer 1 access within certain transitional periods or to convert them so that Layer 1 access is possible for third parties. It also prohibited Swisscom from building or expanding fibre optic networks in this restrictive manner in the future (see Section 3.1).

In the **gas sector**, the Secretariat also dealt with several requests for grid access from third-party suppliers in 2023. Without initiating proceedings, it ensured that third-party suppliers are granted grid access to supply end customers (see 4.1.4). The fact that it was possible to do this quickly and informally as part of market monitoring procedures is the result of key decisions in the energy sector: in 2020, ComCo liberalised the gas market - as it had done around twenty years previously in the electricity sector (decision on Entreprises Electriques Fribourgeoises / Watt Suisse AG), by reaching an agreement with ewl Energie Wasser Luzern Holding AG (ewl) and Erdgas Zentralschweiz AG (EGZ) on transmission via the natural gas networks. With this legally binding decision, ComCo opened up the natural gas supply market in Central Switzerland. In the past, these two grid operators had only granted third parties access to the grid in order to supply certain large industrial customers which met the requirements of the 'Association Agreement', an agreement under private law between the Association of Grid Operators and organisations of major customers. In the ComCo ruling, the two network operators were required to arrange network access to their pipeline networks for all third parties on request. Following the publication of the ComCo decision, numerous other grid operators authorised supplier changes not covered by the Association Agreement, even though the decision was only legally binding on EGZ and ewl. Since then, the competition authorities have not had to open any preliminary investigations or investigations into refusal of grid access and have instead been able to deal with various enquiries from third-party suppliers informally and promptly. This suggests that there have been no more network access denials since the ComCo decision was published. The number of changes of supplier in the natural gas supply sector more than tripled between 2017 (2.4%) and 2020 (7.7%), which is probably also related to the outcome of the ComCo proceedings (see EVU Partners, Study Gas Market Switzerland 2021, p. 4).

## 8.3 Combating price-fixing agreements

Rivalry between competitors drives prices down. In order to increase their own turnover and profits, businesses try to attract customers. They must ensure that what they offer appears attractive. They entice customers away from their rivals with more favourable offers. However,



some companies try to avoid competing by entering into **price-fixing agreements**. These lead to excessive prices and have therefore been banned by law. ComCo enforces this ban by systematically investigating indications of price fixing, gathering evidence by searching offices, and penalising violations of the law with sanctions.

One of ComCo's priorities in the area of price-fixing agreements is to prevent and combat **bid rigging**. In the past, companies regularly discussed their bids with each other before submitting them. They agreed on the amount of their bids, decided who was to be the 'winner' and created the impression of competition by submitting bids that they knew would be unsuccessful. As ComCo showed in the case concerning the Ticino road construction cartel, this leads to substantial price increases. Bids were around 30 per cent lower after the cartel was broken up. ComCo also unmasked and fined construction cartels in the cantons of Aargau, Zurich, St Gallen (See-Gaster) and Graubünden, bid-rigging by electricians in the cantons of Bern and Geneva and agreements relating to tunnel cleaning and optical networks. The agreements dealt with by ComCo cover around 2,000 procurement contracts. By rigorously pursuing unlawful practices, ComCo uncovers agreements that drive up prices and thus prevents further bid-rigging agreements that cost the public and private sectors a lot of money.

Companies in **other markets** have also agreed on prices. Both business customers and consumers can be affected by these inflated prices. As the ComCo investigations revealed, freight forwarders and airlines coordinated and agreed on surcharges for air transport. Suppliers of door products agreed to comply with minimum margins. Car dealers set discounts and flat rates for deliveries and harmonised their pricing policy. Plumbing wholesalers decided to work together to increase profits. Galvanising plants agreed on joint price increases, surcharges and minimum prices. Driving instructors coordinated the prices of driving lessons within their association.

Not all agreements between businesses on prices are so harmful that they are prohibited. In such cases, ComCo ensures that these price-fixing agreements do not lead to the setting of excessive prices, but are limited to elements that are important for markets to function. For example, ComCo has been monitoring credit and debit card fees for 20 years, as the **banks** work together to apply the interchange fee. This is the fee that credit card issuers receive from the companies (acquirers) that conclude contracts with merchants who accept credit cards as means of payment. For each payment with a card, a fee of this type is due from the acquirer to the issuer, which is part of the fee that the acquirer charges the merchant as commission for accepting a card payment. Such fees may help to ensure the smooth operation of payment card markets and may be justified for efficiency reasons in certain circumstances. ComCo has held that such justification applies with regard to domestic interchange fees for credit cards, provided that their amount is limited. In 2004, a fee of CHF 1.69 was charged for a credit card transaction of CHF 100. Over the course of three investigations, ComCo agreed with the parties to successive reductions in the domestic interchange fees for credit cards to 44 centimes per 100 francs. In relation to debit cards, two new investigations have been opened in connection with interchange fees (see above 4.1.5).

## 8.4 Opinions on regulatory legislation

Legislators regulate behaviour in numerous markets and areas of life in primary and secondary legislation. Regulation serves specific objectives, which can be achieved through various forms of state intervention. The state can act as a provider of services or products itself or leave this partly or entirely to the private sector. Market-based systems have the advantage that the businesses can constantly adapt their behaviour to technological and economic developments. Indirectly influencing markets, for example by defining framework conditions or levying incentive taxes, is usually the mildest form of state regulation. Conditions and requirements, bans and subsidies are tougher forms of state intervention in the market economy. Price regulation, state monopolies and market-isolating standards regularly inhibit competition. Legislators

therefore also use regulation to set the openness of markets and the scope for competition. On the other hand, a certain level of regulation is needed to ensure that markets function properly.

So what is the **role of the competition authorities** in the legislative process? Draft primary and secondary legislation from federal offices that could influence competition must be submitted in advance to the ComCo Secretariat for review. In its opinions or through participation in working groups, the Secretariat points out any competition and economic problems as well as alternative solutions. It provides arguments and discusses the benefits and costs of various instruments and regulations that can be used to achieve the legislator's objectives. The Secretariat has no right to decide on or veto the planned legislation. The Federal Council ultimately decides which path it proposes to Parliament.

ComCo comments on draft legislation that restricts or otherwise influences competition as part of the consultation process. ComCo scrutinises the draft from a competition perspective and points out potential problems. The legislator does not have to follow this opinion but has to consider the arguments as part of the balancing of interests.

The competition authorities have concentrated in particular on the sectors of electricity, gas, healthcare, agricultural policy, transport, postal services and procurement in recent years:

- For example, the competition authorities shared their experience and knowledge of restrictive bidding agreements and restrictions on the internal market in the revision of the **law on procurement**, which came into force at federal level on 1 January 2021. They drafted opinions, recommendations and reports, and participated in working groups. This is another reason why federal, cantonal and communal procurement agencies can take more effective action against anti-competitive bidding practices if there is evidence of such. As procurement offices are now required to report any indications of bid-rigging agreements, the preventive effect against such agreements is increased.
- The competition authorities have also invested a great deal of effort in improving regulation in the **electricity sector**. Two legislative projects were particularly significant in 2023, for example. On 29 September 2023, Parliament passed the Federal Act on a Secure Electricity Supply from Renewable Energy Sources (a consolidation act). The relevant amendments to the law are due to come into force on 1 January 2025. As a result of this law, end customers in the basic supply will still be prevented from choosing their basic electricity provider on the free market. This also applies to those basic providers which have substantially increased electricity prices for end customers since the start of the energy crisis because of their procurement portfolio. In addition, metering is to be monopolised. These developments must be viewed critically from a competition perspective. In the official consultation on various amendments to ordinances made necessary by the consolidation legislation, the Secretariat worked to ensure that additional distortions of competition are minimised as far as possible. The Secretariat also took the view that regulatory safeguards should be put in place to ensure that distribution system operators, as monopoly providers, cannot charge unreasonable prices for their services.
- In spring 2023, a consultation procedure was carried out in relation to a discussion paper submitted to the Federal Council on the new **Gas Supply Act**. This discussion paper sets out various key points of the future law. The Secretariat was in favour of full regulatory market liberalisation in relation to end customer supply. However, the Federal Council approved only a partial opening up of the market to favour major consumers which consume more than 300 MWh per year. In addition, the Secretariat submitted various proposals aimed at ensuring non-discriminatory and fair cost allocation in the statutory monopoly sectors.

- Since March 2022, the Secretariat has been involved in the **Winter Gas Supply** task force. It made the participants in the task force aware of the potential for abuses of competition that arise from agreements made to guarantee winter supplies. From September 2023, the Secretariat decided not to take further part in task force meetings. From the Secretariat's point of view, the essential requirements for guaranteeing the winter supply of gas have been established. The members of the task force are aware of the Secretariat's competition concerns. It is now up to the gas industry to take these concerns into account when implementing the winter supply programme.
- In relation to **passenger** and **freight transport**, the Secretariat and ComCo were invited to provide their opinions as part of various consultation procedures. The competition authorities have advocated non-discriminatory access to the public transport industry's joint sales infrastructure for external mobility providers. They have also focused on a competition-neutral design of planned funding measures for freight transport.

## 8.5 Relative market power

The new provisions on relative market power came into force on 1 January 2022. They are based on the Fair Prices Initiative and are specifically designed to combat Switzerland's position as a 'high-price island'. A company has relative market power if another company does not have sufficient and reasonable alternative options and is therefore dependent on products or services from that company. Relative market power in itself is not unlawful. However, the new provision prohibits a company with relative market power from abusing its position by obstructing a dependent company in competition or by imposing an undue disadvantage.

An abuse may in particular arise where the same goods or services are offered both in Switzerland and abroad and a company with relative market power restricts the ability of customers to purchase those goods or services abroad at the market prices and customary industry conditions that apply there. The new provisions are intended to enable Swiss companies to avoid unjustifiably higher procurement costs compared with those charged abroad (so-called 'Swiss surcharges').

Immediately after the adoption of the regulations on relative market power, the ComCo Secretariat began preparing for their smooth implementation. It set up an internal working group and published a factsheet and a notification form to make it easier for companies affected to report abuses.

The huge rush of reports, which was a particular concern in parliamentary debates, did not materialise in the first two years after the new provisions came into force (see also above Section 4.1.13 a). However, two reports from 2022 led to the first *investigations* being opened. One relates to the pharmaceuticals industry (opened in August 2022), the other to book sales in French-speaking Switzerland (opened in January 2023). It can also be assumed that sales contracts and provisions have been proactively adapted and that the provisions will take effect in this way.

## 8.6 Conclusion

For years, ComCo and its Secretariat have been combating price fixing and market foreclosure, opening markets and strengthening the internal market with their procedures and decisions. The competition authorities have focused on the most harmful horizontal agreements affecting competition (price, volume and territorial agreements), on the key vertical agreements (price maintenance and absolute territorial protection) and on the abuse of market dominance. They regularly comment on draft legislation from federal offices and point out issues that may affect competition and the economy, providing alternative solutions in their opinions or in their contributions to working groups. The competition authorities act as advocates of competition as a means of ensuring the efficiency of the Swiss economy.

## 9 Annex: Members of the Commission and the Executive Management of the Secretariat

### Commission:

- Laura Melusine Baudenbacher, President, Partner in a Swiss law firm with an office in Brussels
- Danièle Wüthrich-Meyer , Vice-President, former Cantonal Supreme Court judge in Bern
- Igor Letina, Vice President, Associate Professor of Microeconomics at the University of Bern
- Florence Bettschart-Narbel , Member, Attorney-at-law, former head of the Politics and Law Section in the Central Secretariat of the Fédération Romande des Consommateurs FRC
- Nicolas Diebold , Member, Professor of Public and Commercial Law at the University of Lucerne
- Clémence Grisel Rapin , Member, Professor of Administrative Law at the University of Fribourg (until February 2024)
- Mikael Huber, Member, Head of the Department of Financial and Tax Policy, Digitalisation and Trade at the Swiss Union of Crafts and Small and Medium-Sized Enterprises SGV
- Pranvera Këllezi , Member, Attorney-at-law in the canton of Geneva
- Isabel Martinez , Member, Economist (Senior Researcher) at the KOF Swiss Economic Institute at the ETH Zurich, former economist at the Swiss Federation of Trade Unions SGB
- Rudolf Minsch, Member, Deputy Chairman of the Executive Board, economiesuisse
- Gerd Mühlheuser, Member, Professor of Economics at the University of Hamburg, specialising in Microeconomics, with a focus on Industrial Economics
- Mauro Nicoli, Member, Attorney-at-law in a Swiss law firm
- Martin Rufer , Member, Director of the Swiss Farmers' Union

Declared interests: [www.weko.admin.ch](http://www.weko.admin.ch) → ComCo → Commission → Members.

### ComCo Secretariat:

- Patrik Ducrey, Director
- Frank Stüssi, Deputy Director, Construction
- Andrea Graber Cardinaux, Vice Director, Product Markets
- Olivier Schaller, Deputy Director, Services
- Carole Söhner-Bührer, Vice Director, Infrastructure