IN-DEPTH

# Dominance And Monopolies

## SWITZERLAND

LEXOLOGY

# Dominance and Monopolies

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In-Depth: Dominance and Monopolies (formerly The Dominance and Monopolies Review) provides an accessible and easily understandable summary of global abuse of dominance rules. Each jurisdiction-specific chapter – authored by specialist local experts – highlights the most consequential legal and regulatory provisions; provides a review of the regime's enforcement activity in the past year; and sets out a prediction for future developments.

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# Switzerland

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## Summary

## Introduction

Swiss law regulates the abuse of a dominant position by a dominant undertaking in the Cartel Act (CartA). It is thereby to a large extent modelled after Article 102 of the Treaty on the Functioning of the European Union. Hence, according to Article 4, Paragraph 2 of the Cartel Act, companies are considered dominant if they are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market.

Conceptually different, however, and as of 1 January 2022, Swiss law also captures relative market power in its Article 4, Paragraph 2 bis. This provision defines relative market power as dependency for supply or demand without adequate and reasonable opportunities for switching.

Article 7 of the Cartel Act clarifies what conduct is prohibited for undertakings that are considered dominant or have relative market power. According to the general clause in Article 7, Paragraph 1 of the Cartel Act, dominant undertakings behave unlawfully if they, by abusing their position in the market, hinder other undertakings from starting or continuing to compete or disadvantage trading partners. This general clause is supplemented by a non-exhaustive list of types of conduct that are particularly considered unlawful:

1. refusal to deal (e.g., refusal to supply or to purchase goods);
2. discrimination between trading partners in relation to prices or other conditions of trade;
3. imposition of unfair prices or other unfair conditions of trade;
4. undercutting of prices or other conditions directed against a specific competitor;
5. limitation of production, supply or technical development;
6. conclusion of contracts on the condition that the other contracting party agrees to accept or deliver additional goods or services; and
7. restriction of the opportunity for buyers to purchase goods or services offered both in Switzerland and abroad at the market prices and conditions customary in the industry in the foreign country concerned.

Furthermore, the Federal Price Surveillance Act and the Federal Act against Unfair Competition have parallel jurisdiction in the context of excessive prices.

## Year in review

In 2024, the Federal Supreme Court (FSC) has rendered two important decisions at the time of writing. The first one concerns a decision regarding the alleged abuse of a dominant position of Swisscom, Switzerland's incumbent telecoms service provider. In 2015, ComCo concluded that Swisscom had abused its dominant position with regard to an offer for the construction and operation of a 'wide area network' (WAN) for Swiss Post. According to ComCo, Swiss Post and Swisscom's competitor Sunrise, which purchased upstream

products from Swisscom, had to pay excessively high prices. In addition, in ComCo's view, Swisscom should also have squeezed Sunrise out of the market (margin squeeze). ComCo, therefore, imposed a fine of approximately 7.9 million Swiss francs. Swisscom appealed ComCo's decision to the Federal Administrative Court (FAC), which, however, upheld it. On appeal, the FSC overruled both ComCo's and the FAC's decision, lifted the sanction in its entirety and clarified several important questions regarding the imposition of unfair prices according to Article 7(2)(c) CartA, the relevant market assessment methods, and the requirements for a margin squeeze.[1]

In the second decision, the FSC upheld ComCo's and the FAC's sanction of 71.8 million Swiss francs against Swisscom and Blue Entertainment (formelyCinetrade) for abuse of a dominant position on the market for pay-TV broadcasting of soccer and ice hockey games of the Swiss major leagues (sports in pay-TV). The FSC agreed with the FAC that the full supply of Swiss soccer and ice hockey matches was objectively an essential component of a TV platform's broadcasting content. Withholding this content and discriminating between TV platforms by differentiating the scope of the sports programmes were likely to hinder the competitiveness of Swisscom TV's rival TV platforms. Furthermore, according to the FSC, unfair conditions of trade were forced on competitors, which had to undertake to refrain from acquiring certain content.

In 2023, the FSC upheld ComCo's decision against Naxoo AG for the abuse of a dominant position on the market for the access to the cable infrastructure in the city of Geneva. According to the finding of the FSC, Naxoo abused its dominant position, affecting building owners, third-party suppliers of facilities and customers by enforcing unreasonable terms and conditions in its infrastructure contracts and by restricting sales opportunities and technical development. The FSC, however, reduced the fine from 3.26 million to 3.1 million Swiss francs due to a reduction in the time frame of the infringement.

In 2023, ComCo fined a landfill operator (Deponie Höli Liestal AG) for the abuse of a dominant position on the market for non-recyclable construction waste. ComCo held that the landfill operator had abused its dominant position by allowing its shareholders to deposit waste material at significantly lower prices (preferential conditions) than non-shareholders. In addition, the landfill operator temporarily refused to accept material from non-shareholders. In ComCo's view, as a result of this unequal treatment, disposal companies without shareholder status were less competitive than shareholders. ComCo imposed a fine of 1 million Swiss francs.

Finally, with regard to abuses of relative market power, ComCo opened an investigation in January 2023 against the French group Madrigall to determine whether it unlawfully restricted Swiss booksellers' ability to obtain book supplies from France on better terms. ComCo opened another investigation in January 2024 against BMW for unexpectedly terminating cooperation with an authorised BMW dealer and service centre without providing an appropriate interim solution.

In 2023, ComCo also concluded two important preliminary investigations against Google Shopping and Google News.

Significant decisions and cases 2023–2024

| Sector | Investigating authority | Conduct | Fine levied |
|---|---|---|---|
| Telecoms | | | |

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|---|---|---|---|
| | Federal Supreme Court (judgment dated 5 March 2024) | The Federal Supreme Court ruled that Swisscom had not abused its dominant position with regard to an offer for the construction and operation of a wide area network (WAN) for Swiss Post. Swisscom did not squeeze Sunrise out of the market (margin squeeze). The FSC overruled both ComCo's and the FAC's decision, lifted the sanction of approximately 7.9 million Swiss francs in its entirety, and clarified several important questions regarding imposing unfair prices according to Article 7(2)(c) CartA, the relevant market assessment methods and the requirements of a margin squeeze. | 7.9 million Swiss francs |
| Telecoms | Federal Supreme Court (judgment dated 23 April 2024) | The Federal Supreme Court decided that full access to Swiss soccer and ice hockey broadcast is objectively necessary for every TV platform to be able to compete in Switzerland. | 71.8 million Swiss francs |

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| | | Because Swisscom had successfully acquired such rights on an exclusive basis, the FSC qualified Swisscom to be dominant in the national markets for such sports broadcasting and was therefore obligated to grant access to them to competing TV platforms. | |
| Pay - TV | Federal Administrative Court (judgment dated 31 October 2023) | The Federal Administrative Court (FAC) confirmed ComCo's fine against UPC Schweiz GmbH (now Sunrise GmbH) for anti - competitive behaviour regarding the supply of live ice hockey broadcasts of the top Swiss hockey leagues, the NLA and NLB (now the National League and the Swiss League). UPC's refusal to supply Swisscom constituted, according to the FAC, an abuse of UPC's dominant position, as a broadcaster must be able to offer a limited range of Swiss ice hockey matches, in order to compete effectively in pay | 29 million Swiss francs |

| | | | |
|---|---|---|---|
| | | TV. However, the FAC reduced the fine from 30 million to 29.1 million Swiss francs. | |
| Recycling and waist disposal | ComCo (decision dated 3 July 2023) | ComCo fined Deponie Höli Liestal AG regarding the abuse of a dominant position on the market for non - recyclable construction waist. | 1 million Swiss francs |

Current cases

| Sector | Investigating authority | Conduct | Case opened |
|---|---|---|---|
| Books | ComCo | Investigation against Madrigall on the allegation that Swiss booksellers are hindered from purchasing French books abroad at cheaper, foreign conditions. This behaviour is unlawful for companies with relative market power with regard to the Swiss bookseller. | January 2023 |
| Payment solutions | ComCo | In June 2023, ComCo opened two separate investigations against Visa and Mastercard on interchange fees for new debit cards for transactions carried out in Switzerland. ComCo authorised an interchange fee only for the market introduction phase | June 2023 |

| | | | |
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| | | of the new Visa and Mastercard debit cards. This phase is now over, as they have each achieved a 15 per cent market share. The amount of the interchange fee is the subject of these two separate investigations.<br><br>In May 2024, ComCo and Mastercard settled and agreed interchange fees of 0.12 per cent for card present transactions in Switzerland. The investigation of the interchange fees of Visa continues. | |
| Pharma | ComCo | Investigation against an internationally active pharmaceutical company. ComCo is investigating the allegation that Swiss wholesalers are hindered from purchasing various goods offered in Switzerland and abroad at cheaper, foreign conditions. This behaviour is unlawful for companies with relative market power with regard to the Swiss wholesaler. | August 2022 |
| Payment solutions | ComCo | Following a complaint from SIX that Mastercard was obstructing the market entry of | February 2021 |

| | | | |
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| | | its new ATM scheme (NCS), ComCo opened an investigation. The obstruction was said to be Mastercard's refusal to co - badge the NCS on the new debit Mastercard. ComCo is now investigating whether Mastercard engaged in abusive conduct by a dominant company. Precautionary measures to grant access to Mastercard's ATM that were initially imposed by Comco have been withdrawn after the FAC reinstalled the suspensive effect of Mastercard's appeal. | |
| Telecoms | ComCo | Investigation against Swisscom AG concerning the expansion of the fibre optic network. According to ComCo, there are indications that Swisscom is abusing a dominant position by changing the construction method during expansion in such a way that competitors no longer have direct access to the network infrastructure. | December 2020 |

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|---|---|---|---|
| | | ComCo took precautionary measures to prohibit Swisscom from denying competitors access during the expansion of the fibre optic network. The FAC confirmed these measures, and the FSC confirmed the interim measures. The proceeding is pending at ComCo. In April 2024, ComCo fined Swisscom 18 million Swiss francs for the abuse of a dominant position. The decision can be appealed to the FAC. | |
| Pharma | ComCo | Investigation against Novartis concerning blocking patents. According to ComCo, there are indications that Novartis has tried to protect one of its drugs by using a patent to block a competing drug. The investigation is supposed to clarify whether this is a case of a 'blocking patent', which could constitute a potential abuse of a dominant position. | September 2022 |
| Hotel booking platforms | Price surveillance authority | Indications that Booking.com's online prices for | February 2017 |

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| | | hotel bookings are excessive. | |
| Telecoms | Federal Supreme Court | The Federal Administrative Court ruled on 24 June 2021 that Swisscom charged excessively high prices in a tender for projects to network company locations. Further, Swisscom charged its competitors excessively high prices for accessing its network infrastructure so that they were unable to submit a competitive bid for this project. According to the court, Swisscom also a conducted a margin squeeze. An appeal was filed to the FSC. | July 2013 |
| Steel | ComCo | Investigations against three steel producing undertakings. According to ComCo, there are indications that the three undertakings had increased prices if customers ordered certain steel materials. ComCo will also verify if the undertakings concerned have a combined dominant position. | November 2023 |
| Cars | ComCo | Investigations against BMW concerning its relative market power vis - à-vis an authorised BMW | January 2024 |

| | | | |
|---|---|---|---|
| | | dealer and service centre. The garage accuses BMW of offering it the prospect of expanding its business relationships and inducing it to invest millions. BMW then unexpectedly terminated the co - operation without providing an appropriate interim solution. The garage was dependent on the continuation of the business relationship with BMW in order to amortise the aforementioned investments. | |

## Market definition and market power

### Undertakings

Only undertakings may achieve a dominant position. According to Article 2, Paragraph 1 bis of the Cartel Act, undertakings are all consumers or suppliers of goods or services active in commerce regardless of their legal or organisational form. This concept of an undertaking is very broad and follows – similarly to other antitrust laws in Europe – a functional approach, based on the economic activity of an entity. Both undertakings governed by public law and private undertakings that are part of a public body (e.g., the federal government, cantons or communes) are considered as undertakings within the meaning of the Cartel Act.[2] Furthermore, an undertaking in this sense may act on the supply side or on the demand side of a market. For the purpose of the Cartel Act and therefore for assessing dominance, a group of companies is considered as one single economic entity or undertaking, respectively. The Federal Supreme Court did not decide whether the control principle under which the mere possibility of controlling another company, or the management principle, which requires exercised and decisive influence, is sufficient to create group liability.[3]

### The relevant market

To determine whether an undertaking enjoys a dominant position or monopoly power, the relevant market has to be defined. In cases concerning abuse of a dominant position, the rules applicable in merger control cases are being used analogously. Due to the partial reform of the Cartel Act, ComCo will use the internationally recognised significant impediment to effective competition test (the SIEC test) in the future. Pursuant to Article 11, Paragraph 3 of the Merger Control Ordinance, the relevant product market comprises all those goods or services that are regarded as interchangeable by consumers on the one hand and by suppliers on the other hand with regard to their characteristics and intended use. The relevant geographic market comprises the area in which consumers purchase and in which suppliers sell the goods or services that constitute the product market.

As for the definition of the relevant product market, Swiss authorities generally rely on the demand-side-oriented market concept.[4] According to this concept, the relevant product market consists of all goods and services that have the same characteristics or the same intended use as the product under investigation. Accordingly, goods or services that are regarded as functionally interchangeable by the opposite market side fall within the same product market. The good has to be substitutable for another good. Other methods used by the Swiss authorities to determine the relevant market are the test of cross-price elasticity and the small but significant and non-transitory increase in price test.[5] These methods serve to assess whether the allegedly disadvantaged opposite side of the market could switch to alternative offers with regard to product, geographical and temporal terms.

## Dominant position

### Single dominance

According to the legal definition in Article 4, Paragraph 2 of the Cartel Act, 'dominant undertakings are one or more undertakings in a specific market that are able, as suppliers or consumers, to behave to an appreciable extent independently of the other participants (competitors, suppliers or consumers) in the market'. Based on this definition, dominance may exist on the demand side as well as on the supply side of a market.

Under Swiss law, there are no hard criteria to assess whether an undertaking has a dominant position.[6] The FAC ruled that, to assess single dominance, an in-depth analysis of the market characteristics, such as the current competition (market shares), potential competition (market entry barriers), the position of the other side of the market (countervailing market power) and the influence of interrelated markets have to be performed. Moreover, it held that the structure of the undertaking as well as the specific market conduct has to be taken into account.[7] ComCo assesses the competitive pressure and market position of the potentially dominant undertaking and its competitors. It takes the competitive pressure due to the imminent expansion of already existing competitors or the imminent market entry of new suppliers into consideration. With regard to market shares, there is no statutory threshold above which an undertaking must be considered as dominant under Swiss law. Whereas according to the former practice of the authorities, market shares of 50 per cent and more were considered as an 'indicator' for dominance, the FAC now holds that market shares of 50 per cent or more 'at least' give rise to a presumption of the existence of a dominant position. The presumption is further strengthened for market shares above 60 or 70 per cent. The requirements for rebutting

the presumption increase accordingly.[8] Finally, ComCo analyses the vertical relationships by assessing the competitive pressure due to the negotiating strength of the other side of the market.

To establish market dominance, the Swiss competition authorities satisfy themselves on the balance of probability.[9]

Collective dominance

According to the wording of Article 4, Paragraph 2 of the Cartel Act, one or more undertakings may hold a dominant position. In cases of collective dominance, several undertakings together hold a dominant market position. In the context of merger control, ComCo introduced the concept of collective dominance to Swiss antitrust law in 1998[10] and later also applied this concept to cases of abuse of market dominance.[11] Collective dominance is assumed if at least two undertakings deliberately adopt a parallel (i.e., collusive) market conduct (collusion). Because parallel behaviour is a normal reaction of competitors to exogenous market developments, collective dominance is only assumed in cases of deliberate collusion.

There are no hard criteria for the existence of collective dominance. ComCo bases its assessment primarily on the following indicators:

1. market concentration (number of companies active in the market and their market shares. The fewer companies that are active in a certain market, the more likely it is for collusion to occur);
2. symmetries in cost structure, products offered and interests (price remains the sole competitive factor);
3. market growth, potential competition and market-entry barriers; and
4. market transparency.[12]

Taking these indicators into consideration, it is necessary to perform an overall assessment of the competitive situation on the relevant market as well as on the upstream and downstream markets to determine whether the relevant market offers sufficient incentives for durable collective dominance.

In 2020 ComCo applied the aforementioned criteria to the planned merger between Sunrise Communications AG and Liberty Global Europe Financing BV.[13] The target company of this merger was UPC GmbH, Switzerland's largest cable company. However, in the case at issue, ComCo found it unlikely for the newly created entity to hold a collectively dominant position together with Swisscom. When assessing the planned merger between Ticketcorner and Starticket, Switzerland's two largest ticketing providers, ComCo considered potential collective dominance. However, ComCo did not find sufficient evidence for the existence of a collectively dominant position.[14]

In another case, ComCo investigated a potential collective dominance of Booking.com, Expedia and HRS in the market for hotel booking platforms. While it found strong indications of a single dominant position for Booking.com, it considered the existence of collective dominance to be unlikely.[15]

In November 2023, ComCo initiated another investigation regarding the collective dominance of steel producers.

### Relative market power

The revised Cartel Act, which introduced the concept of relative market power, entered into force on 1 January 2022. In December 2021, shortly before the revised Cartel Act came into force, ComCo published a guidance paper on how it intends to interpret and enforce the new rules.

Under the revised Cartel Act, the prohibitions previously applicable only to dominant undertakings (Article 7 Cartel Act) are extended to companies with relative market power. A company is considered to have relative market power if other companies depend on it with respect to the supply of or demand for a product or service to which there is no sufficient and reasonable alternative. According to ComCo's guidance paper, alternatives are sufficient if other offers are available that can also adequately satisfy the undertaking's needs. In this regard, a number of factors are taken into account, such as product characteristics, purchasing conditions, brand reputation, brand loyalty of consumers and the market share of the undertaking with relative market power. Further, an alternative can be considered unreasonable as a result of individual characteristics of the dependent undertaking, such as specific investments in connection with an existing business relationship, the contractual relationship itself, switching costs, affected turnover in relation to total turnover and the occurrence of the alleged dependency (e.g., cause of the dependency). As a general rule, and according to ComCo, an undertaking can only invoke the allegation of relative market power after it has unsuccessfully tried to find reasonable alternative sources of supply. Contrary to a conventional assessment of market dominance, it is irrelevant whether the allegedly relative dominant company can behave independently of other market participants to a significant extent. The relative market power of a company must always be determined with respect to a specific bilateral commercial relationship.

Unlike dominant undertakings, relatively dominant undertakings cannot be sanctioned directly for abusing their relative market power (i.e., for a first offence). However, such undertakings may face an investigation of ComCo or civil lawsuits from private plaintiffs, or both. If ComCo finds a violation, it can impose behavioural remedies (e.g., an obligation to supply or non-discriminatory pricing). Already before the new rules entered into force, ComCo announced that it is determined to decide leading cases to provide guidance on the scope of application of the new rules. However, even in the second year following the introduction of the relative market concept, only a limited amount of relative dominance cases exist.[16]

## Abuse

### Overview

Given a dominant position or relative market power of an undertaking, the application of Article 7 of the Cartel Act requires that the undertaking hinders other undertakings

from starting or continuing to compete, or disadvantages trading partners by abusing its dominance or market power. Article 7 of the Cartel Act is only applicable if there are no legitimate business reasons for the abusive behaviour of the undertaking. These preconditions have to be met cumulatively.

Paragraph 2 of Article 7 of the Cartel Act contains a non-exhaustive list of examples of types of conduct that may be considered abusive. However, if a certain behaviour is listed in Article 7, Paragraph 2 of the Cartel Act, it is not unlawful per se, because to constitute abusive behaviour, the preconditions pursuant to Article 7, Paragraph 1 of the Cartel Act have to be met additionally. In other words, Paragraph 2 has to be applied in conjunction with Paragraph 1.[17] Conversely, conduct not covered by one of the examples listed in Paragraph 2 but meeting the preconditions mentioned in Paragraph 1 falls within the scope of this umbrella clause and is, therefore, unlawful. This is, for example, the case for margin squeeze behaviour.[18]

Regarding abuse of a dominant position, the Cartel Act does not contain any per se prohibitions. It is therefore necessary to consider the specific circumstances and market conditions of the case at issue when assessing potentially abusive behaviour.[19] In particular, it needs to be analysed whether the conditions of a specific (contractual) relationship diverge significantly from those that could be expected in the context of effective competition. In practice, the authorities analyse both the competitive and anticompetitive effects of a certain conduct on the market, in particular when the conduct does not fall under at least one of the listed abuses in Article 7, Paragraph 2 of the Cartel Act.

However, the FAC held that where a certain conduct fell under Article 7, Paragraph 2 of the Cartel Act, no economic theory of harm had to be examined as this conduct was generally perceived to be unlawful.[20]

Nevertheless, even a dominant undertaking needs to be allowed to protect its own legitimate business interests by competing on the merits to maintain its leading market position. Consequently, if the purpose of a certain practice is simply to improve the quality of a product (e.g., by requiring suppliers to respect a certain standard), this practice has to be considered legitimate even if it may eliminate certain suppliers or competitors from the market.

Article 7 of the Cartel Act covers exclusionary as well as exploitative practices. While the first mainly concern competitors, the latter aim at harming commercial patterns or consumers.

With the introduction of the concept of relative market power, a further type of abusive practice was added to Article 7 of the Cartel Act. Under the revised Cartel Act, undertakings with relative market power as well as dominant undertakings are prohibited from restricting the opportunity of buyers to purchase goods or services offered both in Switzerland and abroad at local prices and conditions.

## Exclusionary abuses

### Refusal to deal

Refusal to deal is one of various forms of exclusionary abuse. According to Article 7, Paragraph 2, Letter a of the Cartel Act, any refusal to deal (e.g., refusal to supply or to purchase goods) may constitute an abuse of a dominant position. The concept of refusal to deal takes various forms, such as refusal to supply, termination of supply, refusal to access, refusal to licence or exclusion of sales. However, this provision does not constitute a general obligation to contract for dominant undertakings.[21] The refusal to deal is only unlawful if it has (or is likely to have) an anticompetitive foreclosure effect and if it cannot be justified by legitimate business reasons. In particular, a refusal to deal is likely to be held unlawful if a dominant undertaking intends to boycott its business partners or aims at forcing them to behave in a certain way. Under certain circumstances a refusal to deal may also be considered unlawful if a dominant undertaking refuses to grant access to an essential facility. The essential facility doctrine was recently used by the FSC.[22]

One of the major cases in which ComCo applied the essential facilities doctrine concerned the SIX Group. ComCo imposed a fine of approximately 7 million Swiss francs on the SIX Group for refusing to supply interface information to competitors and thus rendering their products incompatible with SIX card payment terminals.[23] The FAC and the FSC upheld this decision.[24] However, the latter did not examine whether there was a refusal to deal.

In 2013, ComCo approved an amicable settlement between the Secretariat and Swatch Group, under which the latter may gradually reduce the supply of third-party customers with mechanical watch movements.[25] Swatch Group had undertaken to supply certain minimum amounts per year to third-party customers and to treat all customers equally. The supply obligation ended on 31 December 2019.

ComCo fined Swisscom approximately 72 million Swiss francs for having refused to supply certain competitors with broadcasts of live sports for their platforms and for having only granted access to a reduced range of sport content to others.[26] The FAC the and FSC upheld this decision.[27] In a similar case, in 2020, ComCo fined UPC 30 million Swiss francs after finding that UPC abused its market dominance by refusing to supply Swisscom with broadcasts of certain live ice hockey games. The FAC upheld the decision while lowering the fine to 29.1 million Swiss francs.[28]

In addition, in the ongoing investigation against Mastercard for refusing to co-badge, a refusal to deal allegation is at stake. In its interim measure, ComCo held that Mastercard had prima facie abused its dominant position by not allowing the requested co-badging. Mastercard has appealed this interim decision, and the investigation is ongoing. Precautionary measures to grant access to Mastercard's ATM that were initially imposed by ComCo have been withdrawn after the FAC reinstalled the suspensive effect of Mastercard's appeal.

As far as refusal to license is concerned, such refusal is only considered abusive if standard essential patents are concerned. It is, in fact, inherent to IP rights that their holders enjoy some form of exclusivity, which will allow them to act independently on the market to a certain extent. Accordingly, Article 3, Paragraph 2 of the Cartel Act explicitly exempts the effects on competition that result exclusively from the legislation governing IP from the scope of the Cartel Act. Only the modalities to exercise an IP right may be considered abusive, namely if they go beyond the scope of protection conferred by the IP legislation (e.g., registration of patents for the sole purpose of blocking the technical development of competitors). However, the distinction is difficult to make.

Exclusive dealing

Another form of exclusionary abuse is exclusive dealing, a conduct that is not listed in Article 7, Paragraph 2 of the Cartel Act. However, cases of exclusive dealing may fall within the umbrella clause of Article 7, Paragraph 1 of the Act.

Rebates

Fidelity rebates are considered to be financial benefits, granted to customers for purchasing all or a certain percentage of their demand exclusively from the dominant undertaking. The rebates are granted irrespective of the actual quantity purchased.[29] Such rebate systems are considered to impede the market entry of potential competitors, as customers are reluctant to switch from the dominant undertaking granting fidelity rebates to other undertakings.[30] Consequently, fidelity rebates are considered unlawful under Article 7, Paragraph 2, Letter e of the Cartel Act.

Target discounts have a comparable effect. Target discounts are unlawful under the Cartel Act if they are granted under the condition that the customers achieve certain turnover targets set by the dominant undertaking.[31]

However, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflect these cost efficiencies correctly.

In a 2017 decision, ComCo found that the Swiss Post rebate system unlawfully hindered its competitor Quickmail. Swiss Post granted additional monthly discounts to those customers who had reached a certain sales target. According to ComCo, because of the complication of Swiss Post's rebate system, customers were almost unable to assess the impact of outsourcing parts of their mail delivery to Quickmail.[32] This decision became binding and enforceable in 2021.

Predation

Even if set by a dominant undertaking, low prices are generally desirable and not illegal per se under cartel law. However, if a dominant undertaking deliberately sets particularly low prices to drive current competitors out of the market or to deter a potential new competitor from entering the market, Article 7, Paragraph 2, Letter d of the Cartel Act is fulfilled (predatory pricing).

In cases of predatory pricing, a dominant undertaking would first undercut prices of competitors until they leave the market; eventually, it would re-increase its prices once the competitive pressure has been decreased (or eliminated). In general, the competition authority is likely to assume that prices below average variable costs are aimed at driving competitors out of the market or preventing new competitors from entering the market.[33]

According to the practice of the authorities, predatory pricing occurs when the following conditions are cumulatively met:

1. predatory strategy: the dominant undertaking deliberately and intentionally attempts to drive a weaker current competitor out of the market or to keep a potential new competitor out of the market; and

2. recoupment: the dominant undertaking is able to raise prices as soon as the competitor has left the market, the threat of market entry has been prevented or the competitor has been disciplined.[34]

Price or margin squeeze

Price or margin squeeze is a particular form of discrimination between trading partners and may be inferred as abusive market behaviour of a dominant undertaking.

According to the Federal Supreme Court, price or margin squeeze can only occur if the following characteristics are present: a dominant undertaking, vertical integration of the dominant undertaking and competitors depending on the good or service provided by the dominant undertaking on the wholesale market. It further defines price or margin squeeze as a situation where the wholesale price for competitors is set above the price the dominant undertaking sets as retail price on the downstream market. Price squeeze shall also occur if the margin between the wholesale price for competitors and the market price of the dominant undertaking is not sufficient to cover an as-efficient competitor's product-specific costs. In both scenarios, price squeeze occurs if an equally efficient competitor on the retail market could not meet the retail price of the dominant undertaking. To assess whether an efficient competitor could meet the price of the dominant undertaking, a cost-price comparison has to be carried out (as-efficient competitor test).-[35]

In 2009, ComCo imposed a fine of approximately 200 million Swiss francs on the Swiss telecommunications provider Swisscom for abusing its dominant position in the market for broadband internet through margin-squeeze behaviour.[36] ComCo held that because of the high prices set by Swisscom on the wholesale market competitors, with which Swisscom competed on the retail market by offering its asymmetric digital subscriber line broadband internet services to end customers, were unable to profitably offer their services on the retail market. The abusive behaviour would have been corroborated by the fact that while Swisscom generated large profits on the wholesale market, its subsidiary active on the retail market incurred losses. The FAC confirmed ComCo's decision in substance, but reduced the fine imposed to approximately 186 million Swiss francs.[37] Ultimately, the Swiss Federal Supreme Court upheld this decision.[38]

More recently, ComCo has been focusing on the behaviour of Swisscom in the wide area network (WAN) sector. In 2015, ComCo imposed a fine of approximately 7.9 million Swiss francs on Swisscom for, inter alia, a margin squeeze (and other abusive practices).[39] A WAN is a telecommunications or computer network that extends over a large geographical distance. In 2008, Swiss Post organised a public tender for WAN services. Swisscom offered a price for its WAN services to Swiss Post that was – according to ComCo – approximately 30 per cent below the price offered by its next competitor, the latter having to acquire prior facilities from Swisscom at a wholesale price before being able to offer its WAN services. Swisscom's wholesale price for these facilities was allegedly above the price at which Swisscom won the public tender. Hence, the price offered by Swisscom on the wholesale level would not have allowed any competitor to compete on the retail market. In 2021 the FAC confirmed ComCo's decision,[40] thereby reducing the fine. Notably, the FAC accepted a reasonably efficient competitor test by ComCo (as opposed to an as-efficient competitor test). Said test focuses on the cost of an actual competitor because, according

to the court, the product-specific costs of Swisscom (i.e., also of an as-efficient competitor) were not available.[41]

However, Swisscom successully appealed the decision before the FSC, which overruled both ComCo's and the FAC's decision, lifting Swisscom's sanction in its entirety. In its decision, the FSC clarified that the primary purpose of the Swiss Cartel Act (CartA) is to prevent economically and socially harmful effects on competition. The goal is to protect competition as an institution by ensuring effective competition. However, it is 'not the task of the CartA to protect undertakings [that] are unable to assert themselves on the market primarily due to their own behaviour, by means of the CartA'. Against this background, the FAC uses the 'as efficient competitor test' and clarifies that equally efficient competitors are protected by competition law 'whereas it is not objectionable if a less efficient competitor is driven out of the market'. Accordingly, a competitor cannot avoid necessary investments to run its business efficiently. Otherwise, according to the FAC, 'a [competitor] would be enabled to forego its own investments and (constantly) accuse the dominant company of imposing unfair prices'. The FAC clarifies that fundamental concerns exist on the control of abusive pricing and that the respective provision of Swiss competition law should 'only be applied as a last resort or subsidiary measure'. The purpose of the CartA is precisely not to regulate prices, but to protect against restrictions of competition.

Hence, the court sets a high standard in assessing whether a dominant undertaking has imposed unfair prices. 'Imposing' requires that the affected trading partners 'may not oppose or cannot evade' the economic pressure of the dominant undertaking otherwise. This is only the case, if the price is set unilaterally by the dominant undertaking. By contrast, if a price is the result of negotiations, the price is generally not imposed. 'Unfairness' is not the same as high margins. Very high prices or margins can reflect superior or innovative performance. Taking measures against such prices 'would contradict the incentive desired in a market economy to invest and develop innovative products'. For this reason, the CartA must only intervene if there is 'a blatant disproportion between costs and sales price'.

For assessing this disproportion, the FSC refers to the 'as if method', 'comparative market concept' and 'cost method'. In the case at hand, the court found that the method of the lower court comparing Swisscom's prices for its upstream products and the price that Swisscom received in the tender of Swiss Post was unsuitable and did not correspond to any of the established tests.

With regard to sector regulations, present the Swiss Telecommunications Act (TCA), the FSC clarifies that these must be taken into account when applying the CartA and that both form a 'closed and integrated legal framework'. In the specific circumstances, ComCo had failed to take into account the legislator's intention to promote investments in the telecommunication sector. The fact that Sunrise had not made these investments and therefore was reliant on (unregulated) upstream products from Swisscom was not Swisscom’s fault. Rather, both ComCo and the lower court should have recognised these investments as a potential alternative for Sunrise. Hence, the prices for Swisscom‘s respective upstream products were not 'imposed' under the CartA. The FSC emphasises that a margin squeeze is only possible if the following three structural conditions are met: (1) vertical integration; (2) dependence on the upstream services of the dominant undertaking; and (3) dominance on the upstream market together with a 'certain' dominant position on the downstream market.

Additionally, abusive conduct must be proven by ComCo. According to the FSC, this requires a 'pursued strategy, by which a vertically integrated dominant undertaking reduces or completely eliminates the potential profit margins of its competitors in the downstream market . . . in such a way that they are no longer competitive, i.e. ultimately the competitor will have to abandon the market and competition in the downstream market is impaired as a result'. In the absence of such an exclusionary strategy, an unlawful margin squeeze is excluded from the outset. It is likely that, based on this judgment, an exclusionary strategy will now be a requirement at least for a number of abuse cases. Even if such an exclusionary strategy had been proven, the lower court was required to carry out the as efficient competitor test and assess the costs of the dominant undertaking. A 'reasonably efficient competitor test', which assesses the costs of the competitor, may only be used if, exceptionally, the costs of the dominant undertaking cannot be assessed.

The judgement of the FSC is convincing and sends an important signal against ComCo's (price) interventionism, which has been rubber-stamped by the FAC. The court rightly emphasises that the CartA's primary purpose is not to protect individual competitors or to regulate prices, but rather to protect effective competition. It remains to be seen how ComCo and the FAC will implement this leading case in their own rulings and judgements. However, the purely form-based analysis of market abuse cases, as constantly carried out by the FAC in particular, is likely to be strongly questioned.

In 2020, ComCo opened a follow-on investigation in the WAN sector. The accusations of price squeeze against Swisscom are similar to those of the 2015 decision, but this time Swisscom allegedly pursued a strategy of price squeezing not only in the Swiss Post public tender but also in the WAN sector in general. In addition, ComCo focuses more on the alleged price discrimination. ComCo has not yet rendered a decision in this regard.

The purpose of the provision on tying transactions[42] is to prevent a dominant undertaking from disadvantaging or hindering other undertakings by making a transaction dependent on another transaction with no reasonable connection to the underlying transaction. Tying practice is generally understood to occur when the dominant undertaking induces a trading partner (supplier or customer) to provide or accept an additional service in the form of goods or services that has no factual connection to the main good or service.[43] Such tying can occur on both the supply side and the demand side.

According to the Federal Supreme Court, tying practices within the meaning of Article 7, Paragraph 2, Letter f of the Cartel Act occur if the following criteria are met:

1. separate goods;
2. tying;
3. restriction of competition; and
4. lack of objective justification.

Goods are considered to be separate if the additional good or service has no factual connection to the main one. Whether a factual link exists can be assessed based on the market of the additional good or service. The fact that both the main product or service and the tied one belong to the same product market indicates a factual link. Conversely, if separate product markets exist, a factual link between both products or services is unlikely. Tying occurs when the supplier of the tying good makes its supply conditional on the

purchase of an additional service. Hence, the customer has no choice but to purchase the tied good as well.

A tying practice is – in principle – only relevant under antitrust law if it results in a restriction of competition. This is particularly the case if the dominant undertaking uses its position to induce its suppliers or customers to supply or purchase a good that they either do not want to sell or purchase at all, or at least not under the terms and conditions stipulated by the dominant undertaking, or if the dominant undertaking uses its dominance on one market to transfer its market power to the market of the tied good on which it is not yet dominant.[44]

Based on the SIX/DCC case, no effect-based analysis of the infringement is required in the context of Article 7, Paragraph 2, Letter f of the Cartel Act. According to the FSC, tying is therefore a by object offence and the mere threat of the occurrence of abusive effects is sufficient.

## Discrimination

According to the Cartel Act, a dominant undertaking is not allowed to treat its trading partners differently with regard to prices and other conditions of trade.[45] However, the prohibition to discriminate trading partners does not imply a general obligation to treat trading partners equally. Unequal treatment is considered unproblematic from an antitrust point of view as long as it can be objectively justified (e.g., quantity rebates, justified by corresponding economies of scale). According to the authorities, a dominant undertaking is unlawfully discriminating its trading partners if the following criteria are met:

1. unequal treatment;
2. the unequal treatment concerns trading partners;
3. the unequal treatment results in restriction of competition; and
4. there are no legitimate business reasons for treating trading partners differently.

With regard to discriminatory pricing, rebates are of special importance. Rebates may be considered as practices discriminating trading partners and therefore be unlawful under Article 7, Paragraph 2, Letter b of the Cartel Act. This is the case when only larger customers above a certain turnover threshold may benefit from more favourable conditions.[46]

In contrast, quantitative rebates based on cost efficiencies are considered legitimate if the rebates reflect these cost efficiencies correctly.

In a 2017 decision, ComCo fined Swiss Post approximately 23 million Swiss francs for, inter alia, allegedly having discriminated against some of its business customers by granting discounts and special conditions for mail delivery to some but not all customers. Thus, different customers with comparable mailing characteristics would have received different conditions, resulting in some of them being better off than others.[47] Discriminatory pricing may also appear in the form of margin or price squeezes (see under 'Exclusionary abuses').

According to the law, discriminatory practices of dominant undertakings may not only concern prices but also other conditions of trade. The term 'other conditions of trade' is

interpreted broadly and covers any actual or contractual obligations entailing an economic advantage or disadvantage for trading partners (e.g., terms of delivery, terms of sale and purchase or terms of payment).[48]

## Exploitative abuses

It is unlawful for dominant undertakings to impose unfair prices or other unfair conditions of trade.[49] According to this provision, a dominant undertaking behaves unlawfully if it benefits from unfair prices or unfair trading conditions towards the opposite market side through coercion. It is still unclear whether it is necessary under Article 7, Paragraph 2, Letter c of the Cartel Act to prove the 'imposition' as being coercive, or whether it is sufficient to prove the existence of a causal link between the dominant position and the unfair prices.[50]

However, based on the case law of the Federal Supreme Court, ComCo assesses the existence of coercion according to the following criteria:

1. during the period under investigation, alternative options existed for the trading partner in question; and
2. given the negotiating power, the trading partner in question was able to object to the imposition of the prices or other terms and conditions in question.[51]

A price is unreasonable if it is disproportionate to the economic value of the service provided. Conditions of trade, on the other hand, are unreasonable if they are unfair, disproportionate or excessively binding in terms of time or content. Conditions of trade are disproportionate if they do not serve a legitimate interest or are not necessary for this purpose because more moderate means are available. According to ComCo, a price set by a dominant undertaking is unreasonable if it is disproportionate to the consideration and is not an expression of performance competition but of a monopoly-like dominance on the relevant market.[52]

In the above-mentioned WAN sector ComCo decision (see under 'Exclusionary abuses'), ComCo not only held the price or margin squeeze practice of Swisscom as an abuse of its dominance but also the imposition of excessive prices on Swiss Post. ComCo found that Swiss Post had no alternatives to those telecommunications service providers that had submitted an offer but, rather, would have had to either accept an even more expensive offer or forego a WAN connection for its sites. Since Swiss Post would have had no alternative options available to avoid Swisscom's offer, the element of coercion would have been fulfilled.[53] In 2021 the FAC confirmed ComCo's decision;[54] however, it did lower the fine. As mentioned above, Swisscom successfully appealed the decision.

In addition to ComCo, the price supervisor, a federal government office, has parallel jurisdiction in the context of excessive pricing. Under the Federal Price Surveillance Act, the price supervisor has the power to prohibit abusive price increases and to order price reductions. Unlike ComCo, the price supervisor does not have the power to impose fines for past conduct.

Restrictions on purchases of goods and services abroad

With the introduction of the concept of relative market power, a further type of exploitative abuse was added to Article 7 of the Cartel Act. According to the new Article 7, Paragraph 2, Letter g of the Cartel Act, besides dominant undertakings, undertakings with relative market power may also not restrict buyers from purchasing goods or services offered both in Switzerland and abroad at local prices and conditions customary in the foreign country. The legislative purpose of this amendment is to lower the prices charged to companies in Switzerland (the 'Swiss surcharge') by allowing Swiss buyers to purchase products at cheaper prices abroad. However, it is not required that a foreign supplier specifically tailors purchase conditions to a Swiss buyer's needs (e.g., there is no obligation to arrange for shipment to Switzerland).

It still remains to be seen how this new type of abusive conduct is interpreted and enforced in practice. Even though both companies with relative market power as well as dominant undertakings are captured by the new rule, different sanctions apply. Dominant undertakings can be fined directly for violating Article 7, Paragraph 2, Letter g of the Cartel Act, as for any other type of abusive conduct. In contrast, undertakings with relative market power are not subject to direct penalties for their first violation: only subsequent violations directly trigger fines. However, behavioural remedies (e.g., delivery obligations) may be ordered directly.

## Remedies and sanctions

### Sanctions

Any undertaking that abuses its dominant position may be charged with a sanction of up to 10 per cent of the turnover that it cumulatively achieved in Switzerland in the preceding three financial years. The amount is dependent on the duration and severity of the unlawful behaviour. Additionally, the profit resulting from the unlawful behaviour is taken into account.[55]

The sanctioning of undertakings is more thoroughly regulated by the Cartel Act Sanctions Ordinance,[56] which also sets out the aggravating and mitigating factors in more detail.

Aggravating factors may be the repetition of an infringement, the amount of the profits, as well as a lack of cooperation with the competition authorities or even attempts to obstruct the investigation. In contrast, a premature termination of the infringement or cooperation with the competition authorities are examples of mitigating factors. Furthermore, the conclusion of an amicable settlement or a leniency application can lead to a partial or full waiver of the sanction (see under 'Procedure').

In contrast to other jurisdictions, Swiss cartel legislation does not provide for the sanctioning of natural persons for first-time infringements of the provisions (i.e., individuals acting on behalf of an undertaking abusing its dominant position). However, individuals may be fined up to 100,000 Swiss francs in other cases, such as infringement of amicable settlements or a binding decision of ComCo.[57]

Unlike dominant undertakings, relatively dominant undertakings cannot be sanctioned directly for abusing a position of relative market power (i.e., for a first offence).

## Behavioural remedies

In addition to the possibility of imposing sanctions on undertakings, ComCo has extensive decision-making and remedial powers. According to Article 30, Paragraph 1 of the Cartel Act, ComCo decides the appropriate measures (i.e., issuing orders to eliminate restraint on competition). Measures therefore may prohibit an undertaking from continuing the practice that has been found unlawful or may oblige an undertaking to conduct specific measures aimed at eliminating an unlawful behaviour. As such, ComCo can also oblige an undertaking to enter into a business relationship with another undertaking if it has judged the refusal to deal to be unlawful.

Under certain conditions, interim measures may be ordered for the duration of the proceedings. As such, ComCo may issue injunctions to change specific business practices (i.e., compelling an undertaking to grant access to a certain facility). However, interim measures require, among other conditions, that in their absence, competition would suffer a disadvantage that could not easily be rectified. Interim measures allow ComCo to impose behavioural remedies even before completion of its investigation. In recent years, ComCo demonstrated an increased tendency to impose interim measures, as illustrated by the following two cases.

The first case concerns the expansion of the fibre optic infrastructure of Swisscom. In late 2020, ComCo issued an interim measure prohibiting Swisscom to continue with the fibre roll-out without guaranteeing layer 1 access. On appeal, the FAC upheld the interim measure and confirmed ComCo's assessment finding that the network construction strategy of Swisscom constituted a prima facie restriction of technological development. In 2022, the FSC confirmed that the measures were not arbitrary and upheld the decision of ComCo.[58]

The second case concerns an investigation into ATM schemes in Switzerland. ComCo accused Mastercard of hindering market entry of a competitor by refusing to co-badge new debit cards of its competitor with Mastercard's existing products. Even though the investigation on the merits is still ongoing, in February 2021, ComCo issued various interim measures ordering Mastercard to technically prepare its debit cards for co-badging. Mastercard appealed this decision and the FAC. The measures have then been withdrawn in 2022 after the FAC reinstalled the suspensive effect of Mastercard's appeal.

In 2024, the FAC upheld ComCo's decision against Visa's request for interim measures in the interchange fee investigation.[59] In an interim measure, Visa requested ComCo to declare Visa's interchange fees to be legal and to allow Visa to use its current interchange fees. Both ComCo and the FAC found the request to be unlawful. Both found that Visa was simply trying to evade the risk of being sanctioned, which is, however, a risk for the private undertaking to bear.

## Structural remedies

Apart from corporate merger control, the Cartel Act does not provide for structural remedies (i.e., in abuse of dominance cases, ComCo does not have jurisdiction to order structural measures).

## Procedure

In general, the investigation of restraints of competition, under which abuse of dominance cases fall, starts with the preliminary investigation. According to Article 26 Paragraph 1 of the Cartel Act, the Secretariat of ComCo (Secretariat) may conduct preliminary investigations ex officio, at the request of undertakings involved or in response to a complaint from a third party. At this stage, the information is usually gathered through questionnaires sent to the undertakings. Undertakings have no right to inspect the files. Measures to eliminate or prevent restraints of competition may be proposed by the Secretariat.

Where there are indications of an unlawful restraint of competition, the Secretariat opens an investigation, in consultation with a member of the presiding body of ComCo.[60] Regarding the publication of the opening of an investigation, the Secretariat has and uses various means to give notice of the purpose of and the parties to the investigation. Along with the publication in the Swiss Official Gazette of Commerce, in many cases a press statement is released. Depending on the public interest, the Secretariat may also comment on news coverage. Third parties are invited by the Secretariat to come forward within 30 days if they wish to participate in the investigation.[61]

The investigative powers of the competition authorities within an investigation are broad, and the far-reaching investigative measures include the conduct of searches (dawn raids) and the seizure of evidence (documents and electronic data).[62] Additionally, the competition authorities may hear third parties as witnesses and require the parties to an investigation to give evidence.[63] Regarding the duty to provide information, undertakings subject to an investigation are obliged to provide all the information required and produce the necessary documents to the competition authorities.[64] Failure to act accordingly may entail an administrative fine. Concerning dawn raids in particular, undertakings must answer questions that are related to them and must provide the competition authorities with documents and grant access to any premises for which this is requested. The duty to provide information is limited by the nemo tenetur legal principle (right against self-incrimination). However, in recent case law, the Federal Supreme Court has restricted this principle in a way that only current formal and de facto organs may invoke the company's right to silence. Former organs of undertakings under investigation can be questioned as witnesses without restriction.

The competition authorities can order interim measures for the duration of the proceedings. They may also be applied for by third parties provided that public interests such as the protection of competition are affected. Decisions concerning interim measures can be challenged independently of the main proceedings before the FAC.

An investigation can be terminated with an amicable settlement reached between an undertaking and the Secretariat.[65] Although there is no obligation to conclude an amicable settlement, it may be a reasonable measure to avoid lengthy and costly procedures. The conclusion of an amicable settlement is considered as cooperation, which leads to a reduction of a possible sanction of up to 20 per cent, depending on the timing of the settlement. A partial or even a full waiver of sanction may be reached if a leniency application is filed and if the undertaking assists in the discovery and elimination of the abuse of dominance.[66]

The Secretariat has published various notes on the procedure, including on the conduct of investigations, amicable settlements and deadlines.

## Private enforcement

The Cartel Act explicitly provides for civil proceedings in addition to administrative proceedings. Regarding rights arising from a hindrance of competition, any person hindered by an unlawful restraint of competition from entering or competing in a market is entitled to request the following before a civil court: the elimination of or desistance from the hindrance; damages and satisfaction in accordance with the Code of Obligations (CO) or surrender of unlawfully earned profits in accordance with the provisions on agency without authority.[67] Hindrances of competition include in particular the refusal to deal and discriminatory measures.[68]

Additionally, the Cartel Act explicitly provides for further instruments for the civil courts to enforce the right to elimination and desistance. In this regard, the courts may, at the plaintiff's request, rule that any contracts are null and void in whole or in part or that the person responsible for the hindrance of competition must conclude contracts with the person so hindered on terms that are in line with the market or the industry standard.[69] Furthermore, civil courts also have the possibility to order interim measures.

With respect to case law, in the Etivaz decision,[70] the Swiss Federal Supreme Court found a dominant position of a cooperative and awarded the plaintiff an antitrust claim for admission to the cooperative. There is no specific case law with regard to contracts concluded by dominant undertakings. However, in the Allgemeines Bestattungsinstitut/Kanton Aargau decision, a hospital only contracted one funeral company, which was, according to the court, an abuse of a dominant position.[71]

Additionally, the Swiss Federal Supreme Court held that a contract constituting an unlawful agreement affecting competition according to Article 5 of the Cartel Act is void ex tunc (i.e., from the start) under Article 20 of the CO, as the purpose of the Cartel Act requires this sanction.[72]

Having said this, private antitrust enforcement against unlawful practices of dominant undertakings has not yet played a significant role in Switzerland. The main reasons are considered to be consumers' lack of standing to sue, the short limitation period and the high burden of proof to claim damages. So far, the introduction of the concept of relative market power does not seem to have increased the importance of private enforcement. Even today, civil court proceedings may be preferable in refusal to deal cases.

In 2019, ComCo tried to promote private antitrust enforcement by lowering fines for companies that pay damages to cartel victims. The cartel involved 12 construction companies that regularly allocated road construction projects among themselves and jointly determined their offer prices. ComCo's Secretariat offered the parties the opportunity to settle with the cartel victims following its request for a decision. The Secretariat promised to request that ComCo reduce the fines if damages to the cartel victims were paid. Subsequently, nine out of the 12 companies agreed to pay the cartel victims approximately 6 million Swiss francs in compensation. As a result, ComCo followed the Secretariat's request and reduced the fines of the respective nine companies

by approximately 3 million Swiss francs, taking into account 50 per cent of the settlement payments made. Although this case concerned a cartel, it is likely that ComCo will extend this new practice to abuse of dominance cases in the future.

## Outlook and conclusions

On 24. May 2024, the Federal Council voted in favour of the partial revision of the Cartel Act, to improve the effectiveness of the Competition Act in general and private enforcement in particular.[73] The new rules will, among others things, effect the following changes.

### Standing to sue

With regard to the enforcement of competition law claims, the new Cartel Act provides for a strengthening of the civil law remedies for anyone whose economic interests are threatened or violated by an unlawful restriction of competition. Thus, consumers and public authorities may also seek civil law remedies against market-dominant undertakings.

### Statute of limitations

The statute of limitations will be suspended from the start of an investigation by ComCo until a legally binding decision is rendered. The purpose of this suspension is to ensure that the potentially long duration of administrative competition law proceedings does not preclude the civil enforcement of claims, including against dominant undertakings.

### Time frames

With the aim of speeding up competition law proceedings, the new Cartel Act entails specific times frames for competition authorities as well as courts deciding competition law cases. The overall time frames are 60 months (from the time an investigation is formally initiated), 30 months for ComCo, 18 months for the FAC and 12 months for the FSC. These time frames are proposed to be merely indicative and not enforceable. Competition authorities only bear the burden of giving reasons as to why the time frames have not been met (comply or explain-principle).

### Consultation procedure

The new Cartel Act also contains certain improvements (i.e., shortened time frames, reduced risk of sanctions) with regard to the consultation procedure. The consultation procedure allows an undertaking to notify contemplated conduct to ComCo prior to implementation, thereby avoiding sanctions.

## Endnotes

1 Federal Supreme Court, decision of 5 March 2024, 2C_698/2021. Back to section

2 Federal Supreme Court, BGE 137 II 1999, c. 3.1. Back to section

3 Federal Supreme Court, decision of 2 November 2022, 2C_596/2019. Back to section

4 See, e.g., Federal Supreme Court, decision of 5 March 2024, 2C_698/2021, E.6.3; Federal Administrative Court, RPW 2015/3, p. 619, Sanktionsverfügung – Preispolitik Swisscom. Back to section

5 See Federal Supreme Court, RPW/DPC 2013/1, p. 114, Publigroupe. Back to section

6 The Federal Supreme Court held that the evaluation of a dominant position requires the assessment of all relevant aspects, decision of 5 March 2024, 2C_698/2021, E.6.4. Back to section

7 Federal Administrative Court, decision of 18 December 2018, B-831/2011, c. 404, DCC. Back to section

8 id., c. 442. Back to section

9 id., c. 405. Back to section

10 RPW 1998/3, p. 408, Bell AG/SEG-Poulets AG. Back to section

11 e.g., RPW 2003/1, pp. 134 et seq., Kreditkarten-Akzeptanzgeschäft (collective dominance affirmed); RPW 2016/1, p. 122, Online-Buchungsplattformen für Hotels (collective dominance ruled out). Back to section

12 See, e.g., RPW 2020/2, p. 808 et seq., Sunrise/Liberty Global. Back to section

13 ibid. Back to section

14 RPW 2018/3, p. 672 et seq., Ticketcorner/Starticket. Back to section

15 RPW 2016/1, p. 123, Online-Buchungsplattform für Hotels. Back to section

16 Only two investigations based on the abuse of a relative market power seem to have been initiated: ComCo press release of 31 January 2023 – Frensh speaking books and ComCo press release of 18 January 2024 – BMW. Back to section

17 Federal Supreme Court, RPW 2013/1, p. 114, Publigroupe. Back to section

18 e.g., Federal Supreme Court, decision of 9 December 2018, 2C_985/2015, c. 5.1. Back to section

19 Federal Supreme Court, decision of 5 March 2024, 2C_698/2021, E.6.4. Back to section

**20** Federal Administrative Court, decision 18 December 2018, B-831/2011, c. 1124 et seq., DCC. Back to section

**21** id., c. 797. Back to section

**22** Federal Supreme Court, decision of 5 March 2024, 2C_698/2021, E.6.5.2. Back to section

**23** RPW 2011/1, p. 96 et seq, Six/Terminals mit Dynamic Currency Conversion. Back to section

**24** Federal Supreme Court, decision of 2 November 2022, 2C_596/2019; Federal Administrative Court, decision of 18 December 2018, B-831/2011, DCC. Back to section

**25** RPW 2014/1, p. 215 et seq., Swatch Group Lieferstopp. Back to section

**26** RPW 2016/4, p. 920 et seq., Sport im Pay-TV. Back to section

**27** Federal Administrative Court, decision of 10 May 2022, B-4003/2016; Federal Supreme Court, decision of 23. April 2024, 2C_561/2022. Back to section

**28** Federal Administrative Court, decision of 31. October 2023, B-5819/2020. Back to section

**29** ComCo, decision of 30 October 2017, Geschäftskunden Preissysteme für adressierte Briefsendungen, c. 1027; RPW 1997/4, p. 514, Telecom PTT-Fachhändlerverträge. Back to section

**30** RPW 1998/4, pp. 675 and 676, Beschwerdeentscheid der REKO/WEF. Back to section

**31** ComCo, decision of 30 October 2017, Geschäftskunden Preissysteme für adressierte Briefsendungen, c. 1027. Back to section

**32** ibid. Back to section

**33** RPW 2020/3a, p. 1212, Kommerzialisierung von elektronischen Medikamenteninformationen. Back to section

**34** RPW 2002/3, p. 432 et seq., Radio- und TV-Markt St. Gallen; RPW 2003/1, p. 62 et seq., Espace Media Groupe/Berner Zeitung AG/Solothurner Zeitung. Back to section

**35** Federal Supreme Court, decision of 9 December 2019, 2C_985/2015, c. 5.e et seq. Back to section

**36** RPW 2010/1, p. 116 et seq., Preispolitik Swisscom ADSL. Back to section

**37** Federal Administrative Court, decision of 14 September 2015, B-7633/2003. Back to section

**38** Federal Supreme Court, decision of 9 December 2019, 2C_985/2015. Back to section

**39** RPW 2016/1, p. 128, Swisscom WAN-Anbindung. Back to section

**40** Federal Administrative Court, decision of 24 June 2021, B-8386/2015. Back to section

**41** Federal Administrative Court, decision of 24 June 2021, B-8386/2015, c. 8.4.2.2. Back to section

**42** Article 7, Paragraph 2, Letter f of the Cartel Act. Back to section

**43** Federal Supreme Court, decision of 12 February 2020, 2C_113/2017, c. 6.2.1. Back to section

**44** id., c. 6.2.2.Federal Supreme Court, decision of 2 November 2022, 2C_596/2019. Back to section

**45** RPW 2012/1, p. 74 et seq., Vertrieb von Tickets im Hallenstadion Zürich. Back to section

**46** Article 7, Paragraph 2, Letter b of the Cartel Act. ComCo, decision of 30 October 2017, Geschäftskunden Preissysteme für adressierte Briefsendungen, c. 1027. Back to section

**47** id., c. 1018. Back to section

**48** See Federal Supreme Court, BGE 139 I 72, c. 10.2.3. Back to section

**49** Article 7, Paragraph 2, Letter c of the Cartel Act. Back to section

**50** In decision BGE 137 II 199, c. 4.3.4, the Federal Supreme Court held that 'imposition' as a coercive element was a separate requirement under Swiss law that needed to be established. However, in later case law there have been some implications that the Federal Supreme Court may amend this statement and focus more on EU competition law in terms of this question (BGE 139 I 72, c. 8.2.3). Back to section

**51** RPW 2014/2, p. 403, ETA Preiserhöhungen. Back to section

**52** RPW 2016/1, p. 186, Swisscom WAN-Anbindung; RPW 2008/4, p. 579, Tarifverträge Zusatzversicherung Kanton Luzern. Back to section

**53** RPW 2016/1, p. 187 et seq., Swisscom WAN-Anbindung. Back to section

**54** Federal Administrative Court, decision of 24 June 2021, B-8386/2015. Back to section

**55** Article 49a, Paragraph 1 of the CartA. Back to section

**56** Ordinance of 12 March 2004 on sanctions imposed for unlawful restraints of competition. Back to section

**57** Articles 54 to 55 of the Cartel Act. Back to section

**58** Federal Supreme Court, decision of 29 November 2022, 2C_876/2021. Back to section

**59** Federal Administrative Court, decision of 28. February 2024, B-5972/2023. Back to section

**60** Article 27 of the Cartel Act. Back to section

**61** id., at Article 28, Paragraph 2. Back to section

**62** id., at Article 42, Paragraph 2. Back to section

**63** id., at Article 42, Paragraph 1. Back to section

**64** id., at Article 40. Back to section

**65** id., at Article 29. Back to section

**66** id., at Article 49a, Paragraph 2. Back to section

**67** id., at Article 12, Paragraph 1. Back to section

**68** id., at Article 12, Paragraph 2. Back to section

**69** id., at Article 13. Back to section

**70** BGE 139 II 316. Back to section

**71** Commercial Court of the Canton Aargau, of 13. February 2003, RPW 2003/2, 451. Back to section

**72** BGE 134 III 438. Back to section

**73** Message on the partial revision of the Cartel Act. Back to section

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