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**COMPETITION COMMITTEE**

## Annual Report on Competition Policy Developments in Switzerland

-- 2023 --

This report is submitted by Switzerland to the Competition Committee FOR INFORMATION.

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## *Switzerland*

### 1. Overview of 2023

1. 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.

2. 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.

3. 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.

4. 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.

5. The **Federal Supreme Court (FSC)** and 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

7. 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.

8. 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.

## 3. Key decisions in 2023

### 3.1. Decisions of the ComCo

9. 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

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

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 Section 4).

10. 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

11. 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.

12. 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.

13. 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. 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.

19. 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. Legislation

20. 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.

21. 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.

22. 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 Maître** 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').

## 5. Statistics

**Table 1.**

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

	2023	2022	2021
Investigations			
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
Final decisions	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
Preliminary investigations			
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
Other activities			
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
Mergers			

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
Appeal proceedings			
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

23. 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>2</sup>: As in the previous year, the courts, especially the FAC, issued an above-average number of decisions last year<sup>3</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 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.

## 6. Special topic 2023: Combating market foreclosures and excessive prices

24. 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.

### 6.1. Combating vertical foreclosure and resale price maintenance

25. 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

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<sup>2</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>3</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.

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.

26. ComCo's **notices on vertical agreements** and on the **automotive sector** (replaced by the Motor Vehicle Ordinance on 1 January 2024, see Section 4) 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.

27. 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.

## 6.2. Opening up of markets

28. 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).

29. 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 Section 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).

### 6.3. Combating price-fixing agreements

30. 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.

31. 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.

32. 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.

33. 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 Section 4).

#### 6.4. Opinions on regulatory legislation

34. 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.

35. 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.

36. 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.

37. 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.

## 6.5. Relative market power

38. 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.

39. 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').

40. 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.

41. 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). 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.

## 6.6. Conclusion

42. 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.