
To the Federal Council

2021 Annual Report of the Competition Commission (ComCo)

(in accordance with Article 49 paragraph 2 Cartel Act)

Table of Contents

1	Foreword from the President.....	4
2	Most Important Decisions of 2021.....	6
2.1	Decisions of the Competition Commission.....	6
2.2	Court judgments.....	7
3	Activities in Individual Sectors.....	10
3.1	Construction.....	10
3.1.1	Bid rigging.....	10
3.1.2	Building materials and landfills.....	10
3.1.3	Various activities.....	11
3.2	Services.....	11
3.2.1	Financial services.....	11
3.2.2	Healthcare.....	12
3.2.3	Liberal professions and other services.....	12
3.3	Infrastructure.....	13
3.3.1	Telecommunications.....	13
3.3.2	Media.....	14
3.3.3	Energy.....	15
3.3.4	Transport.....	15
3.3.5	State aid.....	16
3.3.6	Other sectors.....	16
3.4	Product markets.....	16
3.4.1	Vertical agreements.....	16
3.4.2	Consumer goods industry and retail trade.....	16
3.4.3	Watch industry.....	17
3.4.4	Automotive sector.....	17
3.4.5	Agriculture.....	17
3.5	Internal market.....	17
3.6	Investigations.....	19
3.7	International.....	20
3.8	Legislation.....	21
4	Organisation and Statistics.....	23
4.1	ComCo, Secretariat and statistics.....	23
4.2	Statistics.....	23
5	Digitalisation.....	25
5.1	Introduction.....	25
5.2	Activities of the Swiss competition authorities.....	26
5.2.1	Network development strategy – Investigation into Swisscom.....	26
5.2.2	Google.....	26
5.2.3	Marketing of directory data – Investigation into Swisscom Directories.....	26

- 5.2.4 Broadband access for business locations (WAN connection).....27
- 5.2.5 Ice hockey on Pay TV27
- 5.2.6 Cases related to mobile payment services27
- 5.2.7 Online booking platforms for hotels.....27
- 5.2.8 Software providers v. university hospitals28
- 5.3 The international context28
- 5.4 Conclusion28

1 Foreword from the President

In 2021, the modern Cartel Act and the Competition Commission (ComCo) both celebrated their 25th birthdays. These anniversaries were honoured in an official ceremony in June 2021. Whereas prior to 1996, the tendency was to accept restrictions of competition, the current law has made the protection of effective competition the focal point. Cartels are no longer accepted as legitimate, the scope for dominant undertakings to act has been restricted by the ban on abuses, while major company mergers are assessed with regard to their competitive acceptability.

ComCo's annual reports illustrate how these tasks are implemented. They summarise the authorities' activities and provide an overview of the most important court decisions. In 2021, the courts once again clarified some significant issues: the Federal Supreme Court confirmed in the *off-list medicines* cases that in certain circumstances, recommended prices may be prohibited as vertical price fixing agreements. The Federal Administrative Court confirmed in the *Swisscom WAN connection* case that the prices and the margin-squeeze of the dominant company in the market for broadband connections for businesses was unlawful. There were numerous court decisions on procedural issues, e.g., with regard to publishing decisions, the right to inspect files and the duty to testify of former senior managers. Unfortunately, there does not seem to be a balance between procedural and substantive actions. In view of the authorities' limited capacities, every working week spent preparing and following up publication decisions, for example, is a week lost that could have been spent working on actual cases. It is a welcome move in this regard when the courts set clear guidelines that allow recurrent procedural submissions to be dealt with rapidly. In general, speeding up procedures is crucially important in protecting competition. Where there is a risk that competition will be undermined by *faits accomplis*, rapid intervention is required. With this in mind, ComCo ordered interim measures in the case of *Swisscom's network expansion strategy*. Infrastructure competition will be eliminated or at least severely restricted if Swisscom's competitors do not have direct access to the optical fibre infrastructure. The Federal Administrative Court rejected an appeal against the interim measures and the Federal Supreme Court rejected an application to suspend their effect. The proceedings on the measures and on the merits of the case remain pending.

A new task lies ahead: the indirect counter-proposal to the Fair Prices Initiative was approved by Parliament in the 2021 spring session and came into force on 1 January 2022. The rules on relative market power have been added to the Cartel Act, in part with the aim of ensuring that Swiss companies are not discriminated against when purchasing goods and services abroad. ComCo was quick to prepare and publish a factsheet with a report form in December 2021. It aims to play a leading role in the implementation of the new rules and secure key decisions, even if it shares responsibility for applying the new rules with the civil courts. The new regulations against 'geoblocking' on the other hand are part of the Unfair Competition Act and thus do not fall within ComCo's remit.

For years, the dominant topic in the discourse on competition law has been the state of competition in the digital economy. ComCo has been confronted with the main issues for quite some time and has decided numerous cases involving a variety of markets. Because of its enormous importance, digitalisation has been chosen as the special topic for this annual report. Its influence is not limited to the major international internet platforms; it is a phenomenon that permeates every field of competition policy. Case selection presents a major challenge. In an ever more interconnected world, many behaviours have an impact in Switzerland. ComCo prioritises cases that have a particular domestic impact. In addition, it ensures that solutions adopted by other competition authorities, such as those in the EU, are also applied in Switzerland as required. In most cases, this does not require any formal pro-

cedure. What is certain is that the goal of protecting effective competition applies to all markets. ComCo also fulfils this mandate with regard to the digital economy.

Andreas Heinemann
President of the Competition Commission

2 Most Important Decisions of 2021

2.1 Decisions of the Competition Commission

In a decision dated *6 December 2021*, ComCo concluded an investigation against **asphalt** plants and road construction companies in the **Bern** area and imposed fines totalling approximately CHF 2.2 million for violations of competition law. The Belagslieferwerk Rubigen AG (BERAG) abused its dominant position in that it granted its shareholders preferential terms and paid its customers a loyalty bonus. In addition, some of BERAG's shareholders agreed on a ban on competition, by which no one was to compete with BERAG in the area around its works in Rubigen. Furthermore, BERAG and BLH Belagswerk Hasle AG each granted the other a seat on their respective boards and in this way exchanged business-related information. An amicable settlement was reached with five of the seventeen parties. In the case of a further five parties, the proceedings were concluded without action or abandoned. Certain parties have filed an appeal against the ComCo decision in the Federal Administrative Court (FAC).

In a judgment dated *28 June 2021*, ComCo fined Pöschl Tabak GmbH around CHF 270,000. The German tobacco producer Pöschl sells **snuff and rolling tobacco** in Switzerland. It included export bans in distribution agreements with several European sales partners. These dealers were not permitted to supply tobacco products in Switzerland. Territorial protection agreements of this type are unlawful, as they foreclose the Swiss market and prevent competition. Pöschl cooperated with the competition authorities and agreed to an amicable settlement. Foreign sales partners are now allowed to take orders from customers in Switzerland without restriction. Pöschl's full cooperation with ComCo led to a reduced sanction. The decision has taken full legal effect.

In July 2019, ComCo's Chamber for Partial Rulings imposed fines totalling CHF 30 million on eight finance companies that offer **vehicle leasing**. On *10 May 2021* ComCo concluded the investigation into automobile leasing in respect of the last company. It fined Ford Credit Switzerland GmbH around CHF 7.7 million for the unlawful coordination of leasing terms between July 2006 and March 2014. Ford Credit had systematically exchanged details of leasing terms with the eight other companies for several years. The companies informed each other, for example, about interest rates and vehicle residual value tables. These pricing details were used to calculate the leasing rates offered by the various leasing providers. ComCo was able to conclude an amicable settlement with the eight other finance companies, but not with Ford Credit. Ford Credit has filed an appeal with the FAC.

On *10 May 2021*, ComCo fined eight companies involved in **electrical installations and servicing** in the Geneva Region a total of CHF 1.27 million for unlawful bid rigging. From 2013 to 2018, these companies had coordinated the prices in their bids in public and private invitations to tender and divided up the work in the electrical sector among themselves. The companies were involved in the scheme to varying degrees. Their respective involvement ranged from a single project to several dozen agreed projects. The companies agreed to amicable settlements with ComCo. ComCo abandoned the proceedings against two electrical installation companies, as they could not be proven to have participated in the bid rigging. The decision has taken full legal effect.

On *8 February 2021*, ComCo opened an investigation into **Mastercard** for possibly obstructing the National Cash Scheme (NCS) offered by SIX. It ordered interim measures. The NCS is a new national policy from SIX on cash withdrawals and further transactions at ATMs. In particular, it should allow cash deposits and account enquiries to be made at third-party ATMs. The investigation was triggered by a report from SIX that Mastercard was preventing

the NCS from becoming established in the market. The obstruction allegedly involves Mastercard refusing the NCS's 'co-badging' on the new Debit Mastercard. Co-badging is the provision of two or more payment brands/applications on the same card-based payment instrument. The interim measures allow the card-issuing banks to prepare the debit cards technically for the subsequent activation of the NCS. Mastercard has filed an appeal against the interim measures with the FAC.

2.2 Court judgments

On 14 December 2020, ComCo opened an investigation into **Swisscom's network expansion strategy**. At the same time it ordered interim measures and prohibited Swisscom with immediate effect from expanding its optical fibre network in such a way that third parties can no longer have Layer 1 access from Swisscom exchanges. Swisscom appealed to the FAC against the interim measures. The FAC rejected the application from Swisscom to restore the suspensive effect of its appeal in an interim decision on 15 January 2021 and confirmed in its decision of 30 September 2021 ComCo's interim measures on the optical fibre network expansion. The FAC held that Swisscom had failed to establish that there were sufficient technological or economic reasons for changing from the existing optical fibre standard with a four-fibre-model to a single-fibre model. Swisscom's arguments based on service provision and regional policy aspects for providing outlying regions with high-speed broadband networks did not justify a restriction of competition. The court took the view that Swisscom's network expansion with a single-fibre model presumably qualified as abusive conduct by a dominant company. The FAC upheld the urgency of the interim measures because Swisscom, by changing from the existing optical fibre standard, would have secured an unchallengeable legal position for a long period of time. Swisscom subsequently filed an appeal with the Federal Supreme Court and requested the restoration of suspensive effect. The Federal Supreme Court rejected this application on *6 December 2021*.

On 8 February 2021, ComCo opened an investigation into **Mastercard** for possibly obstructing the National Cash Scheme (NCS) offered by SIX, ordering interim measures on the same day. Mastercard appealed against these measures to the FAC (see Section 2.1). On *10 November 2021* the FAC upheld the request from Mastercard to restore the appeal's suspensive effect. The withdrawal of suspensive effect was not justified due to a lack of urgency. The FAC will decide at a later date on the permissibility of the interim measures themselves. This decision by the FAC has taken full legal effect.

Tamedia had appealed to the FAC against an order to pay costs of CHF 5,000 for ComCo's preliminary investigation procedure into the **merger between Tamedia (now the TXGroup) and Adextra**. It demanded the order for the costs be quashed, arguing that ComCo had interpreted the obligation to report too extensively, and that the merger did not have to be reported. The FAC rejected the appeal on 6 October 2020 and confirmed ComCo's interpretation. Tamedia appealed the judgment to the Federal Supreme Court (FSC). The FSC in its related judgment of *23 September 2021* did not consider the question of whether there was a duty to report. It stated that filing a report automatically led to the opening of a preliminary examination and thus the fixed fee of CHF 5,000 became due irrespective of whether there was actually a duty to report. According to the FSC, the question of whether there was a duty could have been clarified by requesting advice from the Secretariat or seeking a contestable declaratory order, for example. The FSC therefore upheld the ComCo decision.

The Zurich Administrative Court on *26 August 2021* granted the ComCo appeal of 28 January 2021 against an invitation to submit offers in a bidding procedure by a Zurich commune. The court allowed ComCo's applications and found that the invitation infringed the Internal Market Act (IMA). The Zurich commune commissioned an engineering firm to plan and supervise the procurement of a water treatment system for the communal **swimming pool**. On behalf of commune, the engineering firm invited four suppliers to make bids. How-

ever, members of the engineering firm were in a family and business relationship with one of the bidders. In the circumstances, the commune had to be held accountable for the actions of the engineering firm. As a consequence, there was a case of 'prior involvement' and a breach of the duty of recusal that rendered the procurement procedure unfair and violated procurement law. Competition was thus obstructed in this bidding procedure and the Internal Market Act violated. The decision has taken full legal effect.

Seven companies appealed against ComCo's **Graubünden construction services** decision made in 2019. The FAC in its judgments of *9 August 2021* rejected three appeals. The judgments related to issues of corporate continuity (continued possibility of sanctions after the restructuring of companies), to ComCo measures and to calculating the five-year period within which sanctions can be enforced. In all the decisions, the FAC upheld ComCo's arguments. One party has appealed the decision to the FSC. ComCo's decision on Graubünden construction services has become legally binding on the other two companies.

In its judgment of *24 June 2021*, the FAC largely confirmed the ComCo decision of 21 September 2015 against **Swisscom** in relation to **broadband access**. Swiss Post in 2008 invited bids for networking their post office locations and for setting up and running a wide area network (WAN) for these locations. Swisscom was awarded the contract, as the price it offered was around 30 per cent lower than its competitors' prices. The latter were reliant on Swisscom's upfront services. The FAC found that Swisscom charged its competitors prices for its upfront services that were too high, with the result that they could not compete with the bid from Swisscom. In addition, through this pricing policy, Swisscom forced Swiss Post to pay excessive prices. As it was impossible for competitors to achieve any profit margin, Swisscom had abused its market power by what is known as a margin squeeze. The FAC calculated the sanction in a way that differed in certain respects from the ComCo calculation and reduced the penalty from CHF 7,916,438 to CHF 7,475,261. Swisscom has appealed the decision to the FSC.

On 16 December 2011, ComCo fined several companies in the case relating to **road construction and civil engineering in the canton of Aargau**. This sanctions procedure was finally concluded by a legally binding judgment of the FSC dated 3 August 2020 in relation to the last remaining appellant company. Earlier, after publication of the ComCo decision, procurement bodies from the Canton of Aargau filed **applications to inspect** the unredacted ComCo decision and the related files. ComCo partially approved these requests for access on 11 December 2017 and intended to allow the procurement bodies to inspect the files to a limited extent or to provide them with information. Certain companies appealed against the inspection decision. The FAC allowed these appeals in its judgments of 23 October 2018. The FAC took the view that a disclosure of data based on the Data Protection Act (FADP) is only possible firstly if a legally binding sanctions decision has been issued, and secondly if a related breach of competition law has been identified. In response, the EAER with support from ComCo and the Canton of Aargau as the procurement body concerned each filed an appeal with the FSC. The FSC allowed these appeals on *18 March 2021* in its two judgments, supporting the position that ComCo had taken, i.e., that ComCo, upon request, can hand over files to procurement bodies even if a legally binding judgment has not yet been issued, i.e., where an appeal is pending against a ComCo decision.

In three judgments dated *8 March 2021*, the FSC upheld the appeals filed by the EAER against judgments of the FAC and confirmed ComCo's opinion that former senior managers of companies and entities subject to investigation can be questioned without restriction as witnesses, i.e., that they are required to testify and tell the truth (subject to the penalties for perjury). According to the FSC, interviewing a former senior manager did not in principle affect the nemo-tenetur principle (protection from self-incrimination). The FAC had previously decided that there were limits to the extent to which former senior managers could be questioned as witnesses, as they had a right, derived from the defendant company's right to remain silent as an actual party to the proceedings, to refuse to make any statement that might

incriminate their former employer. In the FAC's view, on the other hand, current employees without senior management status had no such (derived) right to refuse to testify. These judgments were issued in connection with the **Boycott Apple Pay** investigation.

In its judgment of *16 February 2021*, the FAC confirmed the ComCo decision of 11 December 2017 against **Naxoo SA**. The FAC also concluded that Naxoo SA held a dominant position in the city of Geneva in the market for cable connections. Naxoo abused this position in relation to property owners, suppliers of third party systems and end customers. They imposed unreasonable terms and conditions in house connection contracts and compromised sales markets and technical development. As Naxoo SA corrected its sales figures following the ComCo decision and this forms the basis for the sanctions calculation, the FAC reduced the ComCo sanction from CHF 3.6 to around 3.25 million. Naxoo SA has filed an appeal against this judgment with the FSC.

On *4 February and 7 October 2021*, the FSC allowed four out of five appeals filed by the EAER against FAC judgments dated 19 December 2017 on **off-list medicines (recommended prices)**, rejecting one appeal on *8 December 2021*. The FSC confirmed the unlawfulness of the retail prices (RRPs) recommended by the manufacturers of medicines to treat erectile dysfunction (impotence drugs). These decisions came after a long history of proceedings involving two appeals to the FSC. ComCo on 2 November 2009 had decided that the RRP for impotence drugs were unlawful vertical agreements affecting competition between the pharmaceutical companies and the retailers, which although disguised as recommendations in fact fixed the sales prices for end customers. It prohibited the three pharmaceutical manufacturers from publishing RRP for Cialis, Levitra and Viagra and fined them. The FSC has now confirmed the decision on the merits and referred three of the cases back to the FAC to determine the sanctions and one case to determine the costs and consequential damages. In the absence of sufficient clarification of the facts, the FSC did not pronounce on the issue of the complicity of wholesalers and IT companies in relation to the agreement in question and rejected the appeal, although the FSC did not exclude the possibility that these parties could be regarded as parties to the agreement, insofar as their conduct fulfilled the statutory requirements.

The courts handed down further judgments on the publication of decisions under competition law, confirming the legal precedent:

- In judgments dated *27 October 2021*, the FSC rejected the appeals filed by the parties to the **air freight** proceedings against the publication of ComCo's decision of 2 December 2013. ComCo found at the time that several air freight companies had entered into unlawful agreements on surcharges for international air freight. The main proceedings are pending before the FAC.
- A party to the merger filed an appeal against the publication of a ComCo opinion on a **planned merger**. The FAC decided on 21 September 2020 to refer the opinion back to ComCo for additional redacting and anonymising. The party to the merger appealed against this decision to the FSC. The FSC rejected the appeal on *19 October 2021*, noting that ComCo opinions on planned mergers should be regarded as 'decisions' and that ComCo may therefore publish them. It also confirmed that the ComCo opinion to be published no longer discloses trade secrets and is data protection compliant.
- Several judgments were handed down in the report year in relation to the publication of a final report in 2014: on *9 June 2021* the FSC issued a decision dismissing the action. The FAC had previously largely rejected an appeal against the ruling on publication in a decision dated *16 April 2021* and turned down a further appeal relating to the rejection of an application for reconsideration. After ComCo implemented this judg-

ment with a ruling on publication dated 14 September 2021, the FAC on 15 December dismissed a further appeal against the ruling (see Section 3.3.2).

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

On 27 April 2021, the Secretariat opened an investigation into possible agreements affecting carriers of goods and waste in the canton of Valais. The Secretariat has received indications that several transport companies of goods and waste in the canton of Valais have entered into bid rigging agreements. In one tendering procedure for waste collection and disposal, it is alleged that transport companies coordinated their bids. The Secretariat conducted several searches of business premises. The case is currently in the investigation phase.

In June 2020, the Secretariat opened an investigation in the canton of Graubünden in the **Moesa** region. There are indications of bid rigging involving several companies in the construction and civil engineering sector. The case involves both private and public construction projects. The investigation was extended in June 2021 to include three further companies (two based in Ticino and one in the Moesa region), with searches of business premises being conducted simultaneously. The case is currently in the investigation phase.

In the summer of 2019, ComCo concluded the final two of ten investigations in the **canton of Graubünden**. In each of the Engadin I, II, III, IV, U, Q and road construction cases, some of the parties appealed to the FAC. The exchange of written submissions with the FAC has basically been concluded, and the FAC has issued three decisions in the road construction case (see Section 2.2). The FAC is expected to issue further decisions in 2022.

In the summer of 2021, the Secretariat opened a preliminary investigation into several companies that may have coordinated their bids for **fire protection walls** in a single tendering procedure. The case is currently in the investigation phase.

Three appeals are currently pending before the FAC against the ComCo decision of July 2016 that in several hundred tendering procedures between 2002 and 2009, eight road construction and civil engineering companies in the districts of **See-Gaster (SG) and March and Höfe (SZ)** had unlawfully agreed on prices. The FAC dismissed one case after the corresponding appeal was withdrawn in 2020.

In relation to the ComCo decision on **roads and civil engineering in the canton of Aargau**, a decision was still pending until spring 2021 before the FSC on whether procurement bodies were allowed access before the ruling on sanctions becomes legally enforceable to the unredacted version of a decision and the related files for the purpose of filing claims for damages. The FSC answered the question on 18 March 2021, upholding ComCo's decision (see Section 2.2). Subsequently, ComCo was able to deal with the five requests for access that had been suspended pending this decision. These requests for access relate to the ComCo decision on bid rigging in the See-Gaster case and two decisions in the canton of Graubünden. ComCo dealt with some of the requests for access on 6 December 2021. The applicants and the construction companies concerned have the option of filing an appeal with the FAC.

3.1.2 Building materials and landfills

On 7 June 2021, ComCo opened an investigation into **Deponie Höli Liestal AG**. ComCo has received reports that the company holds and has abused a dominant position in the landfill business in the Basel area. There are indications that Deponie Höli has in the past

charged its own shareholders lower prices than other customers and has refused to accept waste material from certain customers. The case is currently in the investigation phase.

In January 2015, ComCo opened an investigation into several companies in the building materials and landfill industry in the Bern area. The investigation was divided into two cases (KTB-Werke and KAGA) for reasons of procedural economy. ComCo concluded the smaller **KTB-Werke case** on 10 December 2018 with sanctions. This decision has been appealed to the FAC and the exchange of written submissions has reached an advanced stage. The larger of the two investigations, **KAGA**, is in its final stages. It is planned to issue the parties with the Secretariat's proposed decision in the summer of 2022 for their comments. ComCo's decision is expected at the end of 2022.

On 5 March 2019, ComCo opened an investigation into **two surfacing works** in the canton of Bern and against the shareholders of one of the two surfacing works. This investigation has its origins in the **KAGA** case opened in 2015. It was concluded on 6 December 2021 with a ComCo decision (see Section 2.1).

3.1.3 Various activities

The Secretariat dealt with eleven reports in the construction sector as part of market monitoring procedures, provided advice on two occasions, and assessed one merger. In addition, several awareness-raising events were held in 2021 (training/raising awareness for federal and communal procurement officers, CAS course at the University of Bern). In the environment sector, the Secretariat participated in around 15 consultation procedures organised by the Administration.

3.2 Services

3.2.1 Financial services

In the report year, progress was made towards concluding the ordinary procedure in the two IBOR investigations on **EURIBOR** and **Yen LIBOR / Euroyen TIBOR** and the investigation into agreements affecting competition related to **foreign exchange spot transactions** between banks (**Forex**). These sequentially hybrid investigations were the subject of various decisions from the ComCo Chamber for Partial Rulings in the past in which various amicable settlements including sanctions were approved, thereby concluding the investigations against the parties concerned at an early stage.

The **Boycott Apple Pay** investigation was continued in 2021. In the report period, the FSC overruled three judgments by the FAC and decided that former senior managers of companies and other entities under investigation can be questioned as witnesses without restriction (see Sections 2.2 and 3.6). These FSC judgments are of major practical importance for the investigative activities of the competition authorities (see Section 3.6).

In the investigation into **Mastercard** for possible obstruction of the National Cash Scheme (NCS) run by SIX, ComCo ordered interim measures, which Mastercard challenged by appealing to the FAC. In an initial interim decision, the FAC reinstated the suspensive effect of the appeal that ComCo had previously revoked, commenting that a decision would be taken on the urgency of the interim measures at a later date (see Sections 2.1 and 2.2). The investigations are ongoing.

Cashless payment transactions with payment cards is a constant issue for the competition authorities. Once again in this report year numerous enquiries were received from members of the public and the media, in particular with regard to the charging schemes applied by Mastercard and Visa for their new generation of debit cards. The Office for Price Surveillance and the ComCo Secretariat have opened proceedings on this question. In addition, the Secretariat examined whether the introduction of new licence fees and the increase in existing

fees for participating in the card schemes offered by Mastercard or Visa are compatible with the Cartel Act. The Secretariat also continued with the preliminary investigation into Visa's Virtual User Commercial Account solution and into the question of whether the interchange fees incurred in connection with it are covered by the amicable settlement that ComCo reached in 2014 with credit card issuers and merchant acquirers. Lastly, the Secretariat continued the preliminary investigation into interchange fees in the cross-border sector.

On 20 January 2021, the Federal Council instructed DETEC and the FDF (FFA) to draw up, by the end of the year, specific proposals for developing the **universal provision of postal and payment services** in light of the digital revolution. The independent and interdisciplinary panel of experts appointed for this purpose invited the ComCo Secretariat to a hearing in November 2021 on the competition-related aspects of their task. The Secretariat is unable to identify any market failure in relation to payment services. From a competition point of view, no statutory requirement for the universal provision of payment services is required. Payment services are also offered appropriately in other countries without any need for an express universal service mandate.

Lastly, in the financial services sector, various company mergers were assessed and authorised in phase I.

3.2.2 Healthcare

The case relating to **off-list medicines** – specifically Cialis, Levitra and Viagra – reached its conclusion in the report year – following an initial FSC judgment from 2015. The pharmaceutical companies Pfizer AG, Eli Lilly (Suisse) SA and Bayer (Schweiz) AG had issued recommended retail prices (RRPs) for these medicines to wholesalers and retailers (pharmacies and self-dispensing doctors). The majority of retailers followed the 'price recommendations' made available to them via the e-mediag database through their checkout systems when the barcode was scanned. The FSC held that it was proven that there were vertical fixed price agreements between the manufacturers and with retailers that applied the RRP. It thereby confirmed the ComCo pilot decision from 2009 in connection with price fixing agreements and set the course for ComCo's future practice on this question.

The investigation opened in September 2019 into several Swiss and foreign companies involved in the production, distribution and sale of the active pharmaceutical ingredient **scopolamine butylbromide** was continued. The investigation will examine whether the indications of the unlawful coordination of sales prices for the agent at an international level and of an allocation of international markets are substantiated.

In the healthcare sector, the Secretariat received miscellaneous **requests for advice**. The enquiries related to matters ranging from the possibility of introducing tariff structures in supplementary insurance, via the permissibility of tariff negotiations by health insurance companies to rules on a clearer allocation of territories for home care service companies (Spitex) and a plan for the effective organisation of COVID tests in government offices and businesses. In order to respond to all these questions, arrangements were made with those concerned either to have brief discussions in the form of meetings or provide brief written opinions.

In addition, ComCo was called on to assess a range of **company mergers** in the healthcare sector: Astorg/Nordic Capital/Novo/Bioclinica, CSS/Visana/Zur Rose/medi24/WELL and Advent/Eurazeo/Hoist. The Secretariat also dealt with more than 150 **consultation procedures** related to the healthcare sector and numerous **enquiries from members of the public**.

3.2.3 Liberal professions and other services

The case relating to **installation and electrical services in the Geneva region** was concluded with eight companies signing an amicable settlement, which was confirmed by

ComCo on 10 May 2021. The decision has taken full legal effect. This investigation uncovered around 130 horizontal agreements that were concluded between 2013 and 2018 (see Section 2.1).

In the investigation into **automobile leasing**, Ford Credit, the last remaining party under investigation in the ordinary procedure, appealed ComCo's decision concluding the proceedings dated 10 May 2021 to the Federal Administrative Court (see Section 2.1). Previously, the ComCo Chamber for Partial Rulings had concluded proceedings against the eight other parties with amicable settlements in a partial ruling dated 26 July 2019. One of these parties, FCA Capital Suisse SA (FCA, Fiat), raised an action and appeal against the partial ruling. While the Federal Administrative Court dismissed the FAC action in 2020, the appeal remains pending before the Federal Administrative Court.

In addition, the Secretariat has been involved in several cases relating to **digitalisation** that are discussed at the end of this report. It also conducted several proceedings in the **field of sport**. In relation to **skiing**, relations between the tourist office in Zermatt and various ski schools were analysed. As the investigation failed to substantiate specific instances of discrimination against certain ski schools, it was closed without further action. Also in relation to skiing, the 'Snow Sports Campaign (Action sports de neige)' launched by the Canton of Valais was analysed following a complaint of possible unequal treatment of the ski schools that potentially benefit from the campaign. The campaign aims to promote snow sports and grants subsidies to primary schools in Valais to fund ski trips or similar events organised in the canton. ComCo worked with the service concerned in the canton of Valais to adapt 'Action sports de neige' in order to avoid any possible distortion of competition. The Secretariat also analysed subsidies for **tennis halls** in the canton of Zurich. According to a complaint received by the Secretariat, the cantonal sports fund, which is used to subsidise various sports projects, had treated businesses in a discriminatory manner when compared with non-profit clubs. In view of the fact that the cantonal parliament had chosen to make a distinction between profit and non-profit activities and that the cantonal body responsible for awarding subsidies systematically carries out a thorough analysis of the applications in order not to distort competition, it was possible to close the case without taking any further action. In relation to **ice hockey**, the Secretariat was asked for advice by the National Ice Hockey League (National League AG) on the introduction of its 'Financial Fair Play' system. This system aims to limit the total salaries paid to team members in the National League, firstly in order to increase the financial stability of the clubs and secondly in order to support a balance of power within the league, all with the aim of increasing the attractiveness of the sport. The analysis indicated that this system could have constituted a price agreement in that the limited salaries were negotiated between club representatives only. The Secretariat therefore expressed its reservations about this system, suggesting that other options with less impact on competition were possible. Finally, in relation to **motorsport**, the Secretariat received a complaint against the Association Auto Sport Schweiz (ASS). The ASS has been designated by the Fédération Internationale de l'Automobile as the national governing organisation for motorsport and karting in Switzerland. As part of its activities, the ASS ensures that motor sport competitions are fair and comply with the rules laid down by the FIA. The case was not pursued, as private interests are primarily at stake, which meant that the matter had to be brought before the civil courts.

3.3 Infrastructure

3.3.1 Telecommunications

In September 2021, ComCo opened an investigation into Swisscom and its subsidiary Directories in relation to **online directory services**. Directories is the publisher of the printed telephone book and runs the two online directory services 'local.ch' and 'search.ch'. In spring 2019, Directories introduced the standard product 'SWISS LIST', thus fundamentally chang-

ing the prices and conditions for adding or changing a telephone book entry. Until then, businesses could amend their entries individually in order to add information. With the introduction of 'SWISS LIST', various products and services are only offered as part of a package. ComCo is investigating whether and to what extent this has hampered competitors and been detrimental for customers.

The investigation into **Swisscom's network expansion strategy** made further progress. The interim measures in relation to this ordered by ComCo in December 2020, which prohibit Swisscom from stopping competitors from gaining access (Layer 1-access) to the infrastructure as the optical fibre network is expanded, was confirmed by the FAC in a judgment dated 30 September 2021. Swisscom referred the matter to the FSC, which rejected its application to restore the suspensive effect of the appeal at the end of 2021 (see Section 2.2).

The investigation opened in 2020 into Swisscom in relation to **broadband access for business locations (WAN connection)** continued, primarily by collecting and evaluating additional data.

ComCo fined Swisscom in 2015 for abusing a dominant position by way of a so-called **margin squeeze** related to an invitation to tender for networking post offices. The FAC largely confirmed ComCo's decision in its judgment of 24 June 2021, making only minor changes to the amount of the fine. Swisscom has referred the matter to the FSC (see Section 2.2).

The FAC confirmed in its judgment of 16 February 2021 the ComCo decision of 11 December 2017 against **Naxoo SA** for abusing a dominant position in relation to cable connections in the city of Geneva. The FAC reduced the fine imposed by ComCo from CHF 3.6 to around 3.25 million, as the court based its calculation on slightly lower sales figures. Naxoo SA has appealed against this judgment to the FSC (see Section 2.2).

3.3.2 Media

In relation to **marketing and placing cinema advertising**, a market monitoring procedure was opened in response to a report from an advertising agency in order to identify any abuse of a dominant position. Here, the main question is whether any other cinema advertising agencies or intermediaries are being prevented from entering the market or competing.

ComCo was required to assess three **planned mergers** in the media sector. In the case of TX Group / Acheter-Louer.ch and in TX Group / Immowelt Schweiz, the TX Group AG intended firstly to acquire Acheter Louer.ch & Publimmo Sàrl and secondly part of the Swiss business of Immowelt AG. The analysis in the preliminary investigations revealed that there were no (or scarcely any) indications that a dominant position would be established or consolidated by the two planned mergers. In the case of Aventinus / Heidi Media, the Fondation Aventinus intended to take over Heidi Media SA. Here, ComCo's assessment in the preliminary examination allowed the green light to be given.

The decision issued by ComCo in 2020 relating to the live broadcast of **ice hockey matches on pay TV**, which fined UPC around CHF 30 million, is still pending before the FAC. In the report year, an exchange of written submissions took place. Likewise, the decision that ComCo issued in 2016 against Swisscom, which sanctioned Swisscom for a similar practice in the transmission of live sport (football and ice hockey) is also pending before the FAC.

The FAC partly allowed the appeal against the ruling on publication of 27 May 2015 in relation to the publication of the final report of 12 November 2014 on the abandonment of a preliminary investigation into **TV marketing and radio advertising services** in a judgment dated 16 April 2021. Essentially, further redactions and anonymisations had to be made to the final report. However, the FSC dismissed the appeal by the company concerned in a judgment dated 9 June 2021. To implement the FAC's judgment, ComCo issued a new ruling on publication on 14 September 2021, in response to which yet another appeal was filed in the

FAC. The FAC dismissed this appeal in a decision dated 15 December 2021. In the same case, the FAC also rejected a further appeal in which ComCo's decision relating to rejection of an application for reconsideration had been challenged (see Section 2.2).

The FAC had decided on 21 September 2020 to refer a ruling on publication back to ComCo for the further redaction and anonymisation of an **opinion on a planned merger**. The appeal raised by one party to the merger was dismissed by the FSC on 19 October 2021, which confirmed that the ComCo opinion to be published no longer disclosed any trade secrets and also that publication was not contrary to the data protection regulations (see Section 2.2).

In the case of another planned merger, on 6 October 2020 the FAC rejected the appeal of a party to the merger against the fixed fee of CHF 5,000 to be paid for the preliminary investigation and thus upheld ComCo's **extensive interpretation of Article 9 paragraph 4 Cartel Act**. The FSC rejected the appeal against this decision in its judgment of 23 September 2021 and found that the fixed fee is payable irrespective of whether there is a duty to report (see Section 2.2).

3.3.3 Energy

The Secretariat is conducting several market monitoring procedures related to the issue of **using data originating from a monopoly sector** in order to establish whether there is any abuse of a dominant position.

In relation to the preliminary investigation abandoned in August 2020 into the use of data originating from a monopoly sector for activities in other markets, the **publication of the final report** is in dispute. The decision issued by the Secretariat on 23 September 2021 has been appealed by the electricity grid operator concerned to the FAC.

In the electricity sector, both the Secretariat and ComCo were requested on several occasions to provide opinions in various consultation procedures. ComCo advocated in particular a prompt and full liberalisation of the market for the supply of end customers and for metrology, the possibility of changing during a year and a market-oriented, competition- and technology-neutral system to guarantee the expansion of renewable energy sources. In addition, in the area of national economic supply, ComCo requested that, in the event of public tasks being transferred from the Energy Section, an actor that is legally and professionally separate from the gas industry and completely independent should operate the monitoring system for observing the supply situation, collect the data required for this purpose and make this data available to the Energy Section.

3.3.4 Transport

In relation to freight forwarding and logistics, ComCo was called on to assess the **planned merger** between DSV Panalpina and Agility Global Integrated Logistics. Here DSV Panalpina A/S intended to acquire Agility Logistics International B.V. and Agility International GIL Holdings I Limited from Agility Public Warehousing Company K.S.C.P. The assessment made in the preliminary examination resulted in ComCo allowing the merger.

The FAC has still to issue a decision in the appeal proceedings in the case relating to **air freight**. Various parties have appealed to the FAC against the ruling of 2 December 2013, which led to sanctions totalling around CHF 11 million being imposed on 11 airlines for entering into horizontal price-fixing agreements. Also in dispute in this case was whether and to what extent the ruling of 2 December 2013 could be published. Following the FAC's decision to refer the matter back to ComCo on 12 November 2018, ComCo ordered the publication of a revised version of the ruling. This decision was once again appealed to the FAC, but the appeals were all dismissed in their entirety in 2020. Four of these judgments were appealed to the FSC. The FSC in judgments dated 27 October 2021 rejected all these appeals in their entirety, insofar as it actually considered them (see Section 2.2).

In relation to regional passenger transport and multimodal mobility, the Secretariat was on several occasions asked to provide opinions as part of the **office consultation procedures**. In connection with promoting multimodal mobility, the Secretariat has repeatedly advocated non-discriminatory and timely access to public transport marketing infrastructure for external mobility facilitators.

3.3.5 State aid

In the report year, ComCo was required to assess a case relating to **state aid under the Air Transport Agreement (ATA)** based on the Aviation Act. The Canton of Geneva intends to grant Geneva Airport a credit amounting to a maximum of CHF 200 million in the event of a crisis due to the corona pandemic, so as to guarantee the required liquidity for maintaining and continuing operations. The Canton of Geneva submitted a related draft law to ComCo. ComCo examined the planned support measures with regard to their compatibility with the Air Transport Agreement. In its opinion of 5 July 2021, it concluded that the planned law would only be compatible with the ATA if the instalments of the loan were paid in accordance with the terms set out in the memorandum to the law and the ComCo opinion. The Geneva Cantonal Parliament must now take account of the results of this review in approving the draft law, i.e., in its decision on granting the aid.

3.3.6 Other sectors

Swiss Post AG withdrew its appeal to the FAC against ComCo's decision of 30 October 2017 in the case of **business customer pricing systems for addressed postal deliveries**. The FAC subsequently dismissed the appeal on 24 August 2021 as it no longer required consideration. Accordingly, ComCo's decision to impose a sanction of around CHF 22.6 million on Swiss Post for the abuse of a dominant position has become legally binding.

3.4 Product markets

3.4.1 Vertical agreements

On the subject of '**Switzerland as an island of high prices**', the Secretariat conducted some ten market monitoring procedures in response to suspicions of price-fixing agreements and market foreclosures. In several cases, contracts were revised and circulars sent to sales partners in order to achieve clarity and prevent misunderstandings.

In June 2021, ComCo concluded the investigation into **Pöschl tobacco products** amicably and fined the German manufacturer Pöschl Tabak GmbH for unlawful export bans in its distribution agreements (see above Section 2.1).

3.4.2 Consumer goods industry and retail trade

Enquiries as part of the investigation into a possible **demand-side cartel of trading companies** continued. Following the opening of the investigation in 2020, one party filed an appeal with the FAC against the search of premises and requested the sealing of the data seized. The Federal Criminal Court (FCC) agreed to ComCo's request to remove the seals in February 2021 and the FAC rejected the appeal against the search of premises in March 2021 (see Section 3.6). The judgments are not yet legally binding.

A monitoring of the market in 2020 led to the opening of a **preliminary investigation into Coop payment processes** in January 2021. In the course of the *market monitoring*, Coop assured the Secretariat in the summer of 2020 that it did not force its suppliers to bill their deliveries to Coop through Markant Handels- und Industriewaren-Vermittlungs AG. If a supplier decides not to bill via Markant, Coop claims it would under no circumstances use that decision as a reason to remove the supplier from Coop's list of business partners, but would try

to negotiate a solution with the supplier concerned in line with the partnership approach cultivated so far towards the suppliers. As the Secretariat had received allegations of conduct that was contrary to the assurance given by Coop, it opened a *preliminary investigation*, focusing on the suspicion that Coop exerts pressure on suppliers so that they now bill their deliveries to Coop via Markant, a process that is subject to a charge. As an alternative to billing via Markant, Coop has offered suppliers a more expensive individual billing option via Coop. The preliminary investigation will clarify whether there are any indications of the abuse of a dominant position.

3.4.3 Watch industry

In May 2021, the Secretariat opened a *preliminary investigation* into the **Swatch Group** and its subsidiary Nivarox, whose products include assortments (the regulating components of a mechanical watch movement). In an order dated 21 October 2013 in the Swatch Group Supply Stop case, ComCo found that Nivarox holds a dominant position in the market for mechanical assortments manufactured in Switzerland. The preliminary investigation focuses on the conduct of Nivarox in relation to the supply of assortments to customers outside the Swatch Group. The preliminary investigation aims to establish whether there is any evidence that the Swatch Group or Nivarox has abused its position in the market and has thus acted unlawfully, in particular by restricting the quantities that may be ordered or by making unjustified increases in prices.

In June 2021, ComCo fined two companies CHF 20,000 each for **violating the obligation to provide information** (Art. 52 Cartel Act) in the course of the reassessment proceedings in the Swatch Group Supply Stop case. The decisions have been challenged.

3.4.4 Automotive sector

The investigation continued in the case of **Concessionari VW**, which was opened in June 2018 and expanded in December 2019. The subject of the proceedings are suspected unlawful price and market allocation agreements between authorised dealers of Volkswagen Group vehicles in the canton of Ticino. In December, the Secretariat sent the parties its draft decision for comment. The ComCo decision is expected in 2022.

The Secretariat regularly responded to enquiries about compliance with the **rules of the MV Notice**. In various cases, the Secretariat made it clear that the statutory guarantee and the manufacturer's warranty do not lapse if consumers have their vehicle repaired or serviced by an independent workshop and the relevant work is properly carried out. Consumers are therefore not required to have their vehicles maintained or repaired while under warranty exclusively by workshops within the authorised network. In addition, access by independent workshops to technical information and original spare parts for repair and maintenance work may not in principle be restricted by agreements affecting competition.

3.4.5 Agriculture

The Secretariat took part in around 50 office consultation procedures that relate to agriculture in 2021. In addition ComCo approved the merger between *Swissgenetics and New Generation Genetics* in relation to bull semen. As the merger had not been reported as was required under Article 9 paragraph 4 Cartel Act, the Secretariat opened an **administrative penalty procedure** in September 2021 in accordance with Article 51 Cartel Act by agreement with the ComCo presiding committee.

3.5 Internal market

The Federal Act on the Internal Market (IMA) guarantees the **free exercise of professional activities** throughout Switzerland. This is ensured by granting a right of access to the market

if the provisions of the place of origin of the product are satisfied, through public tendering for the transfer of monopolies to private entities, and by maintaining legal minimum requirements for cantonal and communal procurements. At the start of 2021, the revised law on public procurement came into force. In view of this, ComCo **focused** its internal market activities on public procurements by cantons and communes.

ComCo filed an appeal with the Canton of Zurich Administrative Court in relation to the public bidding procedure organised by a commune for a contract for renovating a **swimming pool**. The appeal was upheld on 26 August 2021, the court largely following ComCo's arguments (see Section 2.2). The court held there had been a breach of the cantonal law on public procurement (rules on recusal and prior involvement) and a violation of the ban on discrimination under the Internal Market Act. The competition authorities are aware of reports that similar scenarios, where those involved in preparatory planning activities are at the same time involved in submitting offers, frequently arise in cases of public invitations to tender. Such dual roles can lead to restrictions of competition and access to the market, as other providers are not given a fair chance to win the contract. Following the swimming pool case, the Secretariat ran a preventive campaign involving over 90 communes to raise awareness of this difficulty.

On 30 March 2021, ComCo issued a recommendation that the **purchase of electricity** at cantonal and communal level be made subject to the law on public procurement and a public tendering process. Up to now, there have been hardly any public invitations to tender for electricity purchases. In ComCo's view, the purchase of electricity by a public authority is governed by the law on public procurement, in part in view of the revised law on public procurement which came into force at the start of 2021. For example, a public invitation to tender is required when selecting an electricity provider for administrative buildings or public transport. Utility companies also have to invite public bids for the purchase of electricity for end customers in terms of the universal provision of services. Public invitations to tender make it possible to choose between several electricity providers and permit more providers to have access to the market. In the course of the year, the competition authorities received numerous enquiries about the ComCo recommendation and discussed the recommendation with various actors. Some issues will have to be decided by the courts.

The Secretariat carried out a market monitoring procedure in the French-speaking part of Switzerland in response to a report from a vehicle recovery company concerning the **towing of motor vehicles**. The Secretariat concluded that the collaboration of the Canton concerned with a specific group of garage proprietors without a public invitation to tender did not comply with internal market law. The Secretariat therefore invited the Canton to issue a ruling that there was no invitation to tender as this amounted to a restriction on market access. ComCo could then appeal against the ruling. The Canton chose not to issue a ruling, but decided to conduct a public tendering process for future vehicle recovery services.

The right of free access to the market has as its basic principle the right to offer goods and services anywhere in Switzerland provided the person concerned is permitted to carry on the same professional activity at their place of origin. The Internal Market Act provides a simple, rapid and free of charge procedure for granting access to the market. Any official review of access to the market must therefore be carried out without costs being imposed. In a case relating to **security firms** in the French-speaking part of Switzerland, fees were charged by the cantonal executive authority concerned for extending a licence, even though the company concerned drew attention to its existing licences in other cantons of origin and to the requirement not to charge fees under the IMA. Both ComCo and the parties concerned filed appeals against this charging of costs. The cantonal authority allowed ComCo's appeal in a decision dated 7 May 2021 and held that charging fees was contrary to the requirement in the Internal Market Act that costs should not be imposed.

ComCo submitted opinions in two appeal proceedings before the FSC based on the Internal Market Act. In the first opinion dated 25 May 2021, ComCo took the view that the Internal Market Act also applies to penalties imposed under the law on public procurement, but that there had been no violation of the IMA in the case in question. In a second opinion dated 25 October 2021, ComCo stated in relation to the use of **tourist tax revenues** that the Internal Market Act also applies to positive support payments such as subsidies or aid if these payments lead to restrictions on market access.

In addition, at the request of a cantonal court, ComCo provided an expert opinion on the issue of whether public invitations to tender based on the Internal Market Act were required in connection with the **Gateway Basel North** project. The Internal Market Act provides that transferring the use of cantonal and communal monopolies to private entities requires a tendering procedure. ComCo comments on the legal issues this raises in its expert opinion of 6 December 2021. This and the two FSC appeal proceedings mentioned are still pending.

3.6 Investigations

In 2021, two searches of business premises were carried out. The first took place in April and related to allegations of agreements among transporters of goods and waste in the canton of Valais (see Section 3.1.1). The second was carried out in June as an extension of the investigation into alleged bid rigging in the construction industry in the Moesa region and also related to companies in the canton of Ticino (see Section 3.1.1). Both operations were carried out in compliance with COVID-19 protective measures.

On 8 March 2021, the FSC decided on the long disputed question of which former and current company employees and managers can claim the right to remain silent when questioned (*nemo tenetur*) and thus refuse to provide a statement. In its landmark decision, the FSC held (1) that in cartel sanctions proceedings, which are similar to criminal proceedings, companies may invoke the principle of *nemo tenetur* (right to remain silent); (2) that de facto and formally appointed senior managers may exercise the right to remain silent of a legal entity; and (3) that all other persons may be questioned without restriction; i.e., in particular former managers and all other current and former employees of the company. This judgment is very significant as far as the competition authorities' investigative activities are concerned. The limits that the FAC had imposed for the questioning of former senior managers have been set aside. In addition, in two further judgments, the FSC held that the FAC should not even have considered the appeals against summonses, as they did not meet the requirement of an irretrievable disadvantage.

In the report year, a company filed both an objection with the Federal Criminal Court (FCC) and an appeal to the FAC for the first time in connection with a search of business premises. Both courts reviewed the search of business premises independently of each other and concluded that they were lawful. The company appealed both judgments to the FSC, which can now also rule on the relationship between the two legal remedies (see Section 3.4.2). The competition authorities argued in the FAC that in the case of the sealing of documents – even if only partial – the procedure before the FCC should take precedence over the appeal proceedings before FAC, so that an inefficient duplication of appeal proceedings and the risk of contradictory judgments can be avoided. Furthermore, in another procedure for removing the seals on documents, the FCC held that a search of business premises that was carried out in the investigation into bid rigging in the Moesa region (see Section 3.1.1) was lawful and approved the removal of the seals. An appeal to the FAC on the same matter is pending.

The possibility of setting a marker for a voluntary report by means of an electronic form on the ComCo website (an 'e-Marker'), introduced in the second half of 2020, has proven its value and was regularly used in 2021.

3.7 International

EU: The cooperation agreements between Switzerland and the EU on competition law encourage the discussion of experiences and facilitate close cooperation and coordination in investigations, including the exchange of evidence. In practice, this exchange is extremely valuable, even if it can only be done under restrictive conditions. In the report year, ComCo and the EU's Directorate-General (DG) for Competition exchanged evidence in one parallel investigation. Already in the run-up to opening this investigation in the EU and in Switzerland, searches of business premises were coordinated. In various other investigations, the case managers at ComCo were in contact with their counterparts at DG Competition in order to discuss procedural and substantive issues. In merger proceedings based on parallel reports in Bern and Brussels, technical and material issues were discussed. Furthermore, where changes to acts, ordinances and guidelines are in the pipeline, an exchange between the authorities can bring clarity. For example, ComCo consulted colleagues in Brussels with regard to the revision of the Vertical Block Exemption Regulation, and was consulted by them in connection with the revision of the Horizontal Guidelines. For specific questions on the application of EU competition law, such as the assessment of purchasing alliances in the retail trade, the Competition Commission contacted specialists in the EU.

Germany: At the end of 2017, Switzerland and Germany began talks on a cooperation agreement on competition matters. The agreement envisaged relates to administrative assistance between ComCo and Germany's Federal Cartel Office in connection with unlawful restraints of competition and company mergers under the respective competition laws of the contracting parties. The content of the draft agreement negotiated with Germany in the intervening period corresponds to a large extent to the cooperation agreement with the EU. When the agreement with Germany will be signed remains unclear in view of the elections to the German parliament in September 2021. The Federal Council will thereafter submit the agreement to Parliament for approval.

OECD: Once again the two annual meetings of the OECD in June and in December were held virtually this year. As it was not necessary to travel to Paris, more ComCo employees were able to benefit from direct participation in the debates. In particular, the following topics were discussed: 'Competition enforcement and regulatory alternatives', 'Data portability, interoperability and competition', 'Methodologies to measure market competition', 'Competition issues in books and e-books', 'Environment consideration in competition enforcement', 'Ex ante regulation and competition in digital markets' and 'News media and digital platforms'. At the Global Forums, the focus was on 'Economic analysis and evidence in abuse cases'. ComCo again played an active part in the discussions, for example with a contribution on a books case in which it had fined ten wholesalers of books in French for restricting parallel imports. In addition, ComCo also contributed actively to the revision of various OECD recommendations, such as those on international cooperation and on combating bid-rigging.

ICN: On 5 October 2021, ComCo met the Non-Governmental Advisors (NGA) appointed last year for the annual discussion. Discussions focused on the latest topics following the agenda of this year's ICN annual conference, which was held from 13 to 15 October 2021 in Budapest. Representatives of the authorities and the Swiss NGAs took part online in selected blocks of the event. ComCo took part in the question round on the main theme of this year's ICN annual conference, 'Sustainable development and competition law'. In addition, ComCo was involved in producing various ICN information sheets. This year, the focus was on preparing and publishing a report from the Unilateral Conduct Working Group on the subject of 'Theories about damage and remedies in digital markets'. In compiling the report, the working group questioned competition authorities and NGAs.

UNCTAD: In July 2021, ComCo participated virtually in the UNCTAD annual conference. In addition, ComCo took part alternately with SECO in the video conferences of the newly established working group on cross-border cartels, providing the Swiss perspective. The aim of

the working group is to increase cooperation on combating cross-border cartels and in particular to thereby provide better support for smaller and more recently established competition authorities.

World Bank: In the second half of the year, ComCo was involved in the ‘Competition Policy Implementation Review in Ukraine – International Practice’, a SECO-funded development project in Ukraine. The project was conducted jointly with the International Finance Corporation (IFC), an institution in the World Bank Group responsible for private sector development. In November 2021, ComCo and the Ukrainian competition authority, the AMCU, held a virtual two-day capacity building workshop. The workshop centred on a practical exchange of experiences between competition authorities focusing on screening, i.e. methods of detecting cartels by means of bid data. The workshop was very well received, with a total of over 80 participants. In addition, ComCo supported the IFC with a project study by providing the view of a competition authority and highlighting the issues and challenges of competition law that are currently being discussed at an international level.

3.8 Legislation

In the final vote on 19 March 2021, the Council of States and National Council adopted the indirect counter-proposal to the ‘Fair Prices Initiative’. The new provisions (Art. 4 para. 2^{bis} and Art. 7 para. 1 and para. 2 lit. g), which introduce of the concept of **relative market power** in the Cartel Act, came into force on 1 January 2022. The ComCo Secretariat started the implementation work in the early summer of 2021. It drew up an implementation plan and a **factsheet**, which it published on 14 December 2021. The key information on the factsheet is as follows:

- A company has relative market power if other companies are dependent on it for the supply of or demand for goods or services in such a way that there are no adequate and reasonable opportunities for switching to other companies. Companies can file a report with ComCo if they are prevented from competing or disadvantaged in competition in this way. A company with relative market power acts unlawfully, for example, if it refuses without justification to supply a manufacturer with components that it is reliant on. An abuse can also arise where a company with relative market power prevents another company from purchasing a product that is offered both in Switzerland and abroad on the foreign terms.
- In order for ComCo to be able to take action at all, it is dependent on information provided by the companies concerned. To make it easier for them to file a report, ComCo has published a factsheet and a notification form.
- With this revision of the law, the previous prohibition of abuse under competition law is extended to companies with relative market power. Companies will not be fined for violations of the new provisions. However, the Competition Commission can impose obligations on them to act or to cease and desist.

The current status of **parliamentary proposals** with regard to the Cartel Act is as follows:

- The **Bischof Motion** of 30 September 2016 ‘Ban adhesion contracts between online booking platforms and the hotel industry’ (16.3902) has been approved by both Councils. The Federal Council on 17 November 2021 approved the draft act and the dispatch on the amendment to the Federal Unfair Competition Act (UCA): by classifying price parity clauses as unlawful GCBs and thus as null and void, price fixing clauses in contracts between online booking platforms and accommodation providers will be prohibited.
- The Councils have accepted two of the four points in the **Fournier Motion** of 15 December 2016 ‘Improve the position of SMEs in competition proceedings’ (16.4094), namely the introduction of deadlines for competition law administrative proceedings

and the reimbursement of party costs even in first instance administrative proceedings. The Federal Council included these points in the Cartel Act revision bill and opened the consultation procedure in November 2021.

- The **Pfister Motion** of 27 September 2018 on the ‘Effective implementation of the Cartel Act in the motor vehicle sector’ (18.3898) demands that the Federal Council enact an ordinance to protect consumers and SMEs from practices in the motor vehicle sector that distort competition. After its acceptance by the National Council in September 2020, the motion is now before the Council of States.
- The **Nantermod Motion** of 12 December 2018 on ‘Fair and effective procedures in competition law’ (18.4183), which called for changes to the procedural rules on inspecting files and compulsory fees in preliminary investigations, was rejected by the National Council in December 2020 and is therefore concluded.
- The **Français Motion** 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’ (18.4282), which calls for an amendment to Article 5 Cartel Act, was approved by the Council of States and afterwards also by the National Council in June 2021. The Federal Council included the required amendment in the Cartel Act revision bill and opened the consultation procedure in November 2021.
- The **Bauer Motion** of 14 December 2018, ‘ComCo investigations: the presumption of innocence must take precedence’ (18.4304) demanded the repeal of Article 28 Cartel Act, which provides for the public announcement of the opening of an investigation, including naming the parties. The motion was abandoned in December 2020.
- The **Molina Postulate** of 9 May 2019, ‘Strengthen merger controls in the case of direct foreign investments’ (19.3491), was rejected by the National Council in June 2021 and is therefore concluded.
- The **Noser Interpellation** of 28 September 2021, ‘Comprehensively modernise the Cartel Act’ (21.4108), urged a reform of the competition authorities’ institutional structures and asked the Federal Council related questions. It was dealt with in December 2021 in the Council of States without debate and is now concluded.
- The **Wicki Motion** of 30 September 2021, ‘Safeguard the principle of investigation – No reversal of the burden of proof in the Cartel Act’ (21.4189), aims to clarify the Cartel Act, in particular by strengthening the principle of investigation in such a way that the Act also applies the constitutional presumption of innocence. The Federal Council called for the motion to be rejected because the irregularities in applying the law that the motion criticises do *not* occur and because the Cartel Act already includes the requirements called for with regard to the presumption of innocence. Nevertheless, the motion was approved in December 2021 by the Council of States and will probably be debated in the National Council in 2022.
- Several additional parliamentary proposals related to competition and state-affiliated or state-owned enterprises and access to closed markets, in particular the **Caroni Motion** (15.3399), the **Schilliger parliamentary initiative** (17.518), the **Caroni Postulate** (19.3701), the **EATC-S Postulate** (19.4379), the **Caroni Motion** (20.3531), the **Rieder Motion** (20.3532) and the **Sauter Interpellation** (21.3472).

The Federal Council is planning a **partial revision of the Cartel Act** in which the main points are the modernisation of the merger control procedure, consolidation of civil competition law and improvements to the opposition procedure. The revision will include the two demands in the Fournier Motion just mentioned, namely official processing times and the award of legal costs in proceedings before ComCo, and the Français Motion relating to cartel

agreements. In November 2021, the consultation procedure began. The GS-EAER and SECO share overall responsibility for the partial revision of the Cartel Act within the Administration. The ComCo Secretariat plays a part in this work.

4 Organisation and Statistics

4.1 ComCo, Secretariat and statistics

In 2021 ComCo held eleven full or half-day plenary sessions (including six online). At these meetings, it took decisions on matters related to the Cartel Act and the IMA. More details on these can be found in the statistics below (see Section 4.2).

4.2 Statistics

As of the end of 2021, the **Secretariat** employed 76 (previous year 75) staff members, 44.7 per cent of whom were women (previous year 45.3%). The 76 employees include both full-time and part-time staff representing a total of 65.2 (previous year 64.1) full-time positions. The number of employees involved in matters relating to the application of the Cartel and Internal Market Acts (including the executive board) is 57 (previous year 56), corresponding to 50.6 full-time positions (previous year 49.8). Nineteen employees (previous year 19) work in the Resources Division, providing support for all ComCo's work; this corresponds to 14.6 (previous year 14.3) full-time positions. The Secretariat also offers four (previous year 4) internships. These four interns work full-time.

The statistics on the work carried out by ComCo and its Secretariat in 2021 are as follows:

	2021	2020	2019
Investigations			
Total number of active investigations	20	20	19
Investigations carried forward from the previous year	16	13	16
Newly opened investigations	4	7	3
Investigations resulting from splitting up existing investigations	0	0	2
Final decisions	4	6	11
Amicable settlements	3	4	9
Administrative rulings	2	1	2
Sanctions under Art. 49a para. 1 Cartel Act	4	4	10
Partial decisions	0	2	5
Procedural rulings	2	2	2
Other decisions (concerning publications, fees, access to files, etc.)	2	1	6
Interim measures	1	1	1
Sanctions proceedings under Art. 50 ff. Cartel Act	2	1	0
Preliminary investigations			
Total number of active preliminary investigations	11	14	14
Preliminary investigations carried forward from the previous year	7	13	8
Newly opened preliminary investigations	4	1	6
Concluded preliminary investigations	3	8	4
Investigations opened	1	1	1
Modification of conduct	1	4	3
No consequences	1	3	0
Other activities			
Notifications under Art. 49a para. 3 let. a Cartel Act	1	1	2
Advice	33	24	28

Market monitoring	48	80	63
Freedom of information applications	10	18	7
Other enquiries	519	565	488
Mergers			
Notifications	31	35	40
No objection after preliminary investigation	31	34	37
Investigations	0	1	3
ComCo decisions after investigation	0	1	2
Authorisation refused	0	0	0
Authorised with conditions/requirements	0	0	0
Authorised without reservations	0	1	2
Early implementation	0	0	0
Appeal proceedings			
Total number of appeals before the FAC and FSC	39 (92)	42	46
Judgments of the FAC	11 (15)	9	4
Success for the competition authority	8 (12)	6	1
Partial success	2 (2)	2	2
Unsuccessful	1 (1)	1	1
Judgments of the FSC	5 (12)	7	6
Success for the competition authority	4 (11)	6	5
Partial success	1 (1)	1	0
Unsuccessful	0 (1)	0	1
Pending at the end of year (before FAC and FSC)	30 (71)	29	36
Expert reports, recommendations and opinions, etc.			
Expert report (Art. 15 Cartel Act)	0	0	0
Recommendations (Art. 45 Cartel Act)	0	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	0	2
Follow-up checks	0	0	1
Notices (Art. 6 Cartel Act)	0	0	1
Opinions (Art. 46 para. 1 Cartel Act)	335	327	120
Consultation proceedings (Art. 46 para. 2 Cartel Act)	11	12	17
State aid assessments	1	2	-
Internal Market Act			
Recommendations / Investigations (Art. 8 IMA)	1	0	3
Expert reports (Art. 10 IMA)	4	1	2
Provision of advice (Secretariat)	68	63	93
Appeals (Art. 9 para. 2 ^{bis} IMA)	1	2	0

The statistics for 2021 and a comparison with the figures for 2020 and 2019 reveal the following:

- Investigations: In 2021 the competition authorities conducted around the same number of investigations as in the two previous years. As in 2020, ComCo concluded a slightly below average number of cases.
- Preliminary investigations and market monitoring procedures: The number of preliminary investigations and market monitoring procedures in 2021 was also lower than in previous years. On the other hand, the Secretariat was called on for advice more often than usual.

- Mergers: The number of mergers assessed was rather lower than in 2020 or 2019, but was in line with the average for earlier years.
- Appeal proceedings: The number of appeals pending before the courts remained almost the same. However, the courts made important decisions, sometimes on individual appeals, and sometimes on all appeals against a ComCo decision. The following points should be noted with regard to the statistics:
 - ComCo decisions (rulings) normally apply to several parties. Each party has an individual right of appeal. The courts normally deal with each appeal individually and therefore issue several judgments in response to a single ComCo decision. These court rulings are sometimes very similar in substance, but may also address individual issues.
 - In a new move for 2021, not only are parallel appeal proceedings counted as a single case per ComCo decision, but the total number of all separate but parallel appeals is given in brackets. The foregoing also applies to the statistics at court level: the judgments are counted as a single judgment irrespective of the number of appeals against a ComCo decision, while at the same time the number of judgments on the individual appeals is given in brackets (e.g., the FSC judgments in the five appeals against the ComCo decision on off-list medicines is counted as one judgment and in brackets as five judgments).
- Expert reports, recommendations and opinions: while the number of expert reports, recommendations and consultation proceedings is similar to previous years, the number of office consultation procedures remains at an above average high level.
- IMA: The number of enquiries dealt with relating to the Internal Market Act fell within a similar range as in recent years. The number of advisory procedures was similar to that in 2020 and thus once again about a third lower than in 2019 and 2018.

5 Digitalisation

5.1 Introduction

Digitalisation has been a major issue for businesses, politicians and competition authorities at national and international level for years. ComCo has also been grappling with the question of the **digitalisation of the economy** for years, commenting in detail on the subject in its annual report for 2016, for example. *Digital platforms* bring various market sides together and generate network effects, which must be taken into account in making an accurate assessment of possible restraints of competition. *Big Data* tend to lead to concentrated markets and constantly developing business models for data usage. The *Sharing Economy* brings new business models and with them the opportunity to consider adapting the regulatory framework to the new situation. *Online trading* reduces distribution costs and creates space for new business models.

In addition to the opportunities that digitalisation brings in the shape of new business models, improved processes and a broader choice for consumers, digitalisation also brings risks to competition. In 2016, ComCo described a range of developments and potential problems, as well as the complexity of assessing their effect on competition. **ComCo's task** is to warn if it sees risks to competition, and to intervene when competition is adversely affected. For example, it must be ensured that any network infrastructure forming the basis for the digital economy, among other things, does not exclude competition and that investment incentives remain in place.

In this annual report, ComCo has decided to look at its **many years of activities** in digital markets. It should be made clear beforehand that ComCo concentrates above all on business practices that have a connection with the Swiss economy. It applies a certain caution in its approach to practices that affect domestic and foreign markets equally and are already being investigated by the EU Commission. For the sake of efficiency, in such cases, ComCo if possible avoids conducting time-consuming parallel investigations. However, ComCo clearly expects that measures and assurances that are applied abroad will also be applied in Switzerland. It is actively committed to this, both within and outside formal procedures.

5.2 Activities of the Swiss competition authorities

5.2.1 Network development strategy – Investigation into Swisscom

The Network Development Strategy case involves the question of the extent to which the modified design of the fibre-optic network infrastructure used by Swisscom can lead to a restriction of competition and to what extent this should be prohibited under competition law. In February 2020, Swisscom announced its new network development strategy. In areas where the expansion involved an optical fibre network only, it changed the design of the network so that competitors no longer had direct access to the network infrastructure. The risk is that Swisscom, by building this form of optical fibre network, will exclude competitors from the market. In response, ComCo opened an investigation in December 2020 and at the same time ordered interim measures to stop Swisscom from refusing competitors (Layer 1) access to the infrastructure when expanding the optical fibre network. The FAC confirmed the interim measures in their entirety, and the FSC in an interim decision dated 6 December 2021 rejected Swisscom's application to restore the suspensive effect of the appeal (see Section 2.2).

5.2.2 Google

Google is the focus of various preliminary investigation and market monitoring proceedings. These cases cover a variety of Google's activities: for example, the design of Google's general search function has been discussed, as has the workings of 'Google Shopping' as Google's own price comparison service. The opportunities for search providers to present themselves on Android smartphones and the restrictions that Google has itself imposed on advertising for specific, possibly problematic products and services have also been examined. In this connection, particular attention has been paid to ensuring that ComCo does not simply duplicate the proceedings of other competition authorities, such as the European Commission. However, when foreign proceedings have led to Google changing its practices, ComCo has repeatedly been successful in ensuring that Google also applies these changes in Switzerland, as in the 'Google Shopping' case just mentioned. Another current example is extending to Switzerland the application of commitments that Google has given to the French competition authority in relation to advertising technology.

5.2.3 Marketing of directory data – Investigation into Swisscom Directories

The investigation opened in September 2021 relates to a possible breach of competition law in relation to the online directory services provided by Swisscom Directories (see Section 2.1). Directories publishes the printed telephone book and runs the two online directory services 'local.ch' and 'search.ch'. In spring 2019, Directories introduced a standard product known as 'SWISS LIST', fundamentally changing the prices and the conditions for altering phone book entries. Previously, the option for businesses to change their entry and add additional information was a separate service. With 'SWISS LIST' various products and services are only offered as packages. ComCo is investigating whether and to what extent this could be obstructing competitors and having a detrimental effect on customers.

5.2.4 Broadband access for business locations (WAN connection)

On 24 August 2020, ComCo opened a further investigation into Swisscom in relation to broadband access for business locations (WAN connection; see Section 3.3.1). WANs (Wide Area Networks) are extensive networks that in some cases stretch across whole countries or even continents. They link individual computers within a network with each other. WANs are often used by businesses to connect different locations over long distances. In this case, Swisscom demanded that competitors pay prices that were allegedly excessive in connection with various tenders for projects to network business locations. Swisscom's competitors, i.e., other telecommunications companies, are reliant on Swisscom's network infrastructure for such projects and are unable to offer their customers competitive prices if the charges for up-front services are too high. There are therefore indications that Swisscom has abused its market position. ComCo fined Swisscom in 2015 for similar conduct over bids for networking post offices. The FAC largely confirmed ComCo's decision. The case is pending before the FSC (see Section 2.2).

5.2.5 Ice hockey on Pay TV

In autumn 2020, ComCo fined the then UPC (now Sunrise UPC) around CHF 30 million. In 2016, UPC secured exclusive television rights for the 2017-2022 period to broadcast the Swiss ice hockey championship, and thereafter refused for years to allow Swisscom to broadcast live ice hockey. By doing so, UPC unlawfully prevented Swisscom from engaging in competition. ComCo had already fined Swisscom in an earlier case in May 2016 for similar practices related to broadcasting live sport (football and ice hockey). Both cases are pending before the FAC (see Section 3.3.2).

5.2.6 Cases related to mobile payment services

Mobile payment services are a recurring field of activity for ComCo: for example, the current national mobile payment solution TWINT is the product of a merger between Paymit and TWINT approved by the Competition Commission. Furthermore, the ComCo Secretariat decided in favour of TWINT in a preliminary investigation into Apple. Here, the original problem from TWINT's point of view was that often when trying to pay using TWINT at a shop terminal with an iPhone, Apple's mobile payment solution, Apple Pay, was automatically activated. In order to stop this malfunction from occurring, Apple committed to provide TWINT with a suppression code. At the same time, the possibility that international mobile payment solutions such as Apple Pay, Google Pay or Samsung Pay may be prevented from entering the market in Switzerland is the subject of an ongoing ComCo investigation (see Section 3.2.1). This investigation was opened because there were indications that the Swiss banks participating in TWINT had agreed to a collective boycott of such international mobile payment solutions.

5.2.7 Online booking platforms for hotels

ComCo was one of the first competition authorities in Europe to conduct an investigation into online booking platforms, which focused on contractual restrictions on hotels' right to set prices: in October 2015, ComCo prohibited broad parity clauses as unlawful agreements affecting competition. This decision allows hoteliers to set different prices on different online booking platforms. On the other hand, under the applicable close parity clauses, hotels are not permitted to offer lower prices on their own websites. Booking.com, Expedia and HRS have also introduced a series of exemptions for direct sales channels used by hotels: for example, hotels are allowed to offer lower prices offline (e.g., in response to telephone enquiries), and online in the case of non-public prices (e.g., for customer loyalty schemes that require registration). At a political level, the Federal Council decided in November 2021 that a new provision in the Unfair Competition Act would ban all price fixing clauses in agreements

between online booking platforms and accommodation businesses (see Section 3.8). The related bill and the draft provisions are set to be debated in Parliament.

5.2.8 Software providers v. university hospitals

The Secretariat has become aware of the potential abuse of a dominant position by a major software provider relating to awarding licences for its products to university hospitals. In 2020, the company decided not to renew a contract with these hospitals and in future to consider them as ‘government/administration’ users rather than ‘education, research and teaching’ users, as was previously the case. From the plaintiffs’ viewpoint, this change represented a major increase in the price of the licences, without receiving any consideration in return. In other countries, the software provider in question made no comparable change to its pricing policy. The issues that have to be analysed are the position of this provider vis-à-vis the university hospitals, the possibility that these partners have been discriminated against and finally the question of the price, i.e., whether it is potentially unfair in terms of the Cartel Act.

5.3 The international context

As digital transformation is a global phenomenon, other countries face the same questions and challenges as Switzerland. The international developments in recent years are worth considering. On the one hand, the case law is becoming more consistent. For example, experience in relation to online trading has had an impact on the EU’s revised Vertical Block Exemption Regulation. On the other hand, online platforms operated by ‘Big Tech’ companies have increasingly been subjected to public scrutiny. These platforms are of paramount importance for digital access to the online economy, for example in internet searches, in the organisation of online advertising, as a marketplace for online commerce or as a platform for software applications. Basic reports indicate that the relevant markets should be accessible and that competition on the platforms should not be unduly restricted.

In this connection, competition has a role to play in combating the abuse of dominant positions. This is illustrated by the cases that are ongoing or have been concluded before various competition authorities. The application of competition law as an ex post check on practices has its limits, however. The proceedings in this complex field are extremely expensive and time-consuming. In some cases, new authorities or ex ante regulations have therefore been created, such as the GWB (Restraints of Competition) Digitalisation Act in Germany or the proposals relating to the Digital Markets Act and the Digital Services Act that are going through the legislative process in the European Union.

5.4 Conclusion

The digitalisation of the economy presents numerous challenges. While it brings opportunities both for businesses and for consumers, it also brings risks, which competition authorities are wisely addressing. Intervening too quickly might jeopardise new opportunities and thus slow economic development. On the other hand, a delay in tackling a problem could lead to restraints of competition and make it more difficult to find remedies for a new situation.

It is therefore advisable to act with some circumspection, while not hesitating to open proceedings in order to clarify new circumstances. In the search for this balance, the Secretariat has established a proven practice of monitoring market developments, taking a systematic interest in any new proceedings against the Big Tech companies abroad, and initiating proceedings as soon as companies complain of any obstacles to competition in Switzerland. In this way, the Swiss competition authorities reserve their interventions for the cases that are most problematic for the Swiss economy and keep themselves constantly informed of developments in a rapidly evolving field.