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# **Annual Report 2022**

## **Competition Commission (ComCo)**

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# 1 Overview of 2022

The Competition Commission (ComCo) and its Secretariat once again received and examined several hundred reports and enquiries from members of the public, public authorities, businesses, associations, etc. These related to the widest variety of markets and led to around 75 new **cases** being opened, both large and small, and opportunities to give **advice**. The cases related to, for example, the automotive sector, the construction industry, the energy sector, financial markets, the expansion of fibre optic networks, postal services, pharmaceuticals and the watch industry.

ComCo issued various **decisions**, such as that relating to agreements between Ticino car dealers (Concessionari VW). In addition, ComCo approved the revised Vertical Notice, which businesses can refer to in order to draw up contracts that comply with competition law in their dealings with partners at other levels of the market, e.g. suppliers or purchasers. ComCo's decisions are regularly challenged in the appeal courts. The Federal Administrative Court (FAC) and the Federal Supreme Court (FSC) issued a series of judgments this year. The Federal Supreme Court, for example, approved ComCo's interim measures with regard to the expansion of fibre optic networks by Swisscom, while the Federal Administrative Court upheld the decision on live transmission rights for football and ice hockey matches on pay TV, which will open up that particular market.

On 1 January 2022, the new provisions on **relative market power** came into force. They have their origins in the Fair Prices Initiative and are specifically designed to counter Switzerland's position as an 'island of high prices'. The flood of reports that was talked about in Parliament has yet to occur. However, two reports did lead to the first *investigations* being opened. One relates to the pharmaceutical industry, the other to book sales in French-speaking Switzerland. ComCo would like to help establish legal certainty as quickly as possible and create rules that are clear and consistent.

The Federal Council continued with its **partial revision of the Cartel Act**. ComCo also made submissions on the proposed amendments to the draft Act. It is in favour of the key points of the Federal Council bill, such as updating the merger control procedure, strengthening civil aspects of competition law and improving opposition proceedings. On the other hand, it opposes the implementation of parliamentary proposals that in some cases are based on incorrect premises, that make procedures more difficult, and that weaken the competition law. Switzerland needs a strong Cartel Act with clear rules in order to be able to combat harmful practices effectively.

Following the challenges posed by SARS-CoV-2 to society, government and business over the past two years and more, the war in Ukraine brought further tensions and uncertainties. These **times of crisis** also give rise to competition-related questions. In Switzerland, the focus has been on winter gas supplies and the high price of fossil fuels. ComCo called for a joint effort to deal with the crisis in the gas sector, while at the same time being committed to stopping any abuses. The high price of fossil fuels led to many reports from members of the public. The ComCo Secretariat analysed the factors behind the increases and found no indications of unlawful agreements. In addition, ComCo investigated allegations of price-fixing in connection with COVID-19 self-tests. ComCo benefits in these times of crisis from the expertise that it has acquired over the years. Its activities in relation to the gas and fuel industries and COVID-19 self-tests are our special topic in the 2022 Annual Report.

## 2 About ComCo and its Secretariat

What would be the point of the Ironman competition in Rapperswil-Jona if it was agreed before the contest who the winner was going to be? What would happen if the wrestlers at the Brünigschwinget were to agree among themselves on who was going to be the champion? What would the Ascona-Locarno Run be like if the competitors worked out before the race who was going to take the first three places? There would be no genuine contests and no record-breaking results. The same applies in the world of business: companies that limit or indeed eliminate competition with each other by entering into unlawful agreements on prices or the quality of products and services, do not perform to their best. These arrangements have a negative impact on 'results' and the cost-benefit ratio of goods and services. In order to combat such malpractices and encourage competition, Parliament passed the **Cartel Act** and the **Internal Market Act**. For more than 25 years, ComCo and its Secretariat have been responsible for implementing the will of Parliament. They combat unlawful agreements and improper practices by dominant companies, assess major mergers and ensure that businesses and self-employed workers are not prejudiced by cantonal regulations. They advise businesses, prepare expert reports for federal offices and civil courts and examine federal legislation to assess its impact on competition.

The Competition Commission (ComCo; the decision-making body) is a part-time authority currently comprising twelve members appointed by the Federal Council, including law and economics professors, lawyers, and representatives of the major trade associations and consumer organisations (a list of the members is provided in the Annex). ComCo meets every two to four weeks to agree on the authority's most important decisions, including fines, based on proposals made by its Secretariat. In 2022, it held twelve one-day or half-day plenary sessions.

ComCo has a full-time **Secretariat** (the investigating body). This conducts proceedings under competition law, drafts ComCo's decisions and is the contact point for businesses, members of the public and authorities for all competition law questions. The Secretariat comprises four divisions, the Internal Market sector and a resources service (a list of members of the Executive Management is provided in the Annex). At the end of 2022, the Secretariat employed 76 persons (not including interns, previous year 76), most of whom are lawyers and economists and 44.7 per cent of whom are women (previous year 44.7 per cent). These 76 employees work part or full-time, occupying a total of 65.3 (previous year 65.2) full-time equivalents. The number of employees responsible for the application of the Cartel Act and the Internal Market Act (including the executive management board) is 57 (previous year 57), corresponding to 50.7 full-time positions (previous year 50.6). Nineteen (previous year 19) employees work for the resources service, providing support for all the work that the authority does; this corresponds to 14.6 (previous year 14.6) full-time positions (these employees also work for the Federal Office for Housing and the Federal Office for National Economic Supply). The Secretariat also offers four (previous year 4) full-time positions to interns.

At the end of 2022, **Andreas Heinemann** stood down as Commission President. He joined ComCo in 2011, serving as its Vice President from 2012 and President from 2018. Andreas Heinemann has since 2007 been a professor of Commercial, Economic and EU law at the University of Zurich and a permanent visiting professor to the University of Lausanne. He studied law, economics and administrative science. With his many years of work in teaching and research in Switzerland and abroad, Andreas Heinemann is a renowned expert on Swiss, European and international economic law, specialising in the fields of competition and intellectual property.

Andreas Heinemann has an excellent grasp of how to apply his extensive expertise constructively and productively in the work done by ComCo. His knowledge of European and German competition law has been extremely helpful in applying Swiss competition rules. He has given particular attention to new issues such as digitalisation and competition law or the connection

between sustainability and competition law, and has ensured that the competition authority has always kept up-to-date with developments, which he himself has decisively helped to shape as an academic.

Andreas Heinemann has a particular interest in the position of the Swiss competition authorities in international bodies. He was an active member of the International Competition Network (ICN), the Group of International Government Experts in Competition Law at UNCTAD and the Competition Committee of the OECD. In the last-named, he was appointed to the Bureau in 2019 and has taken a keen interest in the choice of topics that it has dealt with. Among his particular concerns have been relations with the competition authorities in our neighbouring German-speaking countries, Germany, Austria and Liechtenstein. Once a year, the authorities from these four countries meet as the DACHLIE group, maintaining a close and trusting dialogue. Andreas Heinemann has been successful in building and cultivating friendships that will endure far beyond his term of office.

One aspect of Andreas Heinemann's character has been evident throughout his term of office and will leave its mark on the competition authority for a long time to come: he has shown enormous appreciation for the members of ComCo and all the Secretariat's staff, from the most senior managers to those working in the background. He has treated everyone with the utmost courtesy, always emphasising the strengths first when responding to proposals. He formulated critical feedback with care and consideration for the person concerned and suggested corrections in a way that always led to positive outcomes.

Andreas Heinemann has been an extremely committed member of the Commission for the entire twelve years, and has been instrumental in many of ComCo's decisions. He chaired the Commission as President with great sensitivity, discretion and fairness. Andreas Heinemann has been a pillar for ComCo, an ambassador in Switzerland and abroad, and a loyal colleague. He will be sorely missed by ComCo and the Secretariat. He deserves our most sincere thanks for all the work he has done and for his enormous dedication.

## 3 Most important decisions in 2022

### 3.1 Decisions of the Competition Commission

On *12 December 2022* ComCo completed the revision of its **Vertical Notice** on agreements between undertakings. Assessing agreements between undertakings at different levels of the market, e.g. between manufacturers and dealers, is part of the daily routine. These agreements normally increase efficiency within a production or sales chain. Certain agreements, such as price fixing agreements and agreements to close off the Swiss market, are basically unlawful, however. The EU has modernised its rules (in the Vertical Block Exemption Regulation including vertical guidelines), the new regulation coming into force on 1 June 2022. ComCo subsequently revised its Notice, thus ensuring that basically the same rules apply in Switzerland as in the EU. In addition, it took account of the most recent case law and its practical experience of cases. This includes the landmark decision of the Federal Supreme Court ('Off-list medicines') on recommended prices. Before the revision, ComCo held public consultations. The proposed changes were broadly welcomed, in particular the close similarity to EU competition law. The Notice came into force on 1 January 2023. Companies have one year to adapt their operations to the new rules.

On *31 October 2022* ComCo finished dealing with the final two outstanding **requests for access** that had been filed following the ten decisions on bid rigging in the canton of Graubünden. In addition to these, ComCo has dealt with other requests to inspect rulings on bid rigging (roads and civil engineering in the canton of Aargau and in the canton of Zurich, construction services in See-Gaster). Requests for access have required staff to work long hours, as in each case all files, often with thousands of pages have had to be checked to determine whether they could be handed over. Two points arising from all the requests for access and related decisions taken by ComCo and the courts must be stressed. Firstly, the Federal Supreme Court followed the view taken by ComCo that procurement agencies are entitled before the conclusion of the appeal proceedings against a ComCo ruling on sanctions to have access to a version of the ruling on sanctions, in which individual construction projects are named, and to obtain the related files; in this way they can pursue claims for damages and/or take measures under the law on awarding contracts. Secondly, the principle has been affirmed that undertakings that have voluntarily disclosed self-incriminating evidence should not suffer undue disadvantages or enjoy unreasonable advantages relative to companies that have not done so when considering requests for access. As a result, ComCo does not allow access to documents and procurement projects affected by bid rigging that it was only able to receive, understand and identify with the voluntary aid of involved undertakings. If this were not so, it would undermine the incentive to voluntarily submit self-incriminating evidence to the authorities.

At the start of 2021 ComCo opened an investigation into **Mastercard** relating to allegations that it had obstructed the National Cash Scheme (NCS) operated by SIX; at the same time ComCo ordered interim measures. With these measures, ComCo made it possible for banks to issue Mastercard debit cards during the ongoing investigation which would have been capable, from a purely technical point of view, of processing NCS transactions. For this purpose, the NCS system should have been carried on the cards alongside the Mastercard system (what is known as 'co-badging'), although the NCS system could not yet have been actively used. It however became clear that the card-issuing banks did not make use of this option. SIX has therefore postponed the market entry of NCS until the investigation has been concluded. Under these circumstances, the interim measures are no longer necessary, which is why ComCo cancelled them on *22 August 2022* (as a result of an appeal filed by Mastercard, the interim measures were not going to be legally binding until the decision had been taken). The investigation is continuing irrespective of these issues.

As a consequence of Swissgenetics failing to comply with its duty to report its *takeover* of New Generation Genetics in the bull semen business, ComCo fined Swissgenetics CHF 50,000 on *27 June 2022*. ComCo revised its **sanctions assessment practices**: it now no longer measures the base amount as 0.1 thousandths of the annual turnover of the company at fault. This criterion is not suitable for ensuring that the competition law duty to report mergers is complied with.

In June 2018, ComCo opened the **Concessionari VW** investigation. It decided on *23 May 2022* that seven dealers of VW vehicles in the canton of Ticino had acted unlawfully, fining them a total of around CHF 44 million. From 2006 to 2018, the dealers participated in an unlawful cartel that sold new vehicles to private individuals and to the public sector. Its aim was to reduce competition among car dealers and keep the sale prices of new vehicles for private individuals and the public sector at an excessive level. The car dealers colluded on all sales activities in Ticino: they agreed on public sector bids, agreed on a pricing policy (e.g. rebates, special offers and repurchase prices) for the sale of new vehicles to private individuals and divided the canton of Ticino into areas of activity. Five companies indicated they were prepared to reach an amicable arrangement with regard to their conduct, and the decision on them is now legally binding. Two dealers have filed appeals in the Federal Administrative Court.

### 3.2 Judgments of the courts

In 2011 ComCo prohibited the Association of Manufacturers, Importers and Suppliers of Cosmetics and Perfumery Products (**ASCOPA**) and its members from exchanging sensitive market information (prices, turnovers, advertising costs and general terms and conditions of business). The exchange of information, involving 27 companies in the cosmetics and perfumes sector, related to wholesale price lists, gross turnover figures and details of advertising investments, and the recommendations from ASCOPA on general terms and conditions of business. The exchange allowed the companies to adapt their market behaviour to each other. This led to significant restrictions of competition in the market for perfumery and cosmetic products. In its judgment of *12 December 2022*, the Federal Administrative Court rejected the only appeal against the ComCo decision. The judgment has taken full legal effect.

On *16 November 2022*, the Federal Administrative Court issued its judgment on nine appeals against the ComCo '**air freight**' decision of 2 December 2013. The ComCo ruling applied to 14 parties and related to routes between Switzerland and five states outside the EU. In five cases, the Federal Administrative Court agreed in principle that there were price-fixing agreements: the court regards it as proven that in the air freight sector various airlines maintained an exchange on fuel surcharges and commission on surcharges that was damaging to competition over a long period. However, it reduced the fines. The Federal Administrative Court allowed three of the appeals in full, as the three companies concerned first transported their freight by land to an EU country and only then transported it by plane to a third country. The Agreement on Civil Aviation between Switzerland and the EU, which is relevant to this case, only accords Switzerland responsibility for 'routes between Switzerland and third countries', which is why the court did not regard ComCo as having jurisdiction to assess agreements relating to the land transports. In addition, the Federal Administrative Court allowed certain parts of the appeal of one airline that had filed a voluntary report. Six parties appealed the Federal Administrative Courts' ruling concerning them before the Federal Supreme Court.

On 14 December 2020, ComCo opened an investigation into **Swisscom's network expansion strategy**. At the same time, it ordered interim measures in relation to Swisscom and prohibited the company with immediate effect from expanding its optical fibre network in such a way that third parties are denied Layer 1 access from Swisscom exchanges. Swisscom appealed to the Federal Administrative Court and the Federal Supreme Court against the interim measures. Both the Federal Administrative Court and the Federal Supreme Court rejected the appeal. In its judgment of *2 November 2022*, the Federal Supreme Court upheld ComCo's

competence to order interim measures, and rejected the claim that it had violated the ban on arbitrary decision-making and the principle of the separation of powers. As a result, the interim measures that ComCo ordered will remain in force until the decision in the main proceedings.

On 29 November 2010, ComCo fined the company **SIX** around CHF 7 million, because it had denied other providers of debit/credit card terminals access to the **DCC** (dynamic currency conversion) function. After the Federal Administrative Court rejected an appeal in a judgment dated 18 December 2018, the Federal Supreme Court has now also rejected the same appeal in a judgment dated 2 November 2022. What was the case about? SIX Multipay had abused its dominant position in order to give an advantage to the debit/credit card terminals operated by SIX Card Solutions, an affiliated company: the DCC function, launched by SIX Multipay in 2005, was only available on the terminals of its affiliate, but not on those of other terminal providers. DCC makes it possible to convert to a foreign currency at card terminals in shops, i.e. holders of foreign credit or debit cards can choose at the terminal whether to pay for goods in francs or in their home currency.

In a judgment dated 25 October 2022, the Federal Administrative Court decided not to consider the merits of an appeal against the preliminary refusal to allow the inspection of all files and the taking of evidence, a violation of due process and the costs charged, on the grounds that no disadvantage had been suffered that required to be remedied. In the ongoing **Costruzioni Moesa** investigation, the party concerned had repeatedly demanded access to all the files and that evidence be taken, in particular the questioning of witnesses. The ComCo Secretariat refused for a preliminary period to allow access to all the files, deferred its decision on the request to take evidence and issued an interim ruling.

In a judgment dated 14 September 2022, the Federal Supreme Court decided not to consider the merits of an appeal by one company against the decision of the Federal Administrative Court dated 9 August 2021 in relation to the ComCo decision in the **Graubünden construction services** case from 2019. The Federal Supreme Court and the Federal Administrative Court confirmed the measures that ComCo had imposed on the company, by which ComCo prohibited the company from agreeing on bids, and discussing bids, elements of prices, the allocation of customers and common interests before submitting bids to procurement agencies (ComCo specified certain exceptions in connection with consortiums and sub-contractor relationships). Four appeals against ComCo's decision are pending before the Federal Administrative Court.

In judgments dated 16 August 2022, the Federal Administrative Court considered three appeals against a ComCo decision issued on 19 October 2015. ComCo fined four car dealers for entering into price-fixing agreements, imposing flat-rate sanctions ranging from CHF 10,000 to CHF 320,000. These four licensed VW dealers and AMAG had agreed on a joint list of conditions (e.g. discounts) at the start of 2013 for new cars produced by the VW Group. ComCo found that the dealers had discussed the coordinated discounting policy in March 2013 at regional gatherings of the Volkswagen Partners Association (**VWPA**). On 8 August 2014, ComCo concluded the proceedings against AMAG with an amicable settlement. Three of the four other car dealers filed appeals in the Federal Administrative Court. The Federal Administrative Court largely confirmed the ComCo's decisions, but overturned the conduct requirements that ComCo had imposed, as it regarded these as not being sufficiently justified. One car dealer has continued its appeal to the Federal Supreme Court.

In a judgment dated 10 May 2022, the Federal Administrative Court confirmed ComCo's decision from 2016 against Swisscom, Cinetrade and Teleclub relating to anti-competitive practices in connection with broadcasting football and ice hockey matches. In the period under investigation (2006 to 2013), CT Cinetrade AG (now Blue Entertainment AG) held a range of exclusive live broadcasting rights for **football and ice hockey matches on pay TV**, which it passed on to Teleclub. While Teleclub provided Swisscom with a comprehensive schedule of



football and ice hockey matches for Swisscom TV, other TV platforms had to content themselves with a reduced range of matches on less favourable conditions. Some TV platforms were not allowed to broadcast any matches at all. As broadcasting Swiss football and ice hockey matches is a core service for a TV platform, not permitting the games to be broadcast and discriminating against TV platforms by offering Teleclub sports services that differed in their scope amounted to unlawful practices. The decision has been appealed to the Federal Supreme Court.

In a judgment dated *4 May 2022*, the Federal Administrative Court rejected the appeal against a ComCo interim ruling on the **participation of a company as a third party** in the investigation against Mastercard relating to the possible obstruction of 'co-badging' the National Cash Scheme (NCS) from SIX. An appeal against an interim ruling is permitted if the ruling can cause a disadvantage that cannot be remedied or if allowing the appeal can lead directly to a final decision (which means that significantly less time and money must be spent on the proceedings). Neither criterion applies in this particular case, with the result that the Federal Administrative Court did not consider the appeal.

In a judgment dated *19 January 2022*, the Federal Administrative Court upheld ComCo's decision against HCI Solutions. Wholesalers and hospitals, pharmacies and doctors need online information on medicines in order to sell, dispense and charge for medicines. HCI Solutions AG, a subsidiary of Galenica AG, provides this information. ComCo concluded in December 2016 that HCI Solutions AG held a dominant position in relation to **commercialising online information on medicines** and had abused this position. There were clauses in its contracts with software companies that were intended to prevent the use of databases of other companies that provide information. In addition, it only allowed pharmaceutical manufacturers to include its information on medicines in their databases if they purchased other services. The Federal Administrative Court upheld the substance of ComCo's decision, but reduced the sanction of around CHF 4.5 million to CHF 3.8 million, in part because it regarded the breaches of the law as marginally less serious than ComCo had done. The judgment has now been appealed to the Federal Supreme Court.

On 27 May 2013, ComCo imposed sanctions on ten **wholesalers of French-language books** in Switzerland for restricting parallel imports. Because of exclusive agreements between the wholesalers and the publishers, bookshops were unable to purchase any books abroad during the period under investigation. On 30 October 2019, the Federal Administrative Court confirmed that the agreements were unlawful. However, it reduced the sanctions imposed on four wholesalers. Eight parties appealed to the Federal Supreme Court against the Federal Administrative Court's judgments. *Towards the end of 2021 and during 2022*, the Federal Supreme Court considered the eight appeals:

- In its judgment of *21 December 2021*, the Federal Supreme Court partially allowed the appeal filed by **Dargaud**, a wholesaler of French-language books in Switzerland. In relation to certain distribution agreements that the Federal Administrative Court had, in a judgment dated 30 October 2019, ruled to be agreements affecting competition as defined in the Cartel Act, the Federal Supreme Court concluded that the lower court had not adequately established their content. Accordingly, and because the facts had not been adequately established in the contested judgment, the Federal Supreme Court took the view that it was not possible to say whether all the distribution agreements in question had actually been intended to cause or had in fact caused a restraint of competition in the market for French-language books in Switzerland during the period under investigation. As a result of the intra-group exemption and because the Federal Administrative Court had not established the facts in full, the Federal Supreme Court held that certain agreements could not be regarded as unlawful and referred the case back to the Federal Administrative Court for it to reassess the sanction to be imposed on the wholesalers.

- On 3 *March* 2022, the Federal Supreme Court essentially rejected the appeal filed by **Flammarion** on its main points, upheld the finding that there had been unlawful agreements and confirmed the sanction. In relation to the agency relationship, it held that the recognition of the preferential status of commercial agents, a principle inspired by EU law, did not amount to a ‘blank cheque’ under competition law. More specifically, the court held that the Cartel Act is applicable to contractual obligations between commercial agents and their principals. This is particularly the case for the exclusive territory clauses in the distribution agreements between Flammarion and its sales partners in Switzerland. With regard to the obligations imposed on the ‘supplier’, the Federal Supreme Court decided that the obligation that Flammarion accepted not to supply Swiss retailers directly from France was not entirely equivalent to a manufacturer’s obligation, but was a distribution obligation in that it also covers books that are normally sold abroad by the Flammarion Group, without the Group actually publishing them. From this point of view, the agreement very probably represents an attempt to carve up markets by region.
- In relation to **Albert le Grand SA**, Federal Supreme Court allowed the appeal on 14 *June* 2022 in its entirety, quashed the sanction and referred the case back to the lower court for it to reassess the procedural fees and party costs for the proceedings before the lower court. The Federal Supreme Court decided in particular that the conviction of Albert le Grand by the lower courts was unjustified in relation to all agreements.
- With regard to **Diffulivre SA** and **Diffusion Transat SA**, the result is comparable to that in the Dargaud case. The Federal Supreme Court on 3 *August* 2022 and on 8 *December* 2022 confirmed that Diffulivre and Diffusion Transat had participated in illegal agreements, but decided on the same grounds as in the Dargaud case that the violations were not so serious as the lower courts had judged. The cases are currently pending before the Federal Administrative Court, which is reassessing the sanction.
- In relation to **Editions Glénat (Suisse) SA** and **Servidis SA**, the Federal Supreme Court allowed the appeals in their entirety on 8 *December* 2022, as in the case of Albert le Grand SA, quashed the sanctions and referred both cases back to the lower court for it to reassess the procedural fees and party costs for the earlier proceedings. The Federal Supreme Court decided that the convictions of Glénat and Servidis in relation to all the agreements considered by the lower courts were unjustified.
- Lastly, on 8 *December* 2022, the Federal Supreme Court rejected the appeal filed by **Interforum Suisse SA** on the main points, confirmed the existence of unlawful agreements and upheld the sanction. In relation to the agency relationship, it held, as in the Flammarion judgment, that the recognition of the preferential status of commercial agents, a principle inspired by EU law, did not amount to a ‘blank cheque’ under competition law. It is the Cartel Act that determines the obligations that the parties owed to each other in order to regulate their mutual relationship. This is particularly the case for the exclusive territory clauses in the distribution agreements between Interforum and its sales partners in Switzerland. In addition, the Federal Supreme Court found that Interforum was clearly involved in a vertical distribution agreement that guaranteed its sales partner in Switzerland absolute territorial protection.
- Both in the **Dargaud** and **Diffulivre** judgments, the Federal Supreme Court added that the latest amendment to the Cartel Act (relative market power) possibly prohibited the practice of certain corporate groups of refusing to supply Swiss customers at foreign prices and on foreign terms and conditions, instead referring them to suppliers in Switzerland (often companies within the group), so that they have to buy products at (higher) Swiss prices and on (stricter) Swiss conditions. This amounts to a certain qualification of the intra-group exemption by the Federal Supreme Court.

In a judgment dated *1 December 2021*, the Federal Supreme Court for the first time considered two appeals in connection with a **search of houses and premises** that had been filed in the same case in the Federal Administrative Court and Federal Criminal Court (FCC) and had been rejected by both of these courts. The Federal Supreme Court combined the appeal proceedings against the decisions of the Federal Administrative Court and of the FCC in order to prevent itself from reaching contradictory decisions. The Federal Supreme Court regarded the requirements for the search of houses and premises as having been met and confirmed the legality of the search. It quashed the judgment of the Federal Administrative Court and dismissed it as unfounded, because the court had wrongly considered the merits of the appeal against the search and the seizure. The Federal Supreme Court allowed the appeal against the FCC's decision and referred the case back to the FCC for reassessment, because the FCC had infringed the party's right to due process and the unsealing of documents was therefore unlawful.

## 4 Activities

### 4.1 Activities in various markets

The Cartel Act and the Internal Market Act apply basically to all markets. As a result, the activities of ComCo and the Secretariat cover various sectors. Each year, the ComCo Secretariat receives several hundred reports and enquiries from members of the public, public authorities, businesses, federations, etc. On average, these reports and enquiries result in 80–90 cases each year. Around 75 per cent of these are small informal market monitoring procedures, some 18 per cent are medium-sized cases ('preliminary investigations') and about 7 per cent are larger cases ('investigations').<sup>1</sup> **The following remarks** present the most important findings from these proceedings and from cases in which advice was provided, opinions were submitted on national legislation or other forms of assistance were given, broken down by market sector. Information is also given on newly opened preliminary investigations and full investigations.

#### 4.1.1 Automotive sector

The automotive sector is in a state of **transition**. First of all, it is experiencing a trend towards vertical integration, the use of agency models and direct online sales by manufacturers. Vehicles with combustion engines are increasingly being replaced by electric vehicles. Electric engines are easier for garages to maintain than combustion engines: they require fewer spare parts and less servicing. As a result of increasing digitalisation, the demands made in the business of servicing vehicles are also growing. The Cartel Act and the MV Notice<sup>2</sup> create the instruments required to counter potentially unlawful practices under the Cartel Act in the sales networks and to ensure that independent workshops have access to technical information and spare parts for repair and maintenance work.

The ComCo Secretariat regularly answered enquiries about compliance with the rules in the **MV Notice**. In various cases in 2022, it made it clear that the warranty provided by law and the manufacturer's warranty do not lapse if consumers have their vehicles repaired or serviced by an independent workshop, provided the work is carried out properly. Consumers are therefore not obliged to have their vehicles serviced or repaired at approved workshops during the warranty period.

As Parliament accepted the Pfister Motion in March 2022 (see Section 6), it is planned to reissue the MV Notice as an **ordinance**. The State Secretariat for Economic Affairs (SECO) has overall responsibility for drafting it.

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<sup>1</sup> By way of explanation: Investigation proceedings under the administrative law on cartels are used to assess the legality or otherwise of restrictions on competition under the law on cartels, are comprehensive in their approach and take around 2-3 years. The decision is taken by the Competition Commission. A preliminary investigation is a preparatory procedure that is largely informal, in which enquiries are made into cases that are worth investigating and which normally take around one year. Market monitoring is informal administrative action under the law on cartels which, depending on the findings that the authorities make with regard to the market in question, may result in a preliminary investigation or a formal investigation or be terminated informally. Preliminary investigations and market monitoring are carried out and concluded by the ComCo Secretariat.

<sup>2</sup> Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade ([www.weko.admin.ch](http://www.weko.admin.ch) → Legislation / Documentation → Notices / Explanatory Notes).

It should be mentioned that ComCo (**Concessionari VW**) and the Federal Administrative Court (**VW Partners Association**) issued decisions this year relating to the automotive sector. They are summarised in Section 3.

#### 4.1.2 Construction industry

In May 2022, the ComCo Secretariat concluded a *preliminary investigation* into **fire-resistant sealing products** that it had opened one year previously. It was suspected that six companies (five distributors and one manufacturer) had coordinated their offers relating to fire protection products for a private construction project (the offers lay between CHF 200,000 and CHF 400,000). The Secretariat found that the identical premiums and discounts that the distributors used in the first step of the calculation certainly suggested a concerted practice. In the case in question, however, the available evidence did not suggest the existence of a bidding agreement. There were also indications that the manufacturer had specified certain premiums and discounts as examples in training sessions or initial discussions. There was no suggestion that similar premiums and discounts were being applied in any other construction projects. As a result, the preliminary investigation found no evidence for concerted practices by the manufacturer of relevance under competition law.

In another *preliminary investigation*, the ComCo Secretariat again considered evidence of a bidding agreement. A public procurement agency filed a report with the Secretariat of specific indications of the coordination of prices between two companies that came to light when they were invited to bid for a contract to purchase **electrical products**. The Secretariat established in its preliminary investigation, opened in March and concluded in October of last year, that the two companies had coordinated their bids, in that one of the companies had calculated both bids, and that the two companies had pretended to the procurement agency that they had submitted their bids independently of each other. The Secretariat decided not to open an investigation because the concerted action had proved unsuccessful and the companies undertook to introduce measures to prevent bid rigging in future.

As part of its *market monitoring procedures* in 2022, the ComCo Secretariat dealt with five further reports of possible **bid rigging**. These came from procurement agencies or companies involved in the procurement procedures concerned. Most of these procurement projects had been initiated by public authorities, but private individuals also reported irregularities. The procurements were worth from a few thousand to 1.5 million francs. The ComCo Secretariat consistently follows up on such allegations of bid rigging, offering advice to the persons who have invited the bids. Here it should be mentioned that a duty to report suspicions of bid rigging to ComCo has applied since the start of 2021 at federal level, and since 2022 in some cantons as well (at cantonal level, the ratification processes for the revised law on public procurement are still ongoing). As an aid, the Secretariat has published a checklist on preventing bid rigging and a fact sheet on suspected bid rigging ([www.weko.admin.ch](http://www.weko.admin.ch) → Reports → Information about bid rigging) and held several events in 2022 to raise awareness of this topic.

The Swissolar Federation contacted the ComCo Secretariat to *request advice* in connection with launching a **price index for photovoltaic systems**. This price index is primarily intended as a tool that will be used when a contract is concluded much before the photovoltaic system will be installed. In such a situation, the contracting parties can agree on a price that is based on the index. Due to supply bottlenecks for photovoltaic systems, it is currently quite normal for over a year to elapse between concluding the contract and actually installing the system, and prices for photovoltaic systems are subject to serious fluctuations. The Secretariat advised the federation on how to organise the price index so that it complies with competition law, so as to prevent its preparation and publication from leading to a coordination of prices among photovoltaic system suppliers and installation firms. The advice focused on the statistical requirements for gathering price information (e.g. data must be representative and be gathered by a neutral body) and on the presentation of the price index (including the level of detail and presenting the spread of the published price information).

In January 2022, the ComCo Secretariat opened a *new investigation* into indications of bid rigging by four companies in the cantons of Fribourg, Jura, Neuchatel and Vaud. In June 2022, the Secretariat expanded the investigation to include one further company. The Secretariat searched the premises of all the companies. It is suspected that for several years these companies have coordinated their bids and prices for public procurement projects relating to **road repairs** (spreading loose chippings and doing bituminous resurfacing work).

#### 4.1.3 Digital Services

In the digital markets, where **GAFAM** (Google, Amazon, Facebook, Apple, Microsoft) are active, the Swiss competition authorities generally conduct fewer of its own proceedings than in other markets. It is pointless for the Swiss authorities to take legal action in Switzerland in cases where foreign competition authorities have already investigated the same matter and taken measures, as GAFAM normally operate in neighbouring countries in much the same way as in Switzerland. In such cases, however, the Swiss competition authorities systematically require GAFAM to implement the measures that foreign authorities imposed in Switzerland as well. For example, the measures that the European Union imposed on Google in 2015 following the investigation into 'Google shopping' have also applied in Switzerland for several years. Recently Google was also convicted by the French competition authorities in two separate cases. The cases resulted in interim measures being taken against Google in the market for *ad servers* and in the market for related protective rights (*snippets*). The ComCo Secretariat requested Google to implement the measures ordered in the first investigation in Switzerland as well, which it did from the start of 2022. With regard to the measures from the second investigation, the Secretariat is awaiting the result of the ongoing legislative process in Switzerland in connection with the administration of related protective rights, before ensuring that Google applies the measures introduced for the French market in Switzerland as well.

#### 4.1.4 Energy

A feature of 2022 was the unusual number of *office consultation procedures* and *consultations* on various ordinances in the **electricity and gas sector**. They mainly concerned the **energy crisis** caused by the war in Ukraine and related measures to secure the energy supply. The main focus was the Ordinance on Securing Supply Capacities in the event of a Serious Shortage of Natural Gas and the ordinances on measures to be taken in the event of an electricity and/or gas shortage (such as restrictions and bans on use of electricity and gas and quotas for their purchase). The Secretariat and ComCo primarily advocated that the costs incurred in building reserves should be borne in a non-discriminatory manner by the person responsible for creating them. In addition, ComCo and its Secretariat repeatedly pointed out that when passing on data for the purpose of monitoring compliance with the regulations, no consumer data or other data that is sensitive in economic terms should fall into the hands of those active on the production, supply and trading side. In the Ordinance on Creating a Hydropower Reserve, the Secretariat and ComCo in particular advocated a technology-neutral structure from the winter of 2023/24 and that the facilities that will in future operate outside the electricity market as reserve power plants in order to guarantee security of supply in the winter should be selected in competitive procedures.

#### 4.1.5 Financial markets

In 2022, digitalisation again caused disruption in relation to financial services. 'Traditional' financial institutions were required to react to new, very dynamic actors offering innovative financial products. The pandemic further accelerated the **digital transformation** in the financial sector, in that it forced participants to take a whole range of measures to enable them to satisfy the needs of their customers during the lockdown, not to mention those of their employees who were working from home, more comprehensively from a distance, while at the same time guaranteeing the best possible level of security. A large number of electronic platforms and stock

exchanges now offer an ever more comprehensive palette of financial services. The Secretariat was called on in 2022 to provide advice to market participants in several of these sectors, in order to guarantee compliance with the provisions of the Cartel Act. Particularly worthy of mention is the *advice* given to SIX Swiss Exchange AG (SIX) in relation to **transmitting data signals**.

SIX's position was that the fastest data links were essential for stock exchange trading in general and in particular for parallel or additional trading in multiple trading centres. Currently, low latency technologies (e.g. via microwaves) provide the fastest connections between two stock exchanges, with individual market participants having apparently already built their own microwave networks. SIX claimed that in order to prevent distortions of competition, it was essential that no individual market participant should gain a monopoly over the fastest connection between two trading centres. In order to stop this from happening, SIX is planning to make only one direct access to SIX's low latency connections available, to all market participants on the same terms. The ComCo Secretariat concluded in this particular case based on the information that SIX provided that there did not appear to be any *prima facie* difficulties with SIX's plan from the point of view of competition law, provided access is made available equally and on appropriate terms to all interested market participants according to the principles of openness, fairness and freedom from discrimination.

At the start of 2022, the industry and its interest groups and representatives complained publicly and directly to the competition authorities and the Price Supervisor about increased fees as a consequence of the introduction of **new debit cards by Mastercard and Visa**. The widespread criticism from the industry caused political groups to demand the regulation of card fees. From a competition point of view, the change to a new generation of cards is to be welcomed. The old generation (Maestro/VPay) is being replaced by new cards (Debit Mastercard/Visa Debit) that have the advantage that they can be used in online shopping. This process of changing cards, which affects all of Europe and not just Switzerland, increases competition between Visa and Mastercard debit cards and ends the quasi-monopoly that Maestro enjoyed in Switzerland for many years. In order to understand the issue better, a distinction must be made between merchant service charges (MSC) and multilateral interchange fees (MIF): the former, which are paid by merchants (e.g. shops) to acquirers (the financial institutions that process the payment on the merchant's behalf), are rather high in more expensive transactions, as they are calculated as a percentage of the price. This was the reason why the Price Supervisor reached an amicable settlement on a charge cap with SIX/Worldline. The MIFs, which are paid by the acquirers to the card-issuing banks, but which are passed on to the merchants as a (smaller) part of the MSCs, are the subject of a preliminary investigation that the ComCo Secretariat opened in September 2022. The competition authorities take the view that the MIFs could be regarded as agreements affecting competition as defined in the Cartel Act. On the issue of the various charges that apply to card payments, it should be remembered that ComCo is not a price regulator. It can only intervene if it is suspected that an infringement of the Cartel Act has occurred. If Parliament genuinely wants to regulate charges for card payments, a specific law would have to be enacted that applies to all charges that are incurred within a card system and to all methods of payment (including Twint, Postcard, etc.) and their respective charges.

On 5 December 2022, the ComCo Secretariat opened a *preliminary investigation* into a number of banks in the German-speaking part of Switzerland in order to establish whether they have entered into **agreements on salaries** and salary elements for various categories of their employees. The issue of cartels that artificially create a monopsonistic power over the jobs market has been raised by various competition authorities, which have increasingly considered the well-being of employees in their analyses. The preliminary investigation conducted by the ComCo Secretariat is the first of its kind in Switzerland. It aims to establish the extent to which the Cartel Act applies to employment contracts that have not come about through negotiations between employer and employee associations.

#### 4.1.6 Liberal professions services (maintenance and repair services)

The digitalisation of the economy is having a considerable impact on a range of services, in particular in the markets for maintenance and repairs. In order to be able to offer their services, many companies operating in these sectors are increasingly reliant on computer-based technical data that are held exclusively by the manufacturers of the products concerned. This, for example, applies in the case of **lifts**, where independent repair businesses regularly have difficulties in obtaining original spare parts and diagnostic tools, which makes it difficult for them to work on certain lifts and freight lifts. The ComCo Secretariat carried out a *preliminary investigation* in 2011 in which certain restrictions on access to interfaces and technical aids were identified. It noted at the time that external servicing in the future could become more difficult, as traditional lifts would soon be replaced by newer models with more electronic components, and decided to continue monitoring developments in this sector. Against this background, the Commission opened a new preliminary investigation in October 2022 in order to investigate the current market conditions for installing and servicing lifts.

#### 4.1.7 Healthcare

In 2022 the ComCo Secretariat had to remind participants in the market for **supplementary hospital services** (rooms and catering, additional out-patient and in-patient services) of certain principles. ComCo stressed the following to market participants that had been in contact in an effort to ensure behaviour in line with competition law: 1) tariff negotiations must be conducted, separately or in small groups, depending on the numbers involved, between insurers and hospitals (and not at federation level); 2) the insurers as purchasers can cooperate on procurement, as long they do not try to reach agreement on premiums and the products offered to policyholders; 3) the market power of the insurers must not lead to a situation in which the hospitals are forced to charge unreasonable prices; 4) the market power of certain hospitals must not lead to a situation in which they refuse to do business with insurers or force them to charge unreasonable prices. As the field of supplementary hospital insurance is subject to considerable changes, the competition authorities will continue to monitor developments and will intervene if necessary to ensure effective competition in the healthcare sector.

On 10 August 2022, ComCo received the report of a *merger plan* between the **Universitätsspital Basel (USB)** and **Bethesda Spital AG**. In view of their respective market shares, there could have been difficulties under competition law in the fields of obstetrics and gynaecology. ComCo nonetheless decided not to open a detailed investigation. Based on the findings from the *USB/KSBL* case, ComCo concluded that the two hospitals will be regarded as separate institutions by obstetrics and gynaecology patients. As the merger will lead to the continuation of an existing specialisation and at the same time also bring a rationalisation in this field, the creation of a dominant position could well have been offset by the gains in efficiency resulting from the merger. A further factor was the strong negotiating position of the health insurance companies and the intervention by FINMA and the Price Commission to ensure greater transparency in hospital bills covered by supplementary insurance. For all these reasons, ComCo concluded that the merger of the two institutions was unlikely to eliminate effective competition.

On 13 September 2022, ComCo began an investigation into Novartis, conducting a search at the group headquarters in Basel. It is suspected that Novartis has been trying to protect one of its medicines used to treat skin conditions by using a patent to block a competing medicine. The investigation is intended to establish whether a '**blocking patent**' is indeed being used, which could potentially amount to an unlawful abuse of a dominant position. This investigation is the first investigation in a case involving a potential abuse of an intellectual property right under the Cartel Act. The investigation was opened in close cooperation with the European Commission based on the bilateral agreement between the European Union and Switzerland on competition law, which came into effect in 2014.



On 16 August 2022, ComCo opened the first *investigation* on the subject of the **relative market power** (see Section 4.1.14.a). Pharmaceutical wholesalers buy pharmaceutical and health products from Swiss and foreign companies and sell them in Switzerland. ComCo has received indications that Fresenius Kabi, an international pharmaceutical company, is preventing the Swiss wholesaler Galexis from obtaining various products that are offered in Switzerland by purchasing them abroad on foreign conditions. The products concerned include **sip and tube feeds**. If it is established that Fresenius Kabi has relative market power, the refusal to supply could amount to a violation of the Cartel Act.

#### 4.1.8 Agriculture

In an *opinion* issued in October 2022, ComCo answered a series of questions from the Bern-Mittelland Regional Court. The questions related to whether it was permitted under competition law to **exclude a farmer** from the **IP-SUISSE** association, because he breached the guidelines on production issued by the IP-SUISSE because of poor animal husbandry. ComCo assessed the exclusion to be justified.

ComCo fined Swissgenetics for an unreported *merger* (see Section 3.1). The merger related to the bull semen business.

#### 4.1.9 Media (cinema advertising and books)

The ComCo Secretariat concluded its *monitoring of the market* for **marketing and brokering cinema advertising** relating to the possible abuse of a dominant position. The cinema advertiser concerned assured the Secretariat that exclusive contractual relations with the cinema operators would be limited to a maximum of five years and that it would not impose any unilateral requirements on the cinema operators with regard to cooperation with other advertising marketers or brokers. In view of this, there were no indications that other cinema advertising marketers or brokers were being obstructed from or in competing.

In autumn 2022, Payot reported the Madrigall Group for the abuse of a position with relative market power. The bookshop chain claims it is being restricted from purchasing **books** that are offered in Switzerland and in France at the prices charged in France and on the conditions that are customary in the industry there. The ComCo Secretariat conducted initial enquiries as part of a market monitoring project and opened an investigation in January 2023.

#### 4.1.10 Postal services

In relation to **postal services**, ComCo received several reports in connection with acquisitions made by Swiss Post in which claims were made of abuses of a dominant position. The alleged abusive practices essentially took the form of unlawful cross-subsidies, passing on data from its monopoly area, price discrimination and unlawful tying transactions. In order to make further enquiries into the alleged practices, the ComCo Secretariat opened two *market monitoring procedures*.

#### 4.1.11 Sport

In 2022, the ComCo Secretariat submitted its opinion, based on various observations from several *opinions* on decisions by sports federations, in particular the ice hockey federation, in relation to the Federal Council response to the **Regazzi Interpellation**, which requested the Federal Council to consider among other things the need for provisions in the Cartel Act with rules on financial fair play in professional sports leagues. The Secretariat does not see a need to introduce such rules into the Cartel Act, as the Act already provides that agreements of this kind can be justified for reasons of economic efficiency if they are needed to achieve certain goals specific to the sport concerned.

The uncontested autonomy of sports federations and clubs to organise themselves as they wish is also restricted by the current law. The regulations and measures introduced by sports federations and clubs must be reviewed on the basis of the Cartel Act, as there are no exceptions, such as collective employment agreements. This analysis, concentrating on the Cartel Act, leads to a similar result to a review based on the specific test derived from the European 'Meca-Medina' case law. According to this test, sports rules and measures are always subjected to a 'classic' competition law analysis if there is sufficient evidence that they are not inherent in the organisation and proper conduct of competitive sport and are not intended to ensure the fairness of sporting events. The European approach is very similar to the approach adopted in the Swiss Cartel Act, which requires an analysis of economic efficiency from the perspective of necessity and proportionality.

#### 4.1.12 Telecommunications

In the *investigation* into **Swisscom's network expansion strategy**, the decision of the Federal Supreme Court on ComCo's interim measures (see Section 3.2) and the *request for advice* from Swiss Fibre Net AG (SFN) should be mentioned. SFN asked the ComCo Secretariat whether the FTTH expansion model, which SFN developed and which, as a result of the shuntability of at least one fibre in the area of the feeder, offers genuine Layer 1 in terms of P2MP network architecture (a **shunable optical fibre network**), satisfies the interim measures and the requirements that they specify for Layer 1 access. The Secretariat concluded that there should be no breach of ComCo's interim measures provided the current and future demand for Layer 1 access could be covered by using the SFN shunting model and the Layer 1-access offered by SFN is to be regarded as equivalent.

The *monitoring of the market* for **broadband internet** with the aim of examining a possible abuse of a dominant position in the form of a margin squeeze was terminated in 2022. In view of the modification of the advance service prices and the assurance that certain principles will be followed when setting prices for internet offers in future, the ComCo Secretariat does not believe that any further action is required at present. However, it remains to be seen whether the principles announced for preventing margin squeeze actually have an effect.

#### 4.1.13 Watches

At the end of year, the ComCo Secretariat concluded the *preliminary investigation* into **assortments** by making certain recommendations. The preliminary investigation revealed indications of the abuse of a dominant position by Nivarox, a member of the Swatch Group. Nivarox manufactures what are known as 'assortments', components required to manufacture mechanical watch movements and finished watches. It supplies a large number of companies in the Swiss watch industry. The preliminary investigation in particular revealed indications that Nivarox unlawfully restricted the opportunity for manufacturers of mechanical watch movements and finished watches outside the Swatch Group to purchase its products and unlawfully discriminated against customers outside the Group in order to favour customers within the Group. The Secretariat decided not to conduct further investigations as it would have been disproportionate, but recommended that Nivarox should change the way it conducted its business.

#### 4.1.14 Further activities

##### a. Relative market power

The competition authorities are responsible for enforcing the **new provisions** under administrative law on relative market power (see Section 1). In this context, they are the contact point for questions, suggestions and reports. Companies are not being fined for first-time violations of the new provisions. ComCo can however impose obligations on them to act or to desist. A company has relative market power if another company has no adequate and reasonable al-

ternative options and is therefore dependent on products or services from that company. Relative market power in itself is not unlawful. What is prohibited, however, is a company that has relative market power abusing its position by hindering a dependent company or placing it at a disadvantage in competition.

Immediately after approving the regulations on relative market power, the ComCo Secretariat began preparatory work for ensuring their **smooth implementation**. It set up an in-house working group and published a factsheet and report form in order to assist companies affected in filing a report. In two cases, reports have led to an investigation being opened: the first investigation relates to the pharmaceutical industry (see Section 4.1.6), while the second case involves books in the French-speaking part of Switzerland (see Section 4.1.9). These ongoing investigations relate to potential restrictions that prevent Swiss companies from purchasing the products they need abroad. The focus is on a possible application of the new provision, according to which an abuse can also consist of a company with relative market power making it difficult for other companies to purchase goods or services offered both in Switzerland and abroad on the foreign terms. In reaching its decisions in the two investigations, ComCo will create the first legal precedents for the new provisions.

#### **b. Vertical price-fixing agreements and market foreclosures**

In May the ComCo Secretariat concluded the *preliminary investigation* into the **distribution network for Yamaha products** by making certain recommendations. These are intended to eliminate indications of unlawful price and territorial protection agreements. The indications of an unlawful price-fixing agreement resulted in particular from the obligation placed on Yamaha dealers to mark vehicles in their showrooms with the recommended sales price, and the fact that the vehicles were mostly labelled with this sale price. The indications of the absolute territorial protection agreements resulted from the obligation placed on Yamaha dealers to purchase vehicles only from the Swiss general importer and the Swiss general importer's refusal to allow the manufacturer's warranty to apply to imported vehicles.

The ComCo Secretariat conducted around 15 *market monitoring procedures* on suspicion of **vertical price-fixing agreements and sealing-off the Swiss market**. The subjects included suspected export bans in foreign distribution agreements, allegations from employees that they were not permitted to respond to spontaneous enquiries from Switzerland, and a pop-up message on the website of an importer that stated that services would not be provided under the warranty if dealers reduced prices below a certain level. In several cases, the Secretariat secured specific changes in practices or measures, such as the amendment of contracts, circulars to sales partners, and training sessions for employees that made it clear that spontaneous orders from customers from Switzerland can be processed without restrictions and that dealers are free to fix their own prices. In view of various factors in individual cases, such as the problematic distribution agreements not yet being in force, no relevant sales being affected, manufacturers having no agent in Switzerland or the existence of technical barriers to trade, the Secretariat decided not to take any further action.

#### **c. International purchasing cooperation**

In the course of providing certain *advice*, the ComCo Secretariat issued a statement on **international purchasing cooperation**. The Secretariat regarded cooperation as permitted under competition law, but subject to the following conditions: a) the market shares of the dealers involved in the purchasing markets are under 15 per cent; b) the dealers are not competitors as far as sales are concerned; c) cooperation between the dealers is needed to create countervailing buyer power against international brand manufacturers with power on the supply side; d) the purchasing cooperation increases competition in Switzerland on the sales side, because the dealers involved pass on resultant cost reductions to the consumers; e) the only information exchanged in the course of purchasing cooperation is information required for the purchasing cooperation to function.

## 4.2 Internal market

The Internal Market Act guarantees free market access throughout Switzerland. Among the cantons, market access is granted according to place of origin. A right of **free access to the market** applies if the activity is carried out lawfully at its place of origin (the ‘Cassis-de-Dijon’ principle). ComCo’s related supervisory activities resulted in certain cases from reports in connection with community nursing services (Spitex) and the activities of midwives. Both community nurses and midwives often operate in more than one canton and require cantonal authorisation to do so. Not all cantonal public health authorities comply with the internal market rules when deciding whether to grant authorisation. In a case in French-speaking Switzerland, a *Spitex provider* appealed against a decision not to grant authorisation, citing the competition authority as a party. ComCo itself filed an appeal in a case in Central Switzerland against a decision to charge for authorisation as a *midwife*, as access to the market should be granted free of charge. The two appeal proceedings are pending before the competent cantonal courts.

Under the Internal Market Act, the **privatisation of cantonal monopolies** must be carried out by means of a non-discriminatory public bidding process. As a result of the case law, this requirement under internal market law has increasingly come to be seen as the minimum standard for transferring public sector rights with limited availability to private entities. According to the case law of the Federal Supreme Court, for example, a public bidding process is required when public *billboard posting* is privatised. ComCo submitted an opinion in appeal proceedings before the Federal Supreme Court in connection with billboard posting in the Canton of Geneva. A commune had issued a contract to the existing provider without inviting any other bids, even though another company was interested. In its judgment dated 30 November 2022, the Federal Supreme Court regarded this as a clear breach of Internal Market Act, also taking account of ComCo’s view in its deliberations. Further cases involving the privatisation of public monopolies related to *air rescue services* and *publicly owned restaurants in cities*.

The Internal Market Act contains a **ban on discrimination for cantonal and communal procurements**. The competition authority in particular takes action in cases where access to markets is generally restricted to the detriment of suppliers. Cantonal and communal contract awarding entities occasionally instruct external companies to plan public bidding processes. In some cases, a contract is awarded to a supplier that has connections with the company that planned the bidding process. This is unfair and limits competition, as other companies have no chance of getting the contract. These cases constitute a breach of the ban on discrimination under internal market law and against the rules on **prior involvement and recusal** under procurement law. In 2022, ComCo filed an appeal in a case of this type in a cantonal administrative court in Eastern Switzerland, but the court rejected the appeal. ComCo *appealed* against this cantonal judgment to the Federal Supreme Court, as ComCo regarded the cantonal judgment as incorrect in law.

Further activities in relation to **procurement** involved investigations in connection with the direct award of contracts. Direct awards are permitted in certain circumstances as an exception, but this exception is sometimes invoked too easily and without sufficient justification. ComCo received a particularly large number of reports about direct awards of contracts in the IT sector. In addition, the competition authority conducted market monitoring procedures in the German-speaking and the French-speaking parts of Switzerland to examine how the law on public procurement is being applied to the purchase of electricity, and also answered numerous enquiries from the stakeholders concerned. In addition, the competition authority made sure through its responses in consultations (in particular on the TRIAS procurement guidelines) that the revised law on public procurement is also being implemented in accordance with competition law requirements.

## 5 International

**EU:** The cooperation agreements on competition law that Switzerland and the EU entered into in 2013 once again enabled ComCo to work efficiently with the EU Commission's Directorate-General for Competition in the report year. For example, the two sister authorities were able to coordinate the timing when opening an investigation in the pharmaceutical industry and thereafter to exchange evidence. There were exchanges of information in other investigations carried out in parallel. The cooperation agreements help to avoid duplication and speed up proceedings, which is also in the interests of the companies under investigation.

**Germany:** In November 2022, Switzerland and Germany signed an agreement on cooperation on competition law matters. This is an administrative assistance agreement based on the model of the Cooperation Agreement with the EU, which it largely corresponds to in its content. The two agreements are primarily distinct in relation to differences between EU and German competition law and related definitions or minor changes made in the wording. In Switzerland the agreement must still be approved by the Federal Assembly. As a result, it will only come into force in the second half of 2023.

**OECD:** The ComCo Secretariat submitted both written and verbal contributions to the OECD discussions on data-screening tools, purchasing power and purchasing cartels and interim measures. In addition, it followed the discussion on how international cooperation between competition authorities could improve the combating of cross-border breaches of competition law. In this regard, Switzerland has so far relied on bilateral cooperation agreements with selected jurisdictions, such as the EU and Germany.

**ICN:** In May 2022, the ComCo Secretariat attended the 21 ICN Annual Conference in Berlin. The Secretariat participated in compiling various ICN surveys and reports; the contribution to a report on digitalisation and efficiency among competition authorities should be highlighted. In addition, the Secretariat used the various ICN webinars to exchange experiences with other participants. For the future, the Secretariat plans to be more closely involved in the exchange of information and know-how within the ICN on machine learning, as the Secretariat plays a leading role internationally in this field.

**UNCTAD:** The ComCo Secretariat attended the UNCTAD Annual Conference in Geneva in July 2022. It also continued to participate in the working group on cross-border cartels, once again in close cooperation with SECO. Because of the enormous importance of international cooperation in combating cross-border cartels, the mandate of this working group was extended for a further year, in order to provide even better support in future to small and recently established competition authorities and facilitate the exchange between authorities.

## 6 Legislation

The competition authorities have been assigned a new task in the administrative enforcement of the new provisions on relative **market power**, enacted as a response to the Fair Prices Initiative, a task that they already set about fulfilling in 2022 (see Sections 1 and 4.1.13.a).

The Federal Council continued its work on the **partial revision of the Cartel Act**, which was begun after the failure of the last attempt at revision in 2014. In the spring of 2022, a large number of submissions were received in the consultation procedure. The Federal Council will probably publish a draft Act and the dispatch in the first half of 2023. The revision will then be debated in the Federal Assembly. The GS-EAER and SECO have overall responsibility for the partial revision of the Cartel Act within the Administration. The ComCo Secretariat is also involved in the work.

ComCo also commented on the proposed amendments to the draft Act in the **consultations on the partial revision of the Cartel Act**. It supported the key points of the Federal Council bill, particularly the modernisation of the merger control procedure, the strengthening of civil procedures under competition law and the improvement of the opposition procedure. It also welcomes numerous further revisions in the draft that lead to greater legal certainty and shorter and simpler procedures. However, ComCo rejected the implementation of requests from Parliament that in some cases were based on incorrect premises and which aimed to undermine the enforcement of cartel law or at least might achieve such a result: in particular, it opposed changing the criterion that agreements must significantly restrict competition in Article 5 of the Cartel Act (implementing the Francais Motion 18.4282) and the introduction of deadlines and party costs in cartel proceedings (implementing the Fournier Motion 16.4094). Equally problematic, unless they are carefully implemented, are the Wicki Motion (21.4189), which has since been passed, and the reform of the competition authorities, which several participants in the consultation process called for.

The current status of the **parliamentary proposals** relating 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 led to an amendment to the Unfair Competition Act: since 1 December 2022 so-called ‘parity clauses’ in contracts between online forums and hotels and other accommodation businesses have been prohibited. The latter can now offer rooms on their own websites at lower prices than on hotel booking sites.
- The Councils 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 administrative proceedings related to competition law and the reimbursement of party costs even in first instance administrative proceedings. The Federal Council has integrated these two points in the partial revision of the Cartel Act.
- 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**), has been included in the partial revision of the Cartel Act. The submissions in connection with the motion are contradictory: one does not want any amendment to Article 5 of the Cartel Act, the other says that the proposed solution does not go far enough.
- The **Wicki Motion 21.4189** of 30 September 2021, ‘Safeguard the inquisitorial principle – do not reverse the burden of proof in the Cartel Act’ was passed by both Councils, even though the alleged irregularities in enforcing the law do *not* exist, as the decisions taken by the courts prove, and the requirements with regard to the presumption of innocence that have been demanded are already contained in the current law. The Federal Council will implement the motion in the partial revision of the Cartel Act.

- The **Pfister Motion** of 27 September 2018 on the ‘Effective implementation of the Cartel Act in the motor vehicle sector’ (**18.3898**) has been passed. The Federal Council is planning implementation while taking account of developments in the EU.
- The **Gugger Motion** of 17 June 2022, ‘Stop the unilateral introduction of the agency model in the motor vehicle market’ (**22.3838**) has yet to be considered in the Assembly.
- The **National Council Economic Affairs and Taxation Committee Motion** of 15 August 2022, ‘Preliminary investigation of the Competition Commission Secretariat or Competition Commission investigation into competition issues in relation to thermal and motor fuels’ (**22.3885**) urges the Federal Council to require the EAER to instruct ComCo to open an investigation. The National Council accepted the motion on 14 December 2022.
- The **Maitre and de Quattro motions** of 22 September 2022, ‘Ban interchange fees for payments with debit cards’ (22.3976 and 22.3977) have yet to be considered in the Assembly.
- The **Rechsteiner Motion** of 14 December 2022, ‘Speed up procedures – increase legal certainty’ (**22.4404**) calls for a change to the Cartel Act according to which the investigation phase by the ComCo Secretariat (i.e. from the opening of proceedings until the Secretariat submits its proposed decision to ComCo) should take no longer than one year, with the option of a one-off extension of a further year. The proposal has yet to be considered in the Assembly.

## 7 Statistics

The statistics on the work carried out by ComCo and its Secretariat in 2022 are as follows:

	2022	2021	2020
<b>Investigations</b>			
Total number of active investigations	19	20	20
Investigations carried forward from the previous year	16	16	13
Newly opened investigations	3	4	7
Investigations resulting from splitting up existing investigations	0	0	0
<b>Final decisions</b>	1	4	6
Amicable settlements	1	3	4
Administrative rulings	1	2	1
Sanctions under Art. 49a para. 1 Cartel Act	1	4	4
Partial decisions	0	0	2
Procedural rulings	1	2	2
Other decisions (concerning publications, fees, access to files, etc.)	1	2	1
Interim measures	0	1	1
Sanctions proceedings under Art. 50 ff. Cartel Act	1	2	1
<b>Preliminary investigations</b>			
Total number of active preliminary investigations	14	11	14
Preliminary investigations carried forward from the previous year	8	7	13
Newly opened preliminary investigations	6	4	1
Concluded preliminary investigations	5	3	8
Investigations opened	0	1	1
Modification of conduct	4	1	4
No consequences	1	1	3
<b>Other activities</b>			
Notifications under Art. 49a para. 3 let. a Cartel Act	5	1	1
Advice	14	33	24
Market monitoring	52	48	80
Freedom of information applications	22	10	18
Other enquiries	511	519	565
<b>Mergers</b>			
Notifications	49	31	35
No objection after preliminary investigation	49	31	34
Investigations	0	0	1
ComCo decisions after investigation	0	0	1
Authorisation refused	0	0	0
Authorised with conditions/requirements	0	0	0
Authorised without reservations	0	0	1
Early implementation	0	0	0
<b>Appeal proceedings</b>			
Total number of appeals before the FAC and FSC	35 (88)	39 (92)	42
Judgments of the FAC	6 (31)	11 (15)	9
Success for the competition authority	4 (10)	8 (12)	6
Partial success	2 (6)	2 (2)	2
Unsuccessful	0 (3)	1 (1)	1
Judgments of the FSC	5 (7)	5 (12)	7



Success for the competition authority	4 (4)	4 (11)	6
Partial success	1 (2)	1 (1)	1
Unsuccessful	0 (1)	0 (1)	0
Pending at the end of year (before FAC and FSC)	29 (69)	30 (71)	29
Expert reports, recommendations and opinions, etc.			
Expert report (Art. 15 Cartel Act)	1	0	0
Recommendations (Art. 45 Cartel Act)	0	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	0	2	0
Follow-up checks	0	0	0
Notices (Art. 6 Cartel Act)	1	0	0
Opinions (Art. 46 para. 1 Cartel Act)	327	335	327
Consultation proceedings (Art. 46 para. 2 Cartel Act)	14	11	12
State aid assessments	0	1	2
Internal Market Act			
Recommendations / Investigations (Art. 8 IMA)	0	1	0
Expert reports (Art. 10 IMA)	1	4	1
Provision of advice (Secretariat)	62	68	63
Appeals (Art. 9 para. 2 <sup>bis</sup> IMA)	3	1	2

The statistics for 2022 and a comparison with the figures for 2021 and 2020 reveal the following:

- Investigations: ComCo and its Secretariat conducted practically the same number of investigations in 2022 as in previous years. However, ComCo concluded fewer cases than usual. There are two main reasons for this: various cases are in their final stages at Secretariat level. In addition, an above-average number of mergers were reported to ComCo, and they have to be given priority because of the statutory deadlines.
- Preliminary investigations and market monitoring procedures: The number of preliminary investigations and market monitoring procedures is broadly similar to that in the last couple of years.
- Mergers: In 2022, 49 mergers were assessed within the statutory deadline of one month. This is clearly a higher number of reports than in the past two years and the second highest total since 1996 (over the last 25 years, the annual average was around 27 reports). Accordingly, resources were tied up investigating mergers.
- Appeal proceedings: Although the number of appeals pending before the courts is still high, the courts made a large number of decisions; in cases where there were multiple appeals against a ComCo decision, the courts in some cases decided individual appeals and sometimes all the appeals. 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 approach adopted since 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 on the nine appeals against ComCo's decision on air freight are counted as one judgment and in brackets as nine judgments).

- Expert reports, recommendations and opinions: For some years, expert reports and recommendations have been rare. This year ComCo issued an expert report to a civil court. The number of office consultation procedures that the ComCo Secretariat has to deal with remains at a constantly high level. In the healthcare sector alone, there were around 150 office consultation procedures. In relation to agriculture, for example, there were 30.
- IMA: The number of enquiries dealt with relating to the Internal Market Act was similar to that in the past few years.

## **8 Special topic for 2022: Applying the Cartel Act in times of crisis**

The SARS-CoV-2 pandemic posed a serious challenge for society, government and businesses. Last year, war broke out in Ukraine, bringing further tensions and uncertainties. In these times of crisis, rules on competition can also become an issue. In Switzerland, the focus has been on winter supplies of gas and the high prices of fossil fuels. In addition, ComCo had to contend with allegations of price-fixing agreements in connection with COVID-19 self-tests.

Other competition authorities were confronted with similar questions. Based on international experiences, the executive committee of the International Competition Network ICN (which comprises competition authorities from 130 states) published a declaration on the key role of competition and competition policy during crises such as pandemics and wars.

The application of the Cartel Act in times of crisis is therefore this year's special topic.

### **8.1 Guaranteeing gas supplies in winter**

In order to respond to the energy crisis caused by the war in Ukraine, a task force was set up under the auspices of the Swiss Gas Industry Association (VSG) to secure gas supplies in Switzerland. In addition to representatives from the gas industry, the federal authorities in the shape of the Department of the Environment, Transport, Energy and Communications (DETEC) and the Department of Economic Affairs, Education and Research (EAER) were also represented. The ComCo Secretariat was invited to take a seat in the task force and in the working group preparing the ground for the task force. It has attended the meetings that have been held every week since March 2022 with the aim of providing the members of the task force from the gas industry and the federal authorities with as much legal certainty as possible and enabling the task force to work towards ensuring supplies for the winter of 2022/2023 while remaining in compliance with competition law. In addition, ComCo and the Secretariat have submitted opinions on draft legislation on this subject in a large number of office consultation procedures and other consultation proceedings. The competition authorities have been committed to ensuring that the draft legislation on gas supplies does not allow any market participants to be given preference or to be disadvantaged unless this is unavoidable.

In the course of this work, the gas industry accused the competition authorities of delaying the rapid procurement of gas by insisting on compliance with the Cartel Act. The implication was that requiring the gas industry to comply with the Cartel Act was exacerbating the energy crisis and supply shortages. This criticism is unjustified: at no time have the competition authorities argued against rapid or joint purchases in the energy markets. Like other European competition authorities, however, the ComCo Secretariat has regularly pointed out that the energy crisis must not be used to impose unjustified restraints on competition under the pretext of avoiding higher energy prices, thereby obstructing trading partners or exploiting consumers. Accordingly, the ComCo Secretariat argued within the task force for winter supplies not to be organised so that individual customer groups, without any justification, are either given worse access to gas supplies or are offered worse conditions than other customers.

In times of crisis in particular, the Cartel Act has the important tasks of preventing the exploitation of a crisis situation and protecting businesses and consumers that find themselves in positions of dependency from those who seek to profit from the war. The Cartel Act and its application are flexible enough to take account of special circumstances. The Cartel Act itself provides, based on a properly democratic process, for its application to be restricted if other public interests take precedence over competition in a specific situation.

Firstly, the Cartel Act does not apply if another law requires competition to be suspended in a specific market. This requires regulations to be enacted by Parliament or another competent

authority in order to exclude competition in the market concerned. Secondly, the Federal Council may make use of the power it is granted in the Cartel Act to override decisions of the Competition Commission if practices declared unlawful are required as an exception in order to serve more important public interests.

To sum up, it should be stressed that the Cartel Act has an important role to play in a crisis such as the energy crisis in order to prevent abuses, but is also sufficiently flexible to take account of special circumstances, provided Parliament or the government take the required measures. If these democratically legitimised measures are not taken, private individuals do not have the right to disregard the law.

## 8.2 High prices for fossil fuels

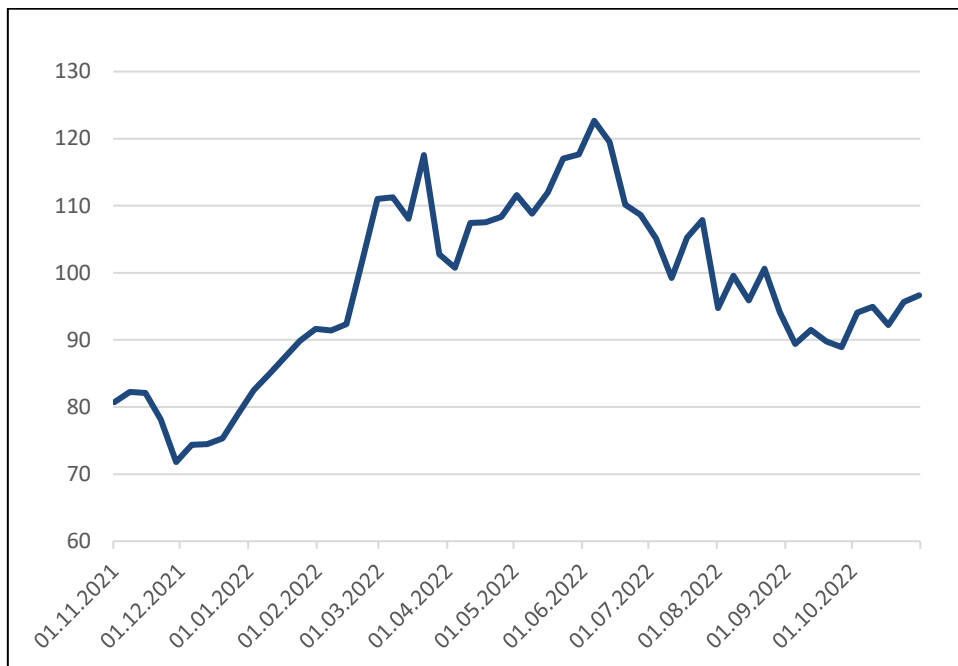
The market prices for fossil fuels and thus the price of fuel at filling stations have clearly gone up as a result of the war in Ukraine. The ComCo Secretariat has received a variety of enquiries from members of the public since the end of February 2022 relating to possible agreements affecting competition. The Secretariat has looked into these allegations and worked with the Price Supervisor to analyse the factors behind the price rises. It has made rough calculations, based in particular on the statistics for the average prices of fuels published by the Swiss Federal Statistical Office (FSO).

The ComCo Secretariat came to the following conclusion: the analysis of fuel prices at filling stations revealed no indications of agreements affecting competition or pricing abuses by dominant companies that would have justified the opening of proceedings against any companies. It is worth noting that the fact that prices rise at the same time at all filling stations does not necessarily indicate that a price-fixing agreement is in operation, but may simply be the result of the actual costs (e.g. an increase in crude oil prices) and can result from companies observing and copying the prices of their competitors. This is especially true of homogeneous products such as motor fuels, where in practice the only aspect that can differ is the price. Unilaterally adopting the same prices as the competition is unproblematic under competition law; the difficulty arises when competitors enter into agreements to coordinate pricing policy. Regional price differences, which are sometimes considerable, and markups at filling stations on motorways are probably due to different cost structures and different levels of competition. The following remarks set out some of the aspects that the ComCo Secretariat has taken into account.

Several factors are relevant to the price of fuel at filling stations: first of all, taxes and duties (mineral oil tax, mineral oil tax surcharge, import duty and value added tax) make up around 50 per cent of the fuel price at the pumps. Further influential factors are the crude oil price (see Figure 1), the exchange rate for the Swiss franc against the US dollar (see Figure 2) and the transport costs on the Rhine, which together make up around 34 per cent. The analysis of the changes in fuel prices at filling stations and the factors influencing them gave no indication that the prices at the pumps had changed independently of the contributing factors mentioned. In other words, the movement in prices is due to the contributing factors presented in the diagrams below.

*Figure 1* shows that the price of crude oil has experienced sharp fluctuations, in particular from February to April 2022 and has clearly increased since the end of 2021.

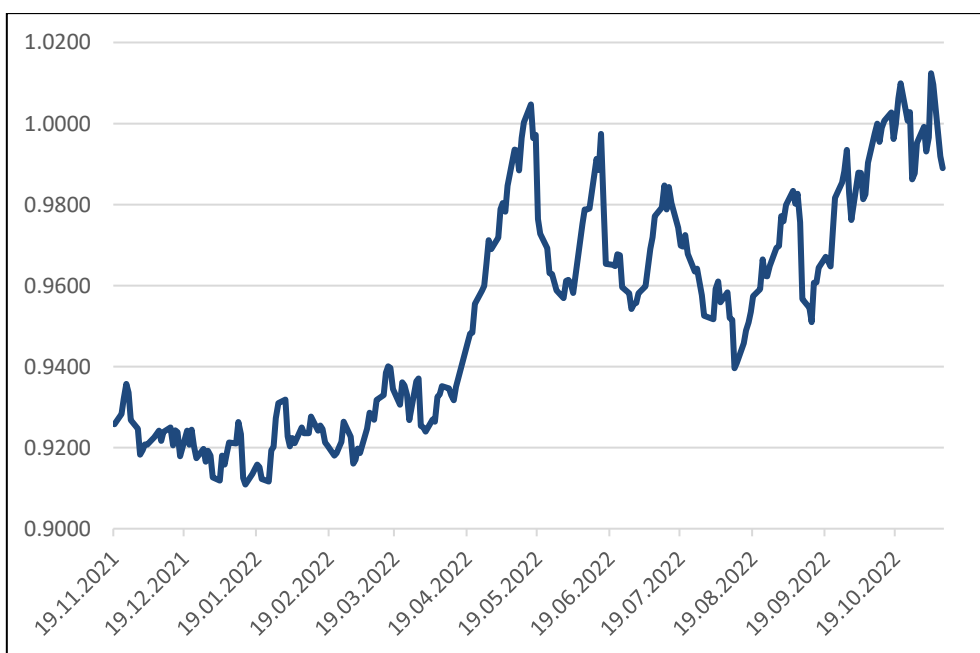
Figure 1: Development of the Brent oil price (weekly average in USD per barrel)



Source: [www.onvista.de](http://www.onvista.de) (Status: 08.11.2022).

Figure 2 shows that the Swiss franc fell slightly in value against the US dollar over the course of the year. While around 93 centimes would buy one US dollar until April 2022, the dollar had increased in price to around 1 franc by the end of October 2022. This corresponds to a loss in value for the Swiss franc of around 8 per cent. This trend is therefore relevant to the fuel prices charged at filling stations in Switzerland, as crude oil is paid for in US dollars. A loss in the value of the Swiss franc against the US dollar thus causes prices at filling stations in Switzerland to rise.

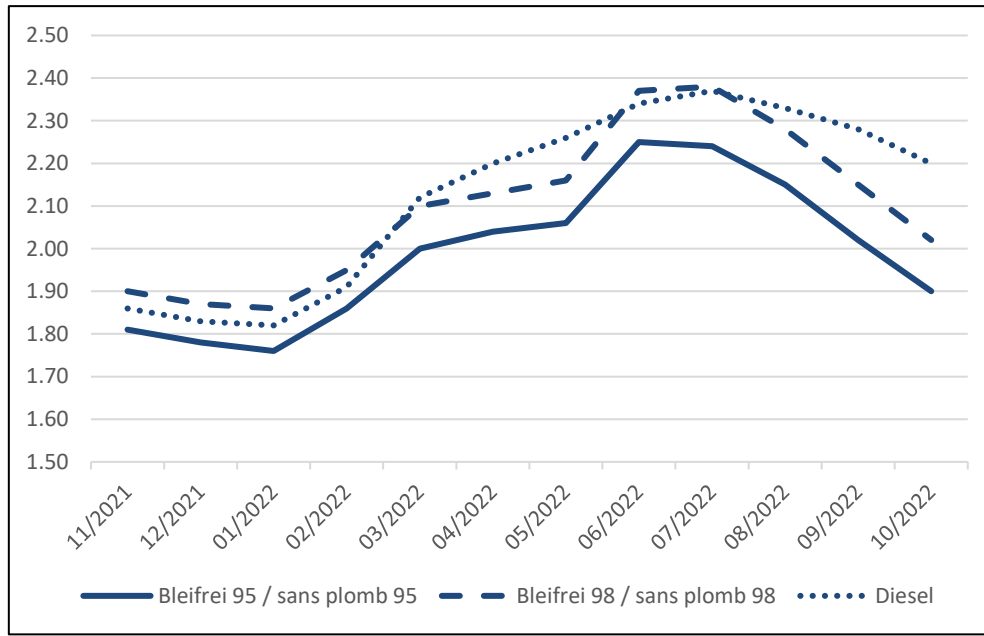
Figure 2: Exchange rate developments for changing USD into CHF (direct quotation)



Source: SNB (Status: 08.11.2022).

Figure 3 shows the development of average fuel prices at filling stations in Switzerland in the period from November 2021 to October 2022. The graph reveals that the prices for fuels (un-leaded, super unleaded and diesel) rose from February to July 2022 on average from around CHF 1.91 by 42 centimes to an average of around CHF 2.33.

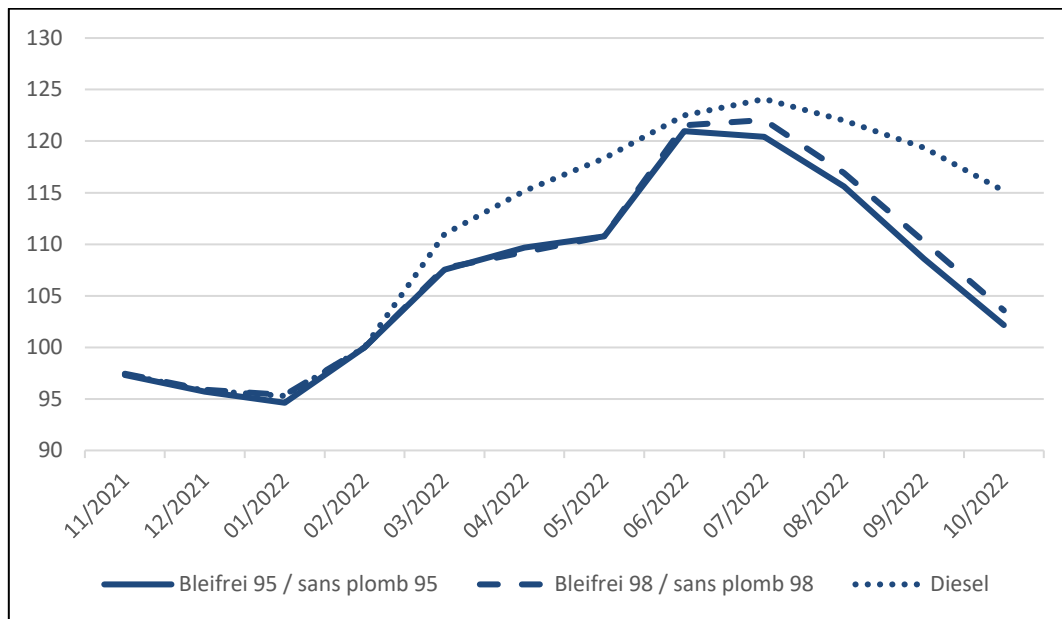
Figure 3: Average prices for fuels at filling stations in Switzerland



Source: FSO, monthly values Nov. 2021 to Oct. 2022 (Status: 08.11.2022).

The relative development of individual fuels in Figure 4 shows that the price at the pump of petrol increased by around 21 per cent between February and July 2022. In the same period, the rise in the diesel price was slightly more, at around 24 per cent. By October 2022, the price of petrol had fallen again, by around 20 per cent, lying around the same level as it was in February 2022, but still some 8 per cent higher than in October 2021. The price of diesel fell from July 2022 by only 9 per cent; as a result, diesel was still around 20 per cent more expensive in October 2022 than in October 2021. The difference in prices between diesel and petrol is probably due to the fact that diesel can be used as a heating oil and the demand for heating oil was already on the rise in spring 2022, as people looked to fill up their tanks and storage facilities as soon as possible in response to the crisis, and businesses decided to switch from gas to heating oil.

Figure 4: Fuel prices at filling stations in Switzerland (Indexed: Feb. 2022 = 100)



Source: FSO and own calculation.

The refinery in Cressier is the only plant producing fuel in Switzerland; it accounts for around 25 per cent of consumption by road traffic. Therefore, the import of motor fuels via the Rhine is an important source of supplies. As a result of the serious drought in the summer of 2022 and the low water level on the Rhine, which in turn reduces the loading capacity of tanker barges, the transport price rose in July 2022 by CHF 15 – 35 above the previous customary price, to over CHF 85 per tonne. This was another factor in the increase in fuel prices at filling stations in Switzerland.

The Price Supervisor and ComCo Secretariat were in close contact about the price situation in the energy markets and coordinated activities according to their respective responsibilities. For example, the Price Supervisor analysed the margins applied by Switzerland’s only refinery. This was because even if there are no indications of a breach of the competition law, excessive margins may constitute a price abuse that falls under the jurisdiction of the Price Supervisor. In addition to working with the Price Supervisor, the Secretariat was represented in the inter-departmental working group on energy prices, which analysed trends in energy prices and considered what action the federal government might take.

In conclusion, it should be stressed that the competition authorities were already keeping a close eye on the market for fuels at filling stations before 2022, in particular in response to regular enquiries about fuel prices from members of the public. However, there have been no indications of unlawful practices in recent years that would have justified the opening of proceedings against any specific company. The ComCo investigation of the Swiss petrol market from 1992 to 2000 disclosed no evidence of unlawful practices either. Furthermore, the investigation conducted in 2022 in this sector by the Austrian competition authorities also found no clear indications in the Austrian fuel market of any cartels or abuse of market power.

### 8.3 COVID-19 self-tests

During the COVID-19 pandemic, the competition authorities were careful to ensure that businesses did not exploit the situation to behave in an anti-competitive manner. When unanticipated events cause consumers to become especially reliant on a particular product for a short time, the supply is often unable to satisfy the demand. In response to this sudden peak

in demand, some businesses may be tempted to take concerted action to increase their prices, which forces the competition authorities to intervene rapidly.

Intervention was called for at the end of March 2021 in relation to the sale of rapid COVID-19 tests, based on a tip-off from one sales company. While people in Switzerland were able to obtain COVID-19 self-tests free of charge in pharmacies from 7 April 2021, an attempt was made to pressurise one provider into adapting the prices for its tests to bring them in line with those of its competitors. The ComCo Secretariat began a preliminary investigation immediately and published a press release. It conducted enquiries that showed that the attempt had failed. As no further indications of any agreements could be found, the ComCo Secretariat advised the company concerned of the issues relevant to competition law and concluded the proceedings by issuing a second press release.

In this way, the competition authorities draw consumers' attention to a specific problem and show the public that they will intervene very quickly to enforce the Cartel Act if companies exploit or try to exploit emergency situations to reach agreements on prices or to abuse a strong position in the market. The ComCo Secretariat is ready to advise businesses at any time in order to avoid protracted and costly proceedings.

## **8.4 Conclusion**

In times of crisis, there may be loud calls for the state to intervene, and encouraging and protecting competition may become less of a priority. History and recent events have shown that in times of crisis it is also important not to forget about competition when drafting new laws or devising government policy. Markets in which competition thrives can respond more flexibly to economic disruption. Markets that are sealed off and protected, on the other hand, are prone to failure in times of crisis. When government measures to respond to a crisis are being considered, questions arise, for example, of whether and to what extent businesses should be left to deal with a crisis on their own, whether and in what form state intervention may be necessary and expedient, and whether businesses should be required to repay state support and if so, on what terms. The ComCo Secretariat was also confronted with such issues in connection with guaranteeing gas supplies in winter. It advocated sustainable solutions that complied with the rules on competition.

Dynamic markets react in times of crisis. For example, when there are shortages, or if certain production processes become more expensive, markets react by increasing prices. This is what happened in 2022 with the prices for fossil fuels. An immediate analysis of the multiple aspects of these increases showed that the high prices could be explained by a variety of factors and events. Proceedings against specific companies were not justified.

The situation was different in the case of the attempts to apply pressure to individual providers of COVID-19 rapid tests in order to secure increases in prices. The ComCo Secretariat reacted at the time without delay and opened proceedings against several providers. The strict enforcement of the law can stop a crisis from being exploited for anti-competitive ends. ComCo and its Secretariat are always ready to advise businesses and members of government on how to adopt crisis management practices that are in line with competition law.



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

### Commission:

- Until 31 December 2022: Andreas Heinemann, President, Professor of Commercial, Economic and European Law, University of Zurich
- Since 1 January 2023: Laura Melusine Baudenbacher, President, partner in a law firm based in Zurich and Brussels
- Armin Schmutzler, Vice President, Professor at the Department of Economics, University of Zurich
- Danièle Wüthrich-Meyer, Vice President, former judge of the Cantonal Supreme Court Bern
- Florence Bettschart-Narbel, Member, Attorney-at-law, former head of the Politics and Law Section in the Central Secretariat of the Fédération Romande des Consommateurs FRC
- Nicolas Diebold, Member, Professor of Public and Economic Law in the Law Faculty at the University of Lucerne
- Winand Emons, Member, Professor in the Faculty of Economics and Social Sciences at the University of Bern
- Clémence Grisel Rapin, Member, Professor of Administrative Law at the University of Fribourg
- Pranvera Këllezi, Member, Attorney-at-law in the canton of Geneva
- Isabel Martinez, Member, economist (post-doc) at the KOF Swiss Economic Institute at the ETH Zurich, former economist at the Swiss Federation of Trade Unions SGB
- Rudolf Minsch, Member, Chief Economist and Executive Board member, economiesuisse
- Martin Rufer, Member, Director Swiss Farmers' Union
- Henrique Schneider, Member, Deputy Director Swiss Union of Crafts and Small and Medium-Sized Enterprises SGV

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

### ComCo Secretariat:

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