

Unclassified

English - Or. English

18 March 2022

Directorate for Financial and Enterprise Affairs  
**COMPETITION COMMITTEE**

## Annual Report on Competition Policy Developments in Switzerland

-- 2021 --

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

JT03491607

## *Table of contents*

<b>Switzerland .....</b>	<b>3</b>
<b>1. Foreword from the President .....</b>	<b>3</b>
<b>2. Most Important Decisions of 2021 .....</b>	<b>5</b>
2.1. Decisions of the Competition Commission .....	5
2.2. Court judgments .....	6
<b>3. Legislation .....</b>	<b>9</b>
<b>4. Organisation and Statistics .....</b>	<b>11</b>
4.1. Annual Budget.....	11
4.2. ComCo, Secretariat and statistics .....	11
4.3. Statistics .....	11
<b>5. Digitalisation .....</b>	<b>13</b>
5.1. Introduction .....	13
5.2. Activities of the Swiss competition authorities .....	14
5.3. The international context .....	16
5.4. Conclusion.....	17

## **Tables**

Table 1.	11
----------	----

## *Switzerland*

### 1. Foreword from the President

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

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

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

4. For years, the dominant topic in the discourse on competition law has been the state of competition in the digital economy. ComCo has been confronted with the main issues for quite some time and has decided numerous cases involving a variety of markets. Because of its enormous importance, digitalisation has been chosen as the special topic for this annual report. Its influence is not limited to the major international internet platforms; it is a phenomenon that permeates every field of competition policy. Case selection presents

a major challenge. In an ever more interconnected world, many behaviours have an impact in Switzerland. ComCo prioritises cases that have a particular domestic impact. In addition, it ensures that solutions adopted by other competition authorities, such as those in the EU, are also applied in Switzerland as required. In most cases, this does not require any formal procedure. What is certain is that the goal of protecting effective competition applies to all markets. ComCo also fulfils this mandate with regard to the digital economy.

Andreas Heinemann  
President of the Competition Commission

## 2. Most Important Decisions of 2021

### 2.1. Decisions of the Competition Commission

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

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

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

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

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

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

## 2.2. Court judgments

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

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

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

13. The Zurich Administrative Court on 26 August 2021 granted the ComCo appeal of 28 January 2021 against an invitation to submit offers in a bidding procedure by a Zurich commune. The court allowed ComCo's applications and found that the invitation infringed the Internal Market Act (IMA). The Zurich commune commissioned an engineering firm

to plan and supervise the procurement of a water treatment system for the communal **swimming pool**. On behalf of commune, the engineering firm invited four suppliers to make bids. However, members of the engineering firm were in a family and business relationship with one of the bidders. In the circumstances, the commune had to be held accountable for the actions of the engineering firm. As a consequence, there was a case of ‘prior involvement’ and a breach of the duty of recusal that rendered the procurement procedure unfair and violated procurement law. Competition was thus obstructed in this bidding procedure and the Internal Market Act violated. The decision has taken full legal effect.

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

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

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

17. In three judgments dated *8 March 2021*, the FSC upheld the appeals filed by the EAER against judgments of the FAC and confirmed ComCo’s opinion that former senior

managers of companies and entities subject to investigation can be questioned without restriction as witnesses, i.e., that they are required to testify and tell the truth (subject to the penalties for perjury). According to the FSC, interviewing a former senior manager did not in principle affect the *nemo-tenetur* principle (protection from self-incrimination). The FAC had previously decided that there were limits to the extent to which former senior managers could be questioned as witnesses, as they had a right, derived from the defendant company's right to remain silent as an actual party to the proceedings, to refuse to make any statement that might incriminate their former employer. In the FAC's view, on the other hand, current employees without senior management status had no such (derived) right to refuse to testify. These judgments were issued in connection with the **Boycott Apple Pay** investigation.

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

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

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

- In judgments dated *27 October 2021*, the FSC rejected the appeals filed by the parties to the **air freight** proceedings against the publication of ComCo's decision of 2 December 2013. ComCo found at the time that several air freight companies had entered into unlawful agreements on surcharges for international air freight. The main proceedings are pending before the FAC.
- A party to the merger filed an appeal against the publication of a ComCo opinion on a **planned merger**. The FAC decided on 21 September 2020 to refer the opinion back to ComCo for additional redacting and anonymising. The party to the merger appealed against this decision to the FSC. The FSC rejected the appeal on *19 October 2021*, noting that ComCo opinions on planned mergers should be regarded



as ‘decisions’ and that ComCo may therefore publish them. It also confirmed that the ComCo opinion to be published no longer discloses trade secrets and is data protection compliant.

- Several judgments were handed down in the report year in relation to the publication of a final report in 2014: on *9 June 2021* the FSC issued a decision dismissing the action. The FAC had previously largely rejected an appeal against the ruling on publication in a decision dated *16 April 2021* and turned down a further appeal relating to the rejection of an application for reconsideration. After ComCo implemented this judgment with a ruling on publication dated 14 September 2021, the FAC on 15 December dismissed a further appeal against the ruling.

### 3. Legislation

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

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

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

- The **Bischof Motion** of 30 September 2016 ‘Ban adhesion contracts between online booking platforms and the hotel industry’ (16.3902) has been approved by both Councils. The Federal Council on 17 November 2021 approved the draft act and the dispatch on the amendment to the Federal Unfair Competition Act (UCA): by classifying price parity clauses as unlawful GCBs and thus as null and void, price fixing clauses in contracts between online booking platforms and accommodation providers will be prohibited.

- The Councils have accepted two of the four points in the **Fournier Motion** of 15 December 2016 ‘Improve the position of SMEs in competition proceedings’ (16.4094), namely the introduction of deadlines for competition law administrative proceedings and the reimbursement of party costs even in first instance administrative proceedings. The Federal Council included these points in the Cartel Act revision bill and opened the consultation procedure in November 2021.
- The **Pfister Motion** of 27 September 2018 on the ‘Effective implementation of the Cartel Act in the motor vehicle sector’ (18.3898) demands that the Federal Council enact an ordinance to protect consumers and SMEs from practices in the motor vehicle sector that distort competition. After its acceptance by the National Council in September 2020, the motion is now before the Council of States.
- The **Nantermod Motion** of 12 December 2018 on ‘Fair and effective procedures in competition law’ (18.4183), which called for changes to the procedural rules on inspecting files and compulsory fees in preliminary investigations, was rejected by the National Council in December 2020 and is therefore concluded.
- The **Français Motion** of 13 December 2018, ‘The revision of the Cartel Act must take account of both qualitative and quantitative criteria in assessing the illegality of an agreement restricting competition’ (18.4282), which calls for an amendment to Article 5 Cartel Act, was approved by the Council of States and afterwards also by the National Council in June 2021. The Federal Council included the required amendment in the Cartel Act revision bill and opened the consultation procedure in November 2021.
- The **Bauer Motion** of 14 December 2018, ‘ComCo investigations: the presumption of innocence must take precedence’ (18.4304) demanded the repeal of Article 28 Cartel Act, which provides for the public announcement of the opening of an investigation, including naming the parties. The motion was abandoned in December 2020.
- The **Molina Postulate** of 9 May 2019, ‘Strengthen merger controls in the case of direct foreign investments’ (19.3491), was rejected by the National Council in June 2021 and is therefore concluded.
- The **Noser Interpellation** of 28 September 2021, ‘Comprehensively modernise the Cartel Act’ (21.4108), urged a reform of the competition authorities’ institutional structures and asked the Federal Council related questions. It was dealt with in December 2021 in the Council of States without debate and is now concluded.
- The **Wicki Motion** of 30 September 2021, ‘Safeguard the principle of investigation – No reversal of the burden of proof in the Cartel Act’ (21.4189), aims to clarify the Cartel Act, in particular by strengthening the principle of investigation in such a way that the Act also applies the constitutional presumption of innocence. The Federal Council called for the motion to be rejected because the irregularities in applying the law that the motion criticises do *not* occur and because the Cartel Act already includes the requirements called for with regard the presumption of innocence. Nevertheless, the motion was approved in December 2021 by the Council of States and will probably be debated in the National Council in 2022.
- Several additional parliamentary proposals related to competition and state-affiliated or state-owned enterprises and access to closed markets, in particular the **Caroni Motion** (15.3399), the **Schilliger parliamentary initiative** (17.518), the **Caroni Postulate** (19.3701), the **EATC-S Postulate** (19.4379), the **Caroni Motion** (20.3531), the **Rieder Motion** (20.3532) and the **Sauter Interpellation** (21.3472).

23. The Federal Council is planning a **partial revision of the Cartel Act** in which the main points are the modernisation of the merger control procedure, consolidation of civil competition law and improvements to the opposition procedure. The revision will include the two demands in the Fournier Motion just mentioned, namely official processing times and the award of legal costs in proceedings before ComCo, and the Français Motion relating to cartel agreements. In November 2021, the consultation procedure began. The GS-EAER and SECO share overall responsibility for the partial revision of the Cartel Act within the Administration. The ComCo Secretariat plays a part in this work.

## 4. Organisation and Statistics

### 4.1. Annual Budget

24. In 2021 ComCo had an overall budget, including personnel, material and investment costs, of 14.3 million Swiss francs respectively 15 million US dollars.

### 4.2. ComCo, Secretariat and statistics

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

### 4.3. Statistics

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

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

**Table 1.**

	2021	2020	2019
Investigations			
Total number of active investigations	20	20	19
Investigations carried forward from the previous year	16	13	16
Newly opened investigations	4	7	3
Investigations resulting from splitting up existing investigations	0	0	2
Final decisions	4	6	11
Amicable settlements	3	4	9
Administrative rulings	2	1	2
Sanctions under Art. 49a para. 1 Cartel Act	4	4	10
Partial decisions	0	2	5
Procedural rulings	2	2	2

Other decisions (concerning publications, fees, access to files, etc.)	2	1	6
Interim measures	1	1	1
Sanctions proceedings under Art. 50 ff. Cartel Act	2	1	0
Preliminary investigations			
Total number of active preliminary investigations	11	14	14
Preliminary investigations carried forward from the previous year	7	13	8
Newly opened preliminary investigations	4	1	6
Concluded preliminary investigations	3	8	4
Investigations opened	1	1	1
Modification of conduct	1	4	3
No consequences	1	3	0
Other activities			
Notifications under Art. 49a para. 3 let. a Cartel Act	1	1	2
Advice	33	24	28
Market monitoring	48	80	63
Freedom of information applications	10	18	7
Other enquiries	519	565	488
Mergers			
Notifications	31	35	40
No objection after preliminary investigation	31	34	37
Investigations	0	1	3
ComCo decisions after investigation	0	1	2
Authorisation refused	0	0	0
Authorised with conditions/requirements	0	0	0
Authorised without reservations	0	1	2
Early implementation	0	0	0
Appeal proceedings			
Total number of appeals before the FAC and FSC	39 (92)	42	46
Judgments of the FAC	11 (15)	9	4
Success for the competition authority	8 (12)	6	1
Partial success	2 (2)	2	2
Unsuccessful	1 (1)	1	1
Judgments of the FSC	5 (12)	7	6
Success for the competition authority	4 (11)	6	5
Partial success	1 (1)	1	0
Unsuccessful	0 (1)	0	1
Pending at the end of year (before FAC and FSC)	30 (71)	29	36
Expert reports, recommendations and opinions, etc.			
Expert report (Art. 15 Cartel Act)	0	0	0
Recommendations (Art. 45 Cartel Act)	0	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	0	2
Follow-up checks	0	0	1
Notices (Art. 6 Cartel Act)	0	0	1
Opinions (Art. 46 para. 1 Cartel Act)	335	327	120
Consultation proceedings (Art. 46 para. 2 Cartel Act)	11	12	17
State aid assessments	1	2	-
Internal Market Act			
Recommendations / Investigations (Art. 8 IMA)	1	0	3
Expert reports (Art. 10 IMA)	4	1	2
Provision of advice (Secretariat)	68	63	93
Appeals (Art. 9 para. 2 <sup>bis</sup> IMA)	1	2	0

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

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

## 5. Digitalisation

### 5.1. Introduction

29. Digitalisation has been a major issue for businesses, politicians and competition authorities at national and international level for years. ComCo has also been grappling with the question of the **digitalisation of the economy** for years, commenting in detail on the subject in its annual report for 2016, for example. *Digital platforms* bring various market sides together and generate network effects, which must be taken into account in making an accurate assessment of possible restraints of competition. *Big Data* tend to lead to concentrated markets and constantly developing business models for data usage. The

*Sharing Economy* brings new business models and with them the opportunity to consider adapting the regulatory framework to the new situation. *Online trading* reduces distribution costs and creates space for new business models.

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

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

## 5.2. Activities of the Swiss competition authorities

### 5.2.1. Network development strategy – Investigation into Swisscom

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

### 5.2.2. Google

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

Another current example is extending to Switzerland the application of commitments that Google has given to the French competition authority in relation to advertising technology.

### ***5.2.3. Marketing of directory data – Investigation into Swisscom Directories***

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

### ***5.2.4. Broadband access for business locations (WAN connection)***

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

### ***5.2.5. Ice hockey on Pay TV***

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

### ***5.2.6. Cases related to mobile payment services***

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

ComCo investigation. This investigation was opened because there were indications that the Swiss banks participating in TWINT had agreed to a collective boycott of such international mobile payment solutions.

### ***5.2.7. Online booking platforms for hotels***

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

### ***5.2.8. Software providers v. university hospitals***

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

## **5.3. The international context**

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

41. In this connection, competition has a role to play in combating the abuse of dominant positions. This is illustrated by the cases that are ongoing or have been concluded before various competition authorities. The application of competition law as an ex post check on practices has its limits, however. The proceedings in this complex field are



extremely expensive and time-consuming. In some cases, new authorities or ex ante regulations have therefore been created, such as the GWB (Restraints of Competition) Digitalisation Act in Germany or the proposals relating to the Digital Markets Act and the Digital Services Act that are going through the legislative process in the European Union.

#### **5.4. Conclusion**

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

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