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Annual Report on Competition Policy Developments in Switzerland

-- 2022 --

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

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Switzerland

1. Overview of 2022

1. 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.

2. 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.

3. 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.

4. 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.

5. 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

6. 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.

7. 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.

8. ComCo has a full-time **Secretariat** (the investigating body). This conducts proceedings under competition law, drafts ComCo’s decisions and is the contact point for businesses, members of the public and authorities for all competition law questions. The Secretariat comprises four divisions, the Internal Market sector and a resources service (a list of members of the Executive Management is provided in the Annex). At the end of 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.

9. 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 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

10. 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.

11. 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.

12. 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.

13. 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.

14. 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

15. 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.

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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. Legislation

27. 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).

28. 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.

29. 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 Français 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.

30. 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.

5. Statistics

31. In 2022 ComCo had an overall budget, including personnel, material and investment costs, of 15.8 million Swiss francs respectively 15.8 million US dollars. The statistics on the work carried out by ComCo and its Secretariat in 2022 are as follows:

Table 1.

	2022	2021	2020
Investigations			
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
Final decisions	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
Preliminary investigations			
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
Other activities			
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
Mergers			
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
Appeal proceedings			
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 ^{bis} IMA)	3	1	2

32. 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.

6. Special topic for 2022: Applying the Cartel Act in times of crisis

33. 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.

34. 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.

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

6.1. Guaranteeing gas supplies in winter

36. 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.

37. 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.

38. 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.

39. 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.

40. 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.

6.2. High prices for fossil fuels

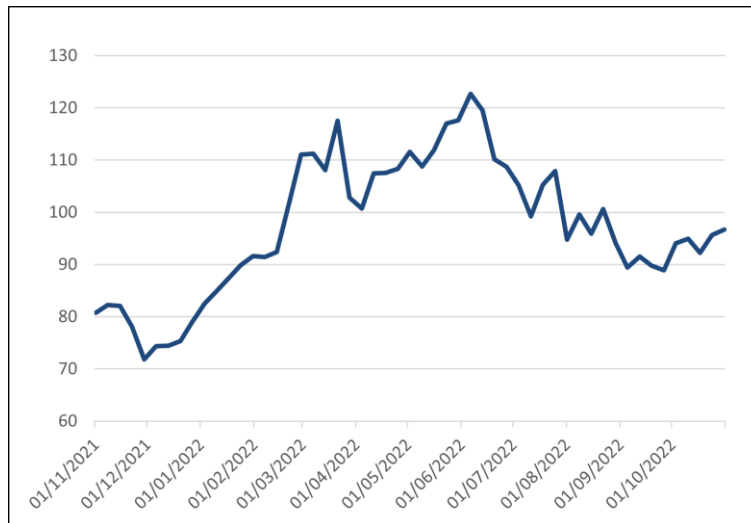
41. The market prices for fossil fuels and thus the price of fuel at filling stations have clearly gone up as a result of the war in Ukraine. The ComCo Secretariat has received a variety of enquiries from members of the public since the end of February 2022 relating to possible agreements affecting competition. 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).

42. 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.

43. 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.

44. *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.

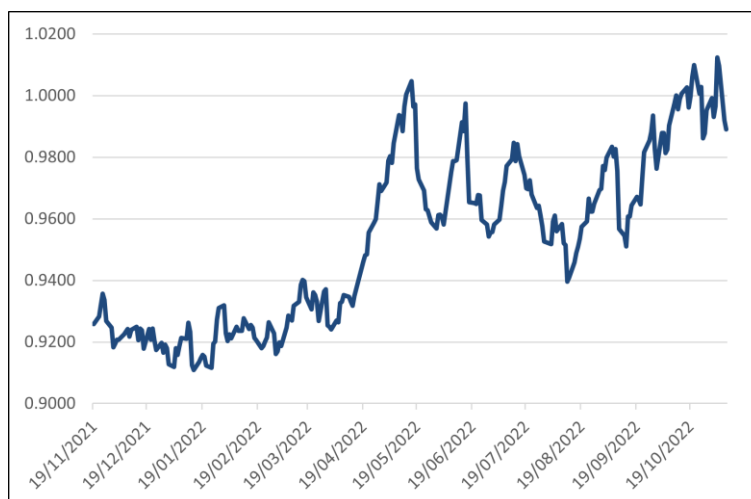
Figure 1. Development of the Brent oil price (weekly average in USD per barrel)



Source: www.onvista.de (Status: 08.11.2022)

45. *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.

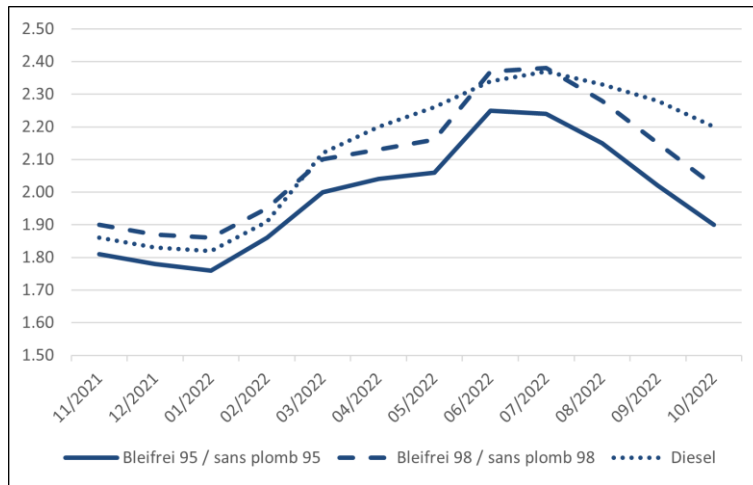
Figure 2. Exchange rate developments for changing USD into CHF (direct quotation)



Source: SNB (Status: 08.11.2022)

46. *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 (unleaded, 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.

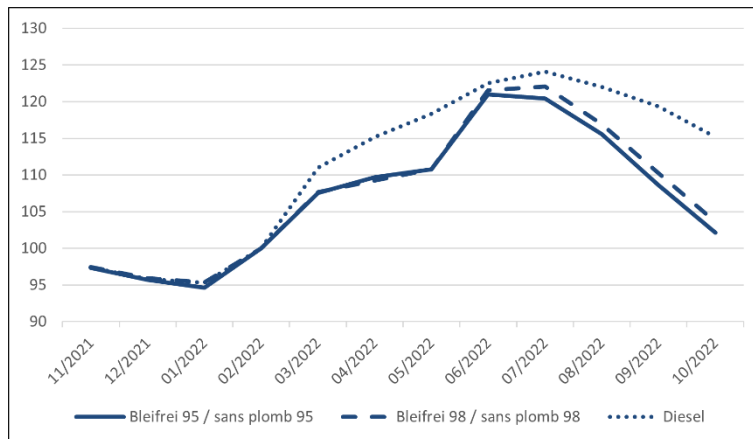
Figure 3. Average prices for fuels at filling stations in Switzerland



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

47. 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

48. 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.

49. 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 interdepartmental working group on energy prices, which analysed trends in energy prices and considered what action the federal government might take.

50. 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.

6.3. COVID-19 self-tests

51. 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.

52. 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.

53. 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.

6.4. Conclusion

54. 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.

55. 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.

56. 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.