Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Wettbewerbskommission WEKO
Commission de la concurrence COMCO
Commissione della concorrenza COMCO
Competition Commission COMCO

To the Federal Council

Annual Report 2010 of the Competition Commission

(in accordance with Article 49 paragraph 2 of the Cartel Act)

028.5/2009/00031/COO.2101.111.5.130299

Table of Contents

1 Foreword from the President

On 1 July 2010, I took over as President of the Competition Commission from Professor Walter A. Stoffel. I would like to use this opportunity to thank Professor Stoffel personally for his enormous commitment to this job. This change is very much a sign of continuity, for nothing has changed as far as the main goals and terms of reference in the application of Swiss competition law are concerned. I would therefore like to take the liberty of recalling the most important priorities for the competition authorities.

In the area of agreements affecting competition, proceedings concentrate on the most harmful forms of horizontal and vertical restraints of competition. In the case of horizontal agreements, these are price, quantity and territorial agreements between direct competitors. These are our top priority. Here special attention is paid to a specific form of horizontal agreement, namely bid rigging in the construction industry. In addition, the Competition Commission is endeavouring to raise awareness and thus encourage the use of the bonus programme, i.e. the opportunity to report a cartel voluntarily in return for relief from sanctions. As far as vertical agreements are concerned, the focus is on the foreclosure of the Swiss market by preventing parallel and direct imports.

In relation to the conduct of dominant undertakings, the Competition Commission aims to bring proceedings that give clear guidance on what practices are permitted. It is also prepared to seek amicable solutions in relation to future conduct with the undertakings concerned, provided those undertakings indicate a willingness to cooperate. In the case of concentrations of undertakings, the competition authorities focus on concentrations that may be detrimental to competition in the Swiss market specifically.

In the focus topic of this annual report, we examine the issue of the growth in international cartels that has resulted from increasing globalisation. Their pursuit in Switzerland could be made easier, especially if the Swiss competition authorities were able to cooperate more closely and more successfully with their EU counterparts.

In the Annex, we also deal with an issue that in the report year gave rise to a large number of enquiries to the Secretariat and a major public debate, namely the increasing strength of the Swiss franc against the Euro and the Dollar. As will be seen from the remarks made, the potential that the competition authority has to intervene is limited, because the pass-through of currency benefits follows specific economic patterns, and these cannot be influenced by competition policy.

The Competition Commission and its Secretariat are aware of the crucial importance of effective competition for Switzerland's national economy and for the competitiveness of Swiss businesses and Switzerland as a whole. They are eager to achieve a high degree of effectiveness by taking signal decisions and maintaining a pragmatic attitude. By their nature, however, the activities of the competition authorities are clearly a long-term project and the aim is not to achieve short term successes.

Prof. Vincent Martenet

President the Competition Commission

2 The Competition Commission's most significant decisions

The following paragraphs provide a chronological account of the most significant decisions taken by the Competition Commission in 2010. Further details of these decisions can be obtained in the reports on the individual fields of activity (see 4.1 to 4.3).

In a ruling dated 25 January 2010, the Competition Commission took precautionary measures against the **credit card companies**. It regulated the further fixing of what are termed interchange fees, the level of which was until 31 January 2010 subject to the terms of an amicable settlement. The adjustments led to a reduction in the interchange fees, bringing them approximately in line with the European average.

On 16 April 2010, the Competition Commission published an expert opinion based on Art. 2 para. 7 of the Internal Market Act, according to which the **renewal of the concession** for the construction and operation of electrical distribution stations has to be submitted to a **public bidding procedure**. A related expert opinion was issued shortly afterwards in connection with the award of water rights concessions, as not only legal, but also ad hoc monopolies must be subject to a public bidding process.

In 22 April 2010, the Competition Commission prohibited the planned concentration between **France Télécom/Orange** and **Sunrise**. The new company would, together with Swisscom, have assumed a collectively dominant position in the mobile telephony market. In the absence of new competitors entering the market, the companies would have had no incentive to challenge the position of competitors by means of price reductions.

On 10 May 2010, the Competition Commission fined two manufacturers of **components for heating, refrigeration and sanitary installations** due to agreements on the level and timing of price increases (a price cartel). Flamco AG was fined CHF 169,000. Pneumatex AG would have received a fine of around CHF 5.2 million. However, the fine was remitted as Pneumatex was the first company to report participation in the cartel to the competition authorities (report under the bonus system). The decision of the Competition Commission is now legally binding. Parallel proceedings in the EU are still pending.

In a decision dated 28 June 2010, the Competition Commission modified its notice on the competition law treatment of vertical agreements (the **Vertical Notice**) to bring it in line with the most recent case law and developments in the EU. As a result, it has ensured that the same rules continue to be applied in Switzerland in relation to vertical agreements as apply in the EU and that the foreclosure of the Swiss markets can be prevented.

In a ruling dated 18 October 2010, the Competition Commission fined four companies **supplying builders with windows and French doors**, the sanctions amounting to a total of around CHF 7.6 million. The companies had agreed on the timing and level of increases in prices, which effectively made them a price cartel. In the case of one company, the fine was remitted as it was the first to report participation in the cartel to the competition authorities. Three companies have filed appeals against the decision of the Competition Commission with the Federal Administrative Court. In the EU, parallel proceedings based on comparable factual circumstances are pending.

On 29 November 2010, the Competition Commission fined **SIX Multipay AG** around CHF 7 million for an abuse of its dominant position. SIX had refused to disclose the interface for a new function to other manufacturers of debit/credit card terminals. This led to a situation in which retailers who wanted to offer the function to their customers could only purchase the terminals offered by SIX, which amounted to the unlawful hindrance of other terminal manufacturers. SIX has appealed the decision of the Competition Commission to the Federal Administrative Court.

3 Focus on Combating International Cartels

Agreements affecting competition between undertakings generally show no respect for national borders. Increasing globalisation and the widespread opening of national markets to foreign businesses has led to a situation where cartels also organise themselves on a cross-border basis and may be active in several countries or even continents.

Competition authorities, however, are still organised on a national basis. There is no competition authority that operates internationally and is equipped with the powers that would enable it to take action against international cartels. There are various multilateral and bilateral cooperation agreements between national competition authorities, such as those in the European Competition Network (ECN), between the EU and the USA, the EU and Canada, etc. Loose networks such as the Competition Committee within the OECD or the International Competition Network (ICN) also exist, but as these are not based on binding legislation, they are more useful as a means of exchanging information than as a source of formal cooperation.

In Switzerland, the situation is not any different. Switzerland does participate actively in the OECD Competition Committee and in the ICN and takes part in the discussions and exchanges of information. It does not however maintain any bilateral or multilateral agreements on cooperation in competition matters with other states. In the absence of an agreement or of any other statutory basis, it is not possible for Switzerland either to exchange confidential information with other authorities in proceedings against international cartels and thus to simplify the proceedings wherever possible. It should be mentioned in passing that in proceedings relating to concentrations, a minimum of coordination in relation to the duration of the proceedings is possible, because the undertakings concerned normally give their written consent to this in the form of a waiver letter.

The lack of international cooperation – in particular with EU states surrounding Switzerland – can lead to disadvantages in the proceedings that the Swiss competition authorities bring against international cartels. Above all where the proceedings have been initiated through a report under the bonus system and the reporting company has to cooperate throughout the proceedings, fewer disadvantages due to the lack of the possibility of cooperation may be expected. In the following four (some pending, some concluded) proceedings, the Competition Commission has had to deal with international cartels. The cases are listed chronologically according to the date on which the investigation was opened. In all four cases mentioned, this was preceded by a voluntary report (report under the bonus system) with a subsequent house search. The EU Commission in each case also opened a parallel investigation.

- On 13 February 2006, the Competition Commission opened an investigation into various airlines relating to agreements in the area of air freight. These agreements related to surcharges imposed on air freight shipments, such as fuel, security, war-risk and customs clearance surcharges. The investigation in Switzerland is still ongoing. The EU concluded its proceedings with a decision dated 9 November 2010 in which sanctions of EUR 799 million were imposed on the undertakings involved. Appeals against this decision are still pending.

- On 18 July 2007, the Competition Commission opened an investigation into various undertakings relating to agreements on supplying builders with windows and French doors. Companies active both solely in Switzerland and internationally were involved in the agreements under investigation. The investigation was concluded on 18 October 2010 with a ruling issued by the Competition Commission and the imposition of sanctions of around CHF 7.6 million. Three companies have filed appeals against the Competition Commission’s ruling. The proceedings in the EU are still ongoing.

- On 10 October 2007, the Competition Commission opened an investigation into the Spedlogswiss Association together with a variety of international transport and logistics companies suspected of entering into unlawful agreements on the fixing of surcharges, fees and tariffs for transport services. The investigation is still ongoing, as are the proceedings in the EU.

- On 16 December 2008, the Competition Commission opened an investigation into various international companies active in the production of components for heating, refrigeration and sanitary facilities (water management). The investigation was concluded on 10 May 2010 with a ruling from the Competition Commission and a sanction of CHF 169,000. The Competition Commission's decision has now taken full legal effect. The proceedings in the EU are still ongoing.

Two of the four investigations (builders' supplies and water management) have been concluded in Switzerland. Formal cooperation with the EU Commission would have brought benefits that may have simplified the proceedings in Switzerland and in the EU. In both investigations, the facts of the case as ascertained by the Secretariat of the Competition Commission contained evidence of price-fixing agreements concluded and implemented in the EU. It is probable that evidence of the agreements implemented in Switzerland can be found in the EU proceedings. If evidence relating to the respective cases had been exchanged or pass on, this would no doubt have simplified the proceedings, and possibly led to their being concluded more quickly. In addition, in one of the two cases in Switzerland, two voluntary reports under the bonus system were received, while in the EU only one voluntary report was received. The passing on of the second voluntary report or at least of the parts of it that were relevant to the EU proceedings would also have allowed the EU to conclude its proceedings more quickly.

Two investigations are still ongoing in Switzerland (air freight and transport services), while the proceedings in the EU in the air freight case have been concluded. It is worth asking why the Swiss cases are taking so long and why it was not possible to conclude a case at the same time as the EU Commission did. The explanation for this lies above all in the lack of the possibility of cooperation with the EU Commission. The investigations in the air freight and transport services cases relate not only to international undertakings, but also to cross-border activities. Air freight and road transport in a small country like Switzerland are by their nature to a large extent cross-border matters. Although a cooperation clause is included in the bilateral air traffic agreement between Switzerland and the EU, this is regarded as an inadequate statutory basis for an exchange of information between the Swiss and the European competition authorities.

The Swiss Cartel Act ceases to apply at the Swiss border due to the principle of territoriality. This is linked to the further difficulty that where there are parallel proceedings before the EU Commission, without formal cooperation the Swiss competition authority is not aware until the conclusion of the proceedings exactly what factual issues the EU is applying the law to and punishing with sanctions. For example, in the case of an air freight flight from Stockholm to Zurich, is it only the stretch as far as the Swiss border that is relevant and the small stretch from there to Zurich is not? Where freight is transported by road from Hamburg to Naples is the entire route relevant or are the 290 kilometres from Basel to Chiasso not taken into consideration?

Without cooperation agreements with the EU, these key procedural issues cannot be discussed and decided on at the outset or in the course of the proceedings. Nor is any coordination of the procedural deadlines possible. In these circumstances, the only option for the Swiss competition authority remains to wait for the decision to be made by the EU in order to be able to ascertain precisely the extent of its own jurisdiction and of the factual issues to be investigated. This inevitably leads to lengthy proceedings, which is unsatisfactory for the undertakings concerned.

In view of this, the Competition Commission very much welcomed the decision of the Federal Council in August 2010 to approve a mandate to negotiate an agreement with the EU. The Competition Commission is convinced that a cooperation agreement will herald an important phase in the process by which Switzerland will come to make a more important contribution to the prosecution of international cartels. It would also be a further step away from the former image of Switzerland as the "land of the 1001 cartels", an epithet it was awarded in an OECD publication at the start of the 1990s. It would also be further evidence of Switzerland's credibility as a reliable partner in the prosecution of cartels, which has increased considerably in recent years.

4 Activities in Individual Fields

4.1 Services

4.1.1 Health

The competition authorities once again had to tackle issues of procedure and substance in connection with the investigation concluded in 2009 into "off-list medicines: prices of Levitra, Cialis and Viagra". Five appeals were filed within the relevant deadline against the Competition Commission ruling issued on 2 November 2009, including those from the three manufacturers involved in the investigation, which had received sanctions totalling CHF 5.7 million. In procedural terms, the Secretariat responded in particular to objections relating to the duty to state reasons and the standard of proof. In terms of substantive law, the key issues were the comparable legal position in the EU and the requirements constituting an unlawful agreement in accordance with Article 4 paragraph 1 CartA. The appeal proceedings are currently suspended.

In addition, at request of a party, the Secretariat was required to issue a further ruling in connection with the off-list ruling, which declared certain contested passages to be subject to trade secrecy. Only when this additional ruling came into effect, did it become possible to publish the ruling in the off-list case.

At the beginning of year, the Public Health Directorate of the Canton of Zurich submitted a request to the Competition Commission for an expert opinion on the scope of application of the Cartel Act in relation to cantonal hospital planning. The impetus for the request were the revised provisions of the Federal Act on Health Insurance relating to hospital funding, which came into force on 1 January 2009 and which have the aim inter alia of conferring equal status on officially listed hospitals in relation to the indemnification system irrespective of whom they are funded by, thus increasing competition in the provision of services. The Competition Commission came to the conclusion in its analysis that in accordance with the cantons' relevant constitutional powers, the CartA did not apply to hospital planning (RPW 2010/2, p. 424 et seq.). However, the expert opinion pointed out that it is very important to comply with competition policy principles in relation to hospital planning if the developments and goals envisaged in the reform of the hospital funding are to be achieved. The Secretariat is keen to provide support to the cantons in this connection if requested.

On 7 September 2010, the Secretariat opened a broad-based preliminary investigation into the sale of medicines in Switzerland, a matter which had already been the subject of market monitoring in 2005. The Secretariat has received various indications of possible conduct contrary to competition law in accordance with Art. 5 and 7 CartA. The accusations relate to various levels of the distribution process. The competition authorities are focusing on pharmaceutical wholesalers and the pharmaceutical pre-wholesale industry. The preliminary investigation will provide the Secretariat with a detailed and up-to-date picture of the sale of medicines in Switzerland and effectively indicate whether there is evidence of conduct in breach of competition law.

A further preliminary investigation is being conducted into conditions in the market for hearing aids. The subject of inquiries, in addition to possible horizontal agreements at the level of manufacturers of hearing aids or at the level of the sales agents (known as hearing aid audiologists), are any vertical agreements between hearing aid manufacturers and audiologists.

4.1.2 Financial services

Credit cards

In July 2009, the Competition Commission once again opened an investigation into the **Domestic Multilateral Interchange Fees** (DMIF) charged by Visa and MasterCard. Interchange fees are fees paid by acquirers (who enter into credit card acceptance agreements with dealers) to the issuers (which issue the credit cards). The aim is to clarify whether the collective fixing of interchange fees can still be regarded as justified. In addition, it is intended to determine which calculation principles and methods may be used to fix these fees.

An initial investigation into interchange fees among the credit card bodies was completed in December 2005 by means of an amicable settlement (CRO I) with the issuers and the acquirers (RPW 2006/1, p. 65 et seq.). In terms of the settlement, the DMIF was tied to the issuer's objective network costs and a competitive approach was taken to the calculation method.

In view of the imminent expiry of CRO I, the Secretariat made an analysis of the effectiveness of the credit card decision. In January 2010, the Competition Commission took precautionary measures to reach a transitional solution as part of a new amicable settlement (CRO II) (RPW 2010/3, p. 473 et seq.). CRO II applies for 3 years or until the conclusion of the ongoing investigation. In the transitional period, the DMIF will continue to be fixed on the basis of a cost-based procedure, with certain adjustments being made to the calculation model in order to bolster the competitive approach to determining the DMIF. These adjustments have led to a reduction in the DMIF and brought it in line with the European average. Jelmoli Bonus Card AG appealed to the Federal Administrative Court against the Competition Commission's ruling. The court dismissed the appeal (RPW 2010/3, p. 592 et seq.).

Debit cards

In March 2010, MasterCard Europe filed a report with the competition authorities. The subject was the introduction of a **Domestic Fallback Interchange Fee** (DFIF) for all domestic transactions carried out in the Swiss market using the newly introduced "Debit MasterCard". The Secretariat opened a preliminary investigation into the matter in April 2010 and joined this with preliminary investigation relating to the Maestro debit card already opened in 2009. The joinder of proceedings was possible because both preliminary examinations related to the introduction of a DFIF by MasterCard Europe. In contrast to other European countries, the Maestro system in Switzerland still operates without an interchange fee.

A further preliminary investigation tackled the question of whether the introduction of various **acquisition fees** by MasterCard constitutes an unlawful agreement affecting competition or the abuse of a dominant position. In this connection, the Secretariat rejected the applications made by SIX Multipay AG, the Swiss Petroleum Association and the Electronic Payments Association for precautionary measures to be ordered against MasterCard due to a lack of specific evidence.

Further proceedings

On 29 November 2010, the Competition Commission imposed a fine of around CHF 7 million on the SIX Group AG. The Competition Commission established that SIX Multipay AG had abused its dominant position in relation to the acquiring of credit and debit cards in order to give preference to the debit/credit card terminals of its affiliated company SIX Card Solutions

AG. The system of **foreign currency conversion at the card terminal** of the dealer, which was launched by SIX Multipay AG in 2005 (Dynamic Currency Conversion, DCC), was only available at the terminals of its affiliated company, but not at those of other terminal providers.

The proceedings were triggered by a report received from a terminal provider, which companied that its terminals were not compatible with the DCC function offered by Multipay AG (earlier Telekurs Multipay AG), as SIX Multipay had refused to provide it with the required interface information. This refusal on the part of SIX Multipay AG had led to a situation in which its dealers could only offer the DCC function to their customers and benefit from the related revenues if they had a terminal produced by the company affiliated to SIX Card Solutions AG.

In the view of the Competition Commission, Multipay's conduct resulted in a number of breaches of competition law: refusal to do business with the other terminal providers, discrimination, restrictions on technical development and the linking of acquiring to the Multipay DCC function and the Card Solutions terminal.

The breach of competition law ceased in December 2006: as early as the preliminary investigation proceedings, SIX Multipay disclosed the interface information. The lengthy duration of the proceedings is explained by the fact that a procedural issue (repetition of procedural acts) had to be ruled on by the Supreme Court. The ruling contains a variety of authoritative elements: the interpretation of Art. 3 para. 2 CartA is brought up to date and not regarded as a reservation of application; the "leveraging" mechanism, i.e. the transfer of market power from the dominated market to another market is described and analysed taking account of the economic literature and of the international context; the issue of the disclosure of interface information by dominant undertakings and the implications of such disclosure on incentives for investment and innovation in the company concerned are examined.

In 2010, the Secretariat was required to review a plan reported by the three banks UBS, Credit Swiss and Zürcher Kantonalbank. This related to setting up an association with the aim of compiling data on transactions relating to privately owned homes in Switzerland (based on postcodes or locations, and also based on micro-location, land area, room volume and/or net area, condition, date of purchase and purchase price) by a data pooling agent, standardising the data terminologically and thereafter harmonising it. By creating this **real estate data pool,** the founder banks aim to enlarge the basis for valuing real estate in Switzerland and thus to improve the accuracy of such valuations. In specific terms, the data pool, according to the founder banks, has the objective of encouraging innovation competition with regard to valuation models, promoting competition in the market for valuing real estate, improving the real estate searches that are generally accessible and thus of improving market knowledge for all interested market participants. It is also claimed that losses due to errors in valuation will be reduced. Not only the members of the association, but also any interested third parties are given access in return for a fee to the consolidated and harmonised data and may use it without restriction for internal and external purposes. Only the passing on or publication of data records in the pool or of the entire data pool is prohibited. The Secretariat decided not to open proceedings. At the same time, it notified the founder banks that the association will probably assume a dominant position and therefore special care must be taken with regard to the initial structure of the association and the organisation of the pool in order to avoid any discrimination against market participants (e.g. in relation to access to the data pool).

In the course of a preliminary investigation, the competition authorities assessed the acquisition of joint control of **ValFinance AG**, a subsidiary of Valiant Holding AG, by SwissPost and Valiant Holding AG and the related product cooperation between SwissPost and Valiant Bank AG in the credit business. As SwissPost, or more specifically PostFinance does not hold a banking licence, it is reliant on working with a bank when carrying out its activities in

the market for credit services. The planned concentration that has been reported will enable PostFinance to continue its activities in the market for credit services and thus to compete in this market with the major and cantonal banks and the agricultural credit co-operatives. The provisional examination revealed no indications of effects on competition that would give cause for concern.

4.1.3 Liberal professions and professional services

An investigation into the Swiss Estate Agents Association (Union Swiss des professionnels de l'immobilier), Neuchâtel Section, concerns recommendations on tariffs made to its members for the **brokerage** and **real estate management** markets that are published on the internet. The aim is to ascertain the potential impact on these markets of these recommendations in the Canton of Neuchâtel, as well as their possible influence on bordering cantons. In order to conduct an analysis of the impact, numerous companies have been interviewed in the Cantons of Neuchâtel, Vaud, Fribourg and Bern. The proceedings are ongoing.

Also in the field of tariff recommendations, the Secretariat has conducted a preliminary investigation into the activities of **land surveyors** in the Canton of Vaud. Their activities are many and varied and there are a number of documents on how to calculate fees or charges, some issued at federal level, and others at cantonal level. It seems that if there were a tendency for the land surveyors in Vaud to refer to the latter tariff, this tendency could not truly be linked to an agreement between competitors, nor could it constitute a concerted practice. It is more likely that it would result from the attitude of the Canton of Vaud, which already requires land surveyors to apply this tariff in certain cases, thus almost encouraging a generalised form of conduct. The attention of the parties concerned, both the Canton of Vaud and the land surveyors, has been drawn to this situation. They have been requested to cooperate and the required measures have been taken in order to encourage competition in relation to fees.

A preliminary investigation has been conducted relating to **contracts for the maintenance of elevators** following a complaint filed by a foreign maintenance company. The complaint related to the price of spare parts, which were claimed to be very high for a foreign maintenance company. The Secretariat decided to close the proceedings without taking any action. It is clear that the market for elevators enjoyed substantial growth in the first few years of the last decade with the arrival on the market of a new generation of elevators. This new type of product, which contains more electronic components and requires specific materials and know-how, is more complicated to maintain. This development thus makes the existence of independent maintenance companies more difficult, in part due to different commercial choices made by the elevator manufacturers. For the moment, however, given the state of the stock of elevators in Switzerland, which still includes numerous models from the previous generation, there are no further indications of problems in accessing the market for independent businesses. This situation could however change in the future, as a result of which elevator manufacturers have been informed of the existence of certain forms of behaviour that could constitute restrictions of competition.

In the field of **informatics**, the establishment by the company Switch of a subsidiary Switchplus gave rise to the opening of a preliminary investigation. Different providers of internet access in Switzerland have complained that Switch, the company made responsible by ComCom for administering the internet domain names ending in .li or .ch, favoured its subsidiary, in particular by granting cross-subsidies, to the detriment of competing companies. Firstly and following its practice, the Secretariat did not take up the case because the plaintiffs had already brought the case before the civil court on the same grounds. After the negative decision of the civil court, the Secretariat rejected a request for precautionary measures while devoting its attention to the general competitive situation in the Swiss market.

4.2 Infrastructure

4.2.1 Telecommunications

In the telecommunications sector, the Competition Commission was called on to examine a number of concentrations of undertakings. The most important were France Télécom/Sunrise, Sunrise/CVC and Swisscom/Groupe E.

The Competition Commission subjected the planned concentration involving **France Télécom/Sunrise** to a detailed examination, as there were indications that it would create or strengthen a dominant position in a variety of mobile telephony markets. The Competition Commission concluded that the plan would create a collective dominant position for the merged undertaking and Swisscom which would be likely to eliminate effective competition. Taking all the relevant factors into account, the Competition Commission on 22 April 2010 decided to prohibit the planned concentration. The parties to the concentration filed an appeal against the decision with Federal Administrative Court, which they later withdrew.

In contrast, the Competition Commission regarded the planned concentration involving **Sunrise/CVC,** which was reported some months later, as being unobjectionable under competition law. The preliminary examination revealed no indications that a dominant position would be established or strengthened and it was decided to approve the purchase of Sunrise by the investment company CVC. It was apparent that following the concentration, three large network providers will remain in the mobile telephony market, and this will continue to guarantee a certain level of competitive dynamics and leaves the market for innovation open.

At the end of November 2010, the Competition Commission received the report of a planned concentration between **Swisscom** and **Groupe E**. This project relates to the development of an optical fibre network in the Canton of Fribourg and the setting up of a joint venture to carry it out. In the course of December, the Competition Commission conducted the preliminary investigation and decided to subject the planned project to a detailed examination. This examination will be carried out in the first four months of 2011.

One priority in the telecommunications sector was the issue of **fibre optics**. The Secretariat continued the monitoring of the market in the **fibre optics** sector that it had begun in 2009. In the late summer, the first reports under Art. 49a para. 3 let. a CartA were filed. The individual reports relate to joint projects for the construction of a “Fibre to the Home” optical fibre network (FttH-optical fibre network) between Swisscom and various Swiss **cities or cantons**. In each case, individual clauses were reported that the cooperating parties felt could be problematic in competition law terms in certain circumstances. At the end of 2010, six objection proceedings were pending in relation to this, and others were in prospect from various quarters. In addition, third parties filed several reports against various joint projects in the fibre optics sector. In the course of the coming year, the Competition Commission will tackle the construction and expansion the optical fibre infrastructure in Switzerland and the associated competition law problems as one of its priority issues.

Otherwise, much of the work in the telecommunications sector in 2010 concerned appeal proceedings:

In a decision dated 24 February 2010, the Federal Administrative Court revised the Competition Commission ruling in the case of **Swisscom Mobile (mobile telephony termination charges)** in relation to the abusive conduct on the part of Swisscom and countermanded the CHF 333 million sanction. Both the Federal Department of Economic Affairs and Swisscom have filed appeals against the decision in the Swiss Federal Supreme Court. In the course of these appeal proceedings, several exchanges of written submissions took place. In addition, the Competition Commission decided due to the pending appeal proceedings to defer the **Mobile Telephony Termination II** proceedings until the Swiss Federal Supreme Court has ruled in the case of Swisscom Mobile.

Swisscom also appealed to the Federal Administrative Court against the decision of the Competition Commission of 19 October 2009 in the case relating to **ADSL pricing policy**. In these proceedings, the Competition Commission also responded to Swisscom's submissions.

Lastly, appeals were filed against two part-rulings made by ComCom in the **leased lines sector**. In 2008, the Competition Commission presented its expert opinion to OFCOM and was therefore requested by the Federal Administrative Court to submit two expert reports on a variety of issues in each of the two proceedings.

4.2.2 The media

In the media, the reported mergers between **Axel Springer and Ringier** and between **Edipresse and Cuhat** were approved. The preliminary investigations revealed no indications that a dominant position would be created or strengthened.

In a judgment dated 27 April 2010, the Federal Administrative Court upheld the decision of the Competition Commission of 5 March 2007 relating to the **VSW (Swiss Advertising Companies Association) guidelines on commission payments to professional agents** on all points. Publigroupe has appealed the judgment to the Swiss Federal Supreme Court. The Competition Commission was required to respond to the submissions made by Publigroupe in the course of both exchanges of written submissions.

On 30 July 2010, the Secretariat began a preliminary investigation into **SDA (Swiss News Agency) pricing policy**. There are indications that certain customers are disadvantaged in price terms in comparison with other customers (in particular in relation to the major print media companies).

In 2007, OFCOM invited bids for 13 **broadcasting licences for regional television and regional radio channels** in Switzerland. An appeal was filed in the Federal Administrative Court against the award of licences to two regional radio and one regional television broadcaster. The court upheld the appeal, reversed the decision and referred the matter back for reassessment. Based on Art. 74 para. 2 of the Radio and Television Act, OFCOM must consult the Competition Commission in order to obtain an assessment of the market situation. In the course of the year, OFCOM and the Secretariat worked informally together in order to prepare the expert opinion. At the end of year, the Competition Commission was formally instructed to prepare the first expert opinion and began to finalise the opinion.

Further progress was made in the investigation into **book pricing in French-speaking Switzerland**. An expansion of the investigation was delayed to take account of the parliamentary debate on a possible Book Price Maintenance Act. Due to the postponement of the debate, however, the investigation is now being continued on schedule. The planned Book Price Maintenance Act would re-introduce through legislative channels the book price-fixing arrangement that was declared in 2007 to be an unlawful agreement affecting competition.

4.2.3 Energy

In the energy sector, the Secretariat conducted a market monitoring project relating to **offers for major consumers**, which is now almost completed. This examined the question of whether there are agreements between energy supply companies that lead to a situation in which major consumers that have opted out of the universal provision of services do not receive any attractive offers. In order to clarify the circumstances, a series of comprehensive interviews with the major consumers has been carried out.

The Secretariat continued to monitor the procurement of **system services** by Swissgrid. The key question here was whether competition comes into play below the price ceiling intro-

duced by Swissgrid or whether the offers approximate to the price ceiling. In the summer, the price ceiling was eventually abolished again.

In addition, the Secretariat was represented in the working group on system services in the preparatory work for the **revision of the Electricity Supply Act**. The task of working group was to devise recommendations on how costs in this sector can be further reduced. One of the key issues was whether and to what extent this market must be regulated.

Switzerland has since 2007 been involved in negotiations with the EU on an **Electricity Agreement**. In this connection, the Secretariat took part in the planning of a draft paper relating to the competition law elements of a future agreement. The Secretariat also had the opportunity to comment on the competition law provisions in the draft of the Electricity Agreement.

Lastly, the Competition Commission provided the Administrative Court of the Canton of Bern with an expert opinion in accordance with Art. 47 CartA. In it, the Competition Commission was required to assess permissibility under competition law of an energy supply contract.

4.2.4 Other sectors

The Competition Commission has terminated its investigation into the **beer import market**. It established that parallel imports of certain beer brands by Anheuser-Busch Inbev (e.g. Stella Artois) and Grupo Modelo (e.g. Corona Extra) are possible and do occur. The original indications that parallel imports of these beer brands are being obstructed were not confirmed by the investigation.

Considerable progress was made with the preliminary investigation into the **eggs market,** and the investigation can probably be completed in the first quarter of 2011. As it was not possible to obtain certain information or it could only be done so with substantial delays, various orders to provide information were issued.

In the transport sector, a report relating to the planned concentration involving **SBB and Hupac** was received at the beginning of December. The two companies reported the setting-up of a joint venture (SBB Cargo International) which is intended to provide a variety of services for the transport of freight by rail along the North-South axis. The preliminary investigation was successfully conducted in the course of December. The Competition Commission decided against carrying out a more detailed investigation.

4.3 Product Markets

4.3.1 Revision of vertical notices

On 28 June 2010, the Competition Commission issued the Revised Notice on the competition law treatment of vertical agreements (the Vertical Notice). This takes account of the most recent case decisions made by the Competition Commission (in the cases on clippers and shears, Gaba and off-list medicines), as well as the current developments in EU competition law. The EU amended its legal framework on 1 June 2010 and in doing so took specific account of the increasing importance of the purchasing power of large retail businesses and of online sales. With its revision, the Competition Commission confirmed its intention to continue to take action against harmful vertical agreements and ensured that in this area the same rules as in the EU will continue to be applied in the future.

The most important revisions relate to the rules on rebutting the presumption that effective competition has been eliminated and on assessing the significance of agreements affecting competition. The Vertical Notice now states that in order to rebut the presumption, an overall consideration of the market is decisive. What is crucial is whether there is sufficient intra-brand or inter-brand competition in the relevant market or whether a combination of the two

leads to sufficient effective competition. In addition, the Vertical Notice makes it clear that significance in the case of qualitatively serious agreements such as resale price maintenance and absolute territorial protection will be assessed in each individual case.

The two key innovations in the European provisions, which take account of purchasing power and of the online trading, were reflected in the Swiss Vertical Notice. In a new move, the customer's market share in the supply markets also plays a role when assessing whether an agreement is justified for reasons of economic efficiency. In addition, internet sales are basically regarded as passive sales. This means that in principle any dealer must be allowed to use the internet to sell its products.

The revised Vertical Notice lastly makes it clear what circumstances trigger an assessment of recommended prices and what criteria the Competition Commission applies when assessing their permissibility. The legal appraisal of recommended prices is in this case carried out according to the EU practice.

As customers' market share in the supply markets is taken into account, vertical agreements consumers with market power are now being assessed more strictly. The Competition Commission is providing a transitional arrangement until 31 July 2011 that allows businesses to revise problematic contract clauses that are affected by the new rules.

4.3.2 Consumer goods industry

The Competition Commission has been involved with the **white goods sector** this year at various levels. In addition to an investigation relating to the prevention of internet sales, the Competition Commission also considered a report under Art. 49a para. 3 CartA (objection proceedings) as well as various requests for advice.

In September 2010, the Competition Commission opened an investigation relating to the hindering of product sales on the Internet. The impetus for this came from the fact that Electrolux AG had prohibited its dealers from selling its brand products via the Internet. In addition to this, in the same period V-Zug AG made several changes to its sales network, in the course of which it firstly prohibited online sales and then allowed them again. The investigation it is intended (for the first time) to determine the question of whether hindering product sales via online shops is a breach of the CartA. In the investigation, it is planned to lay down basic criteria for online trading that will be applicable beyond the white goods sector.

The Secretariat dealt with various requests for guidance from manufacturing companies in the white goods sector, which essentially related to the issue of whether what are known as **selective marketing systems** are permitted. The key aspects of this were the structure of the selection criteria by which dealers are permitted to join the sales network, as well as the question of the extent to which online sales may be restricted.

In the spring of 2010, the Secretariat dealt with requests for guidance relating to distribution logistics. It was planned to introduce a so-called **unforeseen delivery cost contribution** throughout the sector for small volume deliveries (1–2 machines) to dealers. The Competition Commission made its concerns as to the competition law aspects of this known, with the result that the report relating to the plan was withdrawn before expiry of the statutory deadline. The main points of criticism for the Competition Commission were in particular (i) the necessity of a sector-wide solution and (ii) the structure of the instrument as a charge (and not for example as a discount).

In May 2010, the Secretariat of the Competition Commission sent its motion in the **ASCOPA** case to the thirty or so parties to the proceedings, inviting their comments. The subject of the investigations is possible price and volume agreements as a result of an exchange of information between well-known manufacturers and distributors of cosmetics and perfumery products. After receiving the responses from the parties, the Secretariat decided to carry out additional investigative activities, which are still ongoing. On conclusion of the investigations,

the revised motion will once again be sent out to the parties once for their comments before it is submitted to the Competition Commission for a decision in the case.

In March 2010, the Competition Commission opened an investigation into **Nikon AG** due to the suspected prevention of parallel imports of Nikon products, and carried out a house search. A report had indicated that Nikon is or has been obstructing parallel imports into Switzerland. Such practices could constitute unlawful territorial protection agreements under Art. 5 para. 4 CartA.

A further investigation concerned **Roger Guenat S.A.** on suspicion of retail price maintenance agreements and the possible prevention of parallel imports in the case of alpine sports products. Roger Guenat S.A. distributes and represents products from a variety of brands, partly as an exclusive importer (in particular Petzl, Beal and Entreprises), and partly as an agent (Ortovox and Boreal). The investigation opened with a house search in response to a report. The related enquiries are still ongoing.

A monitoring of the market on the prices for **wheeled suitcases** of various brands (but in particular those manufactured by Samsonite and Rimowa) revealed that the wheeled suitcase models under investigation were offered by most of the retailers interviewed at the same or almost the same price and that these prices predominantly corresponded to those recommended by the manufacturers or importers. It could not be proved that compliance with the recommended prices by the suitcase retailers is due to unlawful practices under competition law. However it came to light that it was often not clear that the recommended prices are non-binding. The companies involved have therefore been urged to indicate expressly that their recommended prices are non-binding.

4.3.3 Retail trade

The Secretariat conducted various **market monitoring proceedings and held informal meetings** with market participants. The matters to be clarified included in particular issues related to (parallel) import restrictions. The investigations revealed that (parallel) imports are still being prevented by state regulation even where there are considerable price differences in comparison with other countries, as is the case with Garnier Nutrisse Crème (see below). At the same time, companies are however also trying to make such imports unattractive through indirect measures – such as the refusal to honour guarantees in relation to imported products. Also subject to market monitoring activities was compliance with recommended prices and issues relating to access to supply and sales markets. In this connection, the Secretariat has stressed that as a result of the principle of freedom of contract, neither discount supermarket chains nor any other companies have a right to be supplied with specific products or packaging sizes, unless the supplier of the products holds dominant position in the market.

The monitoring of the market for a hair dye from L'Oréal revealed that the company is issuing recommended prices. There were no indications that these are being enforced by means of incentives or sanctions. The prices in Switzerland for this product are clearly higher than in Germany. A parallel import of hair dye by a retailer in Switzerland is basically possible, but due to the regulation that the instructions for use and the warning notices in respect of hazardous substances have to be provided in Switzerland's three official languages, such imports are less practicable. This case shows that the parallel import of certain goods is still difficult despite the introduction of the Cassis-de-Dijon-principle. The competition authority also noted with scepticism that parliamentary motions to dilute the Cassis-de-Dijon principle have already been filed: these would lead to a reduction in its effect of encouraging competition.

A monitoring of the market for **Nivea** Crème then showed that retailers operating in Switzerland complied with varying degrees of strictness with the prices recommended by Beiersdorf Switzerland. In particular, in the case of large tubs, they often undercut recommended prices. As a result, the consumer with an eye for a bargain is able to buy Nivea in Switzerland at as competitive price as is available in neighbouring countries.

Lastly, the Secretariat noted when monitoring the market for **Gillette** razor blades that despite the prices recommended by Procter & Gamble Switzerland, there is sufficient competition between retailers in relation to this brand (so-called intra-brand competition). As a result, the price reduction by Migros for Gillette razor blades in November 2009 was also followed by price reductions from its main competitors for the same products.

4.3.4 Construction industry

In an order dated 10 May 2010, the Competition Commission completed the investigation into components for **heating, refrigeration and sanitary installations** after seventeen months. The investigation was opened on the basis of a voluntary report made by a party to the cartel and began with a house search. The enquiries uncovered evidence of various pricing arrangements relating to expansion tanks and related products between 2006 and 2008. The companies concerned informed each other of imminent increases in prices and to a large extent adjusted these reciprocally in relation to percentage levels and timing. In addition, they exchanged other sensitive commercial information, such as sales figures and price lists. In the period under investigation, the increases in prices were coordinated in each price increase round, which led to an increase for long-term conduct when calculating the sanction. The Competition Commission imposed a sanction of CHF 169,000.-- on one company. The company making the initial report benefited from a 100% bonus and thus avoided a sanction amounting to CHF 5.2 million.

The investigations relating to **bid rigging in road construction and civil engineering in the Cantons of Zurich and Aargau**, which were opened in June 2009, progressed on schedule. The evaluation of the seized documents and the information obtained from the cooperating company has provided evidence that additional companies were involved in the agreements. For this reason, the current investigation was expanded in August 2010 to include further civil engineering companies. At the end of year, the enquiries were in their concluding phase and the motion will probably be submitted in the first half of 2011.

The investigation into **builders' supplies** for windows and French doors was concluded with a ruling dated 18 October. The Competition Commission imposed fines totalling CHF 7.6 million on Siegenia-Aubi AG, SFS Unimarket AG, Paul Koch AG and Aug. Winkhaus GmbH & Co. KG. The reporting company Roto Frank AG benefited from a full remission of any sanctions. Builder's supplies in this case are understood to include any parts that join window casements and frames or control the opening and closing mechanism of a window or a French door. These parts are needed by window producers to manufacture ready-made windows and French doors. The investigation proved that there were price-fixing agreements on the level and timing of increases in prices in Switzerland in 2007. These horizontal price-fixing agreements constitute particularly harmful violations of the Cartel Act.

Similar proceedings relating to **door fittings** such as door handles, locks and hinges are pending.

Based on a report received in June 2010, the Secretariat of the Competition Commission opened a preliminary investigation in the field of electrical tools into the **Festool** brand. The issue was whether the manufacturer von Festool tools, Tooltechnic Systems (Switzerland) AG (TTS), is placing their Festool partner dealers under pressure or providing incentives to comply with its recommended retail prices and whether there is therefore an unlawful vertical price-fixing agreement. The enquiries made by the Secretariat failed to reveal sufficient evidence of an unlawful agreement affecting competition.

4.3.5 Watch industry

In September 2009, the Competition Commission opened an investigation into **ETA Manufacture Horlogère Swiss SA,** a subsidiary the Swatch Group, due to its possible abuse of a dominant position. ETA is by far the largest manufacturer of mechanical watch movements in

Switzerland and is under suspicion of having adjusted prices and conditions vis-à-vis its trading partners in an unlawful manner. The Secretariat conducted comprehensive enquiries.

A few years ago, ETA was the subject of proceedings before the Competition Commission. This related to an announcement made by ETA that it intended to reduce the volumes supplied of ébauches – the basic components of a mechanical watch movement in the form of an assembly set – with a view to stopping supply entirely. The proceedings ended in 2004 with an amicable settlement, in which ETA undertook to continue to supply its existing customers with ébauches until the end of 2010. On expiry of the term of this settlement, nothing was heard from the watch industry that would have caused the Competition Commission to take further action.

At the end of 2009, the then President of the Board of the **Swatch Group** announced in the press that in future the supply of third-party customers with watch components would be reduced or stopped. In response to this, various informal contacts were made with the Swatch Group in 2010. Whether formal proceedings will be opened in this connection depends on the extent to which Swatch intends to implement its plans.

4.3.6 Automotive sector

In 2010, the Competition Commission revised its **explanatory statement relating to the notice on the competition law treatment of vertical agreements in the automobile trade**. The new version of this explanatory statement takes account of the practical experience gained by the Competition Commission in recent years in assessing vertical agreements in the automobile trade and the new legal framework that has been in place in Europe since 1 June 2010. On 27 May 2010, the European Commission adopted a new competition law framework for the automotive sector. According to this, following a transition period until 31 May 2013 in which the current MVBER (Motor Vehicle Block Exemption Regulation) will continue to apply, the sale of new vehicles will be governed by the provisions the general group exemption regulation for vertical agreements. For the markets for repairs and servicing and for the sale of spare parts, the specific provisions of the new MVBER apply. In a broad consensus with representatives of the automotive sector, the Competition Commission decided to retain the notice for the time being unaltered. With a view to the amendments at European level from June 2013, the Competition Commission in consultation with the market participants will decide how the notice will continue to apply from this date.

In October 2010, the Competition Commission opened an investigation into the **BMW Group**. BMW AG (Munich) and the companies affiliated to its as members of its group are alleged to have obstructed the sale of new BMW and MINI vehicles from the European Economic Area to customers and dealers in Switzerland. As a result, there are indications of unlawful protective foreclosure of territory.

In 2010, the Secretariat received more than 50 **enquiries or reports** in connection with the automotive sector. Many questions related to the honouring of warranty claims in relation to directly imported vehicles. Due to the strength of the Swiss franc, the price differences in comparison with other European countries and the incentive to buy a car there have increased. In this connection is it important that customers in Switzerland are able to make successful claims under their warranties, as is required by the notice issued by the Competition Commission.

4.3.7 Agriculture

In August 2010, the agriculture sector was again made the responsibility of the Product Markets Service, as was originally the case due to the supply chain. The Secretariat received a number of **individual reports** in 2010 from participants in the agriculture market and assessed these by means of market monitoring procedures; no unlawful restraints of competition were detected. In the **fertiliser market**, a broader monitoring of the market was begun, but its results will not be available until 2011.

As a result of its dominant position in the markets for consumable milk, consumable cream and butter, **Emmi AG** was required to give notice of three planned concentrations. The first related to the takeover of Fromalp AG. There were indications of a significant increase in market share in relation to processed cheese products, and in particular ready-made fondues. A detailed analysis revealed that potential competition served to bring some discipline to the parties to the concentrations. The other reports involved the acquisition of the Onken brand of the German Dr. Oetker Group, which related to the yoghurt and quark, and the takeover of the Fromagerie Bettex S.A., which related to consumable goat's milk, goat's milk yoghurt and goat's cheese. These plans were unproblematic.

The Secretariat commented on various parliamentary requests in the course of **office consultation proceedings**. It spoke out against the Aebi Motion and pointed out that the quantity control planned by Swiss milk producers in the motion will prevent a solution to the structural problems in the dairy products market from being found. In response to the Lumengo interpellation, the Secretariat took the view that an abolition of the salt monopoly would be consistent with competition policy.

4.4 Internal Market

The activities of the Competence Centre on the Internal Market focused on three thematic priorities: the first was the review begun in the previous year of Art. 2 para. 7 of the Internal Market Act (IMA), which stipulates an **obligation to invite bids for the transfer of the use of cantonal and communal monopolies to private individuals**. It resulted in the approval of two expert opinions respectively relating to the renewal of water rights concessions and the renewal of concession agreements on the construction and operation of electrical distribution stations, which offered the Competition Commission the opportunity to state its position on the scope of terms "monopoly" and "private individual", which were in need of interpretation. In the view of the Competition Commission, the obligation to invite bids under internal market law covers not only the transfer of legally defined monopolies, but also of de facto monopolies. The two expert opinions met in some cases with fierce objections and led in one case to the tabling of a (still pending) motion from the Council of States, which is demanding that the competitive tendering in the hydroelectric power and electricity distribution sectors should be prohibited under a special act of parliament.

A second priority has been the **regulation of the taxi industry**. A multitude of in some cases starkly diverging regulations are still leading to restrictions on access to the market for non-local taxi service providers. In view of these circumstances, the Competence Centre has been supporting the taxisuisse federation in its efforts to draw up a – non-legally binding – set of sample regulations for use by the communes and cantons responsible for regulating taxi services, which lays down market access requirements that are both standardised and competition-friendly. In addition, the penalising of one taxi service provider from an outside canton moved the Competition Commission to file an appeal with the Administrative Court of the Canton of Geneva in order to enforce the guarantee of free access to the Geneva Airport market.

Lastly, the Competence Centre on the Internal Market, in implementing the concept on the **combating of bid rigging** which was approved in 2008, held five one-day training events in which representatives of a total of 11 cantonal procurement agencies took part. The numerous positive feedbacks confirmed the usefulness of this exercise and the need for increased cooperation in this area. Next year further events are planned, in particular in the French-speaking cantons.

In addition to the priority matters mentioned above, this year the Competence Centre on the Internal Market also dealt with several submissions from private individuals and authorities. For the former, the most common problem was enforcing the right of free access to the mar-

ket, and for the latter the primary concern was guaranteeing the compatibility with the IMA of cantonal and communal regulations as well as administrative practices.

4.5 Competence Centre for Investigations

In 2010, the Competence Centre for Investigations was called on to organise and carry out several searches, which required the deployment of a special team composed of employees of the Secretariat trained for these tasks, as well as IT specialists in legal and police matters. In addition, it organised ad hoc training for team leaders, which several employees of the Secretariat successfully attended.

During the year, the Federal Criminal Court made an important decision relating to a procedure for removing seals (cf. DPC 2010/1, p. 226 et seq.). In specific terms, at a search conducted in 2009, one of the companies visited requested that some of the documents seized should be sealed, due to the fact either that their holder was subject to professional secrecy, or that the documents were not relevant to the proceedings in question. The Federal Criminal Court found in favour of the Secretariat on all points.

4.6 Communications

In 2010, the competition authorities published 21 press releases and held three press conferences. Two events generated an especially high level of interest in the media. The first was the decision to prohibit the merger between Orange and Sunrise. The decision was announced at a press conference and was the topic of discussion in the media for a number of weeks. The second was the handover of the presidency from Walter A. Stoffel to Vincent Martenet. The outgoing President received many requests for interviews, with the interest focusing on his assessment of his time in office, while the media were interested in hearing the new President's view on the key issues and prospects for the future.

4.7 International Relations

OECD: Representatives of the Competition Commission and the Secretariat participated in the meetings of the OECD Competition Committee, which take place three times a year in Paris. In cooperation with SECO, various contributions were prepared and presented. Key topics included public procurement and *procedural fairness*. The October meeting was devoted to *green growth*. This subject is becoming an important issue for the OECD Competition Committee in view of the general interest in the environmental and energy matters.

ICN: In April, a delegation attended the ninth annual conference of the ICN in Istanbul. In October, the ICN Cartel Workshop was held in Yokohama, and a representative of the Secretariat chaired one of the sessions. At this workshop, Competition authorities from around the world discussed how their resources can be used as efficiently as possible to detect, investigate and penalise anti-competitive conduct. In addition, the Secretariat took part in the ICN Merger Workshop in Rome and in the ICN Unilateral Conduct Workshop in Brussels.

UNCTAD: The UN Set Review Conference on restrictive business practices, which is held every five years, took place in Geneva in November. The topics were the judicial review of sanctions, the role of competition policy in promoting economic development and the experiences gained in the implementation of the UN Set, with the focus being on cooperation among competition authorities. In addition, a revised version of a model law on competition was discussed. As part of the COMPAL Programme, which has the aim of training and strengthening competition authorities in Latin America, the Secretariat welcomed two trainees from Latin America on a three-month work experience programme.

Vietnam Project: At the start of 2008, the "Strengthening the Vietnamese Competition Authorities" project began. It has the aim of strengthening and supporting the Vietnamese competition authority (VCA), which was set up in 2006. The bilateral cooperation programme in-

cludes the conduct of workshops in Vietnam and the provision of support in relation to market studies. In addition, employees of the Secretariat act as experts in Vietnam, in particular to draw up guidelines on competition-relevant topics. In 2010, one employee of the Vietnamese authority completed a three-month traineeship in the Secretariat. The project, which is funded by SECO, comes to a conclusion in 2011.

EU: With the aim of combating international restraints of competition, the Federal Council on 18 August 2010 approved a mandate to negotiate a cooperation agreement with the EU in the field of competition. It is intended to facilitate the exchange of information, including confidential information, between the competition authorities in Switzerland and those in the EU, so the information can be used in related competition proceedings. Talks are expected to begin at the start of 2011.

Bilateral contacts: In terms of the Agreement with Japan, an initial meeting with the *Japan Fair Trade Commission* was held on the occasion of the ICN Cartel Workshops in Yokohama. Bilateral relations were cultivated with the Chinese, German, French, Austrian and Ukrainian competition authorities.

5 Organisation and Statistics

5.1 Competition Commission

In 2010, the Competition Commission held 14 full-day plenary sessions. The following staff changes took place within the Commission in the report year:

- **Walter A. Stoffel** stood down as President of the Competition Commission at the end of his twelve-year term of office on 30 June 2010 and left the Competition Commission;
- On 1 July 2010, the Federal Council appointed the former Vice-President **Vincent Martenet** as President of the Competition Commission;
- The Federal Council filled the vacant office of Vice-President on 1 November 2010 by appointing the former member of the Competition Commission, **Martial Pasquier**;
- On 1 January 2011, **Andreas Heinemann**, Professor at the University of Zurich, will take up his new post as a member of the Competition Commission.

The Competition Commission would like to pay tribute to **Walter A. Stoffel** for his many years of service as a member and the President of the Competition Commission:

Walter A. Stoffel became a member of the Competition Commission on 1 July 1998. As a result of his many years of experience in competition law as a professor at the University of Fribourg and as judge of the then Competition Appeals Commission, he was predestined for this office. Equipped with his rucksack, on assuming office, he became the Vice-President of the Competition Commission and the President of the Product Markets Chamber. In this capacity, he immediately set a clear course in the practical application of the Cartel Act. The key elements in his first years of office included the competition law assessment of vertical agreements and the liberalisation of the automobile trade. This led in 2002 to the issue of two related Competition Commission notices, in which it highlighted the extent to which vertical agreements in general and in the automobile trade in particular constitute significant and unjustifiable restraints of competition. At the time and in the debate surrounding Switzerland's status as island of high prices, the two notices made a decisive contribution to achieving legal certainty and the transparent application of the law in these fields.

On 1 January 2003, Walter A. Stoffel was appointed President of the Competition Commission. He remained true to his principles. He was an accessible and reliable discussion part-

ner for businesses, lawyers and any other interested persons. He was adept at presenting controversial points of view objectively and fairly and achieving their acceptance. His first year as President saw the revision of the Cartel Act, which came into force on 1 April 2004. As a result of this revision, the Competition Commission gained the power to punish serious violations of the Cartel Act with direct sanctions in the form of fines. At the same time, it became possible, by making a report under the bonus system, for companies to report their own involvement in a cartel and to be exempted from sanctions in return. The implementation of these new instruments in the proceedings before the competition authorities required a great deal of patience and a sure instinct. Patience first of all, because many new procedural issues arose and precise solutions had to be found. And secondly a sure instinct, because the new instruments had to be deployed in a way that their use did not appear arbitrary and but nevertheless had a deterrent effect. Walter A. Stoffel met the challenge superbly, in cooperation with the Secretariat and the Commission. Under his presidency, the Competition Commission was able to conclude a variety of important proceedings and establish a clear practice in the application of the sanctions regulations. In addition, the Federal Administrative Court confirmed in two judgments before he stood down that the institutional structure of the competition authority fulfilled the ECHR requirements.

Apart from the heading the Competition Commission when making its decisions and the other tasks of the President of the Competition Commission, two other matters were especially dear to Walter A. Stoffel:

Firstly, the creation of an international network of relationships for the Swiss competition authority: it was his aim from the outset to raise the profile of the Swiss competition authority on the international stage and to work towards formal cooperation. Walter A. Stoffel brought that stage to Switzerland with the organisation of the 2008 ICN Annual Conference in Zurich. This event brought Switzerland and the Competition Commission a great deal of international prestige. In addition, it was thanks to Walter A. Stoffel that the Federal Council, after protracted preliminary negotiations, in August 2010 – shortly before his retirement – agreed a formal mandate to negotiate a cooperation agreement between Switzerland and the EU on competition matters.

Secondly, Walter A. Stoffel was an excellent ambassador for the Competition Commission and for its activities. In interviews on the radio and television, he was always able to explain the complex decisions of the Competition Commission in a way that was easily understandable to journalists and the public. His preference was for a live interview. He appeared live on several occasions on programmes such as Kassensturz, Rundschau, A bon entendeur, etc. and answered all his questions patiently and in language that everyone could understand. His perfect command of three of Switzerland's official languages (German, French, and Rhaeto-Romansh) stood him in good stead for this task.

The Competition Commission would like to thank Walter A. Stoffel for his outstanding achievements as a member, as vice-president and for seven and a half years as President of the Competition Commission. It wishes him all the very best in his further career at the University of Fribourg and in his private life.

5.2 Secretariat

The principles devised in 2009 for organisational development have been implemented. As a result, proceedings are conducted according to predefined processes. The planning, control and review of proceedings and of the deployment of resources has been improved. This has resulted in certain proceedings taking less time to complete. On the other hand, the personnel resources that are available have been reduced. Savings programmes have cost 1 full-time position; the annual salary increases for a "young" workforce if the budget remains the same will lead to the loss of 1.5 to 2 full-time positions per year. In various proceedings, a reassessment of priorities has therefore been essential. This has led to a situation in which

the Secretariat concentrates on the priority issues as defined by the Competition Commission (see the Foreword from the President) and that even there, individual proceedings and procedural steps have to be deferred.

At the end of 2010, the Secretariat employed 62 (previous year 64) members of staff (full-time and part-time), 40 per cent of whom were women (previous year 45%). This corresponds to a total of 53.8 (previous year 58.2) full-time positions. The staff was made up as follows: 43 specialist officers (including the Executive Management), corresponding to 37.9 full-time positions (previous year 40.7), 7 (previous year 9) specialist trainees, corresponding to 7 (previous year 9) full-time positions, 11 members of staff in the Resources and Logistics Service, corresponding to 8.9 (previous year 8.5) full-time positions.

5.3 Partial Revision of the Cartel Act

On 30 June 2010, the Federal Council opened the **consultative committee stage on the partial revision of the Cartel Act**[1]. The Competition Commission expressed its views on the matter in its own report, in which it firstly stated that, generally speaking, the Swiss competition authorities currently function in a satisfactory manner. With regard to the **institutional structure,** the Competition Commission called for investigation and decision-making duties to be separated. However, it is of the view that this goal is being achieved in the interim or even permanently through the current institutional model. The Competition Commission therefore questioned whether a complete institutional change of system is currently required. If a new competition authority is created, the Competition Commission regards its independence as crucial. The draft Act does not entirely guarantee this, as the Federal Council would exercise administrative supervision over the competition authority, and would appoint its executive for (only) four years.

With regard to **vertical agreements**, the Competition Commission stated that it currently assesses in each case whether the agreement in question eliminates or significantly restricts effective competition. In addition, the Competition Commission's practices in this regard are similar to those of the EU authorities. On the other hand, the Competition Commission welcomes a modernisation of **merger control proceedings**. It prefers the proposed Variant 1, in which it is planned to apply an SIEC Test. In this way, the same assessment criteria would be used in Switzerland for concentrations as are used in the EU and most other western industrialised countries. The Competition Commission is in agreement with the measures proposed for the improvement of the **objection procedure**. It also welcomes improved **international cooperation** and the **strengthening of the private law aspects of competition law**.

[1] See: http://www.weko.admin.ch/aktuell/01024/index.html?lang=de.

5.4 Statistics

Investigations	2009	2010
Conducted during the year	20	20
Carried over from the previous year	16	14
Opened this year	4	6
Final decisions	6	5
Amicable settlements	3	3
Administrative rulings	2	2
Sanctions under Art. 49a para. 1 CartA	5	3
Procedural rulings	n.a.	7
Precautionary measures	0	2
Sanctions proceedings under Art. 50 et seq. CartA	0	0
Preliminary investigations		
Conducted during the year	19	22
Carried over from previous year	11	15
Opened	8	7
Concluded	7	13
With investigation opened	1	3
With modification of conduct	4	6
With no consequences	2	4
Other activities		
Reports dealt with under Art. 49a para. 3 let. a CartA	12	13
Advice	35	56
Market monitoring completed	87	105
Other enquiries dealt with	210	374
Concentrations		
Reports	26	34
No objection after preliminary investigation	19	29
Investigations	5	1
Decisions of the Competition Commission	4	1
after preliminary investigation	1	0
after full investigation	3	1
Early implementation	0	0
Appeal proceedings		
Total of appeal proceedings before the Federal Administrative and Federal Supreme Courts	6	14
Judgments of Federal Administrative Court	1	8
Success for the competition authority	1	6
Partial success	0	1
Judgements of Federal Supreme Court	0	0
Success for the competition authority	0	0
Partial success	0	0
Pending at the end of year (before the Federal Administrative and Federal Supreme Courts)	5	9
Expert reports, recommendations and opinions, etc.		
Expert reports (Art. 15 CartA)	2	0
Recommendations (Art. 45 CartA)	0	0
Expert reports (Art. 47 CartA or 11 TCA)	0	2

Follow-up checks	4	0
Notices (Art. 6 CartA)	0	2
Opinions (Art. 46 para.. 1 CartA)	186	177
Consultation proceedings (Art. 46 para. 2 CartA)	9	5
IMA		
Recommendations / Investigations (Art. 8 IMA)	0	0
Expert reports (Art. 10 I IMA)	0	2
Explanatory reports (Secretariat)	27	19
Appeals (Art. 9 para. 2^{bis} IMA)	1	2

6 Annex: The problem caused by the failure to pass through currency benefits in full, and opportunities to intervene under competition law

6.1 Introduction

In the recent past, the competition authorities have received numerous enquiries as to why, when the Euro is weak, buyers or consumers of imported goods do not profit or do not profit in full from the resultant currency benefits. In other words: due to the loss in value of the Euro in relation to the Swiss franc, imports from the Euro zone have become cheaper and this should – according to the widely held view – have directly repercussions for the domestic prices of imported goods. This applies not only to imports from the Euro zone, but also from the USA, as the US Dollar has also fallen substantially in value against the Swiss franc in recent times. A multitude of examples, in particular in the consumer goods industry, suggest however that this price-reduction process does not or does not fully take effect. The suspicion that the failure of exchange rate benefits to pass through is somehow connected with unlawful agreements or other conduct contrary to competition law is obvious.

The following remarks address the question of why exchange rate benefits in some circumstances do not pass through to domestic purchasers or consumers immediately and in full, and the question of when this failure of currency benefits to pass through could be relevant under competition law. In a first step, empirical facts on the subject of exchange rate pass-through are explained. Then in a second step various arguments are cited that may explain the empirically observed phenomenon of the incomplete exchange rate pass-through. Lastly, findings obtained will be assessed in the light of the Cartel Act.

6.2 Empirical facts

There are numerous international studies that investigate experiences with the issue of the exchange rate pass-through.[2] The following remarks are largely based on a study by the Swiss National Bank (SNB) in which a comprehensive analysis is made of the problem as it relates to Switzerland.[3] Here it should be pointed out that in this study no explicit distinction is made between the effect on prices of a gain or loss in value of the Swiss franc.

In the literature, consideration is given on the one hand to exchange rate pass-through at the level of import prices and on the other the subsequent pass-through of changes in import prices to consumers. There is broad consensus that changes in the exchange rate do indeed lead to changes in import prices; however the benefits of changes in the exchange rate do not pass through in full. There is also consensus that this partial benefit passes through relatively quickly. The degree of the benefit may however vary from country to country. According to the SNB study, in the long-term the percentage pass-through of changes in the exchange rate to the import prices in Switzerland amounts to around 37%, and in the short-

[2] See e.g. B. J. MCCARTHY, Pass-Through of Exchange Rates and Import Prices to Domestic Inflation in some Industrialized Economies, BIS Working Papers, 1999, No. 79; J.M. CAMPA/L.S. GOLDBERG, Exchange Rate Pass-Through into Import Prices, *Review of Economics and Statistics*, 2005, 87(4), 679-690; or for a good summary J. MENON, Exchange Rate Pass-Through, *Journal of Economic Surveys*, 1995, 9(2), 197-231.

[3] J. STULZ, Exchange Rate Pass-Through in Switzerland: Evidence from Vector Autoregressions, Swiss National Bank Economic Studies, 2007, No. 4.

term to 35 %. Accordingly, the pass-through level for changes in the exchange rate in Switzerland lies approximately within the same framework as that in Europe or the USA.[4]

There is also general agreement that changes in import prices pass through (in part) to consumers. In relation to this form of pass-through, there are also country-specific differences. In Switzerland, again according to the SNB study, the benefits of changes in import prices are almost fully reflected in the consumer prices for imported goods. As a result, it may be concluded that the overall failure of changes in the exchange rate to pass through in full to consumer prices is mainly due to rigid import prices.

In addition, a variety of studies indicate that the pass-through of changes in the exchange rate has fallen since 1990 in various countries, including Switzerland.[5] A possible explanation for this is that in this period (around 1990), various central banks adopted policy of encouraging low inflation. In an environment of lower inflation, businesses are less inclined to pass on changes in costs (i.e. including benefits from changes in exchange rates), because delaying the revision of price lists at such times is less costly for the company than in times higher inflation.[6]

In addition to the empirical investigations, which deal directly with exchange rate pass-through, there are a variety of studies that tackle the issue of the frequency of price adjustments in general. These studies indicate that prices are normally fixed for one year or more.[7]

6.3 Reasons for incomplete exchange rate pass-through

In the following remarks, a number of arguments are discussed that could explain the incomplete pass-through of changes in the exchange rate in Switzerland. The list below contains both arguments based on theory, and those based on practical observations. A conscious decision has been made not to evaluate the arguments presented. The list is not exhaustive, but rather seeks to show that price adjustments are complex processes that are often delayed or not implemented in full for understandable reasons:

- The cost reducing effect of a stronger Swiss franc is felt in many sectors only after a certain time and only where there are lasting exchange rate benefits, because the import of goods is first of all often based on long-term contractual arrangements that take account not of the current exchange rate but of a rate that was fixed in the past. Secondly, in some cases, goods are also purchased abroad in Swiss francs. Thirdly, certain companies take hedging measures against foreign exchange risks. In these three cases, a

---

[4] See e.g. P.K. GOLDBERG/M.M. KNETTER, Goods Prices and Exchange Rates: What have we Learned?, *Journal of Economic Literature*, 1997, 35(3), 1243-1272; E. HAHN, Pass-Through of External Shocks to Euro Area Inflation, European Central Bank Working Paper, 2003, No. 243. In contrast MCCARTHY (cited in Fn. 1) shows that pass-through in Switzerland tends to be lower in comparison with other industrialised countries, while CAMPA/GOLDBERG (cited in Fn. 1) is of the view that pass-through in Switzerland is higher than in most OECD countries.

[5] See J.E. GAGNON/J. IHRIG, Monetary Policy and Exchange Rate Pass-Through, Board of Governors of the Federal Reserve System International Finance Discussion Papers, 2004, No. 704 (revised version); J. BAILLIU/E. FUJII, Exchange Rate Pass-Through and the Inflation Environment in Industrialized Countries: An Empirical Investigation, Bank of Canada Working Paper, 2004, No. 21; STULZ (cited in Fn. 2).

[6] International data also indicates that price adjustments in countries with a low average rate of inflation are made less frequently than in countries with high inflation. See L. BALL/N. G. MANKIW/D. ROMER, The New Keynesian Economics and the Output-Inflation Tradeoff, *Brookings Papers on Economic Activity*, 1988, 1, 1-65.

[7] See e.g. A.S. BLINDER, Why are Prices Sticky? Preliminary Results from an Interview Study, *American Economic Review Papers and Proceedings*, 1991, 81, 89-100; A.K. KASHYAP, Sticky Prices: New Evidence from Retail Catalogs, *The Quarterly Journal of Economics*, 1995, 110(1), 245-274.

change in exchange rates has no immediate effect on procurement costs. Fourthly, if possible, companies first of all want to reduce their existing inventory, which due to the exchange rate will have been purchased at higher prices, before they offer the goods that they have just purchased.

- In the case of durable goods, list prices are fixed in advance and not adjusted on a daily basis. Short-term cost reductions may however be passed on as discounts. For example, although Swiss car dealers did not reduce their list prices in 2010 as a result of the strong franc, they did however react to provide a "Euro bonus" or other measures that reflect the stronger Swiss franc.[8] According to industry representatives, short-term price reductions for new vehicles would lead to losses of value amounting to billions on vehicles in the second-hand market: if new price lists with lower car prices were issued, the current Swiss car pool would experience a massive reduction in value. If the value of vehicles were to decline rapidly, it is argued, drivers would lose the desire to buy a new vehicle, and as a result, the car trade would collapse.[9] In the economic literature, the observation that (list) prices are not continually adjusted in line with changes in costs is explained in particular by the associated high adjustment costs and also by the lack of information about future market trends: company adjust their prices to changes in the general situation by taking account of the associated costs only if they have the relevant information required to do this.[10]

- In addition, exchange rate benefits may be (partially) counterbalanced by other cost components in the procurement of goods, for example exogenous cost shocks such as higher raw material and energy prices. Furthermore, changes in the exchange rate may also lead to a substitution process in relation to inputs, which contributes to additional changes in the cost structure. As a result of this, the change in the procurement costs may not necessarily correspond to the change in the exchange rate.[11]

- Lastly, economic models identify the following factors in particular that influence the extent of exchange rate pass-through: exchange rate benefits are more likely to be passed on to customers the lower the market concentration and the more important imports are.[12] Imports are indicators of significant competitive pressure and open markets. In this connection, a further finding of economic studies states that exchange rate benefits are more likely to pass through the less segmented, i.e. the more open, an industry is. In such cases, it is more difficult for businesses to pursue a policy of international price discrimination.[13] In addition, exchange rate pass-through is all the higher if the reaction in the supply of or demand for imports to changes in the exchange rate is greater.[14] This

---

[8] See NZZ, Euro weich, Importeure hart – Ruf nach Senkung der Autopreise, 14.10.2010, No. 300, p. 65.

[9] See AUTO-SCHWEIZ, Klarsicht, Newsletter October 2010, available at http://www.auto-schweiz.ch/Klarsicht.html [15.11.2010].

[10] See KASHYAP (cited in Fn. 7); O. J. BLANCHARD, "Wages, Prices and Inflation Stabilization," in: *Inflation, Debt and Indexation*, R. Dornbusch/M. H. Simonsen, eds., Cambridge, MIT Press, 1983.

[11] See A. GRON/D. L. SWENSON, Cost Pass-Through in the U.S. Automobile Market, *The Review of Economics and Statistics*, 2000, 82(2), 316-324. These authors show that, taking account of such substitution processes, the statistically estimated percentage of exchange rate pass-through increases. However, they also reject the hypothesis of a full pass-through.

[12] See R. M. FEINBERG, The Interaction of Foreign Exchange and Market Power Effects on German Domestic Prices, *Journal of Industrial Economics*, 1986, 35(1): 61-70; R. M. FEINBERG, The Effects of Foreign Exchange Movements on U.S. Domestic Prices, *Review of Economics and Statistics*, 1989, 71(3), 505-511.

[13] See GOLDBERG/KNETTER (cited in Fn. 4).

[14] See J. MENON (cited in Fn. 2) with details of further theoretical reasons for the (non-) pass-through of exchange rate benefits. A good summary of this can also be found in J. MCCARTHY (cited in Fn. 2).

connection can be seen in the results of a study carried out by the Graduate Institute of International and Development Studies in Geneva. According to this study, which analysed the reaction of French exporters to the decline in the value of the Euro, strong export companies with high productivity and/or high quality products maintain their prices at a high level in the target country (here: Switzerland) if they become more competitive due to a decline in the value of the Euro. This strategy allows them to increase their profit margin. Only smaller, less productive exporters pass on exchange rate benefits to Swiss retailers in the form of lower import prices, in order to increase their market share in Switzerland or indeed to enter the Swiss market for the first time. The reason for the differences in strategy is that the perceived price elasticity of the demand[15] is lower for strong export companies than it is for small exporters.[16] For strong companies – often suppliers of strong brand products – it is therefore worthwhile in the event of a decline in the value of the Euro to maintain import prices in Switzerland at a high level.

In conclusion, it may be argued that for various reasons and not only in Switzerland but also in other countries, changes in the exchange rate often pass through to consumers only partially and not immediately.

6.4 Opportunities for the competition authorities to intervene

In view of these circumstances, the question arises of whether and under what conditions the competition authorities can act in the event that exchange rate benefits do not pass through. In principle, the competition authorities may only intervene in the markets on the basis of the Cartel Act (CartA). If the circumstances of a case do not give rise to issues that are relevant to competition law, the competition authorities consequently have no opportunity to intervene in the market. In the event that exchange rate benefits fail to pass through, there could be issues that are relevant to competition law if the problem is connected with an agreement between market participants (Art. 5 CartA) or an unlawful practice by a dominant undertaking (Art. 7 CartA).

What is conceivable, for example, would be an arrangement between competitors not to pass on any exchange rate benefits to customers or consumers. An arrangement of this type would result in direct or indirect price fixing and would accordingly fall within the presumption of Art. 5 para. 3 CartA. If there are indications of such arrangements or similar in certain markets, the competition authorities would without doubt intervene.

A further scenario that would be relevant to competition law could arise if there were a vertical agreement on the non-pass through of exchange rate benefits in a sales network, for example, between foreign producers/manufacturers and their national dealers. This type of case could fall under the presumption of Art. 5 para. 4 CartA. Particularly dubious in competition law terms would be a situation in which a number of such vertical agreements were concluded in parallel in a specific market, as this would mean that the opportunities for customers or consumers to find alternatives would be limited. It should be noted however that an arrangement of this type is not covered by the Cartel Act if it is made within a group of compa-

---

[15] The price elasticity of demand indicates the percentage by which the demand for a good falls if the price of the good is increased by one per cent.

[16] See N. BERMAN/P. MARTIN/T. MAYER, How Do Different Exporters React to Exchange Rate Changes? Theory, Empirics and Aggregate Implications, CEPR Discussion Paper 7493, 2009, available at www.cepr.org/pubs/dps/DP7493.asp [07.12.2010]; N. BERMAN/P. MARTIN/T. MAYER, Exporters (Good Ones) Don't Pass Through, VOX Column, 22.10.2009, available at http://www.voxeu.org/index.php?q=node/4111 [07.12.10]; A. MÜLLER, Starke Marken als Devise, Handelszeitung, Nr. 48, 01.12.2010, S. 19; R. REGENASS, Die Drogeriekette Müller verlangt in der Schweiz bis zu 166 Prozent mehr, Tagesanzeiger Online, 4.12.2010, available at http://www.tagesanzeiger.ch/wirtschaft/unternehmen-und-konjunktur/Die-Drogeriekette-Mueller-verlangt-in-der-Schweiz-bis-zu-166-Prozent-mehr-/story/16407703 [06.12.2010].

nies. If, for example, an international clothing manufacturer sells its products via its own shops in Switzerland, then it is in principle free to fix its prices.

What is questionable, however, is whether a vertical agreement relating only to the non-pass through of exchange rate benefits is something that would make any sense to the parties to the agreement or that could be monitored and enforced, as various other factors can influence the prices. For example, the policy on discounts and special offers would have to be clearly regulated as part of the agreement, in order to prevent dealers from circumventing the agreement. Furthermore, an agreement of this type could only be enforced in the market if parallel imports are impossible or only possible with difficulty. Preventing the pass-through of exchange rate benefits on the basis of a vertical agreement would therefore probably require a far more comprehensive agreement, which would be similar in its effect to a retail price maintenance arrangement and/or a ban on parallel imports. Such forms of conduct are subject to the presumption of the elimination of effective competition under Art. 5 para. 4 CartA and are regularly the subject of action by the competition authorities. This is shown, for example, in the current BMW case, in which the investigation focuses on whether parallel imports of new BMW and MINI vehicles into Switzerland are being hindered by an unlawful allocation of territory. One possible effect of this type of allocation of territory are domestic prices that are generally higher than those in other countries, whereby in the current environment of a weak Euro the non-pass through of exchange rate benefits could also contribute in part to (any) higher domestic price levels.

Lastly, it cannot be excluded that in connection with the non-pass through of exchange rate benefits, Art. 7 CartA (“unlawful practices by dominant undertakings”) could come into play; for example, in the case of a vertically integrated company (a foreign producer/manufacturer with its own distribution network in Switzerland), which holds a dominant position in relation to its products. In a similar way to the case of a vertical agreement, here again the question of whether parallel imports are possible is a decisive assessment criterion. According to the list in Art. 7 para. 2 CartA, the unlawful practices that come under consideration in such a scenario could be relevant in particular to discrimination between trading partners in relation to prices or other conditions of trade (Art. 7 para. 2 let. b CartA) or imposition of unfair prices or other unfair conditions of trade (Art. 7 para. 2 let. c CartA).

In any case, it should not be forgotten that the competition authorities – even in cases where specific conduct may restrict competition to some extent – are obliged to assess whether there are economic efficiency grounds. It must not be excluded that certain practices may be justified on the grounds of the economic efficiency, because, for example, they generally lead to lower costs for the organisation of sales structures. In addition, it should be pointed out that – as mentioned above – the problem of the failure of exchange rate benefits to pass through is primarily due to rigid import prices. This means that in most cases a foreign company is to be found at the source of non-pass through of exchange rate benefits. As Switzerland currently has no agreements with other countries in relation to competition law matters, the competition authorities are in many cases hemmed in by tight practical and legal boundaries in their scope for intervention.

6.5 Conclusion

In conclusion, it may be stated that as far as the non-pass through of exchange rate benefits is concerned, the competition authorities can only intervene if the case involves issues relevant to competition law. As demonstrated above, there are a number of reasons why exchange rate benefits do not pass through or only pass through in part that have no direct connection with competition law. If, however, there are specific indications of unlawful conduct under competition law that are of importance to the economy, the competition authorities are certain to intervene.

It should however be noted that the consistent enforcement of competition law represents only one starting point for the combating of the failure of exchange rate benefits to pass through. Similar impetus should be expected in particular from the implementation of the “Cassis de Dijon” principle, the combating of technical barriers to trade and the further liberalisation of the agriculture and other domestic sectors. Nor can consumers and retailers be entirely relieved of responsibility, as by exploiting the potential for arbitrage by making direct and parallel imports, they can make a considerable contribution to exerting pressure on the level of prices in Switzerland.