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To the Federal Council

Annual Report 2011 of the Competition Commission

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

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1 Foreword from the President

2011 was an eventful year, for four reasons in particular. First of all two special issues occupied the resources of the Secretariat more than had been expected. The first related to notifications from Swisscom and municipal utility companies in connection with their agreements on the construction of optical fibre networks, which led to the Secretariat carrying out complex preliminary investigations. The Secretariat found that the cooperation agreements contained clauses that were liable to eliminate effective competition. Secondly, the exchange rate for Euro/CHF (and the Dollar/CHF) fell drastically last summer with the result that existing price differences between Switzerland and its neighbouring countries became far greater. The Secretariat received many reports in this connection, resulting in various additional proceedings relating to suspicions of a foreclosure of the Swiss market.

Secondly, last year the Competition Commission succeeded in concluding several large cases. In the investigation into online trading, the Competition Commission decided that online sales may only be restricted in exceptional cases and subject to very strict conditions. In the investigation into the cosmetics and perfumes sector, it made it clear that an exchange of confidential commercial information between competitors is not permitted. In the Nikon case, the Competition Commission held that parallel imports had been restricted unlawfully and imposed a large fine. And lastly, in the investigation into roads and civil engineering in the Canton of Aargau, it uncovered a large number of unlawful bid rigging schemes and fined the companies involved.

All these large cases were extremely complex and imposed a very high procedural workload not only on the Secretariat, but also on the Competition Commission in the decision-making phase. Hearings before the Competition Commission involving companies threatened with sanctions were especially time-consuming, but were essential in the interests of making the correct decision.

Thirdly, the Federal Council intends to revise the Cartel Act to make it stricter, by making agreements under the current paragraphs 3 and 4 of Article 5 of the Cartel Act unlawful in future unless suitable justification is provided. This will simplify procedures for the competition authority. In addition, it will reduce the size of the competition authority's decision-making section, making it more of a full-time professional body. Whether the authority will take on the form of a court – as proposed by the Federal Council– or whether it will continue as an independent administrative authority, is for Parliament to decide.

Fourthly, the 2008-2011 term of office came to an end, which saw the resignation of three members of the Competition Commission and the election of their replacements. The new Competition Commission team will continue to work consistently towards protecting effective competition over the next term of office, for the benefit of consumers and businesses.

Prof. Vincent Martenet

President of the Competition Commission

2 Most Important Decisions of the Competition Commission

The most important decisions made by Competition Commission in 2011 are listed below in chronological order. They are explained in greater detail in the reports on the individual sectors (see 3.1 to 3.3).

At the end of April 2011, the Competition Commission decided that the joint venture (JV) reported by **Swisscom and Groupe E** cannot be investigated under the merger control procedure. In the course of the detailed examination, the Competition Commission concluded that the JV will not have an independent market presence and that it therefore lacks an essential requirement for being a full-function JV subject to the merger control procedure. Following the Competition Commission's decision, the Secretariat began a preliminary investigation, in which the agreements affecting competition on which the JV is based will be examined.

On 6 June 2011, the Competition Commission opened an investigation into the **Swatch Group**. The Group intends to stop supplying finished watch movements and assortiments to third-party purchasers. At the same time, in the interests of effective competition in the watch market, the Competition Commission ordered precautionary measures against the Swatch Group, requiring it to continue to supply third companies for the duration of the proceedings, although minor reductions in supplies will be permitted. The precautionary measures are based on an amicable settlement between the Secretariat and the Swatch Group, which was approved by the Federal Administrative Court shortly before the end of the year.

On 11 July 2011, the Competition Commission issued a landmark decision on whether restrictions of **online trading** are permitted under competition law. It held in the decision that restrictions of online trading in principle contravene the Cartel Act and that they are permitted only on very strict conditions. For example, it may be justified in a selective sales network to require online merchants to meet the same requirements as licensed specialist dealers and to operate a physical sales outlet. The online merchants must however always be free to fix their own retail prices.

In response to a notification from Swisscom and various municipal utility companies, the Secretariat began various preliminary investigations into **optical fibre cooperation projects**. Following some very demanding investigations, at the start of September 2011 it concluded that the contracts concerned included hard horizontal agreements affecting competition and could not be exempted in advance from sanctions. The four-fibre-model chosen by the municipal utility companies and Swisscom should in fact make competition possible in the optical fibre networks. However, the contracts contained clauses such as Layer 1 exclusivity for the municipal utility companies or a price control clause, which the Secretariat held to be pricing and quantity agreements that could seriously harm the desired level of competition. As a consequence, Swisscom and certain municipal utility companies revised their cooperation agreements accordingly.

In connection with exchanges of information between competitors, the Competition Commission decided on 31 October 2011 that the exchange of turnover figures, gross prices and advertising expenditure figures between companies in the **cosmetics and perfumes sector** constituted an unlawful agreement affecting competition. The exchange of confidential information between direct competitors is always liable to influence the competitive behaviour of individual companies in a manner harmful to competition. If this influences the specific pricing behaviour of the companies, it amounts to a price-fixing agreement giving rise to sanctions. In the case in question, this could not be proved, with the result that no sanction was imposed.

On 28 November 2011, the Competition Commission ruled that **Nikon** had unlawfully restricted parallel imports of cameras and other photographic equipment from February 2008 to September 2009. The Competition Commission imposed a sanction of CHF 12.5 million on NIKON for this restriction using unlawful vertical agreements. With this decision, the Competition Commission signalled that it was determined to act against any restrictions of direct or parallel imports by means of vertical agreements that foreclose territory. It also confirmed its decision of December 2009 in the case of GABA/Elmex, which is still pending before the Federal Administrative Court.

Lastly, on 16 December 2011 the Competition Commission completed its investigation into **roads and civil engineering in the Canton of Aargau**. It identified a large number of unlawful bid rigging arrangements between the 18 companies involved and fined these a total of CHF 4.3 million. The Competition Commission was thus able to conclude another major investigation in the priority area of bid rigging. A further case based on similar allegations is currently pending in the Canton of Zurich.

3 Activities in the Individual Sectors

3.1 Product markets

3.1.1 Consumer goods and retail trade

With their decision in the **Nikon** case of 28 November 2011, the Competition Commission consolidated its previous practice (see Gaba, RPW 2010/1 65 et seq.) on absolute territorial protection. The Competition Commission opened the investigation on 24 March 2010 in response to a complaint and conducted a search of the offices of Nikon Switzerland AG on the same day.

The investigation revealed that Nikon had contractually prevented parallel imports into Switzerland in two ways: firstly, it prohibited companies in Switzerland from purchasing Nikon imaging products from outside the territory covered by the agreement (Switzerland and Liechtenstein). Secondly, it placed export bans in foreign distribution agreements in order to prevent sales to Switzerland. In addition, e-mail correspondence seized during the search of Nikon's offices disclosed that sales by parallel traders to Switzerland had actually been restricted or that the intention had been to restrict them. These clauses and the pressuring of parallel traders helped to ensure that from spring 2008 to autumn 2009 excessive prices were charged by comparison with prices under free competition.

Although these territorial protection measures did not eliminate effective competition in the relevant markets, they nonetheless had a substantial adverse effect (Art. 5 para. 4 in conjunction with para. 1 Cartel Act). The fine imposed of CHF 12.5 million was based on Nikon's turnovers in Switzerland and on the duration and seriousness of the unlawful conduct.

In a ruling dated 31 October 2011, the Competition Commission decided that the exchange of information between the members of the association of manufacturers, importers and suppliers of cosmetics and perfumery products **(ASCOPA)** constitutes a violation of Article 5 paragraph 1 of the Cartel Act and prohibited its continuation. The parties were **the Swiss subsidiaries and distributors of leading manufacturers in the luxury cosmetics branch**. The companies concerned had joined to form a cartel and exchanged sensitive information on prices, turnovers, advertising costs and general terms and conditions of business. In this way, they were able to adapt their market behaviour to each others' practices. This adaptation led to a substantial restraint of competition in the market for perfumery and cosmetic products.

In July 2011, the investigation opened in September 2010 into the **restriction of online trading** was concluded. In its decision, the Competition Commission declared the restriction of

online trading by Electrolux AG and V-Zug AG to be unlawful in terms of Article 5 paragraph 1 of the Cartel Act. The Competition Commission commented for the first time in this decision on the issue of whether and under what conditions internet sales may be restricted. It held that internet sales must in principle be permitted and may only be restricted subject to specific, strict requirements. Furthermore, the Competition Commission stressed that scenarios involving restrictions of internet sales with resale price maintenance agreements or absolute territorial restriction clauses must be regarded as particularly harmful. The Competition Commission regarded it as permissible in case in question that Electrolux AG and V-Zug AG required their retailers as part of their selective distribution systems also to have bricks-and-mortar specialist shops at the same time as selling products via the Internet. Amicable settlements were reached with both Electrolux AG and V-Zug AG.

The preliminary investigation opened on 19 May 2011 into **graphical papers** was closed at the end of December 2011 without consequences. The Secretariat was unable to find sufficient evidence of any restraints of competition, and in particular the prevention of parallel imports, by the four paper wholesalers operating in Switzerland, Antalis AG, Inapa Switzerland AG, Papyrus Switzerland AG and Fischer Papier AG.

The investigation into **Roger Guenat S.A.** (now Altimum S.A.) on suspicion of retail price maintenance agreements in relation to alpine sports products, which began in 2010 with a search of premises, entered its final phase. The investigations are complete, and the motion for a ruling will soon be ready for submission. It is expected that this investigation will be concluded in the course of the coming year.

A comprehensive market monitoring operation was carried out at the behest of the Foundation for Consumer Protection (SKS) and IG Zölliakie (Association for sufferers of celiac disease). These had criticised the higher prices charged for **gluten-free products** in Switzerland in comparison with neighbouring countries. The Secretariat examined whether prices are being dictated or parallel imports prevented. The Secretariat also questioned manufacturers, retailers and importers and made price comparisons of selected products. No indications of unlawful price fixing or the restricting of parallel imports were discovered. The price differences reported have other reasons: small purchasing volumes and higher margins for domestic retailers are among the reasons for higher prices in the case of imported products. In relation to foodstuffs manufactured in Switzerland, production costs are higher, as there is no specialised manufacturer of gluten-free products in Switzerland.

3.1.2 Construction industry

The investigation opened in June 2009 relating to **bid rigging in road construction and civil engineering in the Canton of Aargau** was concluded by a decision of the Competition Commission dated 16 December 2011.

On 7 June 2011, the Secretariat sent the motion to be submitted to the Competition Commission to the parties for their opinions. Subsequently in October 2011, three sessions of complex hearings were held before the Competition Commission. The parties made full use of their opportunity to comment on the individual steps in the proceedings.

Eighteen companies directly involved in the bid rigging parties were ultimately fined a total of almost CHF 4 million. Seven construction firms benefited from sanction reductions under the bonus programme; one was exempted from sanctions altogether. The investigation revealed that in over 100 projects the building contractors concerned had agreed to coordinate the prices charged in tenders for public and private projects and thus to divide the construction projects up among themselves.

Combating bid rigging is a priority for the competition authorities. The signal sent by this important decision should serve to prevent similar violations of the Cartel Act in the future.

3.1.3 Watch industry

At the end of 2009, the President of the Board of the **Swatch Group** announced in the press that the supply of third-party customers with watch components would be reduced or stopped. This led in 2011 to informal contacts with the Swatch Group, which revealed that the Swatch Group was intending to carry out this plan in some cases at least. Accordingly, on 6 June 2011 the Secretariat opened an investigation into the possible abuse of a dominant position. At the same time, the Competition Commission took precautionary measures for the duration the investigation based on an amicable settlement with the Swatch Group. They require the Swatch Group to continue to supply third-party customers in full for the time being. In 2012, the Swatch Group may reduce the mechanical watch movements and assortiments supplied to 85% and 95% respectively of the volumes supplied in 2010. This should prevent any permanent harm to competition in the relevant markets. The appeals filed against the precautionary measures by the companies affected were rejected by the Federal Administrative Court in mid-December 2011.

The Swatch Group is planning to stop supplying third-party customers with components, in particular mechanical watch movements and assortiments (regulating components for mechanical watch movements). The investigation is intended to show whether this conduct amounts to an unlawful abuse of a dominant position under competition law. In particular, an examination will be made of whether there are alternative sources to the Swatch Group and how long it would take to develop such sources. The Swatch Group has indicated its readiness to reach an amicable solution in the form of a gradual reduction in supplies.

In the course of the enquiries, the Secretariat questioned a large number of market participants in detail. In the coming year, the investigations will continue and if possible be concluded.

The investigation opened in September 2009 into ETA Manufacture Horlogère Swiss SA in relation to the possible abuse of a dominant position was suspended at the same time as the investigation into Swatch Group AG was opened, as the result of the new investigation may have a considerable influence on the outcome of the ETA case.

3.1.4 Automotive sector

In 2011, the Secretariat received further complaints from Swiss end customers who apparently had tried unsuccessfully to purchase a BMW or a Mini in the European Economic Area. The Competition Commission had already begun an investigation in October 2010 into the **BMW Group** on suspicion that it was restricting direct imports or parallel imports of new BMW and Mini vehicles from the European Economic Area into Switzerland. The relevant motion made by the Secretariat to the Competition Commission was sent to the BMW Group in October 2011 so that it could comment.

As a result of the **fall in the Euro exchange rate**, numerous complaints were received from end customers, especially in the summer months of 2011, claiming in some cases extremely high price differences between Switzerland and EU countries for cars and motorcycles. In response to these allegations, the Secretariat examined in particular whether there was any indication of practices of foreclosing territories (e.g. export bans in relation to Switzerland). According to the Motor Vehicle (MV) Notice from the Competition Commission, the restraints placed on retail consumers in Switzerland, members of a selective distribution system in Switzerland or sellers in Switzerland that receive orders from retail consumers in Switzerland to purchase motor vehicles without restriction from a dealer licensed in Switzerland or operating in the European Economic Area normally amount to a serious restraint of competition.

The Secretariat responded to a large number of enquiries relating to the **honouring of warranty claims** in relation to cars that were direct or parallel imports. In every case, the Secretariat pointed to the relevant provisions of the MV Notice and the related explanations. According to these, warranties granted by automobile suppliers at the place where the new ve-

hicle is sold (known as manufacturer's or works warranties) are valid subject to the same conditions throughout the European Economic Area and in Switzerland.

At the end of 2011, the Secretariat began working on the **revision of the Competition Commission's MV Notice**. The revision is being carried out in response to the adoption by the European Commission in 2010 of a new competition law framework for the automotive sector. According to this, following a transitional period until 31 May 2013 in which the current MV-GER will continue to apply, the provisions of the general group exemption regulation for vertical agreements will apply to the sale of new vehicles. For the markets for repairs and servicing and for the sale of spare parts, the specific provisions of the new MV-GER apply. The trade associations concerned will be invited to comment in due course.

The Secretariat submitted its views as part of the office consultation procedure relating to the entry into force of amendments to the Federal Act on the Reduction of CO_2 Emissions **(CO_2 Act)** and the Ordinance on the Reduction of CO_2 Emissions from Private Vehicles. The implementation of the CO_2 Act may bring disadvantages for small-scale importers when compared with major importers. In contrast to major importers, small-scale importers cannot compensate for imported cars with high CO_2 emissions by selling cars with low CO_2 emissions, unless they join together in emissions associations, which can lead to further expense. The Secretariat is basically against any measures that make direct or parallel imports more difficult. As a result, it has expressed concerns with regard to the method proposed for implementing the CO_2 Act.

Lastly, at the end of 2011 the Secretariat commented on amendments to various road traffic ordinances as part of an office consultation procedure. The Secretariat welcomes the fact that it will become easier to register imported cars, provided the importer holds an EU certificate of conformity.

3.1.5 Agriculture

In 2011, a variety of complaints on agriculture-related matters were received. The market monitoring procedures failed however to disclose any restraints of competition. Monitoring of the fertiliser market will probably be completed at the start of 2012. A preliminary investigation into the cereals market was carried out and concluded.

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 a planned merger. This related to the takeover of Rutz Käse AG, a company primarily active in maturing Appenzeller and Tilsiter cheese. The preliminary examination of the merger plan gave no indication that a new dominant position would be established or strengthened.

In the first half of the year, the Competition Commission prepared an expert opinion in an action before Cantonal Court in Vaud. The main issue in the report was whether under the Cartel Act a manufacturer of **Etivaz cheese** should be allowed access to a maturing cellar operated by the "Coopérative des producteurs de fromages d'alpages 'L'Etivaz'". The answer to the question was no.

The Secretariat participated **in over 30 office consultation procedures** on amendments to legislation and commented on more than 20 parliamentary procedural requests. The Competition Commission also took part in the consultation procedure on Agriculture Policy 2014-2017.

3.2 Services

3.2.1 Financial services

The Secretariat completed another preliminary investigation into debit cards. The proceedings date back to two reports from MasterCard. Both reports had the introduction of a default interchange fee as their subject matter. The first related to the **Maestro** debit card system, popular throughout Switzerland, and provided for an interchange fee to be charged on all domestic payment transactions initiated by a Maestro debit card. The subject of the second report was the launch of the new **Debit MasterCard** system in Switzerland at the same time as the introduction of an interchange fee for transactions that are carried out using this new debit card. As the current practice of the competition authorities is normally to regard interchange fees as pricing arrangements between the card issuers (the issuers) and the companies who acquire dealers (the acquirers), and both cases relate to similar payment card systems from MasterCard, the preliminary investigations opened into each case were combined into one procedure.

Initially the Secretariat expressed concerns as to the permissibility under competition law of a default interchange fee for the Maestro system. Among the considerations on which this view was based was the fact that Maestro is by far the largest debit card system in widespread use in Switzerland, both for retailers and among card holders, and that it has no real competition, as the VISA debit card system ("VISA V PAY"), despite its introduction having been announced, has yet to come on the market. The introduction of a fallback interchange fee cannot be justified on the grounds of economic efficiency.

The Secretariat therefore also had concerns about the default interchange fee for Debit MasterCard. Based on the PAY case (see RPW 2009/2, 122 ff.), it approved the introduction of such fees for the new debit card from MasterCard subject to certain conditions, primarily that MasterCard does not introduce a default interchange fee for Maestro and also that it does not offer any incentives for issuers and acquirers to change from Maestro to a different debit card system, and in particular to Debit MasterCard.

In a preliminary investigation, the Secretariat looked into the expansion of the activities of the **Gebäudeversicherung Bern (GVB** (Bern Buildings Insurance) in the private insurance market. With the revision of the Buildings Insurance Act in 2010, the Bern parliament made it possible for the GVB, in addition its monopoly in offering fire and natural hazard insurance for buildings in the Canton of Bern, to offer voluntary additional buildings insurance such as buildings water damage insurance. The parliament also created the statutory basis for the GVB to carry out ancillary activities (e.g. settling third party claims or the valuation of buildings), provided these are connected with its main activity. Both the Swiss Insurance Association (SVV) and individual insurance companies expressed doubts about the GVB's new presence in the market. In particular, they pointed to the inadequacy of a strict separation between the monopoly area and the supplementary insurance area. In addition, there was a concern that the GVB's plans could lead to it gaining competitive advantages in the market for additional buildings insurance and thus to a distortion of competition. The Secretariat therefore gave the GVB suggestions as to how the expansion of its activities could be made as competitively neutral as possible and be made to conform to the Cartel Act. The GVB accepted these proposals in a letter of intent, thus allaying any concerns over competition law issues.

The Secretariat completed a preliminary investigation into **insurance against the risks of asbestos**. This centred on the question of whether the third-party liability insurers operating in Switzerland in the period from 2002 – 2003 had entered into an agreement to exclude asbestos risks from the general contractual terms of their business liability insurance policies. The Secretariat was unable to find any indications of a breach of competition law, especially as various companies had already decided before the period in question to exclude asbestos

risks from general insurance cover in one way or another. The main reason for these exclusions could be identified as international trends in damages actions, which led the insurance industry to lose reinsurance cover and thus made an actuarial reassessment of asbestos risks necessary. Nonetheless, the insurance for such risks has generally not been abolished, but insurance cover has simply been excluded in the general contractual terms, thus refining risk control mechanisms and making improved risk management possible. Individual insurance solutions will therefore be possible in the future and will be offered by insurance companies.

In addition, the Secretariat assessed various **planned mergers** in the financial services sector. Here it should be remembered that in the case of bank mergers, which must be assessed by FINMA on creditor protection grounds (Art. 10 para. 3 Cartel Act), under Article 9 of the Cartel Act, notification must also be given in every case to the Competition Commission. The Secretariat also provided **advice** on two matters, one relating to a type approval paper by SIX Multipay AG for card terminals and the other to benchmarking of mortgage interest margins in the banking sector.

3.2.2 Health markets

The **distribution of medicines in Switzerland** has been subjected to a thorough analysis by the competition authorities as part of a preliminary investigation following several complaints. The aim was to verify the extent to which problems exist in Switzerland throughout the distribution chain, starting from the system of wholesalers and ending with the retail distributors (pharmacists, dispensing physicians and drugstores). The gathering of information on how the system operates and a more detailed investigation of certain aspects is still ongoing.

Following the interim report, the preliminary investigation into the **sale of hearing aids** has been extended in order to take account of important changes in the market in the course of 2011. The procedure will therefore continue at the start of 2012 and will have to show if there are indications that the prices recommended by the producers eliminate or have a significant effect on competition in the market for hearing aids.

In April 2011, the umbrella association **santésuisse** submitted an agreement concluded by its members (83 health insurance companies) to the competition authorities. The agreement relates to information given to clients in the context of opposition proceedings. The agreement, which took effect on 1 June 2011, prohibits telephone advertising or telephone marketing in general, limits commission paid to brokers and direct sellers to a maximum of CHF 50.- and introduces rules laying down quality criteria for brokers and authorised agents. The competition authorities have been unable to exclude the possibility that the effects of this agreement could raise difficulties under the law on cartels. They have therefore decided to open a preliminary investigation. The procedure will have to determine whether the agreement contains any indications of unlawful restraints of competition.

Several reports of **price differences** between Switzerland and neighbouring countries also related to the health sector. The price of medicines, medical devices, antibodies, biotechnology reagents and veterinary dietary foodstuffs in particular are still the object of several market monitoring operations.

Three cases of **mergers of undertakings** have been analysed in the health sector. The first was the creation of a joint venture for research into and the production of veterinary medicines between Merck & Co., Inc. and Sanofi-Aventis SA. This plan was eventually abandoned by the two companies. Next, the creation of the joint venture known as Vifor Fresenius Medical Care Renal Pharma Ltd. between Galenica and Fresenius: this new company will be active in the field of the nephrology, both in research and development and in the sale and distribution of pharmaceutical products. This plan has been accepted by the Competition Commission. Finally, the repurchase of the health insurance company ProVita by SWICA

was not the subject of a final decision by the Competition Commission because SWICA withdrew its notification.

In relation to the **regulated health markets**, the competition authorities were frequently consulted during the discussions on the entry into force of the new financing system for hospitals and the preparation of hospital lists. Based on their opinions published on this subject in 2010, they have stressed to the competent cantonal authorities the importance of allowing public and private providers (hospitals and clinics) as broad an access as possible to the market for hospital services funded by basic insurance, without unnecessary obstacles being placed in the way of the economic freedom of the companies and of free competition. In the course of the year, the competition authorities expressed their opinions on various planned legislative amendments and responded to a number of parliamentary procedural requests.

The Secretariat expressed reservations in connection with the bill for a new **Federal Act on the Supervision of Social Health Insurance**. In the view of the Secretariat, the bill contains various provisions that threaten to restrict the economic freedom of health insurance companies excessively, without such provisions being absolutely essential for the supervision of providers. This would in the long term run counter to the aim of the legislature to facilitate effective competition between health insurance companies.

3.2.3 Liberal professions and professional services

In December 2011, the investigation conducted against **TicketCorner AG and Hallenstadion Zurich AGH** was concluded. The Competition Commission did not regard as unlawful the fact that the organisers of events at the Hallenstadion were required to sell at least 50% of the tickets distributed by third parties via Ticketcorner. The investigation revealed that Hallenstadion was not in a dominant position and that the quota system for the tickets in this performance venue had no significant effect on competition.

In the course of the summer, an investigation was opened against the **International Federation of the Phonographic Industry (IFPI)**, Swiss section, due to an agreement suspected of limiting the possibility of parallel imports into Switzerland of certain musical products, such as compact discs (CDs). The proceedings are also intended to analyse the compilation of the charts underlying the Swiss hit parade. Finally, the proceedings will also study the impact of the Media Promotion Network (MPN), which promotes musical works and facilitates both access to new musical works by the radio media and provides data on these works to journalists specialising in this field.

The professional services sector was also affected by the problem of the **strong franc**. Numerous complaints were processed on a wide variety of matters, including package holidays and computer programs. Several complaints led to detailed investigations, some of which are still ongoing. In a large number of cases, the failure to pass on exchange rate benefits follows decisions taken within a group of undertakings, which excludes the application of Cartel Act due to the principle of “group privilege”. According to this principle, agreements concluded between undertakings belonging to the same group are not unlawful, as the group constitutes a single economic entity.

In the course of this year, new complaints were made against **ski lift companies**, due to alleged unequal treatment of ski schools. In previous years, the Secretariat had already dealt with several complaints relating to ski schools and their relationship with ski lift companies. In 2007, the Swiss association for ski lifts prepared a recommendation for its members at the request of the Secretariat. This basically called on them to guarantee equal treatment to ski schools, subject to certain conditions (participation of the ski schools in mountain rescue activities, promotion of tourism, etc.). This recommendation was well received, but new complaints have been received suggesting there may still be unequal treatment. The investigations are continuing.

At the end of the year, the Secretariat received a complaint from l'Olympique des Alps SA/FC Sion (**FC Sion**) relating to the Union of European Football Associations (**UEFA**) and its refusal to allow FC Sion to participate in the Europa League. According to FC Sion, UEFA abused its dominant position by not complying with an interim order issued on 5 October 2011 by the Vaud Cantonal Court. Having noted that proceedings were being conducted at the same time before the civil and arbitration courts, the Secretariat accordingly decided, following its regular practice, not to take up the issue.

Finally, various complaints were made over the year relating to a range of fields relevant to professional services. These complaints led to proceedings, some of which are still ongoing. The following cases drew special attention. The first concerns the **distribution of cinematographic works** in Switzerland. The proceedings related to certain film distribution companies, and various cinemas. Certain of the latter claimed to be discriminated against when compared with large groups, in that they did not receive copies of films until a certain time after their official launch. These cinemas therefore lost out on part of the market, as the highest box office returns are primarily achieved in the first few weeks after the launch of a film. Also considered were issues relating to websites allowing the **online booking of overnight stays in hotels**. Certain hotels claimed that websites providing an online reservation service were abusing a dominant position. According to the reports received, in recent years these sites have become essential players in the hotel industry and were abusing their position in the market by imposing high commissions based on the price of an overnight stay at the hotel. They also imposed a range of unfair commercial conditions, such as the "lowest price" system, according to which the hotelier should bill guests who book online with the lowest practical price for an identical room on the day they make their booking. This type of clause prevents hotels from making their own special last minute offers when they have empty rooms. The investigations are still ongoing.

3.3 Infrastructure

3.3.1 Telecommunications

The priority in relation to telecommunications this year was once again **optical fibres**. Swisscom and the regional energy supply companies for the cities of Basel, Bern, Geneva, Lucerne, St. Gallen and Zurich have agreed to jointly construct Fibre-to-the-Home (FttH) optical fibre networks. The partners submitted certain clauses of their cooperation agreements to the Secretariat in accordance with Article 49a paragraph 3 letter a of the Cartel Act. As some of these clauses contained indications of unlawful agreements affecting competition, the Secretariat opened several preliminary investigations in the course of spring 2011. A detailed market analysis including the questioning of significant market participants eventually revealed that the clauses submitted to the Secretariat were agreements on quantities and prices and on the allocation of markets according to trading partners. In view of this, the Secretariat was unable to rule out the possibility that effective competition would be eliminated. The Secretariat informed the partners of its concerns in a detailed final report: the Cartel Act does not permit relief from the threat of sanctions in this case. The findings did not however mean that the critical contract clauses would be prohibited, but the partners will still run the risk of competition law sanctions being imposed (for more on the subject of optical fibres see 6.2 below).

In November 2010, the Competition Commission received notification of a planned merger between Swisscom and **Groupe E** for the construction of an FttH optical fibre network in the Canton of Fribourg. After the Competition Commission had decided in December 2010 to subject the planned merger to a detailed examination, it held in May 2011 that the planned joint venture did not have the character of full functionality and at the same time decided that the plan did not have to be reported. In the course of its detailed examination, however, the Secretariat identified competition law issues in certain clauses of the agreement between

Swisscom and Groupe E. The Secretariat therefore opened a preliminary investigation on suspicion of an unlawful agreement affecting competition.

The court judgment in the case on **mobile telephony termination charges** has been instrumental in determining the future approach of the Competition Commission to cases of pricing abuses. In its judgment of 20 April 2011, the Swiss Federal Supreme Court dismissed the appeal filed by the Federal Department of Economic Affairs (FDEA) against **Swisscom Mobile** and thus upheld the related judgment of the Federal Administrative Court. The Swiss Federal Supreme Court assumed in its decision – in derogation from the current practice of the EU Commission and the EU courts – that the element of "coercion" in price abuse cases must be proved independently. This meant that the threshold for intervention when combating price abuses under the Cartel Act has been raised. As a result, the **Mobile Telephony Termination II** proceedings against Swisscom, Sunrise and Orange, which had been suspended by the Competition Commission pending the decision of the Federal Supreme Court, were abandoned in December 2011.

3.3.2 Media

In relation to the media industry, the Competition Commission was required to review several mergers:

Tamedia notified three mergers to the Secretariat in 2011: **Tamedia AG/car4you, car4you Switzerland AG (Tamedia)/www.auto-online.ch** and **Tamedia AG/Doodle AG**. In the first two mergers, the Competition Commission concluded that only the market for users/readers of (print/online) classified advertisements in French-speaking Switzerland is affected, and that due to the current competitive situation and the expected market development, the companies involved would show sufficient discipline. The merger involving Tamedia AG and Doodle AG affected two markets: the market for national banner advertising in German-speaking Switzerland and the market for national banner advertising in French-speaking Switzerland. Again in relation to this plan, the Competition Commission took the view that competitors would ensure adequate discipline in the market. The Competition Commission therefore declared all three mergers to be unobjectionable in the preliminary examination.

In mid-December 2011, a planned merger involving **NZZ/Ringier/Tamedia/cXence** was submitted for preliminary examination. The companies involved intend to establish a joint venture known as PPN AG in order to market available inventory on websites. It is planned to publish the advertising in a user-specific manner in the available inventory of NZZ, Ringier and Tamedia. The result of the preliminary examination will be announced at the start of 2012.

Also in December 2011, the Competition Commission was notified of planned mergers involving **Tamedia/Bilan/Tribune des Arts**. After Edipresse decided to make a partial withdrawal from the Swiss sectors for financial and economic print media and lifestyle magazines, Tamedia intends to take over the two remaining Edipresse titles, "Bilan" and "Tribune des Arts" and to expand its business operations in French-speaking Switzerland. The month allowed for the preliminary examination will run into 2012.

As part of the reassessment of the **award of broadcasting licences for regional television and radio channels,** the Competition Commission has been instructed to provide three expert opinions to OFCOM following the related judgment of the Federal Administrative Court was issued on 7 December 2009. These assignments to investigate potential dominant positions cover the regions of eastern Switzerland, south-eastern Switzerland and Aargau and focus on the NZZ Group (TV), the Sudostschweiz Mediengruppe (Radio) and the AZ-Mediengruppe (Radio) respectively. The expert opinion for the eastern Switzerland region was already completed on 28 February 2011 and submitted to OFCOM. The opinions for the south-eastern Switzerland Region and the Aargau Region, which were commissioned in autumn 2011, should be completed in the first quarter of the coming year.

In summer 2011, a referendum on a book price maintenance act was successfully requested and the vote on the introduction of this act will be held 11 March 2012. As a result, the Competition Commission suspended its investigation into **book pricing in French-speaking Switzerland** until the final result of the referendum is published in the Official Federal Gazette.

The Secretariat will complete its preliminary investigation into **SDA pricing policy** at the start of 2012. The Secretariat examined evidence suggesting that the SDA may have abused its position in the market through the structuring of its pricing system. The main focus was on the discounting policy of the SDA, and in particular the granting of exclusivity discounts, and on the coupling of offers. In addition, the transaction between the Deutscher Depeschendienst (ddp) and the SDA, as a result of which the former AP Switzerland was closed down at the start of 2010, will be more closely examined, as there are indications for the existence of a territorial agreement.

3.3.3 Energy

The Competition Commission also had to assess a number of mergers in the energy sector. Worthy of mention is the merger involving **Fluxys G SA/Eni Gas Transport Deutschland S.p.A./Eni Gas Transport GmbH/Eni Gas Transport International SA/Transitgas AG/Swissgas AG.** This related to the acquisition by Fluxys G of sole control of three companies, Eni Gas Transport GmbH, Eni Gas Transport Deutschland S.p.A. and Eni Gas Transport International SA, as well as the acquisition by Fluxys G and Swissgas of joint control of Transitgas AG. In these merger proceedings, the Competition Commission carried out a definition of the market for natural gas for the first time, based on the case law from the EU. In its preliminary examination, the Competition Commission declared the merger to be unobjectionable.

In the course of opposition proceedings, the Secretariat opened a preliminary investigation in the case of **Erdgas Zentralschweiz (EGZ)**. This relates to an inter-trade agreement that the EGZ – acting through its owners, who at the same time are customers – concluded with its customers. This inter-trade agreement includes regulations on calculating the network use charge by different methods, depending on whether the two shareholders or third-party customers are involved. The Secretariat must therefore assess in the preliminary investigation whether third-party customers are being discriminated against by these network use charge regulations when compared with the shareholders.

The monitoring of the market relating to **offers for major consumers** was successfully concluded. The matter related to the question of whether agreements exist between electricity companies that result in major consumers not receiving any competitive offers if they have withdrawn from the system of universal provision of services. The Secretariat decided against opening a preliminary investigation because the survey of major consumers revealed no indications of an unlawful agreement affecting competition.

The Secretariat continued its monitoring of the procurement of **system services** by Swissgrid. The Secretariat concluded that even after the abolition of the price limits, the prices did not increase again.

The Secretariat was also involved as a member of the “G Component” working group in the preparatory work for the **revision of the Electricity Supply Act**. The working group in particular tackled the issue of the introduction of a power plant component.

3.3.4 Other sectors

The Secretariat abandoned the preliminary investigation into the **eggs market**; there were no indications of any restraint of competition. First of all, the Secretariat established that the egg producer that was the subject of the report did not hold a dominant position and would be

acting contrary to its own interests if it were to displace or exploit production equipment manufacturers. Secondly, the Secretariat held that there was no agreement affecting competition between the egg traders and the egg producers.

The Secretariat opened a preliminary investigation into Swiss Post relating to a new **business customer pricing system for letter post services**. There are indications that the system of discounts in the new business customer pricing system for letter post services could prevent rival companies from competing and could foreclose the market. The preliminary investigation should be concluded in the first quarter of 2012.

3.4 Internal market

On 1 July 2006, the revised Internal Market Act came into force. The main issue in this revision was to consolidate market access rights and to make requirements for the permitted restrictions on market access stricter. In 2011, the Competence Centre reviewed the first five years of the revised Internal Market Act and concluded that Parliament's desired improvement in market access rights for non-local suppliers had been consistently achieved. The Competition Commission made regular use of its right of appeal (Art. 9 para. 2^{bis} IMA), which was introduced in the revision and which has proved to be a very effective instrument in enforcing market access rights.

The Swiss Federal Supreme Court acknowledged Parliament's concerns in its landmark decision on the revised Internal Market Act BGE 134 II 329 (Inclusion of traineeships in the rules on lawyers' freedom to practise) and confirmed its liberal practice in 2011.

One of the priorities in 2011 was again cantonal and communal restrictions on market access for non-local taxi companies. The Competence Centre was contacted by various cantonal and communal regulators and offered its advice on plans to issue new or revised taxi regulations. At the same time, the Secretariat regularly received complaints from taxi companies. In particular, taxi companies in rural communes claim that they are denied access to the market in the cities. An appeal filed by the Competition Commission against restrictions on market access imposed by the Canton of Geneva on taxi companies from other cantons is still pending before the Geneva Administrative Court. The Swiss Federal Supreme Court contributed to the opening of the internal market in taxi services with an important decision in which it held that call centres may not be prohibited from assigning taxi jobs to non-local taxi companies (Swiss Federal Supreme Court judgement 2C_940/2010 of 17 May 2011 E. 5.2).

In the course of 2011, the Competence Centre dealt with several submissions from private individuals from a wide variety of economic sectors. In response to some of these submissions, the competence centre contacted the relevant communal and cantonal authorities and was thus able to ensure access to the market in accordance with the internal market legislation.

3.5 Investigations

In 2011, the Competence Centre for Investigations made selective but practice-relevant alterations to the factsheet on how to act during searches of premises. In line with the Criminal Procedure Code (Art. 264 CrimPC), which came into force on 1 January 2011, the protection afforded to lawyers' correspondence was extended. Lawyers' correspondence is now exempt from seizure, regardless of where it is found and when it was created.

In the report year, the Competence Centre for Investigations continued to maintain contacts with Swiss and foreign authorities in relation to IT forensics, and indeed increased its interest with the result that one employee of the Secretariat was able to benefit from an internship in the corresponding section of the French Competition Authority. The Competence Centre for Investigations for its part trained the new Secretariat employees and prepared them for conducting searches of premises and making seizures.

In November 2011, the Competence Centre for Investigations together with the Product Markets Service planned and carried out a major series of searches of the premises of sanitation equipment wholesalers. This involved cooperation between the Secretariat and the police authorities in 5 cantons as well as the Federal Criminal Police. For the first time, the Secretariat, at the same time as conducting the searches, also questioned persons at the search locations.

3.6 International

OECD: Representatives of the Competition Commission and of the Secretariat attended the meetings of the OECD Competition Committee, which are held three times a year in Paris. The delegation, in cooperation with SECO, prepared and presented several contributions. In various sessions the issue of mergers (requirements, econometric analysis, effects of decisions) and the subject of encouraging compliance with the law and of compliance programmes were raised on several occasions. The Competition Committee decided to draw up a recommendation relating to public procurement. In a new move, strategic issues for the coming years were examined in greater detail by the Committee. These included international cooperation and the evaluation of the activities and the decisions of the competition authority.

ICN: Two representatives of the Swiss authority took part in the 10th Annual Conference of the ICN, which was held in The Hague from 17 to 20 May 2011. The ICN Cartel Workshop took place from 10 to 13 October 2011 in Bruges. The mergers subgroup organised several teleseminars on issues relating to mergers of undertakings. The subgroup on unilateral conduct continued its work producing a guide on the analysis of the abuse of dominant positions.

UNCTAD: The 11th Conference of the Intergovernmental Group of Experts on Competition Law and Policy (IGE) was held from 19 to 21 July in Geneva. The competition authorities were represented by the Director and the President. The matters dealt with at the conference included a presentation and discussion of the results of the Peer Review of Competition Law and Policy in Serbia, which was chaired by the President and funded by SECO. As part of the COMPAL Programme, which has the aim of training and strengthening competition authorities in Latin America, two female trainees from Latin America completed internships of three months each in the Secretariat of the Competition Commission.

EU: Following the approval of a negotiation mandate by the Federal Council in August 2010, the negotiations on an agreement aimed at closer cooperation between the Swiss and European competition authorities began on 25 March 2011 in Brussels. The planned bilateral agreement should ensure that the provisions of cartel law are applied more effectively by both sides. The instrument should also regulate the possibility of the exchange of confidential information. The negotiations were conducted throughout the year, either as face-to-face meetings, video conferences or telephone conferences. The agreement should probably be signed in the first half of 2012.

Bilateral relations: Relations were cultivated in particular with the German, French and Austrian competition authorities. On a working visit by the Ukrainian competition authority to Bern, a memorandum of understanding on cooperation was signed.

Vietnam project: This year the three-year project “Strengthening the Vietnamese Competition Authorities” was concluded. The project had the aim of strengthening and supporting the Vietnamese competition authority (VCA), which was established in 2006. In 2011, an employee of the Vietnamese authority completed a three-month internship in the Secretariat. The project, which was financed by SECO, was subjected to an external audit following its completion.

4 Organisation and Statistics

4.1 Competition Commission

In 2011, the Competition Commission held 18 plenary sessions. At the end of 2011, the four-year term of office of the members of the Competition Commission expired. The members **Vincent Martenet** (President), **Stefan Bühler** (Vice-President), **Evelyne Clerc**, **Andreas Heinemann**, **Andreas Kellerhals**, **Daniel Lampart**, **Jürg Niklaus**, **Thomas Pletscher** and **Johann Zürcher** were re-elected for the period of office 2012-2015.

The following members stood down at the end of 2011 due to the expiry of their maximum term of office or for reasons of age:

- **Martial Pasquier,** Professor at the University of Lausanne, former Vice-President of the Competition Commission;
- **Anne Petitpierre**, Professor Emeritus at the University of Geneva;
- **Rudolf Horber** (Swiss Union of Crafts and Small and Medium-Sized Enterprises).

They were replaced for the 2012-2016 period by the following persons:

- **Winand Emons**, Professor at the University of Bern;
- **Armin Schmutzler**, Professor at the University of Zurich;
- **Henrique Schneider** (Swiss Union of Crafts and Small and Medium-Sized Enterprises).

At the same time as these elections, the Federal Council appointed **Andreas Heinemann**, Professor at the University of Zurich, to be Vice-President of the Competition Commission from 1 January 2012.

Martial Pasquier joined the Competition Commission on 1 July 1998 and was its youngest member at the time. He quickly took on an important role, as a professor of economics with a wealth of practical experience and as the bridge builder between economists and lawyers. As a pragmatist, he wanted to decide on cases efficiently. He always remained true to this role in his 14 years as a member of the Competition Commission. As a member of the former product markets chamber and also later, he stamped his mark on many important decisions made by the Competition Commission. His special concerns included both in-house communication and communication with the public. He made important proposals and brought about changes in communication that have been adopted as standard today. He was always committed to ensuring that the Competition Commission communicated its decisions actively, properly and objectively. Thanks to his achievements, the Federal Council appointed him Vice-President of the Competition Commission at the start of 2011. He leaves the Competition Commission in the knowledge that he contributed a great deal to current practices on the Cartel Act.

Anne Petitpierre was a member of the Competition Commission from the start of 2003. With her comprehensive knowledge of environmental and economic law, she helped to include these disciplines in the way that competition law is applied. She was also a great enthusiast for the concept of interdisciplinarity, a matter she successfully brought into deliberations time and again.

Rudolf Horber (Swiss Union of Crafts and Small and Medium-Sized Enterprises) joined the Competition Commission at the start of 2001. He had an excellent understanding of how to make competition law more relevant to SMEs, adopting the role of ambassador by regularly stressing the fundamentals and goals of competition law and explaining it using practical examples. The appropriate treatment of small and micro-enterprises in the application of the

Cartel Act was always an important concern for him. With of his pragmatic approach, he also made many valuable contributions to the deliberations on demanding cases.

The Competition Commission would like to thank these three members for their efforts and wishes them every success in their professional future.

4.2 Secretariat

A major challenge facing the Secretariat since July 2011 has been how to deal with the failure to pass on foreign exchange benefits. The Secretariat received more than 370 complaints from consumers and businesses. Its aim was to process the reports quickly and where necessary, to open proceedings as pilot projects. To this end, a Task Force was set up in mid-August 2011, in which four persons dealt exclusively with the detailed reports and initiated new proceedings (see 6.1.). However this required a reassessment of priorities as well, because the Task Force was made up of experienced members of staff. The Secretariat received support from the FDEA, which provided additional resources for the four positions in the Task Force until the end of 2011.

As a result of the allocation of new personnel resources from 2012 onwards, the Secretariat will be able to add around ten new employees to its workforce.

At the end of 2011, the Secretariat employed 68 (previous year 62) members of staff (full-time and part-time), 41% of whom were women (previous year 45%). This corresponds to a total of 58.6 (previous year 53.6) full-time positions. The staff was made up as follows: 45 specialist officers (including the Executive Management, corresponding to 40.3 full-time positions; previous year 37.9); 10 (previous year 7) specialist trainees, corresponding to 10 (previous year 7) full-time positions; 13 members of staff in the Resources and Logistics Service, corresponding to 8.3 (previous year 8.9) full-time positions.

4.3 Statistics

Investigations	2011	2010
Carried out during the year	21	20
Carried over from previous year	16	14
Opened	5	6
Final decisions	6	5
Amicable settlements	1	3
Administrative rulings	4	2
Sanctions under Art. 49a para. 1 Cartel Act	2	3
Procedural rulings	3	7
Precautionary measures	1	2
Sanctions proceedings under Art. 50 et seq. Cartel Act	0	0
Preliminary investigations		
Carried out during the year	40	22
Carried forward from previous year	12	15
Opened	28	7
Concluded	27	13
Investigations opened	1	3
Modification of conduct	7	6
No consequences	18	4
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	22	13
Advice	39	56

Market monitoring	62	105
Reports of failure to pass on foreign exchange benefits	371	n.a.
Other enquiries	566	374
Mergers		
Notifications	30	34
No objection after preliminary examination	29	29
Investigations	1	1
Decisions of the Competition Commission	1	1
after preliminary examination	0	0
after investigation	1	1
Early implementation	1	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	11	14
Judgments of the Federal Administrative Court (Federal Administrative Court)	1	8
Success for the competition authority	1	6
Partial success	0	1
Judgments of the Federal Supreme Court	1	0
Success for the competition authority	0	0
Partial success	0	0
Pending at the end of year (before Federal Administrative Court and Federal Supreme Court)	9	9
Expert reports, recommendations and opinions, etc.		
Expert reports (Art. 15 Cartel Act)	1	0
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act or 11 TCA)	1	2
Follow-up checks	3	0
Notices (Art. 6 Cartel Act)	0	2
Opinions (Art. 46 para.. 1 Cartel Act)	219	177
Consultation proceedings (Art. 46 para. 2 Cartel Act)	8	5
IMA		
Recommendations / Investigations (Art. 8 IMA)	0	0
Expert opinions (Art. 10 I IMA)	1	2
Explanatory reports (Secretariat)	26	19
Appeals (Art. 9 para. 2^{bis} IMA)	1	2

The statistics show that there were no significant changes in comparison with the previous year in the case of investigations, mergers, appeals, expert opinions, etc. and Internal Market Act procedures. The number of investigations conducted has remained constant, although there can be major differences in the workload involved in different investigations, depending on whether they relate to simple or complex allegations and whether they can be concluded with an amicable settlement or by ordinary proceedings.

Notable differences from the previous year can be seen firstly in the case of the preliminary investigations. There account must be taken of the numerous and complex preliminary investigations in the optical fibre dossier. Secondly there were the complaints about the failure to pass on foreign exchange benefits and other related enquiries, which involved dealing with a large number of reports (in total over 900).

5 Revision of Cartel Act – Current Status of the Work

On 25 March 2009, the Federal Council approved its report to Parliament on the evaluation of the Cartel Act, as required by Article 59a of the Cartel Act, and delivered its opinion on the measures to be taken. Subsequently, on 30 June 2010, the Federal Council began the **first consultation procedure on the partial revision of the Cartel Act**. This consultation stage covered six points: an institutional review of the competition authority, the improvement of the opposition procedure, the revision of the procedure for vertical agreements, the enhancement and simplification of merger control, creating a legal basis for better cooperation with the foreign competition authorities and the consolidation of the civil procedure relating to cartel law.

At the same time as the evaluation and the follow-up work which led to the first Cartel Act revision bill, Parliament considered the **Schweiger motion** (07.3856) on "Competition Law: A balanced and more effective system of sanctions". This calls firstly for a sanctions reduction based on compliance programmes (programmes ensuring that the provisions of cartel law are respected), and secondly, the introduction into the Cartel Act of criminal penalties for private individuals. Based on a legal opinion prepared by the professors of criminal law Günter Heine, from the University of Bern, and Robert Roth, from the University of Geneva, together with work carried out within the Administration, the Federal Council, some months after the definitive submission of the motion, opened **a second consultation** which began on 30 March 2011 and was completed on 6 July 2011. It declared its willingness to implement the first part of the motion, i.e. the reduction of sanctions imposed on companies that take compliance measures, but expressed its reservations with regard to the introduction of criminal penalties against private individuals, whether as administrative measures (prohibition from practising a profession and forfeiture of financial benefits such as bonuses), or as criminal sanctions (monetary penalties or custodial sentences).

Following the significant rise in the value of the Swiss franc, certain sectors, in particular the export industry, experienced economic difficulties. This worrying situation led the Federal Council to decide on 17 August 2011 to intervene with a series of measures intended to support the Swiss economy. The proposed measures included moves to stimulate competition in Switzerland by guaranteeing the better passing on of the reduced costs obtained by companies by making purchases abroad. Agreements between companies can effectively obstruct such an effect, thus damaging domestic competition, since they prevent companies active in the Swiss market or in the export industry and final consumers from benefiting from foreign exchange gains. As a result, the Federal Department of Economic Affairs (FDEA) was handed the responsibility for preparing an amendment to Article 5 of the Cartel Act, in order to introduce a more effective ban on horizontal agreements on price fixing, quantitative restrictions and the allocation of territories, as well as vertical agreements on prices and territorial foreclosures, while allowing parties concerned the opportunity to justify their conduct. In order to guarantee the swift implementation of the amendments, the **third consultation round** on the revision of Cartel Act was begun on 23 September 2011 and took place as a conference on 5 October 2011. The participants invited to the conference were also given the opportunity to submit a written statement of their position.

Based on the results of the consultation procedure, on 16 November 2011 the Federal Council set out the basic parameters for the revision of the Cartel Act and instructed the FDEA to prepare a dispatch to Parliament on the revision of the Act by the start of 2012. The parameters for the revision are as follows:

- institutional reforms making the competition authority an institution of the decentralised Federal Administration and establishing a Competition Court as a chamber of the Federal Administrative Court; reduction of the number of stages of appeal in proceedings;

- Amendment of Article 5 of the Cartel Act (partial prohibition of cartels with the possibility of justifying horizontal price, quantity and territorial agreements and vertical territorial foreclosures and price fixing agreements);
- Increase in opportunities to bring private actions (extending the right to bring legal proceedings to end customers);
- Change in assessment criteria for the merger control procedure (introduction of the SIEC test) combined with a relaxation of regulations on undertakings in the case of mergers with defined international markets and in relation to deadlines (harmonisation with conditions in the EU);
- Reduction of sanctions where there are suitable programmes to ensure compliance with the provisions of cartel law (compliance programmes);
- Improvement of the administrative appeal procedure (reduction of the filing period to two months, possibility of sanctions being revived only on the opening of an investigation).

6 Special Issues in 2011

6.1 Failure to pass on foreign exchange benefits

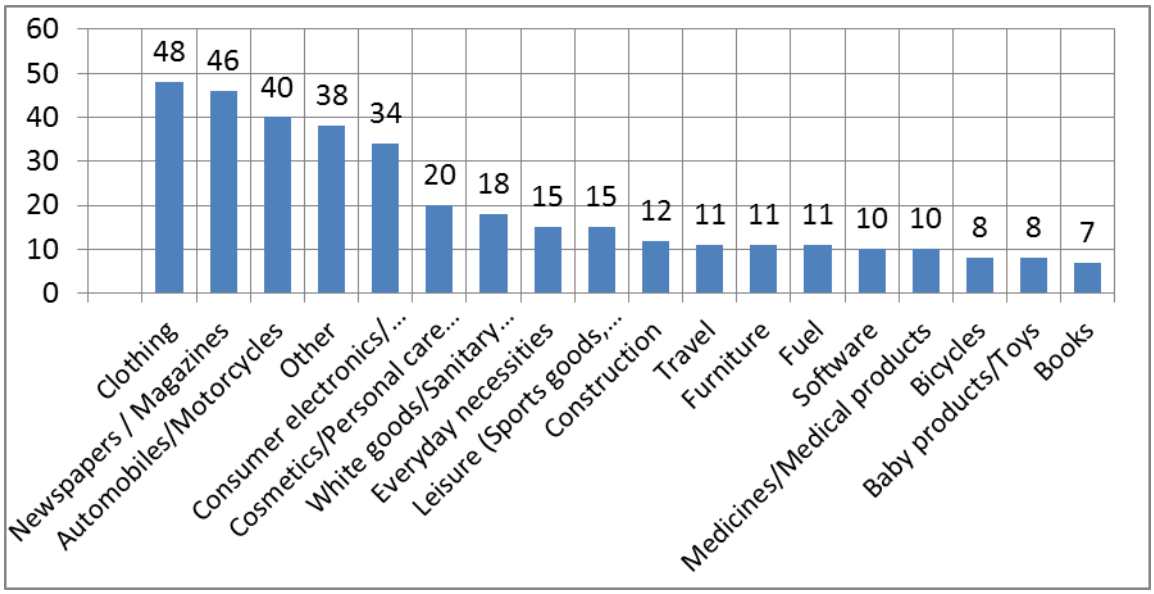
6.1.1 Development of the situation

In the Annex to its Annual Report for 2010 (RPW 2011/1) under the title “Problem caused by the failure to pass through foreign exchange benefits in full and opportunities to intervene under competition law”, the Competition Commission outlined the difficulties caused by the falling value of the Euro and explained what action the competition authority could specifically take. This is limited to intervening in cases of the abusive use of market power and of agreements affecting competition that foreclose markets. It also gave a variety of reasons why changes in the exchange rate do not automatically and quickly lead to equivalent changes in consumer prices. It was more often the case according to the 2010 Report that only part of the foreign exchange gains passed through to the consumer, and in most cases there was a delay before this happened.

As a result of the exchange rate developments in the summer of 2011, the Secretariat was confronted with of a growing number of reports. The majority (85%) came from consumers. The reasons for this high number included the fact that the €/CHF exchange rate had reached an all-time low – on 10.08.2011, the €/CHF rate of exchange fell below 1.03 – and the request made by the Competition Commission in the media for the public to report specific cases of companies failing to pass on foreign exchange benefits. In addition, at the beginning of August, the Competition Commission made a form for “Incomplete passing on of exchange rate benefits” available on its website on its Services page. A “Strong Franc Task Force” was also set up (comprising 4 members) in order to devote suitable attention to this important problem and make sufficient resources available. In the initial phase, further action on the matter also had to be coordinated in-house.

The Task Force recorded all the reports in one place and then, following a cursory assessment, allocated them both according to sector and to the potential violations. From these categories, sample cases were taken up and, depending on the available evidence, continued as market monitoring procedures, preliminary investigations or investigations. The work also included drawing up regular progress reports for submission to the Director.

In order to illustrate the main concerns among the general public, the following graph shows the reports received according to sector:



A large number of complaints related to magazines. In most of these cases, the complaints were about price differences between Switzerland and its neighbouring countries. The Cartel Act offers no solution in such cases because they almost always involve matters agreed within corporate groups. In order to examine the question of whether a company with market power might be guilty of abusing prices, such reports were passed on by mutual consent to the Price Supervisor, which has been actively examining the magazine industry since the start of 2011.

The complaints relating to clothing also predominantly related to price differences between Switzerland and its neighbouring countries. Depending on the quality of the evidence, the competition authorities conducted investigations in certain cases, particularly where reputable foreign manufacturers were involved. To this end, several market monitoring procedures were begun because the reports received did not on their own make it possible for the competition authorities to begin formal proceedings (preliminary investigation or investigation). These market monitoring procedures have still to be concluded.

In addition, it may be said of the complaints received that it was members of the public in particular who wanted to bring potential irregularities to the attention of the competition authorities, but the allegations in most cases were not backed up by sufficient evidence, not sufficiently documented or not documented at all. In those cases where there was clear evidence of restraints of competition, the competition authorities carried out further investigations, which were highly detailed in some cases. In relation to certain complaints, the Secretariat checked the alleged price differences and established that they were not actually as high as claimed (for example in the case of Nivea Cream). In every case, the member of the public concerned was sent a summary of the legal assessment of the case.

In the sectors for automobiles/motorcycles, consumer electronics/electronic equipment, cosmetics/personal care products, white goods/sanitation, leisure, travel, everyday goods, construction, software, bicycle and baby goods, the competition authorities took action in response to complaints from members of the public. Further information on the resultant proceedings is given in the next Section.

6.1.2 Proceedings

Last year, the Competition Commission made two landmark rulings on the issue of market foreclosure. In the first, it fined NIKON for obstructing parallel imports and thus reaffirmed its practice in the Gaba decision (both rulings have yet to become legally binding; the Federal

Administrative Court has still to rule on the appeal filed by Gaba at the start of 2010). In the second decision, in the investigation into online trading, it underlined that restrictions of online trading are permitted only subject to very strict competition law requirements. This also applies to cross-border online trading.

Based on complaints made by members of the public and professionals, as well as the results of market monitoring, the Secretariat of the Competition Commission on 22 November 2011 searched of the offices of the **Schweizerischer Grosshandelsverband des Sanitären Branche (SGVSB) and five sanitary equipment wholesalers** in Switzerland. There were specific indications that the companies concerned had entered into price and territorial agreements.

A number of reports were received from members of the public and from businesses relating to **Jura Elektroapparate AG**. Usually these criticised Jura's warranty policy, which basically prevents unauthorised retailers from providing services under the warranty. The reports primarily related to products that had either been purchased online or in other European countries. There were clear indications that parallel imports were being restricted. A related investigation was opened on 26 October 2011.

In relation to **cosmetic products**, the Secretariat opened an investigation on 26 October 2011 into Care on Skin GmbH for a possible restriction of parallel imports and of online trading. Beauticians claimed that they were prohibited from buying **Dermalogica** products via online shops. It is also impossible to import the products into Switzerland from neighbouring countries. In one other case, despite some evidence, the allegations were regarded as insufficiently substantiated. Accordingly, in October a preliminary investigation was opened into another distributor of cosmetic products. Lastly, two market monitoring procedures are being carried out in relation to nail cosmetics and body care products.

On 25 October 2011, a preliminary investigation was opened into various market participants in response to allegations that they are influencing **pricing in online shops** and in particular the prices published on comparison sites. The exertion of such influence could constitute a retail price maintenance agreement, which according to the recently published Competition Commission ruling on the restriction of online trading (see above Section 3.1.1) is regarded as particularly problematic.

In connection with **online trading,** reports also led to two market monitoring procedures being started in the sports clothing and sports shoes sectors and in relation to software.

A preliminary investigation was opened into a well-known Swiss **electric bicycle manufacturer** in October due to indications of price fixing agreements. The competition authorities obtained information that the manufacturer is putting pressure on retailers to determine their pricing policy. In addition, a market monitoring procedure is ongoing due to a possible foreclosure of territory by another Swiss bicycle manufacturer.

Many members of the public have complained to the competition authorities that **motorcycles and spare parts** manufactured by the well-known American company Harley Davidson cannot be purchased on the Internet, in neighbouring countries or in the USA itself. As a result, a preliminary investigation was opened in November.

In the past six months, based on complaints from members of the public, **market monitoring procedures were also opened in relation to the following products**: printer cartridges, air conditioning equipment, pet accessories, baby milk and prams and pushchairs. It should be added that a preliminary investigation was opened into the secondary construction industry in September on suspicion of an absolute territorial foreclosure arrangement by a northern European manufacturer. This preliminary investigation was successfully concluded by modifying the distribution agreement.

In response to the strong franc, Federal Councillor Schneider-Ammann held a round table on 10 August 2011 with participants including representatives of food retailers. They claimed that they were dependent on certain (multinational) brand product suppliers to the extent that specific brand products had to be included in their range if they were to prevent the loss of customers. In relation to these products – known as **must-stock products** – the local retailers were bound by the prices dictated by the suppliers and were unable to exercise any effective pressure in order to obtain lower (Euro compatible) cost prices.

The Secretariat has invited the main food retailers to provide the relevant information immediately so that a competition law assessment can be made of their allegations. The food retailers have yet to respond to this offer. They have justified this in part by saying that in the meantime numerous multinational producers have reduced their sales prices in the Swiss retail trade and thus allowed Swiss customers to enjoy the foreign exchange benefits resulting from the strong Swiss franc.

In addition to the proceedings mentioned, reports have been received that are currently being examined by the competition authorities and which may lead to further proceedings being opened where there is evidence of unlawful restraints of competition. In view of the heavy workload incurred due to the proceedings already opened, any new cases that have to be opened will be placed on hold.

There are also **ongoing investigations** relating to cases in which the Swiss market is allegedly being foreclosed, retail prices imposed or Switzerland is being further established as an "island of high prices" by other unlawful means. In this connection, special mention should be made of the ongoing proceedings against BMW and Roger Guenat SA (alpine sports products) (see Section 3.1.1).

6.1.3 Current situation

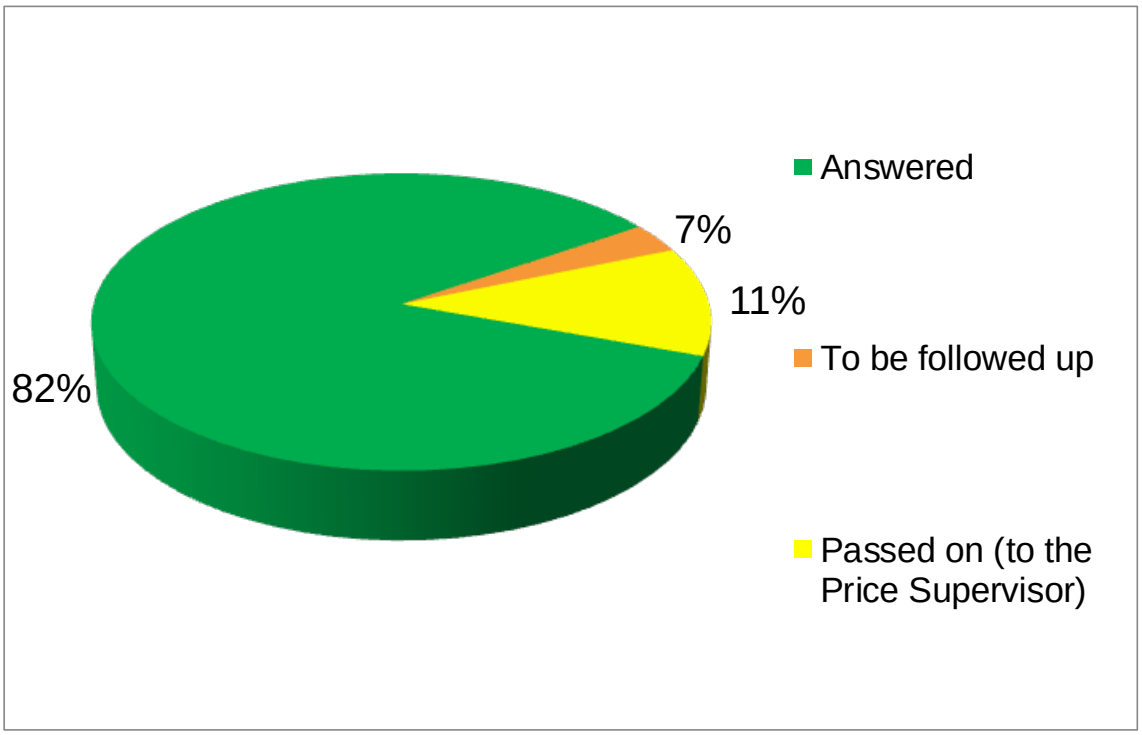
As already explained, the Secretariat still regularly receives reports but there has been a substantial reduction in the number of these. This is certainly due to the intervention of the Swiss National Bank (SNB) on 6 September 2011, although according to the SNB, the franc is still overvalued at an exchange rate of 1.20[1]. A further weakening of the franc in relation to the Euro or a "normalisation" of the exchange rate would further ease the problem.

However, in certain sectors there are indications that lower purchase costs are finally being reflected in lower prices for consumers (according to figures from the Federal Statistical Office, Swiss import prices fell from December 2009 to November 2011 on average by 6 %, excluding commodities and other products with highly fluctuating prices). Here mention should be made, for example, of discounts in the automotive sector.

In addition, it has become apparent that businesses can on their own initiative ensure that exchange rate benefits are passed on to the retail trade and customers, provided they are willing to take appropriate measures. A prominent example is the Coop's desourcing campaign.

[1] http://www.snb.ch/de/mmr/reference/pre_20110906/source/pre_20110906.de.pdf

As of 22 December 2011, progress with processing the reports received was as follows:



6.2 Proceedings relating to optical fibre cooperation

In 2011, **optical fibre cooperation projects** were also a priority for the Secretariat. Various regional energy supply companies and Swisscom had agreed to jointly construct future-oriented optical fibres networks in certain Swiss cities. This cooperation makes it possible to share the investment risk and reduce the construction costs due to a more efficient use of cable ducts. Accordingly, the Secretariat welcomed in principle the cooperation on the construction of the optical fibre infrastructure. At an early stage, however, there were signs that the cooperation could include unlawful agreements affecting competition. In the long-term, this might adversely affect the desired competition in operating future telecommunication networks.

In view of this, in the late summer of 2010 the city of St.Gallen notified specific clauses of its cooperation agreement with Swisscom under Article 49a paragraph 3 letter a of the Cartel Act. By January of the year of this Report, further notifications were made for the cities of Geneva, Zurich, Bern and Basel. Swisscom submitted its own report a short time later. The only joint report was made for the city of Lucerne by Energie Wasser Luzern and Swisscom. As a result, by spring 2011 the Secretariat was conducting objection proceedings in eleven cases relating to the optical fibre cooperation projects. Added to these was the planned establishment of a joint venture by Swisscom and Groupe E for the construction of an optical fibre network in the Canton of Fribourg as well as various complaints from third parties against the operators of the optical fibre networks.

By filing the report, the cities and Swisscom wanted to find out whether they might face competition law sanctions with regard to the cooperation agreements. They therefore submitted individual contract clauses that were potentially problematic for assessment. The objection

proceedings focused on three contract clauses in particular, which were found in various forms and combinations in the cooperation agreements: with “Layer 1 exclusivity”, Swisscom dispensed with offering naked optical fibres to other suppliers of telecommunications services; at the same time Swisscom was able through “investment protection” to control the price of this monopoly offer made by the energy supply companies; the “compensation mechanism” further allowed the cooperation partners to make a subsequent balancing adjustment of the share of the investment based on their actual use of the optical fibre network. If there are indications of a restraint of competition, the notification procedure meant that the Secretariat or the Commission had to open ordinary proceedings within the statutory five-month deadline, otherwise the reported restraints of competition would have been permanently exempt from competition law sanctions. The Secretariat thus had to answer the question of whether an exemption from sanctions could be granted in respect of the reported contract clauses for the entire term of the cooperation agreements of 30 to 40 years.

The partners have chosen a multiple fibre model for the optical fibre project, which should theoretically make competition possible in the optical fibre network. At the same time, however, they incorporated clauses in their agreements that could seriously affect the subsequent operation of the optical fibre networks. While some of the notified contract clauses were unobjectionable, in the opposition proceedings the Secretariat was unable, particularly in the case of the three key clauses, to rule out an elimination of effective competition. For this reason the Secretariat successively opened preliminary investigations relating to the optical fibre cooperation projects in the cities of St.Gallen, Geneva and Zurich. In April 2011, the Secretariat finally decided to begin a preliminary investigation into all the objection proceedings still ongoing. This meant that the Secretariat could merge the various proceedings and deal with them more quickly. For the partners, the opening of the preliminary investigation meant that they continued to run the risk of competition law sanctions being imposed.

In the preliminary investigation, a detailed market analysis including questioning significant market participants revealed that the “market for access to the physical network infrastructure with optical fibre-based transmission speeds” constituted an independent market. This definition of the market was based not only on information provided by trading partners and specific, mainly technical aspects of network access, but also on the structure of the cooperation agreements and the behaviour of the partners themselves. In the preliminary investigation, the Secretariat concluded that the clauses mentioned could constitute unlawful agreements on quantities and prices as well as on the allocation of markets according to trading partners within the meaning of Article 5 paragraph 3 of the Cartel Act. In the case of such agreements, the Cartel Act makes the presumption that effective competition is eliminated. Based on the definition of the market carried out and the market analysis conducted, it was not possible to rebut the statutory presumption of the elimination of effective competition. The proceedings in question also had the special feature that certain contract clauses were liable to an ex-ante competition law assessment, long before they could have any effect on the market. According to the case law of the Federal Supreme Court, however, it can only be conclusively ascertained retrospectively whether there are actually any unlawful agreements affecting competition that carry competition law sanctions.

On 5 September 2011, the Secretariat submitted its analysis of the critical contract clauses in the final report on the preliminary investigation. According to the final report, these contract clauses constitute price and quantity agreements and are also agreements on the allocation of markets according to trading partners. From an ex-ante perspective, there is at least a risk that effective competition will be eliminated. Based on the final report, the partners are now aware of what practices could be problematic in competition law terms and of the basis on which the Secretariat would assess the reported restraints of competition in any investigation. The Secretariat has however not prohibited the critical contract clauses given the ex-ante character of the procedure chosen by the parties. The partners can better assess the risk of competition law sanctions and bear personal responsibility for structuring their cooperation agreements in compliance with competition law. The Secretariat was unable to grant

an exemption from the threat of sanctions in respect of the optical fibre cooperation projects. If the partners require additional guarantees for their substantial investments, they can only secure these by persuading Parliament to enact corresponding regulations.

In the autumn of 2010, initial meetings were held with the individual cooperation partners in parallel with the Secretariat's investigations, at which the Secretariat signalled its concerns with regard to the notified contract clauses. By the summer of the year of this Report, further meetings had been held. Despite the concerns expressed by the Secretariat following the objection proceedings, the partners initially showed no willingness to modify the cooperation agreements. At the same time, it proved increasingly difficult as the preliminary investigation progressed to fulfill the statutory requirements for an exemption from sanctions. Ultimately it was not possible to achieve a modification of the cooperation agreements which was acceptable to the partners, which would have taken account of the Secretariat's concerns, and which would have been accepted by the parties.

In connection with the optical fibre dossier, the Secretariat had to deal with continual and in some case highly critical reports in the media. At the same time, due to the involvement of the cities and Swisscom, there were major expectations in the political world. The Secretariat therefore communicated its views on the optical fibre dossier very actively from the outset, both to the general public and to the telecommunications industry. It proved a major challenge to explain such technically and economically demanding issues as well as the complex procedure in an understandable way – in part due the confidentiality of many aspects of the case.

Following publication of the final report, various partners eventually made substantial changes to the cooperation agreements. First of all, Industrielle Werke Basel and Swisscom, agreed to dispense with "Layer 1 exclusivity" and "investment protection"; at the same time they agreed to amend the "compensation mechanism" to take account of the analysis in the final report. The cooperation in Basel paved the way for the other cities to revise their cooperation agreements to bring them in line with competition law requirements. By the end of the year, other cities announced the amendment of their cooperation agreements. The Secretariat welcomes these amendments. However, the threat of sanctions continues to apply.

In view of both the economic and political importance of the construction of the optical fibre infrastructure in Switzerland, the Secretariat of the Competition Commission expects the optical fibre sector to be a permanent priority. It is crucially important that competition in the future network for cable-based communications is not restricted from the very outset.