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To the Federal Council

Annual Report 2012 of the Competition Commission

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

028.5/2009/00031/COO.2101.111.5.259686

Table of Contents

1 Foreword from the President

Once again in 2012, the Competition Commission and its Secretariat conducted important proceedings and made significant decisions in the course of their main duties. These related in particular to two themes: freedom to set prices and market foreclosure.

The **freedom to set prices** according to supply and demand is a key feature of a free market economy. If businesses consciously and intentionally choose not to set their prices according to this principle and instead set or manipulate prices in concert, we talk of price-fixing agreements. Such agreements can take a variety of forms, as we discovered last year. In the investigation into road construction and civil engineering in the Canton of Aargau (decided in December 2011, announced in January 2012), the Competition Commission detected a large number of separate cases of bid rigging. The companies involved gave the impression to the agencies inviting bids that there was competition among bidders, although the bidders had already agreed with each other on the price and the company that would be awarded the contract. In the investigation into the tariffs recommended by Neuchatel real estate agents, the Competition Commission found that the recommended prices were followed to a considerable extent and that customers accordingly did not pay prices based on their individual cases, but had to pay a flat-rate price. And in the investigation into alpine sports products, the Competition Commission successfully proved that an importer unlawfully limited the freedom of the retailers it supplied to set their own prices by dictating the maximum discount that they could offer.

For Switzerland, a small economy that already has high price levels, **market foreclosures** are harmful because they reduce the competitive pressure from abroad on prices, thus helping to ensure that Switzerland remains a “high price island”. Where these market foreclosures relate to agreements between undertakings, the Competition Commission consistently intervenes. Because the car manufacturer BMW prevented Swiss customers from importing BMW and MINI vehicles directly into Switzerland, the Competition Commission fined it CHF 156 million. Likewise the association for the Swiss music industry, the IFPI, was fined because it required its members not to make parallel imports. These examples show that one of the main functions of the competition authority is to open up markets and keep them open. Consumers should be free to make their own decisions as to where they want to buy products at the cheapest prices, whether this is in Switzerland, abroad, in a specialist shop or on the Internet. If on the other hand market foreclosures are based on statutory regulations, such as those relating to meat or other foodstuffs, the competition authority cannot open up the markets. It can however make related recommendations to government bodies. It is then for Parliament to decide whether a case of market foreclosure is based on an overriding public interest or can be eliminated in the interest of having open markets.

In the report year, further cases were opened in response to allegations of suspicious activities. The Libor investigation related to allegations of the concerted manipulation of the Libor interest rate; in the investigation into roads, civil engineering and construction in the Lower Engadin, there are suspicions of bid rigging, and in the investigation against Steinway & Sons there are indications that parallel imports are being prevented and that there are price-fixing agreements between Switzerland’s retailers of grand pianos and other pianos.

The Competition Commission and its Secretariat will continue to pursue these two most harmful forms of restraints of competition as a top priority.

Prof. Vincent Martenet
President of the Competition Commission

2 Most Important Decisions of 2012

The most important decisions taken by the Competition Commission and the appeal courts in 2012 are summarised below in chronological order. Details of the individual decisions are provided in Sections 3.1-5.

On 27 February 2012, the Competition Commission issued a recommendation based on the Internal Market Act (IMA) relating to the **market access rights of non-local taxi companies**. The power to regulate the taxi trade lies in the hands of individual cantons and communes. This leads to a wide range of different regulations and complicates taxi transport between different communes. The Competition Commission highlighted the example of the taxi regulations in the cantons of Bern, Basel-Stadt, and Basel-Landschaft and in the cities of Zurich and Winterthur to show which regulations prevented reciprocal access to cantonal and communal markets and thus violated the IMA. The recommendation issued by the Competition Commission indicated what a taxi company should be able to do outside its local commune and the requirements under which a commune must issue an operating licence to a non-local taxi company.

In a decision dated 7 May 2012, the Competition Commission imposed a sanction of CHF 156 million on **BMW AG** due to foreclosure of the Swiss market for BMW and MINI automobiles. BMW AG had inserted a clause in contracts with dealers in the European Economic Area (EEA) to prevent direct and parallel imports into Switzerland. Under this clause, authorised dealers in the EEA were prohibited from selling new BMW and MINI vehicles to customers outside the EEA and thus in Switzerland as well. In the second half of 2010, the Competition Commission received numerous complaints from end customers in Switzerland who had tried unsuccessfully to buy a new BMW or MINI in the EEA. Over this period, the value of the Swiss franc rose considerably against the euro, thus making purchases in the Eurozone more attractive. As a result of the contractual clause, customers in Switzerland were unable to benefit from substantial exchange rate benefits. Due to the value of the goods concerned, these advantages for individual consumers would have been considerable. The foreclosure of the Swiss market also led to reduced competitive pressure on retail prices for new BMW and MINI vehicles in Switzerland. BMW has filed an appeal against the decision in the Federal Administrative Court.

The Federal Supreme Court handed down an important judgment on 29 June 2012 in the case against **Publigroupe**. Specifically, it confirmed the legality of the procedure before the Competition Commission, above all in the light of procedural guarantees under the European Convention on Human Rights (ECHR). It also upheld the decision of the Competition Commission in substantive legal respects and dismissed the Publigroupe appeal. The Competition Commission's decision, which also involved a sanction of CHF 2.5 million being imposed on Publigroupe, thus becomes legally binding and will be authoritative in relation to procedural objections in pending appeal proceedings before the Federal Administrative Court.

In its decision of 2 July 2012, the Competition Commission held that the application of tariff recommendations on administrative costs for real estate management in Neuchatel violated the Cartel Act. The **Union Suisse des professionnels de l´immobilier (USPI-Neuchâtel)** (Neuchatel Section of the Association of Real Estate Agents) stated its readiness to withdraw their tariff recommendations. The Competition Commission took account of this and imposed a reduced sanction. In its decision, the Competition Commission approved the amicable settlement, while holding that the tariff recommendations constituted an unlawful agreement affecting competition in real estate management sector. On average more than one third of the members of the Association actually followed the recommended prices. In relation to certain recommendations, the level of compliance was even higher than 50 per cent. The decision of the Competition Commission has become legally binding.

On 16 July 2012, the Competition Commission imposed a fine of CHF 3.5 million on **IFPI Switzerland**, the umbrella organisation for manufacturers of sound and audiovisual recording media (e.g. CDs) in Switzerland, due their obstruction of parallel imports. **Phononet AG** was fined CHF 20,000 for the same reason. In an amicable settlement, the two companies have undertaken not to demand the signing of waivers of the right to make parallel imports and not to obstruct or prevent parallel imports of physical sound and/or audiovisual recording media (e.g. CDs). The investigation revealed that in the course of association activities, members of IFPI Switzerland had agreed not to make any parallel imports into Switzerland of sound and/or audiovisual recording media manufactured by other IFPI members. Through its conduct, Phononet AG, which forms a link between retailers, the media and industry, supported the effect of this agreement. The decision has now become legally binding.

On 20 August 2012, the Competition Commission fined Altimum SA CHF 470,000 for retail price fixing in relation to **alpine sports equipment**. Altimum SA (at the time Roger Guenat SA) had dictated minimum sale prices to retailers for alpine sports equipment (headlamps, harnesses, helmets, ice axes, etc.) of the Petzl brand, thus preventing any genuine price competition among retailers in Switzerland. The investigation revealed that competition in Switzerland had been seriously affected at least from 2006 until the end of 2010. Altimum has filed an appeal with the Federal Administrative Court.

On 11 December 2012, the Competition Commission imposed a total of CHF 6.2 million in fines on the **transport companies** Agility Logistics International BV, Deutsche Bahn AG/Schenker, Kühne + Nagel International AG and Panalpina Welttransport (Holding) AG. Deutsche Post AG/DHL, which had initiated the proceedings by making a voluntary report, benefited from complete immunity from sanctions. At the same time, the Competition Commission approved amicable settlements with all the companies and with the Spedlogswiss association. The investigation revealed that from 2003 to 2007, the transport companies had agreed and coordinated certain fees and surcharges for international air freight transport. Using the practices relating to the introduction and implementation of fees and surcharges specifically for Switzerland and those relating to international surcharges as evidence, the competition authority was able to prove the existence of a horizontal price-fixing agreement between the transport companies. The Competition Commission decision has taken full legal effect.

3 Activities in Individual Fields

3.1 Construction

3.1.1 The Construction Division opens for business

On 1 September 2012, a new division was created. The Construction Division– previously part of the Product Markets Division – deals with restraints of competition in the construction and procurement industries as well as in environment-related matters. In the construction industry, building construction, civil engineering, road construction and building installations are the main focus, but the finishing trades (for example electrical and plumbing work) and construction materials are also included. Competition law proceedings relating to the construction industry primarily concern horizontal agreements between companies. The Construction Division also deals with legal and economic issues relating to procurement, contract bidding and the environment. It will also be campaigning to secure competition-friendly legal provisions in the law on public procurement (for example in relation to Swiss adaptation to the revised GPA).

3.1.2 Investigations

The investigation into **door products** was continued as planned. At the beginning of 2012, questionnaires were sent to the subjects of the investigation. In the summer of 2012, the Secretariat held hearings to take evidence. Currently the Secretariat is examining additional documents requested from the parties. The motion to the Commission is planned for spring 2013.

The investigation into **bathrooms** begun on 22 November 2011 also proceeded as planned. After questionnaires had been sent out and physical and electronic data obtained during searches of premises was examined, in autumn 2012 several interviews were held with parties and witnesses. The next step is to draft the motion to the Commission and then serve it on the parties.

The investigation into **road and civil engineering in the Canton of Zurich**, opened in June 2009, was extended at the end of May 2012 to include the parent companies. The investigations were subsequently concluded and the motion served on the parties in mid-November 2012. The hearings before the Competition Commission are planned for spring 2013.

The investigation opened at the same time relating to bid rigging in **road and civil engineering in the Canton of Aargau** was concluded with a ruling issued by the Competition Commission dated 16 December 2011. Certain details in the ruling were anonymised (it is not possible to identify specific projects) and it was published in early May on the Competition Commission website. Subsequently, various project clients requested access to information on the projects concerned. Consideration is still being given as to whether and if so to what extent such access can be granted and a ruling on this will probably be issued in spring 2013.

On 30 October 2012, the Secretariat opened the **Lower Engadin construction investigation** into various companies operating in the sector for road, civil engineering and building construction and surfacing work as well as the upstream markets in the Canton of Graubünden and in this connection conducted searches of premises. The Secretariat has obtained evidence of agreements affecting competition in which several companies in these sectors in the Lower Engadin made arrangements intended to coordinate the award of contracts and to allocate construction projects and customers.

3.1.3 Appeal proceedings

The investigation into **builders' supplies for windows and French doors** was concluded with a decision dated 4 November 2010. Three companies appealed against the decision to the Federal Administrative Court. In June 2012, instruction hearings were held in the Federal Administrative Court in this connection, after which the Secretariat was formally requested by the Federal Administrative Court to answer various questions. The Secretariat filed written answers to the questions in July 2012. The appeal proceedings are continuing.

Four companies have filed appeals in the Federal Administrative Court against the Competition Commission's ruling of 16 December 2011 concerning bid rigging relating to **road and civil engineering in the Canton of Aargau**. The appeal proceedings are still pending. Eleven companies have accepted the decision, which is now legally binding on them.

3.1.4 Informal meetings, market monitoring procedures and advisory activities

The revised CO_2 Act provides in its Article 27 that persons liable to pay tax under the Mineral Oil Tax Act of 21 June 1996 (SR 641.61) may join to form compensation groups. The Secretariat has met with the **Swiss Oil Association** to obtain information on plans to set up a single "compensation group for certificates" that will in principle be for all fuel importers. The Secretariat has stipulated that a single compensation group must be organised so that the

uniform passing on of CO_2 compensation costs to the consumers – as a result of the participation of all fuel importers – is prevented.

In connection with a German rail cartel case in which the companies concerned were ordered to pay sanctions totalling € 124.5 million, the Secretariat held an informal meeting with the **SBB** at the end of October 2012. Discussions focused on whether Switzerland could be affected by similar arrangements, but there were no indications that this was the case. The Secretariat stated in particular that the conduct of bidding procedures can basically remain unaffected by the competition law investigations of the competition authorities.

In addition, between mid-November and mid-December 2012, the Secretariat monitored the market during the bidding process for a contract for overhead conductor rails as part of the NRLA **Ceneri Base Tunnel** railway project. It was suspected that the conclusion of an exclusive agreement – for a product that is an essential element in the bidding process – could amount to an unlawful agreement or practice by a dominant company. The Secretariat made enquiries and conducted a series of meetings with the company inviting bids, AlpTransit Gotthard AG, Lucerne, as well as with companies which are party to the exclusive agreement. The meetings served to assuage the initial suspicions.

3.1.5 Prevention and information

Combating bid rigging has since 2008 been one of the Secretariat's priority activities. This focus area is based on the following three pillars: prevention and information, exposing malpractice, and ultimately the prosecution of bid rigging agreements (cf. Annual Report 2009, RPW 2010/1, p. 2).

In the area of "prevention and information", the Secretariat held events in the cantons of Fribourg, Vaud and Geneva. These serve to raise awareness, allow professionals to exchange views and bring about a better understanding of the procedures and instruments used by the competition authority in combating bid rigging. The events met with a positive response among cantonal and communal procurement agencies. They built on the experience gained from staging similar events in German-speaking Switzerland in previous years.

In relation to the "exposure of bid rigging", the Secretariat presented the results of its project on "exposure of bid rigging using statistical methods" to the cantonal procurement agency concerned. This pilot project involves the evaluation of data from the minutes of bid opening procedures. Based on suitable statistical methods, abnormalities in bids that could suggest collusion were investigated. This pilot project could be extended in future to include further cantons.

3.2 Services

3.2.1 Financial services

In the debit card sector, the Secretariat concluded a preliminary investigation entitled **Acquiring fees for Maestro transactions**. The subject of the preliminary investigation was the introduction of two new fees by MasterCard Europe SPRL: the Maestro Volume Fee (MVF) and the Maestro Development Fund (MDF). The MVF is a licence fee for the use of the "Maestro" brand name and for the provision and administration of the Maestro system (a "brand fee") charged by MasterCard and based on the acquiring turnover. The Secretariat held that it is not unlawful, even for a company with a very strong position in the market like MasterCard, to charge contractual partners licence fees. As far as the level of the MVF was concerned, the Secretariat found no indications that this would be systematically inflated, especially as the MVF is set at the same level for the entire SEPA (Single Euro Payments Area). The MDF is a fee charged by MasterCard that is based on domestic acquiring turnover. MasterCard is supposed to reinvest the entire fee in order to fund innovation projects by the acquirers. The Secretariat came to the conclusion that due to the comparatively low level of

the fee and the fact that the revenue was supposed to be reinvested in its entirety with the acquirers, the MDF can hardly be regarded as unfair under Article 7 paragraph 2 letter c of the Cartel Act. In particular, the MDF fee was considered too low to be regarded as a replacement for the Maestro Interchange Fee, which was problematic under competition law.

In the investigation into **credit card interchange fees**, the Secretariat took note of the related judgment of the European court in the case of MasterCard, which upheld the practice of the EU Commission in relation to interchange fees. The Secretariat consulted representatives of the banks and the trade in relation to these developments.

In the **Libor** case, the Secretariat pressed ahead with its investigation and examined data. The data is very extensive and is to a large extent located abroad, which raises complex issues, as the data is often protected by foreign legislation (e.g. in the field of data protection) from transmission to Switzerland.

Lastly, the Secretariat assessed various **merger plans** in the financial services sector. Worthy of mention here are the bank mergers between Julius Bär and Merrill Lynch and between Sarasin and Safra.

3.2.2 Liberal professions and professional services

In the field of liberal professions and professional services, three important investigations have been concluded. The first is that conducted against the Neuchatel Section of the Association of Real Estate Agents (**Union Suisse des professionnels de l'immobilier**). The procedure concerned a checklist issued by the association to its member companies. This checklist took the form of recommendations on prices and fixed the rate bands for billing real estate management services. It also provided for fixed rates for real estate brokerage. After making a detailed analysis of the market data, the competition authorities came to the conclusion that the recommendations relating to real estate management significantly affected competition in the market. On average more than one third of the members of the Union followed the price recommendations. For a certain band of rental value, the recommended tariff exceeded fifty per cent. The Competition Commission accordingly approved the amicable settlement concluded with the parties and imposed a sanction of CHF 50,000.- on the member companies who followed the recommendations. By contrast, the investigation has been closed with no further action taken in relation to the aspect of brokerage, as it was judged that there was no significant effect on competition.

The second investigation is that against **IFPI Switzerland and Phononet AG**. IFPI Switzerland is the umbrella organisation for the producers of sound and audiovisual recording media (for example CDs) in Switzerland. The investigation showed that the members of IFPI Switzerland agreed, within the association, that they would together exclude parallel imports of sound and/or audiovisual recording media. Phononet AG, an intermediary in the media industry, supported the effects of this agreement through its own conduct towards Swiss producers. These actions have significantly affected competition. The Competition Commission accordingly approved an amicable settlement concluded with the parties, while imposing a global fine of CHF 3.5 million. The parties have made a commitment in future not to sign agreements outlawing parallel imports of sound and/or audiovisual recording media, nor to limit or unduly prevent such imports. The investigation also looked into the conditions for joining IFPI Switzerland, the organisation of the “official Swiss hit parade”, and criticism of the Music Promotion Network (MPN), managed by Phononet AG. However, no violation of competition law was established in relation to any of these aspects. The investigation was therefore closed with no further action taken on these points. As far as the hit parade is concerned, IFPI Switzerland has nevertheless changed its practices with a view to achieving greater transparency.

On 11 December 2012, the third investigation into the **freight forwarding** sector was concluded with a ruling on sanctions totalling CHF 6.2 million. The ruling held that in the air

freight transport sector, major international air freight forwarders coordinated their activities between 2003 and 2007 in relation to certain fees and surcharges. The ruling substantiates this on the basis of several sample fees, including fees specific to Switzerland such as the Surcharge Collection Fee (SCF), Security Fee Agent (SFA), E-dec Fee and import duty clearance fee, together with international surcharges - in particular the Air Automated Manifest System (AAMS), Peak Season Surcharge (PSS), Currency Adjustment Factor (CAF) and the New Export System Fee (NES Fee). The following sanctions were imposed for participation in this cartel: Agility Logistics International BV: CHF 907,349.--, Deutsche Bahn AG/Schenker: CHF 1,021,751.--, Kühn + Nagel International AG: CHF 1,173,767.-- and Panalpina Welttransport (Holding) AG: CHF 3,117,286.--. Deutsche Post AG/DHL, which was also part of the cartel, initiated the proceedings by making a voluntary report. As a result this company benefited from a complete exemption from sanctions. Further voluntary reports were filed by Deutsche Bahn and Agility, which led to substantial reductions in the sanctions imposed on these companies. At the same time the Competition Commission approved amicable settlements with all the above-named companies and with the Spedlogswiss association.

In relation to the **distribution of cinematographic works**, the Secretariat examined complaints made against distributors of films, who were alleged to have refused to supply various works to certain cinemas in French-speaking Switzerland due to pressure exerted by the cinema operator Pathé Swiss SA in order to favour the distribution of successful films in its cinemas to the detriment of rival cinemas. A similar case had already been brought in 2000 (DPC 2000/4 571 *Schweizerischer Filmverleih und Kinomarkt)*. The Secretariat's analysis established that Pathé Swiss SA had a degree of influence in the market in the Lake Geneva region. No indication of abuse of the dominant position held by the company or the film distributors was detected, however. The distributors substantiated their conduct on the grounds of economic efficiency, justifying their choice, on a case to case basis, of the cinemas showing the films they distributed. The Secretariat therefore closed the preliminary investigation without taking further action. However, given technical advances (changeover to the digital system), it will continue to monitor the competition situation and market developments.

In the **field of sport**, the Secretariat examined the complaints brought by the company Olympique des Alpes SA ("FC Sion") against the Union of European Football Associations (UEFA), the Swiss Football Association (ASF) and the International Federation of Association Football (FIFA) in relation to the exclusion of FC Sion from the Europa League and sanctions imposed against the Valais football club. As any possibility that these sports associations had abused a dominant position related in this specific case to what was essentially a private matter, the Secretariat concluded its monitoring of the market without taking further action. In the course of the investigation, a meeting with the Court of Arbitration for Sport (TAS) allowed clarification to be made of the situation in which a dispute is brought before administrative and civil courts at the same time.

The Secretariat was also active in the **tourism sector**, studying the issue of the contractual conditions imposed by certain **online hotel reservation** companies. The co-called "best price guaranteed" clause, together with the clause relating to the number of hotel rooms available, were subjected to special analysis. As indications were found of an unlawful restraint on competition, an investigation relating to this issue was opened at the end of 2012 against the companies booking.com, HRS and Expedia.

The Secretariat also had reason to consider various clauses in the articles **of professional organisations** which could limit competition in the market or access to the same. Certain analyses have also focused on the conditions for the maintenance and repair of technical installations, for which standards have been laid down by the main companies active in the market. Such regulations are likely to restrict access to the market and must accordingly be analysed and, if need be, adapted. This is why the Swiss Association of Security Systems Manufacturers has changed its technical guidelines in the gas sector.

3.2.3 Healthcare markets

The examination of the market for **hearing aids** was continued in 2012 in response to changes wanted by Parliament. An initial analysis of the data relating to the period following the introduction of the new flat-rate system for reimbursing the cost of hearing aids has already provided interesting information for the next phase of the proceedings in 2013.

In December 2012, the competition authorities opened an investigation into the **commercialisation of electronic medical information** required for the distribution, supply and billing of medicines in Switzerland. This investigation aims to establish whether companies in the Galenica AG group hold a dominant position in this market and if so whether they are abusing that position. This case is in part a follow-up to a sectoral analysis of the market for the **distribution of medicines** in Switzerland that the Secretariat has been carrying out since 2011.

The agreement proposed by santésuisse and signed by the health insurance companies, under the auspices of the Federal Department of Home Affairs relating to **advertising for and the acquisition of insurance customers** was examined in the context of opposition proceedings and following a preliminary investigation, which has been extended in order to gather the required information, which will be available from 2013.

The preliminary investigation into the practices of the Swiss Red Cross in the market for **emergency call systems** for elderly people did not reveal conduct in breach of the Cartel Act. It was therefore closed without further action being taken. The question of the financial contribution made by the state to cover the Red Cross's costs in this connection will be considered with the office responsible.

Two new preliminary investigations were opened at the end of the year: the first is considering price differences and the obstacles to parallel imports in Switzerland **of reagents** required for research in the Swiss laboratories; the second relates to the distribution of **medical aids and appliances** in the Canton of Vaud.

As part of the **administrative sanction** proceedings against Swica Holding AG, the Competition Commission concluded that the company had violated the Cartels Act by omitting to give notice of its acquisition of the company ProVAG. A sanction of CHF 35,000 was imposed.

With regard to the **regulated health markets**, the competition authorities expressed their views in the context of several consultation procedures relating to the revision of legal provisions on the health sector. They also gave their opinion on numerous parliamentary questions. The Secretariat has confirmed a growing trend towards regulations limiting the economic freedom of companies active in these markets. This especially concerns not only legal provisions relating to the new system of hospital financing (SwissDRG), but also the new mandatory requirements controlling the activities of health insurance companies, which could substantially reduce the benefits of competition desired by Parliament.

3.3 Infrastructure

3.3.1 Telecommunications

In the field of **optical fibres, t**he Secretariat made an assessment of cooperation agreements for the City of Geneva and the Canton of Fribourg. The Secretariat found that these optical fibre cooperation agreements also contained cartel agreements that were ineligible for an advance exemption from sanctions. In particular, there were contract clauses that constituted agreements on quantities and prices and were liable to seriously harm competition. The Secretariat had already come to a similar conclusion in September 2011 on the optical fibre cooperation between Swisscom and the electricity works in the cities of Basel, Bern, Lucerne, St. Gallen and Zurich. At the same time, the Secretariat was able to conclude various

smaller cases relating to optical fibres. Worthy of mention is the advice given by the Secretariat on cooperation between Lausanne Industrial Services and Swisscom (Switzerland) AG relating to the construction of an optical fibre network in the City of Lausanne. In its advisory report, the Secretariat commented for the first time on cooperation between Swisscom and a cable network operator. The Secretariat was able to close the **optical fibre** dossier with the various cooperation agreements between Swisscom and regional energy supply companies in the report year. This meant that the optical fibre cooperation projects are not prohibited and the construction of optical fibre networks not obstructed, as can be seen in the continuing and comprehensive expansion of the optical fibre network. By reviewing the cooperation projects, the Secretariat however ensured that there is still competition that sets the general conditions for the use of these networks for the next generation. It is now up to the companies concerned to ensure that their optical fibre networks are operated in accordance with competition law.

In January 2012, the report of the merger plan for **Apax partner LLP/Orange Communications S.A.** was received. The Competition Commission assessed this merger in a provisional examination. This revealed that the purchase of Orange by the investment company Apax does not lead to any structural change in the existing market conditions. The Competition Commission concluded that the merger is unobjectionable under competition law.

In April 2012, the Competition Commission opened an investigation entitled **Review of Tele 2 v. Swisscom** relating to customer-specific advertising by Swisscom. The investigation aims to look into the competitive effects of any cancellation of the amicable settlement reached in May 2002 between the Competition Commission and Swisscom. The amicable settlement concluded at the time requires Swisscom not to enclose advertising in the monthly invoices sent to “carrier pre-selection” customers – these are customers with automatic carrier selection.

Lastly the **Swisscom/Telecom Liechtenstein (TLI)** report was received in October 2012. Swisscom planned to acquire 75 % of the share capital of TLI. TLI’s turnover in Switzerland is negligible. For this reason, there is no increase in market share that could change competitive relations in Switzerland. The merger was regarded as unobjectionable in competition law terms.

3.3.2 Media

Following the popular vote on the Federal Act on Book Price Maintenance in March 2012, the Secretariat resumed the investigation into **book prices in French-speaking Switzerland**. The investigation had been suspended pending publication of the final result of the vote in the Official Federal Gazette. The Secretariat sent its motion to the parties to the proceedings in August 2012 for their comments, and in November and December 2012 hearings were held before the Competition Commission. For the Competition Commission, it is important to ensure that such hearings are held, even in proceedings involving many parties, in order to safeguard of the right to a fair hearing.

In February 2012 the Secretariat opened an investigation into the **pricing policy and other practices of the Schweizerische Depeschenagentur SDA** (Swiss Press Agency). The investigation is intended to show whether the SDA has abused its potentially dominant position by obstructing competitors or discriminating against customers. A preliminary investigation gave indications that the SDA’s pricing system was aimed at squeezing out existing competition and preventing market entries.

The Competition Commission then issued two **expert opinions** for OFCOM on the issue of dominant positions: the first related to the market position of the South-Eastern Switzerland Media Group in coverage area 32 (south-eastern Switzerland) and the second expert opinion dealt with the market position of the AZ Media Group in coverage area 15 (Aargau). Both expert opinions originated from an OFCOM consultation as part of the reassessment of the

award of broadcasting licences for the transmission of regional television and radio programming.

In May 2012 the Secretariat began a preliminary investigation into **Cinetrade AG**, the owner of the Pay TV programme provider Teleclub. The aim is to examine whether Cinetrade has abused a potentially dominant position in relation to Pay TV by refusing to allow the transmission of Teleclub programming on specific TV platforms or by discriminating against such platforms in relation to the transmission of exclusive sports events.

Lastly in August 2012 the Secretariat began a preliminary investigation into the **Goldbach Group TV/radio marketing** on the issue of the abuse of a potentially dominant position due to the television and radio marketing carried out by the Goldbach Group. The investigation relates primarily to the pricing policy, the granting of various forms of discount and the pursuit of what may be a strategy to squeeze out competitors.

In the media sector in 2012 the Competition Commission was again called on to assess several **company mergers**. In the merger planned between Tamedia and the Langenthaler Tagblatt newspaper, Tamedia AG intended to take sole control of the Langenthaler Tagblatt business. In the case of NZZ/Ringier/Tamedia/cXense/PPN, the companies involved announced that they were setting up a joint venture that would run network advertising on the owners' websites. In Tamedia/Gérard Paratte/ImmoStreet, notice was given that Tamedia intended to acquire a 20 % stake from Gérard Paratte in the share capital of ImmoStreet.ch S.A., an online real estate marketplace, and would also gain joint control. In the case of Tamedia/Giacomo Salvioni/20 minuti/TIO, it was planned that Tamedia AG and Giacomo Salvioni would take joint control of 20 minuti Ticino SA and TicinOnline SA. In the planned merger of Tamedia/Ringier/jobs.ch/Jobup, Tamedia and Ringier intended to acquire joint control of jobs.ch holding ag and Jobup AG (both companies providing online marketplaces for jobs). In the case of Publigroupe S.A./ImproveDigital B.V., Publigroupe S.A. planned to acquire a majority 85 % stake in the share capital of ImproveDigital B.V. This company provides media owners with real time advertising technologies: advertisers and media owners link up via a marketplace in order to be able to negotiate advertising inventory by automated means. In all six mergers, the Competition Commission approved the plans following the provisional examination.

3.3.3 Energy

In 2012, the Secretariat discontinued the preliminary investigation into **Erdgas Zentralschweiz (EGZ)** (Central Switzerland Natural Gas). The issue related to whether third-party customers were discriminated against in comparison with shareholders as a result of the regulations for calculating the network use charge. It transpired that the different methods of calculating the network use charges for shareholders and third parties indicated an abuse of a dominant position. However, EGZ stopped this questionable practice with retrospective effect in the course of the preliminary investigation. It could therefore be assumed that the contractual provisions regarded as critical had no discernible effects.

Also in relation to natural gas, the Competition Commission assessed the planned merger between **GIM/Fluxys/Swissgas/FluxSwiss/Transitgas**. In terms of the plan reported, Global Infrastructure Management, LLC (GIM) and Fluxys G SA are to acquire joint control of FluxSwiss SA and also, together with the Schweizerische Aktiengesellschaft für Erdgas (Swissgas), joint control over Transitgas AG. Based on the provisional examination, the Competition Commission declared the merger unobjectionable.

Lastly in relation to energy, the Competition Commission was invited to provide an opinion in the course of various consultation procedures. Worth mentioning are the revision of the Electricity Supply Ordinance and the Energy Strategy 2050.

3.3.4 Other sectors

The Secretariat continued its preliminary investigation into Swiss Post in connection with the **new business customer pricing system for letter post services**. The focus here is on 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. It is expected that the preliminary investigation will be completed in the first quarter of 2013.

In June 2012, **Swiss Post and France's La Poste** notified the competition authorities of a plan to set up a joint venture. The main object of the joint venture was to provide cross-border physical letter post services for mail up to a weight of two kilograms. The Competition Commission approved the venture subject to the condition that the activities of the subsidiaries of La Poste in relation to outgoing letter post for business customers in Switzerland is sold off to third parties.

In the investigation into **air freight agreements,** the Secretariat sent its motion to the parties to the proceedings for their comments in November 2012. The investigation aims to reveal whether various air freight companies have entered into agreements on fuel surcharges, security surcharges, war risk surcharges, customs clearance surcharges, freight rates and the commission on surcharges. In addition, the investigation should clarify various issues connected with the relationship between the Cartel Act as national law and the bilateral air traffic agreement with the EU as international law.

3.4 Product Markets

3.4.1 Consumer goods and retail markets

By issuing its decision of 20 August 2012, the Competition Commission completed the investigation into Roger Guenat SA (now **Altimum SA**). The investigation began in 2010 with a search of business premises. The investigations have shown that the general importer, Altimum SA, fixed the minimum retail prices to consumers for Petzl-brand alpine sports equipment (headlamps, ice axes, harnesses, helmets, etc.), thus preventing retailers in Switzerland from truly competing on prices. The Competition Commission therefore imposed a sanction of CHF 470,000 on Altimum SA, which subsequently filed an appeal with the Federal Administrative Court. It should be noted that other Competition Commission decisions relating to vertical agreements are the subject of appeals currently pending before the Federal Administrative Court (GABA/Elmex, off-list medicines, NIKON, BMW).

The investigations forming part of proceedings opened in response to an alleged **failure to pass on foreign exchange benefits** have been continued. The investigation opened on 26 October 2011 into a Swiss general importer of cosmetic products was extended to include the American manufacturer of the products. This investigation aims to verify whether the general importer and the manufacturer of the products in question are parties to unlawful agreements in restraint of competition relating to the allocation of territories, to fixed or minimum retail prices or to barriers to online trading.

The Secretariat continued its investigations in the other case opened in connection with the alleged failure to pass on foreign exchange benefits, which concerns household electrical equipment and electrical appliances manufactured by **Jura Elektroapparate AG**. Through its guarantee policy, the company may have prevented parallel imports of household electrical equipment and electrical appliances.

The preliminary investigation opened in October 2011 into the Swiss manufacturer of "Flyer" electric bicycles was closed without further action being taken. The indications that had led the Secretariat to open these proceedings were not confirmed by the investigations. The manufacturer of the Flyer bicycles, **Biketech AG**, was suspected of exerting pressure on retailers so that they would apply the retail prices fixed by their supplier.

In addition, another preliminary investigation concerning the **issue of the strong franc** was opened in spring 2012. The proceedings were a response to the debate on the question of which stage in the distribution process actually benefits from the savings made thanks to exchange rate differences. The objective of this preliminary investigation is to determine whether certain suppliers of branded goods and retailers fail to pass on the foreign exchange gains to the lower level of the distribution chain, and most particularly to end consumers, and whether there are any indications of unlawful restraints of competition.

Following the publication in the press of an article claiming that the **price of cigarettes** in Switzerland was going to rise by 10 centimes, the Secretariat opened a preliminary investigation in order to verify if this increase could be connected with an unlawful agreement. The investigations carried out by the Secretariat concluded that companies in the industry could not be accused of illegal conduct under the Cartel Act in connection with the announcement made in the press. The preliminary investigation was therefore closed without further action being taken.

In May 2012, the Secretariat opened a preliminary investigation into the **Coop Pronto** chain, having received information that the operators of the Coop Pronto shops had limited freedom in their pricing policy. The investigations in this case are continuing.

3.4.2 Watch industry

On 7 May 2012, the Competition Commission decided to extend by a further year the precautionary measures ordered in the investigation into the supply by the **Swatch Group** of mechanical movements and components for watches. The precautionary measures ordered by the Competition Commission in June 2011 were planned to apply until the end of 2012. Extending the deadline should help companies operating in the watch industry to plan their production. These precautionary measures require inter alia that the Swatch Group may reduce the numbers of mechanical watch movements and assortiments supplied to 85% and 95% respectively of the volumes supplied in 2010. These supply volumes now apply in 2013 as well. The investigation opened against the Swatch Group that gave rise to these precautionary measures is still ongoing. It should determine whether stopping supplies of certain components for mechanical movements is illegal under the Cartel Act.

3.4.3 Automobile sector

In a decision dated 7 May 2012, the Competition Commission imposed a sanction of CHF 156 million on **BMW AG (Munich)** for preventing direct and parallel imports. The Competition Commission noted that BMW AG obstructed direct and parallel imports thanks to a clause in the contracts of dealers in the European Economic Area (EEA). Under this clause, dealers in the EEA are prohibited from selling new BMW and MINI vehicles to customers outside the EEA and, hence, in Switzerland. It emerged from the investigation that competition in Switzerland has been significantly affected at least since October 2010. In the second half of 2010, the Competition Commission received numerous complaints from customers in Switzerland who had attempted, without success, to purchase a BMW or MINI vehicle in the EEA. Over this period the Swiss franc rose considerably in value against the Euro, making purchases in Eurozone countries more attractive. Due to the clause, customers in Switzerland have been unable to benefit from the substantial foreign exchange gains, given the value of the goods affected by this export ban. In addition, the foreclosure of the Swiss market reduced competitive pressure on the sale price of new BMW and MINI vehicles. BMW AG has filed an appeal with the Federal Administrative Court, which has yet to issue its judgment.

On 16 July 2012, the Competition Commission decided for the time being not to modify its **Notice on the treatment of vertical agreements in the automobile trade (Commauto)**. The Competition Commission bases its decision on a consultation of interested groups car-

ried out by the Secretariat, and on the competitive conditions that prevail in Switzerland. In addition, it deems it appropriate, given the revision of the Cartel Act which is ongoing and the uncertainty relating to possible modifications to Article 5 of the Cartel Act, to wait before making any changes to the Notice. Based on the report made on trends in conditions in the automobile market as well as developments in the EU, the principles laid down in Commauto will be reviewed towards the end of the first half of 2014. In the medium term in the automobile trade, the Competition Commission would welcome harmonisation with the EU on the way in which Swiss competition law is applied. The Competition Commission has in particular examined whether Commauto should be modified with regard to the new rules on the sale of new vehicles applicable from June 2013 in the EU (in particular changes relating to multi-branding and contractual clauses protecting the dealer).

The Secretariat continued its preliminary investigation into **Harley Davidson**, which was opened at the end 2011. This case is intended to verify the existence of indications that Harley-Davidson Switzerland GmbH has been involved in measures intended to foreclose the Swiss market. The aim is to determine the extent to which the direct imports into Switzerland of vehicles from the USA are no longer permitted, and in particular if online commerce has been obstructed or even excluded. The issue of granting guarantees is also being examined as part of the proceedings.

During 2011, the Secretariat was consulted on several occasions as part of the revision of the Federal Act on the Reduction of **CO_2** emissions (the CO_2 Act). It spoke out against the new CO_2 Act and the Ordinance on the Reduction of CO_2 emissions in relation to passenger cars at various consultation proceedings relating to the approval of these texts. The Secretariat is of the view that the new provisions may prove disadvantageous to end customers who import their vehicles directly and to small-scale importers. There is a certain degree of discrimination in that major importers can compensate for CO_2 emissions on the basis of all their imported vehicles, while this is not possible for end customers or small-scale importers. This may therefore result in an indirect restriction on parallel and direct imports that will have a negative impact on competition in the markets for new vehicles. In addition, it was intended to integrate the provisions of the Ordinance on the Reduction of CO_2 emissions on passenger cars into the general CO_2 Ordinance. The Secretariat expressed its reservations during the consultation of offices on this integration of provisions by stressing the harmful effects on effective competition. The debate in Parliament is still ongoing.

3.4.4 Agriculture

In spring 2012, the Secretariat opened a preliminary investigation in the **Interprofession du Gruyère case**, in response to complaints received from several participants in the market. The aim is to confirm whether quantity limits exist that could be illegal under competition law. The investigations are still ongoing.

The Secretariat expressed its views in the course of around 50 **consultations of offices** relating to amendments to acts or ordinances and responded to more than 20 parliamentary questions.

3.5 Internal Market

The activities of the Competition Commission and of the Competence Centre for the Internal Market in relation to the enforcement of the Internal Market Act (IMA) are the special topic for 2012 and will be considered in Section 5 below.

3.6 Investigations

In the course of the year, the Competence Centre for Investigations had to organise searches as part of three investigations. During these procedures, private homes were investigated for the first time, as well as a lawyers' office.

The members of the Competence Centre for Investigations have continued exchanges with their counterparts in the member states of the European Union by participating in a working group on online investigations. Continuing professional training courses have been held in Switzerland and abroad on this special aspect of research.

Finally, several members of the Secretariat's staff have attended technical courses offered by other federal investigating authorities.

3.7 International

OECD: Representatives of the Competition Commission and of the Secretariat participated in meetings of the OECD Competition Committee which are held three times a year in Paris. Jointly with SECO, the Swiss authority presented a variety of written and oral contributions. In 2012, a substantial portion of the meetings of the Committee and of the resources of the delegations was devoted to expanding the limits and the goals to be attained for the two strategic themes chosen in 2011: firstly, evaluating the activities of the competition authorities and secondly, international competition. In addition, several hearings with experts have tackled relatively new topics in competition law, such as the digital economy or the application of behavioural economics to competition policy. Finally, round tables were held to discuss the unilateral exchange of information between competitors and competition in the hospitals sector.

ICN: At the end of October 2012, a delegate from the Secretariat took part in the first ICN Advocacy Workshop. In a new move, the Cartel I Working Group held several "webinars" (audio conferences with simultaneous slide presentations) on the topic of rules on principal witnesses. The Cartel II (Enforcement) Working Group continued its work in 2012 on the Anti-Cartel Enforcement Manual. In addition, a representative of the Secretariat attended the Cartels Workshop. One of the focus elements of this workshop was conducting searches of premises and digital evidence. Lastly, the competition authority was represented at the annual ICN conference in Rio in Brazil.

UNCTAD: From 9 to 11 July 2012, the 12th Conference of the "Intergovernmental Group of Experts on Competition Law and Policy (IGE)" took place in Geneva. The competition authorities were represented by the President and two members of the Secretariat staff. The main topic of the conference was the interaction between competition policy and public procurement. As part of a programme that aimed to train and strengthen competition authorities, three female trainees from Serbia, Egypt and Nicaragua served three-month internships in the Secretariat.

EU: The negotiations with the EU with the aim of concluding a cooperation agreement on competition, begun in March 2011, were completed during 2012. Thanks to this agreement, the Swiss and European competition authorities will be able to cooperate more closely and will have the opportunity to exchange confidential information. This will allow transboundary restraints of competition to be combated more effectively. The parties must still carry out internal consultations before the signature of the agreement.

4 Organisation and Statistics

4.1 Competition Commission and Secretariat

In 2012, the Competition Commission held 14 full-day plenary sessions. The number of decisions in investigations, merger procedures and in application of the Internal Market Act (IMA) can be seen in the statistics in Section 4.2. In the past year, there was no change in the composition of the Commission.

Due to allocations of resources and the additional four temporary positions connected with the Strong Franc Task Force, three divisions, namely those dealing with services, infrastructure and product markets, became considerably larger in 2012. In particular the Product Markets Division, which had to deal with most of the work relating to the failure to pass on foreign exchange benefits, grew to over 20 employees. For the heads of these divisions, the "span of control" thus became so great that in the longer term the efficient and smooth management of persons and cases was called into question.

As a result, the Secretariat, with the agreement of the Competition Commission and the FDEA, decided to create a fourth division and an additional vice-director position as of 1 September 2012. The new Construction Division became responsible for all dossiers connected with the construction markets sector (the main construction and secondary construction industries) as well as the priority topic of bid rigging. Frank Stüssi, previously Head of Management Affairs in the Secretariat was appointed head of the new division.

At the end of 2012, the Secretariat employed 83 (previous year 68) members of staff (full-time and part-time), 39 per cent of whom were women (previous year 41%). This corresponds to a total of 72.6 (previous year 58.6) full-time positions. The staff was made up as follows: 68 specialist officers (including the management board; this corresponds to 51.1 full-time positions; previous year 40.3); 11 specialist trainees (previous year 10), which corresponds to 11 full-time positions (previous year 10); 15 members of staff in the Resources and Logistics Division, which corresponds to 10.5 full-time positions (previous year 8.3). As the contracts for the temporary position in the Strong Franc Task Force have expired, the number of jobs in the Secretariat will fall at the end of 2013 by at least four full-time positions.

4.2 Statistics

Investigations	2011	2012
Carried out during the year	21	22
Carried over from previous year	16	15
Opened	5	7
Final decisions	6	5
Amicable settlements	1	3
Administrative rulings	4	0
Sanctions under Art. 49a para. 1 CartA	2	5
Procedural rulings	3	4
Precautionary measures	1	0
Sanctions proceedings under Art. 50 et seq. CartA	0	1
Preliminary investigations		
Carried out during the year	40	33
Carried forward from previous year	12	18
Opened	28	15
Concluded	27	17
Investigations opened	1	4
Modification of conduct	7	7

No consequences	18	6
Other activities		
Notifications under Art. 49a para. 3 let. a CartA	22	10
Advice	39	25
Market monitoring	62	58
Reports of failure to pass on foreign exchange benefits	371	96
Other enquiries	566	680
Mergers		
Notifications	30	28
No objection after preliminary examination	29	28
Investigations	1	0
Decisions of the Competition Commission	1	1
After preliminary examination	0	1
After investigation	1	0
Early implementation	1	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	11	13
Judgments of the Federal Administrative Court	1	1
Success for the competition authority	1	1
Partial success	0	0
Judgments of the Federal Supreme Court	1	1
Success for the competition authority	0	1
Partial success	0	0
Pending at the end of year (before the Federal Administrative Court and Federal Supreme Court)	9	11
Expert reports, recommendations and opinions, etc.		
Expert reports (Art. 15 CartA)	1	1
Recommendations (Art. 45 CartA)	0	0
Expert opinions (Art. 47 CartA or 11 TCA)	1	2
Follow-up checks	3	1
Notices (Art. 6 CartA)	0	1
Opinions (Art. 46 para. 1 CartA)	219	250
Consultation proceedings (Art. 46 para. 2 CartA)	8	8
IMA		
Recommendations / investigations (Art. 8 IMA)	0	1
Expert opinion (Art. 10 I IMA)	1	1
Explanatory reports (Secretariat)	26	45
Appeals (Art. 9 para. 2^{bis} IMA)	1	3

The number of investigations and decisions in these cases together with merger notifications has remained stable. The number of preliminary investigations and reports under Article 49a paragraph 3 letter a of the Cartel Act has fallen. In the previous year these increased due to the numerous reports in connection with the expansion of the optical fibre infrastructure, but in 2012 they fell again to the level of previous years. There was a marked decline in the number of reports of failure to pass on foreign exchange benefits. In comparison with the previous year, these have fallen by around a quarter. This suggests that although the issue is still regarded as important, it has given rise to far fewer reports in comparison with 2011 due

to a normalisation in the situation. The number of other (minor) enquiries dealt with has however increased, which has also led to the expenditure of additional resources.

5 Special Topic for 2012: The Internal Market in Switzerland

5.1 The Internal Market Act

The Internal Market Act (IMA; SR 943.02) has the aim of reducing restrictions on free access to the market under cantonal and communal public law and thus supplements the Cartel Act, which deals with private law restraints of competition. In its purpose provision, Article 1 paragraph 1, the Internal Market Act guarantees that persons and entities permanently resident or established in Switzerland have free and equal access throughout the entire territory of Switzerland in order to exercise their gainful economic activity. This makes professional mobility and commercial activities easier within Switzerland, increases the competitiveness of the Swiss national economy and consolidates economic cohesion in Switzerland.

The partial revision of 2005 was intended to increase the effectiveness of the IMA. To this end in particular, the origin principle was extended to cover commercial permanent establishment and the institutional supervisory function of the Competition Commission was reinforced. The revised IMA has been in force since 1 July 2006 and provides for the following market access principles:

- the right to market access in accordance with rules on origin (**origin principle**, Art. 2 para. 1-5 IMA), the right to unrestricted market access (**prohibition of restrictions**, Art. 3 para. 1 IMA) and the right to non-discriminatory market access (**ban on discrimination**, Art. 1 para. 1 in conjunction with Art. 3 para. 1 let. a IMA).
- the right to the **recognition of professional qualifications** (recognition principle, Art. 4 IMA).
- the right to non-discriminatory access to cantonal and communal **procurement** (Art. 5 IMA) and **monopoly markets** (Art. 2 para. 7 IMA).
- closely associated with these market access rights are the absolute prohibition of per se refusal of access to markets (Art. 3 para. 1 IMA), the absolute prohibition of covert protectionism (Art. 3 para. 3 IMA) and the right to a simple, rapid and cost free market access procedure (Art. 3 para. 4 IMA).

5.2 The Competition Commission's Supervisory Function

Under Article 8 paragraph 1 IMA, the Competition Commission monitors compliance with the IMA by the Confederation, cantons and communes. Within the Secretariat, the Competence Centre for the Internal Market is delegated this task. In contrast to the position with the Cartel Act, the Competition Commission has no decision-making powers in relation to the IMA. Instead, the Competition Commission has the following means and instruments:

6 **Provision of informal advice and explanatory reports by the Secretariat**: Every year, the Competence Centre for the Internal Market answers numerous enquiries from authorities, businesses and self-employed people on internal market access issues.

7 **Issuing recommendations:** The Competition Commission may make recommendations to the Confederation, cantons and communes on planned or existing legislation or it may conclude an investigation with a recommendation (Art. 8 para. 2 and 3 IMA). The recommendation delivers an opinion on the application of the IMA, but is not binding on the recipient.

8 **Providing an expert opinion:** At the request of the competent authority or of a court, the Competition Commission may issue an expert opinion on the application of the IMA in administrative and appeal proceedings (Art. 10 para. 1 IMA).

9 **Filing an appeal:** The Competition Commission has an independent right of appeal in order to obtain a court judgment on the issue of whether a cantonal or communal ruling limits access to the market in a manner contrary to internal market law (Art. 9 para. 2^{bis} IMA).

10 **Duty to publish:** The Competition Commission may publish cantonal and communal rulings and judgments issued in application of the IMA in the RPW (Art. 10a para. 2 IMA).

In order that the Competition Commission can fulfil its statutory duty to publish and exercise its right of appeal in internal market matters, Parliament has introduced an official duty to notify (Art. 10a para. 2 IMA). This means that authorities and courts are obliged to send any rulings and judgments issued in application of the IMA to the Competition Commission, without having to be requested to do so. So far the cantonal authorities and courts have rarely complied with this duty to notify. As a result, at the end of 2012, the Competence Centre for the Internal Market sent a circular to the cantonal administrations and courts, requesting that IMA-relevant rulings and judgments be communicated to or formally served on the Competition Commission in future.

10.2 Right of Access to the Market

Although the Federal Supreme Court in its case law on the IMA in 1995 accorded more weight to the principle of federalism than the internal market principle (e.g. BGE 125 I 276; Dispatch on the Amendment of the Internal Market Act of 24 November 2004, BBl 2005 465 et seq., 471), the increased effectiveness of market access rights desired by Parliament is clearly reflected in the case law of the Federal Supreme Court in relation to the revised IMA. Groundbreaking judgments were handed down in BGE 134 II 329 (traineeships as an element of the free movement of lawyers) and BGE 135 II 12 (free movement of psychotherapists). As these first judgments on the revised IMA were discussed in the 2008 Annual Report (RPW 2009/1, 14 f.), the following remarks focus on the developments of the past four years in the relevant sectors.

Health care: While the Medical Professions Act (MedPA; SR 811.11) has guaranteed free movement for university-qualified medical practitioners since 1 September 2007, the IMA still governs free movement for all other health care professions regulated by the cantons. In this area, the focus is on enquiries from private individuals who have problems gaining access to the market, for example to work as psychotherapists, dental technologists, emergency paramedics, rescue service officers or naturopathic doctors.

11 In Case 2C_844/2008 of 15 May 2009, the Federal Supreme Court held that a naturopathic doctor who had worked for a good 15 years in Canton Zug without requiring a licence could not be denied the access to the market in the Canton of Ticino by being made to fulfil certain conditions. In the case in question, adequate protection of overriding public interests was guaranteed by the professional experience the doctor had gained at her place of origin (Art. 3 para. 2 let. d IMA), which was why the requirement of a professional accreditation examination in the Canton of Ticino had to be regarded as an unreasonable restriction of market access (cf. RPW 2009/1, 15). By contrast, according to Federal Supreme Court judgment 2C_57/2010 of 4 December 2010, an alternative medicine practitioner licensed to practise in the Canton of Appenzell Ausserrhoden cannot invoke the rights under Article 2 paragraph 4 and Article 4 IMA if there is specific evidence that he does not meet or subsequently no longer meets the licensing requirements at his place of origin.

12 Regulating cantonal emergency services in accordance with internal market law provides various cantons with certain challenges. According to the established case law of the European Court of Justice, rescue services are governed by the fundamental freedoms of the EU single market. This means that due to the parallel legal position between the agreement on the free movement of workers and the relevant EU law, rescue activities also fall within the scope of the agreement on the free movement of workers and consequently within the scope of Swiss internal market law. Private providers of rescue services therefore have a right in principle to be licensed to operate in other cantons. For cantons that have monopolised these activities, if they transfer the licence to a private entity, the obligation to invite competitive bids under Article 2 paragraph 7 IMA applies.

13 The Competition Commission appealed against a ruling by the Canton of Zurich under which a dental clinic established as a company limited by shares was allowed access to the market in the Canton of St. Gallen only if it met certain requirements. After the Zurich Administrative Court decided in another case that under Zurich healthcare law outpatient medical institutions could be established as legal entities, the contested ruling and thus the appeal by the Competition Commission served no further purpose (The freedom to establish a business for legal entities using the example of a dental clinic, RPW 2012/3, 526 et seq.).

14 The Competence Centre for the Internal Market supported a professionally self-employed emergency paramedic in the Canton of Lucerne in the course of proceedings for access to the market and licensing in other cantons. A selection of the cantonal rulings were published and commented on in RPW 2012/3, 530 et seq. The overview shows that implementing the place of origin principle still brings problems for cantonal authorities, for example if an activity has simply not been contemplated in the canton of destination.

15 On 16 July 2012, the Competition Commission issued an expert opinion to the Public Health Directorate Zurich on the issue of access to the market for an assistant dentist from the Canton of Appenzell Ausserrhoden (RPW 2012/3, 708 et seq.). Ms A. ___ held a Brazilian dentist's degree and had since 2006 been licensed to practise as an assistant dentist in the Canton of Appenzell Ausserrhoden. The Competition Commission in its expert opinion came to the conclusion that under the IMA, Ms A. ___ should also be permitted to practise as an assistant dentist in the Canton of Zurich.

Taxi trade: The cantonal or more often communal regulation of the taxi trade still does not comply with the IMA in many places. In a leading decision, the Federal Supreme Court in May 2011 held that, in terms of Art. 2 IMA, switchboard centres could not be prohibited from offering driving jobs to non-local taxi companies (Case 2C_940/2010 of 17 May 2011). The Competition Commission made use of this judgment along with the many enquiries from authorities and taxi firms as an opportunity to provide a comprehensive explanation of the importance of the IMA to the regulation of taxi markets by issuing a recommendation (RPW 2012/2, 438 et seq.). This recommendation serves cantonal and communal legislators as a set of guidelines for regulating the taxi industry in accordance with internal market law. For example, the City of Zurich has implemented the Competition Commission recommendations in its new Taxi Ordinance, which came into force on 1 January 2013. In addition the Competition Commission appealed successfully against licensing charges for non-local taxi companies in the Canton of Geneva that were not compatible with the rule in Article 3 paragraph 4 IMA that the market access procedure must be free of charge (Judgement of 27 March 2012 of the Administrative Chamber of the Court of Justice of the Republic and Canton of Geneva, RPW 2012/2, 449 et seq.).

Sanitation trades: In accordance with Federal Supreme Court judgment 2C_57/2011 of 3 May 2011, a plumber licensed in commune A has a right of access to the market in Schaffhausen based on Article 2 paragraphs 1 and 3 IMA, even if he does not hold the SVGW

(Swiss Gas and Water Industry Association) certificate required by the Schaffhausen regulations. Also in relation to the sanitation trade, the attention of the Competence Centre for the Internal Market was drawn to charges that certain communes impose on non-local plumbers. These fees contravene the rule in Article 3 paragraph 4 IMA that the market access procedure must be free of charge. Following intervention by the Competence Centre for the Internal Market, these licensing charges at communal level have already been abolished.

Education: According to BGE 136 II 470, the teaching activities of a local authority school are not state activities and thus fall within the scope of the IMA (Art. 1 para. 3). A teacher in the Canton of Neuchatel licensed to teach at secondary levels I and II in principle has the right based on Article 4 paragraph 1 IMA to have his or her teaching qualifications recognised in other cantons. Article 4 paragraph 1 IMA applies even if the intercantonal agreement on the acknowledgement of educational qualifications does not provide for recognition in the specific case. This means that the reservation in favour of inter-cantonal agreements contained in Article 4 paragraph 4 IMA only applies if the inter-cantonal rules on free movement do not restrict the right to recognition in Article 4 paragraph 1 IMA. The Federal Supreme Court has referred the case back to the Swiss Conference of Cantonal Ministers of Education for a reassessment.

15.2 Cantonal and Communal Procurement

The internal market regulations on public procurement are regulated in Article 5 IMA and specify the following minimum standards for cantonal and communal procurement:

16 The procurement procedure must be non-discriminatory (Art. 5 and 3 IMA). The ban on discrimination under internal market law not only benefits non-local, but also local suppliers (BGE 125 I 406 E. 2; Federal Supreme Court judgment 2P.151/1999 from 30.05.2000 E. 1c). Article 5 paragraph 1 IMA thus amounts to a general requirement of equal treatment and ban on discrimination for cantonal and communal procurement.

17 Complex projects and the criteria for participating and securing contracts in the bidding procedure must be made public (Art. 5 para. 2 IMA).

18 Restrictions on market access must be issued in the form of a ruling (Art. 9 para. 1 IMA) and cantonal law must provide for at least one avenue of appeal before a cantonal appellate authority independent of the administration (Art. 9 para. 2 IMA).

The principles of non-discriminatory access to cantonal and communal procurement markets and of transparency set out in Article 5 IMA are put into specific terms and implemented by the intercantonal, cantonal and, where applicable, communal law on public procurement. In other words, the specific procurement regulations relating to thresholds and bidding procedures, the content of documents inviting bids, requirements for technical specifications, eligibility criteria and criteria for awarding a contract, etc. result from the principles of non-discrimination and the transparency in Article 5 IMA. This means that violations of the Intercantonal Agreement on Public Procurement of 15 March 2001 (IAPP, 150.950) and the cantonal or communal bidding regulations, together with incorrect or incomplete appraisals of the legally relevant circumstances (Art. 16 para. 1 let. b IAPP) also constitute violations of Article 5 IMA.

In 2012, the Competition Commission for the first time exercised its right of appeal under Article 9 paragraph 2^{bis} IMA against the exclusion of a supplier in relation to cantonal procurement proceedings, a violation of Article 5 IMA. The Competition Commission argued that the authority awarding the contract applied the eligibility criteria that it had defined in such a way that ultimately only one supplier was allowed to bid and a cheaper supplier was excluded. The case is currently pending before the cantonal administrative court.

The Competence Centre for the Internal Market has devised a training module on the subject of “Ensuring competition in public procurement”. This course has been regularly organised for a number of years for employees of cantonal and federal procurement agencies and is a key element in the campaign to combat bid rigging.

Lastly, the Competence Centre for the Internal Market regularly represents the Secretariat at the Federal Procurement Conference (FPC). The FPC is the Federal Administration’s strategy-defining body for the procurement of goods and services. Its tasks include approving policy guidelines and strategies for public procurement, drafting papers on the interpretation of procurement law issues and approving concepts for basic and continuing professional education.

18.2 Transferring the Right to exploit Monopolies to Private Entities

At the time of the partial revision of the Internal Market Act, Article 2 paragraph 7 IMA was introduced, a provision by which a bidding process was required when transferring the right to exploit cantonal and communal monopolies to private entities. Until now, there has been very little practical guidance on how this provision should be implemented.

The Competition Commission has drawn up two expert opinions on the application of Article 2 paragraph 7 IMA in relation to granting concessions for constructing, operating and maintaining electrical distribution stations and concessions for the right to use hydroelectric power (Expert opinion of 22 February 2010 on the renewal of the concession agreements between Centralschweizerische Kraftwerke AG and the Lucerne communes on the use of public land and the supply of electrical energy, RPW 2011/2, 345; Expert opinion of 28 June 2010 for the attention of the Schwyz District Council relating to renewal of water rights concessions in favour of Elektrizitätswerk Bezirk Schwyz AG, RPW 2011/2, 353). In both cases, private entities were granted a special concession permitting use. By these special concessions local government corporations grant private entities exclusive rights to use public land. Special concessions permitting use are based on a de facto monopoly, i.e. the opportunity that the local government corporation has, thanks to its sovereignty over public property, to exclude private entities from certain activities. Essentially, the Competition Commission takes the view that the obligation to invite bids under Article 2 paragraph 7 IMA applies not only to the transfer of the right to exploit statutory monopolies, i.e. those constituted by law, but also to the transfer of the right to exploit de facto monopolies to private entities.

In the context of the foreseeable implementation problems relating to inviting bids for distribution network concessions, the Competition Commission on 8 March 2010 issued a recommendation to the Federal Council. It proposed that, as part of the ongoing revision of the Electricity Supply Act (ESA), uniform conditions be laid down for inviting bids for concessions relating to the construction, operation and maintenance electrical distribution stations. In the meantime, the Federal Parliament has brought in a special act specifying that both the distribution network and the water rights concession can be awarded without a bidding procedure, but nevertheless in a transparent and non-discriminatory procedure (Art. 60 para. 3bis and Art. 62 para. 2^{bis} Water Rights Act, Art. 3a and Art. 5 para. 1 ESA). Through the principle of non-discrimination, Parliament has revived the criterion already envisaged in Article 2 paragraph 7 IMA. The question that now arises is how an award can be made in a transparent and non-discriminatory manner without a public bidding process.

The key issue of whether under Article 2 paragraph 7 IMA not only monopoly concessions but also special concessions permitting use are subject to a bidding procedure has not yet come before the highest courts for a decision to be taken. The Federal Supreme Court left the question open in two cases (BGE 135 II 49 [Billboard hoardings on public land] and Case 2C_198/2012 of 16 October 2012 [Construction and operation of a car park on public land]). Legal experts disagree on the issue, although at present the prevailing opinion of experts as

well as that of the Competition Commission favours public bids for special concessions permitting use.

The obligation to invite competitive bids under Article 2 paragraph 7 IMA applies only if the state outsources the right to exploit a monopoly to a private entity, but not if a government corporation exploits the right itself. In the two expert opinions mentioned, the question thus arose of the criteria by which it is assumed that a transfer has been made to a “private entity” in terms of Article 2 paragraph 7 IMA. Here the Competition Commission came to the conclusion that the form in which the concession holder is organised is in itself an insufficient criterion. Rather an assessment must be made, according to the “in-house” practice developed in relation to public procurement law of whether the state exercises similar control over the concession holder to what it does over its own agency, and whether the concession holder essentially carries out its activities for the authority awarding the concession.