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To the Federal Council

Annual Report 2013 of the Competition Commission

(in accordance with Article 49 paragraph 2 Cartel Act)

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1 Foreword from the President

Once again in 2013, the decisions of the Competition Commission and the work of the Secretariat focused on the key themes tackled in the last few years (**hard cartels** and in particular **bid rigging** and **market foreclosures**). Investigations into price-fixing agreements in the field of aviation, bid rigging in the road-construction industry in the Canton of Zurich and into restraints on parallel imports of French-language books were concluded with sanctions being imposed on the companies at fault. In the internal market, the Competition Commission recommended the opening up of the cantonal markets for notarial services, which are currently subject to restrictions. In a preliminary investigation, the Secretariat was unable to detect any signs that foreign exchange benefits due to the strong Swiss franc had not been passed on to consumers as a result of unlawful restraints of competition. The Secretariat opened seven new investigations in 2013 into the key themes mentioned above and expanded two existing investigations into bid rigging agreements.

The Competition Commission was called on to decide a special case relating to the watch market – special because it is probably unique in international terms. For historical reasons the Swatch Group has held a dominant position in the market for mechanical watch movements and assortments (the regulating components of a mechanical watch movement). It supplies these core components to a large number of Swiss watch manufacturers for mechanical “Swiss-made” watches that are highly successful globally. The Swatch Group has expressed the intention of phasing out the supply of these products to Swiss watch manufacturers. A reduction in supply that is too rapid would probably constitute an abuse of the dominant position – the watch manufacturers would be obstructed in the market for mechanical watches, if not actually excluded from it. The Swatch Group therefore sought to find a solution for phasing out supplies in accordance with the Cartel Act by means of an amicable settlement with the Secretariat. In this amicable settlement, the Secretariat had the task of finding a balance between reducing supplies from the Swatch Group and the availability of products from alternative manufacturers, so as to maintain “effective” competition in the market for mechanical watches.

The Secretariat and the Swatch Group reached an amicable settlement in the spring of 2013 and, following a market trial, submitted it to the Competition Commission for approval. The hearings held by the Competition Commission for the watch manufacturers concerned showed that a discontinuation of supplies may be regarded as acceptable in relation to mechanical watch movements, but must be regarded as premature in relation to assortments due to the lack of sufficient alternatives. This eventually led to a second, revised amicable settlement, which allows the Swatch Group to gradually reduce the supply of mechanical watch movements by the end of 2019 and ultimately to stop supplies altogether, without abusing its dominant position. The duty to supply assortments continues for the time being. A reduction or termination of these supplies is possible in the future, but depends on future market developments (creation of alternative sources of production).

The special feature of this case was that there was no abuse by a dominant undertaking to be assessed or sanctioned. Instead, the task was to regulate a planned practice so that no such abuse could occur. With regard to the aim of the Cartel Act, “to prevent the harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a liberal market economy”, such intervention by the competition authorities is not only consistent with this aim, but almost essential.

Prof. Dr. Vincent Martenet
President of the Competition Commission

2 Most Important Decisions in 2013

In the Canton of Zurich between 2006 and 2009, **road construction companies** agreed on prices in advance in the case of around 30 invitations to tender and decided who should be awarded the contract. In its decision of 22 April 2013, the Competition Commission imposed fines on 12 construction companies totalling approximately half a million francs. In relation to one company, the Competition Commission remitted the fine in full due to the company's voluntary report. The investigation began in June 2009 with an unannounced inspection. It revealed around 30 bid-rigging arrangements. The contract volume of the unlawful agreements amounts to just under CHF 13 million.

In an order dated 27 May 2013, the Competition Commission sanctioned ten wholesalers of **French-language books** due to unlawful territorial agreements, imposing fines totalling around CHF 16.5 million. The ten wholesalers prevented Swiss bookshops in the period from 2005 to 2011 from purchasing books from abroad – in particular in France – at lower prices. To achieve this, the wholesalers developed distribution systems designed to restrict competition in the procurement market for French-language books. It was impossible for the bookshops to purchase books from abroad during the period under investigation due to exclusive agreements between the wholesalers and the publishers. As a result of this market foreclosure, the wholesalers were able to maintain and thus exploit inflated prices for books in Switzerland. As a specific example of the campaign against market foreclosures, this decision is of great importance for competition in Switzerland. An appeal is currently pending before the Federal Administrative Court.

Under cantonal law, Swiss **notaries** cannot have their practising certificates recognised in other cantons. Their activities are limited to the territory of one canton. The Competition Commission therefore recommended on 23 September 2013 that the cantons recognise equivalent qualifications of professional notaries from other cantons who work in private practice. This will greatly facilitate the mobility of professional notaries in private practice within Switzerland. Restrictive measures such as domicile requirements, provisions on reciprocal rights or citizenship requirements should be abolished. In addition, cantons with public notarial offices should also consider applications from notaries who have qualified in another canton when recruiting staff. At the same time the Competition Commission recommended that the Federal Council, as part of the current revision of the Civil Code (Final Title of the Swiss Civil Code on public certification), should as planned introduce legislation that makes it possible for notaries to arrange for the registration of public deeds relating to real estate transactions in cantonal land registers throughout Switzerland. Currently, an agreement relating to a real estate transaction must be certified by a notary in the canton in which the property is located. The inter-cantonal recognition of public deeds relating to real estate transactions could allow clients to benefit from a broader range of services and choose a notary from anywhere in Switzerland according to their needs in terms of quality, service and price.

On 21 October 2013, the Competition Commission concluded the investigation into the **Swatch Group**'s planned implementation of its new supply policy and approved an amicable settlement between the Secretariat and the Swatch Group. This gives the Swatch Group the opportunity to phase out the supply of mechanical watch movements. The obligation to supply will continue until 31 December 2019. Based on the average for the years 2009–2011, the Swatch Group and ETA must supply 75% of the previous volume in 2014/2015, 65% in 2016/2017 and 55% in 2018/2019. In addition, the Swatch Group and ETA agree to give equal treatment to all customers. Furthermore, the SME clause allows a derogation from this arrangement in cases of special hardship for the benefit of affected customers. Should market conditions develop in a manner that is substantially different from what is expected, the Competition Commission reserves the right to reassess the obligation to supply. The Competition Commission also regarded a reduction in supplies for assortments possible in principle; but at present such a move would be premature. The decisive factors here are current market conditions and the uncertainty over developments in this industry. The Competition Commission will monitor developments closely (test phase at various manufacturers).

In an order dated 21 October 2013, the Competition Commission decided to discontinue the investigation relating to **cosmetic products** that are primarily sold through beauty salons. The restraints of competition under investigation (territorial protection agreements, restrictions on online trading and price recommendations) do not harm competition to a substantial extent. The Competition Commission reached this conclusion by taking account of the negligible market share of the businesses under investigation, the low market concentration and the rather modest international price differences. In addition, the businesses under investigation voluntarily amended the problematic contract clauses, expressly declared the price recommendations to be non-binding, and notified their customers accordingly.

In a preliminary investigation the Secretariat examined the extent to which 22 suppliers of well-known brands as well as Coop, Denner and Migros have passed on foreign exchange gains made from a selection of everyday consumer goods, and whether any **failure to pass on foreign exchange benefits** could be due to unlawful restraints of competition. The survey of market participants neither provided specific indications of unlawful horizontal or vertical price-fixing agreements, nor revealed sufficient evidence of restraints on parallel imports that would be problematic under competition law. Nor was it possible to identify any indications of improper practices by a dominant undertaking. Accordingly, there were no grounds for opening proceedings against Coop, Denner, Migros or any of the 22 brand product suppliers. Most of the brand product suppliers interviewed granted the retailers improved terms. According to the data they provided, in most cases the retailers passed these advantages on to their customers in full.

By order dated 2 December 2013, the Competition Commission sanctioned 11 airlines for unlawful price-fixing agreements in relation to **air freight**, with fines totalling around CHF 11 million. The investigation revealed that various airlines had agreed on pricing elements in relation to air freight. Agreements concerned freight rates, fuel contracts, war risk surcharges, customs clearance charges for the USA and the commission paid on contract awards. Based on the practices relating to the various price elements, the competition authorities were able to prove a horizontal price-fixing agreement. The specific features of the investigation mainly were the scope and complexity of the proceedings and the use of a wide range of air traffic agreements with other states. Of the air traffic agreements, the one with the European Union (EU) is particularly worthy of mention. Due to this agreement, in the investigation the Competition Commission also had to apply the European rules on competition, which are an integral part of the agreement and thus also apply in Switzerland. The Competition Commission also applied the Swiss Cartel Act in parallel. Appeals are pending before the Federal Administrative Court.

On 3 December 2013, the Federal Administrative Court allowed the appeals filed by Pfizer AG, Eli Lilly (Swiss) SA and Bayer (Switzerland) AG and overturned the three fines totalling CHF 5.7 million imposed by the Competition Commission. In three sanctions rulings dated 2 November 2009, the Competition Commission held that the pharmaceutical companies Pfizer AG, Eli Lilly (Swiss) SA and Bayer (Switzerland) AG had fixed the retail prices for their off-list **medicines** for treating erectile dysfunction, Viagra (Pfizer), Levitra (Bayer) and Cialis (Eli Lilly), in the form of recommended retail prices and had thus implemented an unlawful agreement affecting competition under Article 5 paragraph 1 in conjunction with paragraph 4 Cartel Act. In its analysis of the relevant competitive relations, the Federal Administrative Court concluded that the general conditions under the law on therapeutic products (“prescription only” requirement and ban on public advertising) in view of the psychologically effective "embarrassment factor" among the patients concerned prevented price competition within the market at the level of retail outlets to the extent that a statutory reservation in terms of Article 3 paragraph 1 Cartel Act must be assumed. Accordingly it took the view that the Cartel Act did not apply to the matter in dispute, which meant that the contested sanction rulings had no legal basis. The Competition Commission and the Department have challenged the judgments in an appeal to the Federal Supreme Court.

Finally, in a judgment dated 19 December 2013, the Federal Administrative Court dismissed the appeals by the **Elmex** manufacturer GABA International AG (Gaba) and its Austrian li-

censee Gebro Pharma GmbH (Gebro) against the ruling on sanctions issued by the Competition Commission on 30 November 2009. In the ruling, Gaba was fined CHF 4.8 million and Gebro CHF 10,000. The Federal Administrative Court regarded a clause in the licence agreement between the two companies that applied until 1 September 2006 as an unlawful vertical territorial agreement under the Cartel Act. The Federal Administrative Court upheld the Competition Commission's interpretation, according to which a clause agreed-to in writing which prohibited passive sales from Austria and thus parallel imports into Switzerland (an export ban) constitutes an agreement under Article 5 paragraph 1 in conjunction with paragraph 4 Cartel Act, which significantly restricts competition. Justification on economic efficiency grounds remains possible, but does not apply in the present case, with the result that the agreement is unlawful. The court confirmed the view of the lower court, according to which such agreements fall under the sanction provisions of Article 49a Cartel Act and must accordingly be sanctioned. The unsuccessful parties have filed appeals with the Federal Supreme Court.

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

In January 2013, the Secretariat began a preliminary investigation into **reporting systems of cantonal building contractors' associations**. As established in the investigations into the agreements in the roads and civil engineering sectors in the cantons of Aargau[1] and Zurich, these construction company reporting systems can encourage bid rigging. The Secretariat examined whether, and, if so, which building contractors' associations use these reporting systems. In order to establish a practice that is unobjectionable under competition law, in the summer of 2013 the Secretariat made various proposals, including that the names of the participating companies should no longer be made known before the deadline for submission of offers. It is expected that the preliminary investigation will be completed at the beginning of second quarter of 2014.

On 30 October 2012, the Secretariat began the **Lower Engadin construction** investigation into various companies in the sector for roads and civil engineering, surfacing work and building construction, as well as related upstream markets, and conducted an unannounced inspection. The Secretariat had received indications that several companies had entered into agreements to coordinate the award of contracts and to allocate construction projects and customers. Based on the results of these enquiries, the investigation was expanded on 22 April 2013 to include further companies and to cover the entire **Canton of Graubünden**. Once again, an unannounced inspection was carried out. The documents identified and obtained are currently being analysed.

On 5 February 2013, the Secretariat opened the **tunnel cleaning** investigation into three companies active in various regions and carried out unannounced inspections. The Secretariat had received indications that the companies had entered into price-fixing agreements in violation of competition law in order to coordinate the allocation of contracts and customers. Evaluation of the seized data secured has largely been completed. The Secretariat also conducted a comprehensive market survey of the authorities responsible for awarding tunnel cleaning contracts.

On 15 April 2013, the Secretariat opened the **Bauleistungen See-Gaster** investigation into six companies in the roads and civil engineering sector with an unannounced inspection. The Secretariat had received indications that several companies had entered into agreements to coordinate the award of contracts and allocate construction projects and customers. On 21 October 2013, the Secretariat extended the investigation to include two further companies in the target region; unannounced inspections were again carried out. Evaluation of the seized data has basically been completed.

In the investigation into **roads and civil engineering in the Canton of Zurich**, hearings before the Competition Commission were held in spring 2013. In an order dated 22 April 2013, the Competition Commission imposed fines on several construction companies totalling around half a million francs. One company was completely exempted from sanctions because it reported itself and cooperated with the competition authorities. In the case of three companies, the Competition Commission closed the investigation without taking any action because no violation of competition law could be proven. In the absence of appeals, the ruling has become legally binding. The case related to bid rigging in the roads and civil engineering sector. When an invitation to tender was issued, the construction companies agreed in advance which company would be awarded the contract and agreed on the bids to be made. The Competition Commission was able to prove that such agreements existed in relation to some 30 invitations to tender between 2006 and 2009. The fines were calculated on

[1] See RPW 2012/2, p. 273 f., no 8 ff.

the basis of the value of the contracts that the construction companies had been awarded, while also taking account of the severity of the restraint of competition and the number of times the companies had participated in rigging bids.

Appeals are still pending before the Federal Administrative Court against the Competition Commission order relating to bid rigging in the **roads and civil engineering sector in the Canton of Aargau**.

3.1.2 Further topics

The investigation into **bathrooms**, opened on 22 November 2011, was completed on schedule. After questionnaires were sent out and physical and electronic data seized during unannounced inspections were analysed, numerous interviews with parties and witnesses were held in the autumn of 2012. In 2013, the Secretariat again sent questionnaires to the parties and various sanitary facilities manufacturers, conducted negotiations with the Swiss wholesalers' association for the sanitary facilities industry on an amicable settlement and conducted final hearings. In addition, the Secretariat drafted a proposed decision.

The investigation into **door products** was put on hold in the first half of 2013 in order to concentrate on other proceedings, but major progress was made in the second half of the year. The documents obtained in 2012 have been analysed and a proposed decision is being drafted.

Following the two investigations into bid rigging in the **roads and civil engineering sectors in the Canton of Aargau** and **the Canton of Zurich**, several public sector clients requested access to the case files, particularly with regard to the contracts they had awarded. The requests were a consequence of the partial anonymity of certain decisions (it is not possible to identify specific contract awards). Clarification as to whether, and if so, to what extent, these requests to inspect the files can be met is currently underway.

Appeals are still pending before the Federal Administrative Court against the Competition Commission's decisions relating to **builders' supplies for windows and French doors**.

3.1.3 Special topic: Consortia

In the context of the partial revision of the Cartel Act (cf. 3.8), various parties have argued in connection with the partial cartel ban in the case of particularly harmful agreements affecting competition that consortia have already been particularly strictly assessed by the competition authorities and that consortia would be prohibited in future in the event of the adoption of the partial cartel ban (see for example the Gewerbezeitung of 4 October 2013; Handelszeitung of 24 October 2013, p. 18). These allegations are incorrect. This is easily proven by the fact that in neighbouring countries where bans on cartels apply, consortia are still widespread and generally recognised as lawful. The Federal Council, the working group for the revision of the Cartel Act, and the Secretariat have therefore held various explanatory meetings with associations, construction companies and local authorities. The following points should be stressed:

- in principle, consortia are and remain unproblematic under competition law.
- the targets of Competition Commission proceedings so far have been bidding cartels, not consortia.
- many of the reasons for forming consortia are essentially harmless under competition law.

In principle, consortia are and remain unproblematic under competition law. Although consortia are "arrangements" in the colloquial sense, they normally do not constitute agreements affecting competition under Article 4 paragraph 1 Cartel Act, as this would require that they would have the aim or effect of producing a restraint of competition. Normally, consortia do not. On the contrary, they often promote competition in that they enable businesses (in particular SMEs) that might otherwise be unable to do so, to bid for and carry out a specific

project. However, Article 5 Cartel Act, which determines which agreements affecting competition are unlawful and which would also include the partial cartel ban, applies only to agreements affecting competition as defined in the Cartel Act. The competition authorities must prove whether such an agreement affecting competition exists under both currently applicable as well as future legislation. Only where consortia restrict competition by way of exception do they qualify as agreements affecting competition as defined in the Cartel Act and thus require investigation.

Competition Commission cases to date have related to bid rigging, not consortia. In the investigations into the roads and civil engineering sector in the cantons of Aargau and Zurich and into electrical installations in Bern, bid rigging was in the spotlight. In such cases, companies agree with each other in advance who should be awarded a contract, and the other companies submit higher bogus bids in order to provide a semblance of probity. Such bid rigging agreements are obviously harmful to competition and violate competition law. Consortia have only been investigated when they have been involved in such bid rigging practices. In the case relating to electrical installations in Bern, for example, companies formed consortia for the purpose of individual bids, but did not disclose this fact to the clients. Instead the consortium partners submitted separate bids, giving the impression that they were competing with each other and thus deceiving the clients. These were not consortia in the true sense, but bidding cartels (which were designated or disguised as consortia). The Competition Commission has never investigated nor prohibited genuine consortia because they are, in principle, unproblematic.

There are many lawful reasons for forming a consortium. Occasionally it is claimed that the Competition Commission only regards consortia as unobjectionable under competition law if the consortium partners could only carry out a specific project if they joined together. This suggestion is incorrect. It should be noted that the Competition Commission has not considered consortia in the content of its decisions, but has only notionally defined consortia. In doing so, it has certainly not provided a conclusive list of all the reasons why consortia should be regarded as unproblematic. Consortia are often formed in order to make a bid that could otherwise not be made. This may be due to lack of expertise, financial constraints, lack of capacity or clustered risks. Forming a consortium may also make it possible to submit a more competitive offer (better price-performance ratio). Such consortia promote competition and are unobjectionable under competition law, and the revision of Article 5 Cartel Act will not change this situation.

3.2 Services

3.2.1 Financial services

In the financial services sector, the Secretariat concentrated on making progress with ongoing proceedings. These involve the investigation into agreements to influence the reference interest rates **Libor, Tibor** and **Euribor**, as well as derivatives based on these rates. In this connection, obtaining data from abroad has proved to be very complex and time-consuming. The difficulties relate to data from companies located in the UK, France or the USA, because these countries have legislation prohibiting the disclosure of personal data in Switzerland or making such disclosure subject to restrictive conditions. In two cases, the Secretariat had to issue **orders to provide information**. One order involved the interdealer broker ICAP, which took the position that it could not release data without a court order, as it would otherwise contravene the UK Data Protection Act 1998 (DPA). The Secretariat decided that foreign law that might preclude the disclosure of information does not override the obligation to provide information under Article 40 Cartel Act. ICAP contested the information ruling, but the Federal Administrative Court held that although the disadvantage to ICAP was not insubstantial due to a potential violation of the DPA, this was of less significance than the public interest in a prompt investigation. It therefore required ICAP to respond to the request for information. ICAP regarded the judgment as the court order required for the release of data in accordance with the DPA. A second information ruling was issued to the Swiss subsidiary of a French group of companies. It refused to respond to a questionnaire from the Secretariat, ar-

guing that the questionnaire should be addressed to its French parent company. The Federal Administrative Court rejected the appeal. It held that the Swiss subsidiary was obliged to forward the information ruling to the correct recipient within the group, in this case the French parent company.

The second investigation relates to **credit card interchange fees**. In the reporting year, large amounts of data were collected, which are still being evaluated. A preliminary investigation considered the introduction of a new fee by MasterCard (the **pre-authorization fee**). In addition, in autumn a further preliminary investigation on possible agreements on exchange rates in **currency trading** between various banks was opened.

3.2.2 Liberal professions and professional services

In the liberal professions sector, proceedings are currently being conducted into the tourism industry relating to the contractual terms of **online booking platforms for hotels**. The investigation concerns the companies Booking.com, HRS and Expedia. The analysis focuses on what is known as the “best price guarantee” clause, which requires a hotel to charge a guest who has booked a room through an internet booking platform the best price that is offered. Another clause concerns a ban on quotas, which requires a hotel to make all its rooms available to a platform. These clauses could prove problematic under the Cartel Act and led to detailed investigations being carried out over the course of the year. Other competition authorities abroad have also decided to investigate these practices.

Another preliminary investigation was concluded after an agreement was reached with the company in question. At issue was a **cruise operator**’s sales system. This company did not allow companies that were members of its sales network (travel agencies based in Germany) to sell trips from its German catalogue to customers who did not live in Germany. In other words, it was impossible for a Swiss customer to book a cruise sold by a German agency and described in a German catalogue at the price charged in Germany. After the competition authorities intervened, the company concerned agreed to modify its conduct and in future to authorise the agencies in its sales network to sell their organised cruises to customers living in Switzerland as well.

The sector for **information technology**, programmes and equipment also saw a large number of investigations. One concerned the maintenance of a particular category of IT equipment. According to certain complaints received against it, the company concerned was abusing its dominant position by tying the purchase of updates of the software required to use its computer equipment to maintenance contracts. In the same case, and in one other case, the issue of the maintenance carried out by foreign providers also had to be analysed. According to information received, some software providers were making it more difficult for the end consumer to conclude a maintenance contract with a company other than that provided by the seller of the product concerned. Finally, complaints were regularly received about various companies for imposing prices that are higher in Switzerland than abroad. Some of these proceedings are still ongoing. The others were concluded without action being taken.

Lastly, as is regularly the case at the start of the ski season, the Secretariat received complaints **from ski schools** regarding the allegedly abusive conduct of certain ski lift companies. The complaints relate to advantages accorded to “traditional” ski schools in certain resorts that are not given to rival schools or schools established more recently. Where the matter involves a private dispute, the Secretariat generally recommends the aggrieved party to take the matter to the local civil court.

3.2.3 Health markets

The investigations in the case relating to the **commercialisation of** electronic **medical information** required for the distribution, supply and billing of medicines in Switzerland were continued in 2013. Questionnaires were sent to more than three hundred companies in Switzerland. The responses are currently being examined.

The preliminary investigation into the **agreement** proposed by Santésuisse and signed by health insurance companies relating to **advertising and the acquisition of insurance customers** revealed that the agreement on soliciting customers (fixing the commission for brokers, agents and providers of similar services at a maximum CHF 50.-, boycott of call centres) is an agreement under Article 5 paragraph 3 letters a and b Cartel Act that significantly restricts competition among health insurance companies. In 2012, the Federal Council approved the new Act on the Supervision of Social Health Insurance (HISA) and submitted it to Parliament. Article 18 paragraph 2 of the Act provides that the Federal Council may regulate remuneration for agency activities and the costs of advertising. As the Council of States has approved the HISA, the National Council will debate it soon. In view of this, the Secretariat decided to suspend the preliminary investigation pending the decision of Parliament. If Parliament does not enact Article 18 paragraph 2 HISA and the health insurance companies stand by the agreement, then the proceedings will be continued. In this event, the health insurance companies will risk the opening of an investigation and the imposition of related sanctions.

The investigation into the market for **hearing aids** was completed in 2013. The analysis of the data relating to the period following the introduction of the new flat-rate system for reimbursing the cost of hearing aids provided the evidence needed to close this preliminary investigation. The responses to the interim report and additional interviews failed to substantiate the assumption that both the recommended retail prices on the hearing aid lists and those on the manufacturers' price lists that are given to the hearing aid specialists are attributable to the hearing aid manufacturers. It became apparent that the Federal Social Insurance Office (FSIO) had a significant influence on the publication and the specific structure of the recommended retail prices on the tariff lists. In practice, it was impossible to ascertain whether a hearing aid specialist in a specific case followed the official recommended retail price on the hearing aid lists or the price on the manufacturers' lists, as the prices on both lists were largely identical. With a view to encouraging competition in the market for hearing aids, the Secretariat would welcome the separation of the advisory activities of hearing aid specialists from the sale of the devices themselves. This separation could reduce the false incentives for hearing aid specialists.

In the preliminary investigation relating to the **distribution of medical aids and appliances in the Canton of Vaud**, the Secretariat submitted its final report on the preliminary investigation in autumn 2013. The Secretariat took the view that the measures that came into force on 1 January 2013 allowed the case to be closed without further action. These measures taken by the Association Vaudoise d'Aide and de Care à Domicile (AVASAD, Vaud Association for Assistance and Care at Home) provided in particular for an end to tariff recommendations, unrestricted provision of supplies to the centres for medical aids and appliances and the creation of a list of providers that will be distributed to professionals.

3.3 Infrastructure

3.3.1 Telecommunications

On 18 July 2013, the Competition Commission opened an investigation into Swisscom (Schweiz) AG. It aims to reveal whether Swisscom has abused its market position **in relation to broadband internet** for business customers in order to obstruct competitors in contractual bidding procedures. Specifically this relates to an invitation to tender issued by Swiss Post, in which Swisscom and two other telecommunications service providers bid for the contract to link all Swiss Post offices in Switzerland to the same broadband internet network. The two other providers relied on wholesale products from Swisscom in order to make their bids to Swiss Post. There are indications that Swisscom set the prices for wholesale products at such a high level that the other telecommunications service providers were unable to make competitive offers to Swiss Post.

The investigation related to a **review of the Tele 2 v. Swisscom case** was concluded by an order dated 18 March 2013. Swisscom had requested that the ban agreed to with the Com-

petition Commission on enclosing advertising with bills for subscriber connections be lifted, based on the option under the telecommunications law of “set-off of connections of the fixed network”. It was apparent that there had been no substantial change in the legal and factual circumstances that could have justified revoking the amicable settlement of May 2002. Accordingly the request for review was dismissed.

The Competition Commission also had to assess two **company mergers** relating to telecommunications, which were judged to be unobjectionable at the preliminary examination stage.

3.3.2 Media

In the investigation into **book pricing in French-speaking Switzerland**, the Competition Commission concluded in an order dated 27 May 2013 that in the period from 2005 to 2011 ten wholesalers of French-language books prevented Swiss bookshops from purchasing books from abroad – in particular in France – at lower prices. To do so, the wholesalers established distribution systems that they used to restrict competition in the procurement market for French-language books. Based on exclusive agreements between the wholesalers and publishers, the bookshops were unable to purchase books abroad during the period of the investigation. Accordingly between 2005 and 2011, practically no parallel imports took place, as attempts by the bookshops to source books directly from abroad at cheaper prices failed. As a result of this market foreclosure, the wholesalers were able to maintain inflated price levels for books in Switzerland. The Competition Commission fined the ten wholesalers a total of around CHF 16.5 million due to unlawful territorial agreements. Most of the companies fined have filed appeals with the Federal Administrative Court.

The investigation into **pricing policy and other practices** opened against the Swiss Press Agency (SDA, Schweizerische Depeschenagentur) was continued in the reporting year, as planned. It is intended to reveal whether the SDA abused its possible dominant position by obstructing competitors and discriminating against clients. A preliminary investigation disclosed signs that the SDA’s discounting policy, which grants exclusivity discounts, aimed to squeeze out existing competitors and prevent others from entering the market.

The preliminary investigation opened in 2012 into the **Goldbach Group’s TV/radio marketing** is well advanced. It examines the question of abuse of a possible dominant position in television and radio marketing by the Goldbach Group. It focuses in particular on the pricing policy, the granting of various forms of discount and the possible implementation of a strategy to squeeze out competitors.

In April 2013 the Competition Commission opened the investigation into **Broadcasting Live Sport on Pay TV**. The aim is to clarify whether CT Cinetrade AG unfairly denied certain programming to TV platform providers competing with Swisscom TV and whether Cinetrade discriminated against certain TV platform providers and end customers, in that the Teleclub services can be obtained via Swisscom TV at lower prices than via other TV platforms, even though Swisscom TV offers a wider range of sports programmes. Finally, this investigation should clarify whether there is an unlawful tie-in arrangement under the Cartel Act if end customers can only receive the Teleclub sports channels if they also subscribe for a basic package. In May 2013, three cable network operators applied for precautionary measures to be ordered and basically requested that certain programming and supply options be made freely available. In an order dated 8 July 2013, the Competition Commission rejected these applications. The related appeal proceedings are still pending.

In 2013, the Competition Commission was also required to assess several **company mergers** in relation to the media: in the planned merger between Tamedia / Ringier / jobsuchmaschine, Tamedia AG and Ringier AG planned to take joint control of Jobsuchmaschine AG. In the case of Tamedia / PPN AG, Tamedia gave notice of the acquisition of the sole control of PPN Switzerland AG, a company previously controlled jointly with the Neue Zürcher Zeitung AG, Ringier and cXense AS. In the case of Tamedia / Schibsted / SCMS / piazza.ch / car4you, Tamedia and Schibsted Classified Media NV plans to take joint control of

Schibsted Classified Media Switzerland AG, the company division piazza.ch and the car4you Switzerland AG. In the case of Tamedia / Starticket, Tamedia gave notice of its intention to take sole control of Starticket AG. Finally, Tamedia reported the takeover of a majority shareholding and control of Ziegler Druck- und Verlags AG. In the case of PubliGroupe / S1TV, notice was given of the establishment of joint control of S1TV AG by Publigroupe S.A. and its subsidiaries as well as the founders of S1TV. In the case of Mediaspectrum, Inc. / Publigroupe S.A. / xentive sa, Mediaspectrum, Inc. and a third party appointed by Mediaspectrum planned to acquire a 51 % shareholding in xentive sa, which had until then been under the sole control of Publigroupe. It was thus intended that Xentive be jointly controlled by Mediaspectrum and Publigroupe after the merger was completed. Lastly, in the case of Orell Füssli / Thalia, notice was given of the establishment of a full-function joint venture in relation to the sale of books and complementary products to end customers in Switzerland. Following an assessment in a provisional examination, all these mergers were given the green light by the Competition Commission.

3.3.3 Energy

Following an objection procedure, in February 2013 a preliminary investigation was opened into the co-operative VSG ASIG (VSG) and its members. The preliminary investigation is to ascertain whether the provisions of what is known as the **associations' agreement on access to the natural gas network** reported by VSG and its members could constitute unlawful restraints of competition under Article 5 paragraph 3 and 4 and / or Article 7 Cartel Act. The associations' agreement is a set of provisions under private law that has been concluded between VSG (as representative of the network operators) and the natural gas interest group as well as the interest group for energy-intensive industries (as representative of the industrial gas consumers and network customers), and which sets out the conditions for third-party transport to industrial natural gas customers. The Secretariat briefed the parties in December 2013 in a detailed final report – and with express reference to the continuing threat of sanctions – on its competition law-related concerns with regard to certain provisions, in particular individual network access criteria. The gas industry has made adjustments to most of the clauses, so that the Secretariat's concerns have already been taken into account in the course of the preliminary investigation.

In March 2013, the Secretariat began the preliminary investigation into the **ewb ownership strategy**. The preliminary investigation aims to show whether Energie Wasser Bern (ewb) has abused or is abusing its allegedly dominant position in the supply markets in downstream/adjacent markets and has thus prevented other companies from entering into or exercising competition in these markets. The focus of the investigations is possible preferential treatment given to its own subsidiaries by means of cross subsidies from the monopoly sector, any use of market and customer data and/or other information from the monopoly sector as well as possible "tie-in" arrangements or technical restraints.

Finally, the Competition Commission was invited to express its views in relation to energy matters in various consultation procedures. Worth mentioning are partial revisions of the Electricity Supply Act, the Electricity Supply Ordinance and the Energy Ordinance. In addition, the Secretariat was consulted on competition law issues relating to the Electricity Agreement with the European Union.

3.3.4 Other sectors

In the investigation into **air freight agreements,** by an order dated 2 December 2013, the Competition Commission concluded that in the period from 2000 to 2005 several airlines had entered into agreements on pricing elements. The case relates to freight rates, fuel surcharges, war risk surcharges, customs clearance charges for the USA and commission on contract awards. In parallel with the Swiss Cartel Act, in this investigation the Competition Commission had to apply a range of agreements with other States and in particular the agreement with the European Union (EU). The Competition Commission sanctioned 11 airlines for horizontal price-fixing agreements, imposing fines totalling around CHF 11 million.

The German Lufthansa AG (including its subsidiary Swiss Airlines AG), which had initiated the proceedings by making a voluntary report, benefited from a complete exemption from sanctions. In addition, the sanctions imposed on five other undertakings that had filed voluntary reports were substantially reduced. In common with the Competition Commission, the EU Commission and the US Department of Justice among others have sanctioned the airlines' conduct. The Competition Commission's decision is not yet legally binding.

In July 2013, the Competition Commission opened the investigation into the **business customers pricing system for letter post services.** Swiss Post grants special terms to business customers under its pricing system if their annual expenditure is over CHF 100,000. The investigation aims to establish whether Swiss Post is obstructing competitors in the market through the structure and application of its pricing system, for example by making it difficult or even impossible for business customers to obtain services from Swiss Post competitors. In addition, the question of whether Swiss Post discriminates against or otherwise adversely treats certain customers will be examined.

In the rail transport sector, the Competition Commission lastly assessed the **planned merger between BLS AG and BLS Cargo AG**. According to the report, BLS AG had terminated the shareholder agreement with Deutsche Bahn Schweiz Holding AG for the joint control of BLS Cargo AG, with the result that joint control of BLS Cargo by BLS and DB Holding had come under the exclusive control of BLS. The planned merger was given the go-ahead following a provisional examination.

3.4 Product Markets

3.4.1 Consumer goods industry and retail trade

The Secretariat continued its investigations in the case relating to **grand pianos and pianos**, opened on 27 November 2012. The investigation was begun following an invitation to tender issued by the Zurich University of the Arts in the Toni Areal, which revealed indications of distortions of competition. In particular, there was specific evidence of agreements relating to the foreclosure of sales territories and price-fixing agreements. It may also be that parallel and direct imports from neighbouring countries into Switzerland are being obstructed or prevented.

On 3 July 2013, in response to a complaint from a retailer, the competition authorities opened an investigation into Musik Olar AG and carried out an unannounced inspection. The investigation will examine whether vertical price-fixing agreements were entered into relating to the sale of **stringed instruments** (guitars and basses) and accessories.

In an order dated 21 October 2013, the Competition Commission decided to terminate the investigation into **cosmetic products** that are primarily sold through beauty salons. The restraints of competition under investigation (territorial protection agreements, obstruction of online trading and price recommendations) do not adversely affect competition to a significant extent. The Competition Commission reached this conclusion in particular by taking account of the negligible market share held by the businesses under investigation, the low market concentration and the rather modest international price differences. In addition, the businesses under investigation voluntarily amended their problematic contract clauses, expressly declared the price recommendations to be non-binding and informed their customers accordingly.

The Secretariat continued its enquiries in the investigation into **Jura Elektroapparate AG**. The investigation began on 26 October 2011 in connection with the failure to pass on foreign exchange benefits. The investigation aims to establish whether Jura Elektroapparate AG is setting unlawful minimum or fixed prices and/or making unlawful territorial allocations.

In connection with vertical agreements, the following appeals against Competition Commission-decisions were pending before the Federal Administrative Court at the end of 2013: **Nikon, BMW, Alpine sports products/Roger Guénat SA**. The Federal Administrative Court

dismissed the appeal in the GABA/Elmex case in a judgment dated 19 December 2013 (see above 2.). An appeal is pending before the Federal Supreme Court.

In a preliminary investigation, the Secretariat investigated the extent to which **foreign exchange benefits in relation to branded products in the retail sector** have been passed on to the next trading level or more particularly to Swiss end consumers. The subject of the preliminary investigation was the question of whether any failure to pass on foreign exchange benefits was due to unlawful restraints of competition. The Secretariat questioned the three food retailers Coop, Denner and Migros as well as 22 suppliers of well-known brands in particular on the foreign exchange benefits that they granted for each company's three top-selling products from their five main brands. Most of the brand-product suppliers interviewed granted the retailers improved terms. In turn, according to the data they submitted, the retailers for the most part passed these advantages on to their customers in full. Many suppliers confirmed that the retailers had indeed passed on the foreign exchange benefits. The investigation failed to reveal any specific indications of unlawful horizontal or vertical price-fixing agreements, or any indications of problematic restraints on parallel imports under competition law or improper practices by dominant undertakings. Accordingly, there was no reason to open an investigation into Coop, Denner, Migros or any of the 22 brand-product suppliers.

In the **travel articles sector**, a preliminary investigation was opened in which the Secretariat is looking into allegations of the demarcation of territories and price fixing agreements. The focus is on the obstruction of cross-border online trading.

In a market monitoring procedure, the Secretariat looked into international price differences in relation to **adidas** and **NIKE** sports articles. The investigation revealed that end consumers have a wide range of opportunities to buy the relevant sports goods in specialist shops and online shops in Switzerland and abroad, and thus to choose more competitively-priced sales channels. In addition, both companies confirmed in writing that Swiss dealers authorised for selective distribution were freely able to purchase sports goods from wholesalers or retailers abroad on the terms applicable in the countries concerned.

On 20 December 2012, the Federation of Migros Cooperatives and Denner AG (the Applicants) filed an application for the early revocation of the requirements ordered by the Competition Commission in the **Migros/Denner** decision (RPW 2008/1, 129 ff.). Following a comprehensive market survey, on 18 April 2013 the Secretariat sent the Applicants its proposed decision for the Competition Commission so that they could respond. In a letter dated 10 June 2013, the Applicants withdrew their application. As a result the requirements remain in force as planned until 3 September 2014 – with the exception of Requirement 6 relating to the prohibition of exclusivity agreements with suppliers, which was ordered to be permanent.

3.4.2 Watch industry

In a decision dated 21 October 2013, the Competition Commission concluded the investigation into **the Swatch Group AG** relating to its plan to stop supplying mechanical watch movements and assortments (regulating components of a mechanical watch movement). The investigation was opened on 6 June 2011 and aims to establish whether the intended implementation of the new supply policy constitutes an unlawful abuse of a dominant position under competition law. On opening the investigation, the Competition Commission ordered precautionary measures based on an amicable agreement with the Swatch Group in order to allow watch industry companies to plan their activities with certainty. On 7 May 2012, these measures were extended for one year until the end of 2013. Based on a market trial, which in particular examined whether alternative sources of supply to the Swatch Group exist and how long it could take to develop such sources if need be, in spring 2013 an amicable settlement was concluded between the Secretariat and the Swatch Group. This provided for the phasing out of supplies of mechanical watch movements and assortments. On 8 July 2013, the Competition Commission decided to reject this settlement, as it regarded a reduction in supplies of assortments, which are key components, to be premature due to current market conditions. Following further negotiations with the Swatch Group, a new amicable settlement was presented to the Competition Commission, implementing the key data specified by the

Competition Commission, and on 21 October 2013 the Competition Commission approved the new settlement. The new settlement provides for the phasing out of the supply of mechanical watch movements by 31 December 2019, but resolves the restraints of competition under Article 7 paragraph 2 letter a Cartel Act due to ending the supplies. As far as assortments are concerned, the Swatch Group's supply obligations continue to apply for the time being.

In addition, the previously suspended investigation relating to mechanical watch movements, which concerns **ETA SA Manufacture Horlogère Suisse** (ETA, a 100% subsidiary of the Swatch Group) was reopened. At issue in this investigation are price increases and changes to payment terms that ETA communicated unilaterally to its clients. The suspension was necessary because market conditions in relation to mechanical watch movements were being examined in connection with the investigation into Swatch stopping its supply. The investigation aims to show whether ETA's conduct amounts to an unlawful abuse of a dominant position under competition law.

3.4.3 Automotive sector

With the opening of an investigation on 22 May 2013 into various Swiss concessionaries of manufacturers in the **Volkswagen Group** (VW, Audi, Škoda, Seat), the Competition Commission examined information that it had obtained on possible pricing arrangements between these concessionaries. The subject of these agreements was the fixing of discounts and flat-rate deductions in the retail sales of new vehicles by the manufacturers concerned.

In the course of 2013, the Secretariat received several **enquiries from members of the public** in connection with guarantees and warranties for vehicles purchased in members states of the European Economic Area and the obstruction of parallel or direct imports, and responded to these by drawing attention to the competition law treatment of vertical agreements in the automobile trade (MV Notice). Overall it must be assumed that this notice is widely applied in Switzerland.

The preliminary investigation into **Harley-Davidson** opened in November 2011 was terminated without consequences. The investigation was opened in response to enquiries from members of the public, who alleged that Harley-Davidson was possibly involved in measures to foreclose the territory of Switzerland for the sale of Harley-Davidson products. The complex investigations have, however, revealed that there are insufficient indications of unlawful indirect price fixing or any unlawful obstruction of online sales in Switzerland. The Secretariat regarded the ban on the export of Harley-Davidson products from the USA to Switzerland as an insignificant restraint of competition.

3.4.4 Agriculture

The Secretariat expressed its views in around 40 **office consultation procedures** on amendments to acts and ordinances as well as on proposals from the Parliament. In doing so, it again called for the removal of border controls.

In addition, the Secretariat carried out various market monitoring procedures, such as in relation to **apples** (distribution structures) or **tools** (market foreclosure). The Competition Commission also prepared an expert report in relation to **Emmentaler** and aired its views on an application for the exceptional authorisation (Article 8 Cartel Act) of a practice declared unlawful by the Federal Supreme Court, which was however withdrawn before the Federal Council made its decision.

3.5 Internal Market

3.5.1 Notaries

On 26 March 2013, the Competition Commission opened an investigation under internal market law relating to the freedom of movement of notaries and held consultations with the

cantons. Under cantonal law, Swiss notaries are unable to have their practising certificates recognised in other cantons. Their activities are limited to the territory of one canton. In contrast, notaries from the EU can request the recognition of their professional qualifications in Switzerland based on the Agreement on the Free Movement of Workers between Switzerland and the EU and the Professional Qualifications Act (Federal Act on Declaration Requirement and the Verification of Service Provider Qualifications in Regulated Professions, DRPA, in force since 1 September 2013). This leads to discrimination against Swiss notaries, and is precisely what the Internal Market Act (IMA) inter alia seeks to prevent. It grants the Swiss workforce at least the same rights as are granted to foreign persons by Switzerland in international agreements.

The investigation led to the Competition Commission making recommendations to cantons and the Federal Council on 23 September 2013. Essentially the Competition Commission recommends that cantons whose notaries work in private practice should recognise equivalent notary qualifications from other cantons and end restrictions on market access such as domicile or citizenship requirements and provisions on reciprocal rights. This would greatly increase the mobility of notaries in private practice within Switzerland. In addition cantons with public notaries' offices should consider notaries who have trained in other cantons when recruiting staff.

At the same time, the Competition Commission recommended that the Federal Council, as part of the current revision of the Civil Code (Final Title of the Swiss Civil Code on public certification), should as planned create a statutory basis for allowing notaries to handle the registration of public deeds relating to real estate transactions in cantonal land registers throughout Switzerland. At present any agreement relating to a real estate transaction must be certified by a notary in the canton in which the property is located. With the inter-cantonal recognition of public deeds relating to real estate transactions, clients will benefit from a wider choice of notaries and can select their notary from anywhere in Switzerland according to their requirements with regard to quality, service and price.

The introduction of inter-cantonal recognition of professional qualifications and of public deeds relating to real estate transactions recommended by the Competition Commission does not affect the power of cantons to continue to organise the notaries' profession according to their needs. The Competition Commission's recommendations do not call into question the institutions of the Official Notary's Office and the private notary's office.

3.5.2 Activities in other sectors

In relation to **inter-cantonal market access**, the Competence Centre for the Internal Market concentrated primarily on the free movement of notaries (see 5.3.1), legal agents and private security companies.

Based on the IMA, service providers have the right to offer their services in other cantons according to the regulations of their canton of origin. On this basis, legal agents from the Canton of Vaud applied for authorisation in the cantons of Geneva and Bern. Both applications were turned down. The Competition Commission filed an appeal against the negative rulings. This is pending before the first cantonal instance.

In relation to private security companies, inter-cantonal access to the market and the implementation of the IMA can only be described as inadequate. The Competence Centre for the Internal Market therefore advised various cantons in connection with the internal market content of their regulations on market access for security companies. The Competition Commission filed two appeals against decisions not to licence non-local security service providers in the Canton of Aargau. Both appeals were upheld by the Administrative Court of the Canton of Aargau. In the first judgment, the Administrative Court held that checking private parking spaces (subject to a judicial ban on use) was not a security company task and may be carried out without authorisation, contrary to the official practice. In the second case, the question arose of whether a Lucerne security company licensed by the Canton of Lucerne could also operate in the Canton of Aargau, even though it did not hold the federally recognised

VSSU (Association of Swiss Security Service Companies) licence, additionally required by the Canton of Aargau. According to the Administrative Court, the cantonal administration failed to prove that the current professional experience and training of the Lucerne security company did not guarantee the protection sought by the Canton of Aargau (Article 3 paragraph 2 lit. d IMA). In addition, the requirement of the federal recognised VSSU licence is generally not necessary in order to protect overriding public interests and thus is not proportionate. The judgments are not yet legally binding.

In relation to **public procurement**, the Competition Commission filed three appeals. In connection with a contractual bidding procedure for the bituminous sealing of a landfill site, the Competition Commission argued that the eligibility criteria were wrongly applied in violation of Article 5 IMA and were interpreted so restrictively that only one supplier could meet them. The Administrative Court did not accept this argument; the grounds for its decision have still to be published. Then the Competition Commission filed an appeal against the award of a contract for the supply of official rubbish sacks to the retail trade and the levying and administration of the official charge for the sacks. The Administrative Court accepted that the award of the contract breached Article 5 IMA by exceeding the thresholds for bidding procedures, but that this was justified on the grounds of urgency under Article 3 IMA. In response, the Competition Commission filed an appeal with the Federal Supreme Court. Lastly, the Competition Commission filed an appeal against the direct award of a contract to build an asylum centre. The asylum centre is being funded by a private investor and will then be rented to the canton. In the opinion of the Competition Commission, this contract should have been subject to a public bidding procedure under Article 5 IMA. The appeal is pending before the Cantonal Administrative Court.

In relation to **award of licences**, the Competence Centre criticised the practice of certain communes when granting licences for the use of public land by travelling fairs at annual markets and recommended that in future such rights should be subject to a public bidding procedure.

The Federal Supreme Court may consult the Competition Commission in ongoing proceedings based on Article 10 paragraph 2 IMA. In the past year, the Federal Supreme Court invited the Competition Commission to provide opinions in two cases. These related to the issue of the permissibility of a residence requirement for notaries and of a multi-month ban on participation in bidding procedures for a supplier in the procurement sector. Judgments are still awaited in both cases.

With a view to the national implementation of the revised WTO Agreement on public procurement (GPA), the law on public procurement at federal (BöB/VöB) and cantonal (IAPP) levels should be amended. A working group with representatives from the Confederation and the cantons is currently preparing an initial draft. The Secretariat is committed to ensuring that in the course of this revision account will be taken of the protection of competition, legal protection and the Competition Commission's right of appeal.

3.6 Investigations

In 2013, unannounced inspections were carried out at a total of 25 companies as part of five procedures. Two immediately consecutive procedures carried out in April 2013 proved especially challenging.

In legal matters, **protection for lawyers' correspondence** was greatly increased with the entry into force of Article 46 paragraph 3 Administrative Criminal Law Act on 1 May 2013. Documents that constitute correspondence with lawyers are protected from examination and seizure regardless of where they are held and the timing of their creation, i.e. even if they are being held by the company. In the meantime, unsealing proceedings have been brought before the Federal Criminal Court, which clarified that the protection did not extend to documents that were not originally prepared for the lawyer (especially existing correspondence with third parties), even if these documents were later sent to the attorney, e.g. as enclosures with other documents.

3.7 International

With a view to the improved enforcement of competition laws, Switzerland and the EU have entered into a cooperation agreement on competition (see in detail Section 5 below.). In addition, the competition authorities have again participated in the work of various international organisations.

OECD: representatives of the Competition Commission and the Secretariat participated in the three annual meetings of the OECD Competition Committee. In cooperation with SECO, various contributions were prepared and presented. In 2013, special attention was given to two strategic themes, “international cooperation” and “evaluating the activities and decisions of competition authorities“. Work began on the revision of the OECD’s 1995 recommendation on international cooperation. Russia’s accession process was continued and Colombia’s was initiated.

ICN: The Working Group Cartel I (Legal Framework) held several webinars (audio conferences with simultaneous slide presentations). The topic was the rules on principal witnesses with special emphasis on the evidence to be provided by the complainant and continuous cooperation with the competition authorities. In 2013, the Working Group Cartel II (Enforcement) revised the Anti-Cartel Enforcement Manual and the Cartel Enforcement Templates. The Swiss template was fundamentally reworked. At the cartel workshop in South Africa, the discussions included alternative methods for uncovering cartels and the structuring of investigations. The Working Group on Agency Effectiveness concentrated on developing best practices for personnel management and knowledge management within an authority. Finally, the Competition Commission was represented at the ICN annual conference.

UNCTAD: The Secretariat and Competition Commission attended the 13th conference of the Intergovernmental Group of Experts on Competition Law and Policy. The theme of the conference included international cooperation in competition law proceedings. As part of the COMPAL programme, which aims to educate and strengthen competition authorities, one official from Colombia and Ecuador respectively completed three-month internships in the Secretariat, while an official from Egypt completed a one-month internship.

EU: The cooperation agreement with the EU is addressed as a special topic (Section 5 below).

3.8 Revision of the Cartel Act – Progress Report

On 22 February 2012, the Federal Council approved for the attention of Parliament its Dispatch on the Amendment of the Cartel Act and on the Federal Act on the Organisation of the Competition Authorities. The Dispatch is based on the one hand on the evaluation of the Cartel Act required by law, and on the other on the results of three consultation procedures. The Economic Affairs and Taxation Committee of the Council of States (EATC-S), which is responsible for the preliminary examination, discussed the entire reform package and passed it on at the beginning of March 2013 to the Council of States. This approved the Federal Council draft on 21 March 2013, subject to certain amendments.

The main amendment relates to the institutional structure of the competition authorities. Whereas the Federal Council proposed a court-type model with a competition authority and a Competition Court affiliated to the Federal Administrative Court in order to separate the investigative and decision-making processes and to expedite matters up to the decision of the court of final instance, the Council of States decided only to make minor revisions based on the existing institutional model: the Competition Commission should be reduced from 11–15 members to five, who should only be independent experts (i.e. no industry representatives anymore) and should – in line with the Federal Administrative Court – be subject to a standard time limit of twelve months when making its decisions.

From the point of view of substantive law, the Council of States generally followed the Federal Council. In particular it decided to amend Article 5 Cartel Act: in a new move in relation to the five forms of hard (cartel) agreements that may already be directly sanctioned – i.e.

horizontal pricing, quantity and territorial agreements as well as vertical pricing agreements and agreements on the demarcation of territories – due to the special harm that they cause, proving that these agreements significantly affect competition in any individual case is no longer necessary; the defence of justification on economic grounds, however, remains open. In addition, the Council of States added more detail to the Federal Council proposal with an express rule on bearing the consequences of failing to provide sufficient evidence of grounds for justification and with a special provision on consortia, which was a key theme in the discussions in EATC-S. It also added a "de-minimis rule" under which the competition authorities would not pursue restraints of competition that have a negligible effect on competition.

In keeping with the Dispatch, the Council of States decided to make improvements in the private law on cartels (broadening the right to bring legal action to end consumers, suspending time bar periods during administrative Cartel Act investigations and taking account of private law damages payments when determining fines), in the merger control procedure (introduction of the more modern SIEC tests, avoiding duplication of certain mergers assessed by the EU and harmonising Swiss deadlines with those of the EU) and in the objection procedure (shortening the "response time" to the opening of proceedings from five to two months, the possibility of sanctions only after an investigation has begun, as well as the opportunity to adapt without the risk of sanctions during a "test phase").

In response to the Schweiger Motion, the Council of States decided on a rule according to which appropriate measures to comply with competition law provisions (known as compliance programmes) should lead to a reduction of administrative sanctions. In addition, it chose not to introduce penalties for natural persons who have participated in cartels.

Finally, it decided in response to the Birrer-Heimo Motion – contrary to the view of the Federal Council – to introduce a new obligation to supply (Article 7a E-Cartel Act). A refusal to sell abroad should be prohibited: irrespective of agreements and market power, companies are obliged to fulfil orders from Swiss consumers on the terms applicable in the OECD countries.

Since summer 2013, the bill has been before the Economic Affairs and Taxation Committee of the Federal Council (WAK-N) and will probably be considered in plenary in the spring or summer of 2014.

4 Organisation and Statistics

4.1 Competition Commission and Secretariat

In 2013, the **Competition Commission** held 15 full-day plenary sessions. The number of decisions in investigations, merger proceedings under the Cartel Act and in application of the IMA are shown in the statistics in Section 4.2. In the past year, there was no change in the composition of the Commission.

At the end of 2013, the **Secretariat** employed 85 (previous year 83) staff members (full-time and part-time), 43 per cent of whom were women (previous year 39). This corresponds to a total of 75.8 (previous year 72.6) full-time positions. The staff was made up as follows: 58 specialist officers (including the management board; this corresponds to 52.4 full-time positions; previous year 51.1); 13 (previous year 11) specialist trainees, which corresponds to 13 (previous year 11) full-time positions; and 14 members of staff in Resources and Logistics Division, which corresponds to 10.4 (previous year 10.5) full-time positions.

The Secretariat contributed to a report prepared by SECO for the attention of the Finance Committee **on the measures to counter the strong Swiss franc** and the effects achieved. In relation to the Competition Commission, matters may be summarised as follows:

Parliament approved a supplementary credit of CHF 600,000 each for the Competition Commission and its Secretariat for 2012 and 2013 in order to deal with the numerous reports connected with the strong Swiss franc and to be able to conduct proceedings to combat Switzerland's position as an "island of high prices". The Secretariat invested these resources

exclusively in staff and was able to fill a further 5-6 positions[2] in 2012 and 2013. These persons were used as follows:

To cope with the large number of reports, the Secretariat set up a task force in the summer of 2011. This was primarily instructed to check, process, and answer the reports that were constantly being received and in particular to review them for competition law-relevant content (triage). If a report involved circumstances relevant under competition law (suspicion of horizontal /vertical agreements or abuse of market power), the case was normally passed on to the responsible service within the Secretariat for further processing (market monitoring procedure, preliminary investigation or investigation). In addition, the services were allocated staff from the available additional resources to process these proceedings.

In total, the Secretariat received 485 reports in connection with the strong Swiss franc between July 2011 and the end of 2013, which were all handled by the task force. Of the 485 reports, by the end of 2013, 431 (89%) had been answered, 11 (2%) were being processed and 43 (9%) had been passed on to the Price Supervisor.

Of the 485 reports and the cases taken up ex officio, a total of 47 proceedings were raised in order to assess their relevance to competition law or the illegality of the reported circumstances (7 investigations, of which 5 have been concluded; 14 preliminary investigations, of which 9 have been concluded; 26 market monitoring procedures, of which 21 have been concluded).

In these proceedings, the Competition Commission issued three decisions involving the imposition of substantial sanctions for the obstruction of parallel imports (NIKON, BMW and IFPI Switzerland). These decisions and sanctions (BMW CHF 156 million [not legally binding]; NIKON CHF 12.5 million [not legally binding]; IFPI Switzerland CHF 3.5 million) undoubtedly had a serious deterrent effect on companies active at an international level. In many preliminary investigations and market monitoring procedures, it was evident that the Swiss market is open and both parallel and direct imports are possible. In certain cases, technical trade barriers were identified that may obstruct parallel imports. From the point of view of the competition authorities, it would be reasonable to eliminate these wherever possible in order to increase the free movement of goods and bolster competitive pressure from abroad.

Overall the Secretariat of the Competition Commission has come to the conclusion that the CHF 1.2 million additionally made available in 2012/2013 has been successfully used to achieve the intended goals.

[2] Due to staff fluctuations and the varying salaries of the persons concerned, the actual number of additional positions varied in the two reporting yeas between 5 and 6.

4.2 Statistics

Investigations	2013	2012
Conducted during the year	24	22
Carried forward from previous year	17	15
Investigations opened	7	7
Final decisions	7	5
Amicable settlements	1	3
Administrative rulings	2	0
Sanctions under Article 49a paragraph 1 Cartel Act	3	5
Procedural rulings	4	4
Precautionary measures	0	0
Sanctions proceedings under Article 50 ff. Cartel Act	0	1
Preliminary investigations		
Conducted during the year	27	33
Carried forward from previous year	18	18
Opened	9	15
Concluded	11	17
Investigations opened	3	4
Modification of conduct	1	7
No consequences	7	6
Other activities		
Notifications under Article 49a paragraph 3 let. a Cartel Act	7	10
Advice	20	25
Market monitoring	76	58
Reports of failure to pass on foreign exchange benefits	18	96
Other enquiries	547	680
Mergers		
Notifications	32	28
No objection after preliminary examination	26	28
Investigations	0	0
Decisions of the Competition Commission	0	1
After preliminary examination	0	1
After investigation	0	0
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	14	13
Judgments of the Federal Administrative Court	4	1
Success for the competition authority	3	1
Partial success	0	0
Judgments of the Federal Supreme Court	1	1
Success for the competition authority	1	1
Partial success	0	0
Pending at the end of year (before the Federal Administrative Court and Federal Supreme Court)	[13]	11
Expert reports, recommendations and opinions, etc.		
Expert reports (Article 15 Cartel Act)	1	1
Recommendations (Article 45 Cartel Act)	0	0
Expert reports (Article 47 Cartel Act, 5 paragraph 4 PMA or 11 TCA)	1	2

follow-up checks	1	1
Notices (Article 6 Cartel Act)	0	1
Opinions (Article 46 paragraph 1 Cartel Act)	217	250
Consultation procedures (Article 46 paragraph 2 Cartel Act)	5	8
IMA		
Recommendations / investigations (Article 8 IMA)	1	1
Expert reports (Article 10 I IMA)	2	1
Explanatory reports (Secretariat)	36	45
Appeals (Article 9 paragraph 2bis IMA)	6	3

The figures in the statistics are comparable with those of previous years. The number of processed and concluded investigations has increased as has the number of pending appeal proceedings. These two categories make up the majority of the work carried out by the Secretariat. In 2013, the Federal Administrative Court issued one judgment on a final decision by the Competition Commission (off-list medicines) as well as two judgments on interim decisions in the LIBOR investigation. The number of appeals pending before the Federal Administrative Court still remains very high. There was a small increase in the number of reports of company mergers, although none was subjected to a detailed examination. The figures for market monitoring procedures, consultations, other enquiries completed and opinions in official consultations still remain high and involve a significant amount of work for the Secretariat. In relation to the Internal Market Act, the Competition Commission filed an increased number of appeals against cantonal restrictions on market entry and public bidding procedures.

5 The Cooperation Agreements with the EU

5.1 Introduction

To date the Competition Commission and its Secretariat have largely been left to their own devices when applying the Cartel Act. There are no agreements with other competition authorities that would permit the Competition Commission to formally cooperate in applying and enforcing competition law. Although the competition authorities may exchange information and experiences with other competition authorities on an informal basis as part of its involvement in the Competition Committee of the OECD or in the International Competition Network (ICN), no information that is protected by official secrecy can be exchanged in the absence of a statutory basis for doing so. In its annual report for 2010, the Competition Commission focused on the topic of combating international cartels and welcomed the mandate given to the Federal Council at the time to negotiate a cooperation agreement with the EU[3].

After the negotiations concluded, the Federal Council on 17 May 2013 signed the "Agreement between the Swiss Confederation and the European Union concerning Cooperation on the Application of their Competition Laws" (referred to below mainly as "the Agreement")[4] and on 22 May 2013 submitted the Dispatch to Parliament for the approval of this Agreement[5]. According to the Federal Council,[6] the lack of any possibility of cooperation with the EU (and other competition authorities) adversely affects *"the effective implementation of Swiss competition legislation in connection with cross-border anti-competitive practices in that access to evidence outside the sovereign territory of Switzerland is made more difficult. It also leads to*

[3] RPW 2011, 2 ff.

[4] See the press release at http://www.news.admin.ch/message/index.html?lang=de&msg-id=48908.

[5] See the Dispatch and the text of the Agreement at http://www.admin.ch/opc/de/federal-gazette/2013/index_24.html.

[6] Dispatch, BBl 2013, 3962 f.

duplication of procedures and to a lack of coherency in decisions on the same factual circumstances."

The National Council approved the Agreement in the autumn session of 2013 by a large majority. The Council of States Economic Affairs Committee suspended its consideration of the matter on 7 November 2013 so as to clarify its relationship with the ongoing reform of the Cartel Act, which is being carried out in parallel.

5.2 Content of the Agreement

The individual provisions and the content of the Agreement are briefly explained in the following section. The exchange of information and the provisions related to this (Article 7-10 of the Agreement) are considered in a separate section (Section 5.3).

5.2.1 Preamble, purpose and definitions

In essence, the Agreement regulates cooperation between the Swiss and the European competition authorities. It is a purely procedural agreement and does not provide for any substantive harmonisation of competition laws. In the absence of joint substantive provisions and in the absence of any market access aspect to the Agreement, the issue of joint institutions did not arise. Apart from new provisions on exchanging information, which lends the Agreement the character of a "second generation agreement", the Agreement is largely based on the agreements the EU has concluded with South Korea and Japan.

The Preamble sets out certain principles under which the Agreement was negotiated and concluded. It refers inter alia to the OECD recommendation of 1995 on cooperation between member countries on anticompetitive practices affecting international trade[7]. The most important statement from the point of view of the Swiss competition authorities is that "the competition enforcement systems of the Union and of Switzerland are based on the same principles and contain comparable provisions". The EU thus recognises the principle of equivalence between the two legal systems, both from a procedural and from a substantive-law viewpoint.

The purpose provision (Article 1) restates what was already included in the negotiating mandates of the two contracting parties and thus confirms that the goals set out therein have been achieved. The purpose of the Agreement is "*to contribute to the effective enforcement of the competition laws of each Party through cooperation and coordination, including the exchange of information between the competition authorities of the Parties and to avoid or lessen the possibility of conflicts between the Parties in all matters concerning the application of the competition laws of each Party*".

The key terms are defined in Article 2. The "competition authorities" of the two contracting parties; the "competition laws" applied by these authorities, and what is understood by the terms "anticompetitive activities", "enforcement activities", "information obtained by investigative process", "information obtained under the leniency procedure" and "information obtained under the settlement procedure".

5.2.2 Notifications and coordination of enforcement activities

The two competition authorities notify each other in writing of enforcement activities that could affect the important interests of the other contracting party (Article 3 agreement). A list is given of examples of cases in which notification must be given (Article 3 paragraph 2) and the time for notifications in relation to mergers and other cases is also set out (Article 3 paragraph 3 and 4). These notifications largely correspond to the practices already followed by the competition authorities in the EU and Switzerland.

[7] See http://acts.oecd.org/Instruments/ListByCommitteeView.aspx under Competition Committee C(95) 130/Final.

This provision on notifications does not cover the notification or service of sovereign documents. Because in the past conflicts have arisen in relation to the direct service of decisions by the EU competition authorities on undertakings based in Switzerland, the intention was to deal with this issue as well. However, because in the converse case the service of Competition Commission decisions on undertakings domiciled in the EU falls within the jurisdiction of the EU member states, this issue could not be resolved in the Agreement itself. But an exchange of notes between Switzerland and the EU[8], which regulates service of sovereign documents (as far as possible), took place on the occasion of the signing of the Agreement on 17 May 2013. The EU Commission will in future send decisions on Swiss undertakings that have no address in the EU to the Competition Commission, which will then forward them to the relevant undertaking. Documents that have no sovereign character (such as requests for information without threat of sanctions) may still be sent directly to the undertaking at its Swiss address. The EU was unable to offer Switzerland a comparable solution for the service of sovereign documents on undertakings domiciled in the EU. However, it has undertaken in the exchange of notes to inform its member states of the procedure agreed with Switzerland and to urge them to consider a similar solution with Switzerland for the service of sovereign documents from the Swiss Competition Commission.

Article 4 paragraph 1 of the Agreement creates the legal basis for the competition authorities to be able to coordinate their enforcement activities with regard to related matters. Thus this provision allows the timing of inspections or requirements in connection with a merger to be coordinated. This was previously only possible with the consent of the undertaking or undertakings concerned. Paragraph 2 specifies factors that must be taken into account when considering whether particular enforcement activities can be coordinated. Based on the autonomous application of its own competition laws, either competition authority may limit coordination and proceed independently on a specific enforcement activity (paragraph 3).

5.2.3 Negative and positive comity

The principle of avoiding conflicts (negative comity) is covered by Article 5 of the Agreement. The competition authorities of one party must take account of the important interests of the other party when enforcing competition laws and avoid any conflicts.

On the other hand, the principle of positive comity set out in Article 6 of the Agreement makes it possible for a competition authority to request the authority of the other party to carry out certain measures. However, positive comity does not oblige the requested authority to carry out the enforcement activities. Each requested authority decides at its own discretion whether and in what way it will comply with the request. So is it not possible for the EU Commission to require the Competition Commission through positive comity to carry out unannounced inspections in Switzerland in order to obtain evidence there.

The two articles on negative and positive comity are formulated in non-binding language, with the result that they will mainly be applied in informal cooperation activities. When and to what extent a competition authority will make use of these provisions and act on their basis is left to their own discretion.

5.2.4 Final provisions

Articles 11 to 14 of the Agreement contain the (customary) final provisions. For example, the contracting parties, on request, will consult each other on any matters arising from the implementation of the Agreement, consider the possibility of further developing their cooperation and will inform each other of amendments to their respective competition laws (Article 11 paragraphs 1 and 2 of the Agreement). On request, the competition authorities of the contracting parties will meet at the appropriate level and discuss matters listed in Article 11 paragraph 3 of the Agreement.

[8] Dispatch, BBl 2013, 3966 f. and 3997 ff.

Communications based on the agreement will be made in English and the two competition authorities will each designate a contact point for the transmission of communications (Article 12 of the Agreement).

Both competition authorities retain complete autonomy in the application of their own competition laws. Accordingly, the agreement must not be construed in a sense that is prejudicial to this (Article 13 of the Agreement). Lastly, Article 14 regulates the entry into force of the Agreement and any amendments made to it.

5.3 Focus on the exchange of information

Articles 7 to 10 of the Agreement cover the exchange of information between the competition authorities and various protective mechanisms for the use and passing on of confidential information. The Agreement essentially defines confidential information as evidence in the possession of one authority that could also assist the other competition authority in parallel proceedings.

The exchange of information or more specifically exchange of evidence envisaged by the Agreement is an element that was lacking in previous cooperation agreements with the EU. This makes the agreement between Switzerland and the EU a "second generation agreement", which considerably expands the potential for cooperation between the two competition authorities in qualitative terms.

5.3.1 Exchange of information

The procedure for exchange of information set out in Article 7 of the Agreement is structured like a cascade[9]. The higher the need to protect the information to be exchanged, the stricter the requirements for its transmission (from complete informality to the right to refuse transmission).

The principle governing the exchange of information is set out in Article 7 paragraph 1 of the Agreement. To achieve the purpose of the Agreement, the competition authorities of Switzerland and the EU may "share views and exchange information related to the application of their respective competition laws". The requirements to be met under Article 7 of the Agreement and Articles 8 to 10, which relate to the protection and use of the exchanged information, are reserved.

In the first level of the cascade, the competition authorities may discuss any non-confidential information that they have obtained by investigative process or otherwise (Article 7 paragraph 2 of the Agreement). This also covers information that is subject to official secrecy, such as information on ongoing proceedings or that is available before the formal opening of an investigation. This provision relates only to the verbal exchange of information between the authorities, as the exchange of documents/evidence is governed by paragraphs 3 and 4.

The second levels relates to the exchange of documents/evidence. The competition authorities may exchange such information if the undertaking providing the information has given its express consent (in writing or in a waiver) (Article 7 paragraph 3 of the Agreement). In this way, the undertakings consenting to the exchange waive the confidentiality of information and authorise the competition authorities to make an exchange. In practice, this should normally concern cases of mutually notified mergers, rather than investigations into agreements affecting competition. If the exchanged documents contain data on specific persons, the data may only be transmitted if the other competition authority is investigating the same or related matters[10]. Otherwise the data must be redacted, so that it is not possible to see the protected data.

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[9] For more detail, see the Dispatch, BBl 2013, 3970 ff.

[10] The Dispatch, BBl 2013, 3972, refers in this connection to Art. 4 para. 2 of the Federal Act of 19 June 1992 on Data Protection (DSG; SR 235.1).

In the third level of the cascade, the undertakings do not consent to an exchange of documents or evidence. In this case, a competition authority can only transmit the information subject to the following three requirements and in response to a formal request from the other authority (Article 7 paragraph 4 agreement). In practice, this article will mainly apply to the exchange of information in relation to the prosecution of international cartels or to a cross-border abuse of a dominant position.

- First, information may only be transmitted if both competition authorities are investigating the same or related conduct (paragraph 4 let. a). This is primarily intended to rule out the risk of fishing expeditions. In addition, only information that is already available may be exchanged; a request for additional information is not permitted.
- Second, the request must meet certain formal requirements. It must be made in writing, must include a description of the matter under investigation and must cite the relevant legal regulations; in addition, the undertakings under investigation that are known at the time of the request must be identified (paragraph 4 let. b).
- Third, the competition authorities may consult to decide which documents in their possession are relevant and can be transmitted (paragraph 4 let. c). This consultation process will normally be verbal and is intended to prevent complying with a request from becoming a serious burden on the requested authority.

Irrespective of whether the undertakings concerned give their consent, each competition authority is free, or not required, to discuss information obtained in an investigation or to transmit such information to the other authority, in particular if this would be incompatible with its important interests or would be unduly burdensome (Article 7 paragraph 5 of the Agreement). Tactical considerations in the investigation may constitute an important interest if revealing information prematurely could jeopardise the success of imminent investigative measures.

The fourth level of the cascade relates to information and documents that are subject to special protection, in particular information from reports from the leniency system and information given to an authority in the course of settlement negotiations. This information may only be transmitted with the express consent of the undertaking that has provided the information (Article 7 paragraph 6 of the Agreement). This restriction is necessary so that the two very important institutions are not deprived of their purpose in the application of the law, because the undertaking can no longer count on the confidential treatment of the information concerned. However, special protection in relation to reports under the leniency system applies only to the reports themselves. Evidence provided, such as correspondence or evidence obtained in an unannounced inspection, is eligible for transmission under Article 7 paragraphs 3 and 4 of the Agreement.

The exchange of information is not permitted on the fifth level of the cascade if an authority is not permitted to use the information under the procedural rights and privileges granted by its own laws (Article 7 paragraph 7 of the Agreement; the “double barrier”). This relates above all to legal principles on the disclosure of information such as legal professional privilege, the right against self-incrimination or other prohibitions on using illegally obtained evidence.

As a result of the comprehensive protection given in both legal systems relating to the procurement of information and the corresponding bans on transmission in paragraph 7, and in view of the adequate legal protection relating to the use of transmitted information (inspection of files, right to a fair hearing, right to offer evidence, right of appeal against the final decision), the Agreement does not provide for legal protection in relation to the actual transmission of confidential information. Transmission as such is not an administrative act under Article 5 APA, because it does not establish or modify any rights or obligations for the parties. However, the parties concerned are notified of the transmission of documents.

If an authority has transmitted information that subsequently proves to be incorrect, for data protection reasons it must immediately inform the other competition authority, which must correct the information or remove it from the case files (Article 7 paragraph 8 of the Agreement).

5.3.2 Use of information

A competition authority is not free to use information transmitted in accordance with Article 7 of the Agreement. Article 8 of the Agreement places tight restrictions on the authority in relation to this.

First, information that is discussed or transmitted may only be used by the recipient competition authority and only for the purpose of enforcing competition law (paragraph 1). Transmitting the information to the prosecution or tax authorities, for example, is not permitted. Use in criminal proceedings against natural persons is expressly prohibited (paragraph 4).

Second, information obtained and transmitted in investigation proceedings may only be used by the receiving authority to enforce competition law with regard to the same or related matters (paragraph 2).

Third, information that is transmitted in accordance with Article 7 paragraph 4 of the Agreement without the consent of the undertaking concerned may only be used for the purpose stated in the request (paragraph 3).

And finally, a competition authority can request that transmitted information may only be used subject to conditions that it specifies. The receiving authority may only derogate from these conditions if it obtains the prior consent of the other competition authority (paragraph 5).

5.3.3 Protection and confidentiality of information

The information transmitted under Article 7 of the Agreement is subject to express rules on its protection and confidentiality (Article 9 of the Agreement). These rules put into specific terms the official secrecy and requirement to safeguard business secrets that apply to both competition authorities.

Under paragraph 1, the fact that a request for the transmission of information has been made must be treated as confidential. Only the parties to the proceedings are informed in accordance with the national legislation to which they are subject. The information obtained is subject to official and business secrecy and must not be disclosed to third parties or other public authorities (civil or criminal courts, other public offices). Exceptions are made only for the purpose of obtaining a search warrant from a court (let. a), disclosure to the parties to the proceedings to guarantee their right to a fair hearing (let. b), disclosure in appeal proceedings (Federal Administrative Court and Federal Supreme Court in Switzerland; let. c) and disclosure if it is indispensable for the exercise of the right of access to documents under the laws of a party (let. d). The protection of business secrets must be fully guaranteed by the receiving authority in all these cases.

If information is used or disclosed in violation of these protective provisions, the competition authority concerned must notify the other authority immediately. The parties must then consult immediately on steps to minimise any harm caused by such use or disclosure and to prevent any repetition (paragraph 2). If for example information is disclosed in civil proceedings (action for damages) in violation of the Agreement, the two competition authorities must take measures to ensure this does not recur in future.

Paragraph 3 calls for the protection of personal data in accordance with the respective legislations of the contracting parties.

5.3.4 Transmission within the EU and the European Economic Area

Based on its legal system, the EU Commission has certain information duties in investigation proceedings vis-à-vis the responsible authorities of its member states and the EFTA Supervisory Authority. Article 10 of the Agreement specifies the obligations that apply when implementing the Agreement. For example, the EU Commission must consult the competent au-

thorities of the member states before making a decision and provide them with a copy of the most important evidence (Article 11 and 14 of Regulation 1/2003[11])[12].

The information made available to the competition authorities of the member states or the EFTA Supervisory Authority may not be used for any purpose other than the enforcement of EU competition law by the EU Commission and may not otherwise be disclosed (paragraph 2). The Competition Commission will remind the EU competition authorities of these duties when transmitting information. If there is any doubt as to whether information will be protected, the Competition Commission may refrain from transmitting it until the required assurances are provided. If information is transmitted in violation of these obligations, the required consultations and corrections will be initiated immediately in accordance with Article 9 paragraph 2 of the Agreement.

5.4 Assessment

With the exchange of information provided for in the Agreement, cooperation between competition authorities (here in Switzerland and in the EU) is raised to a level that will bring genuine added value in the enforcement of competition laws and in making procedures more efficient. In this respect, the Agreement will facilitate the more effective implementation of competition laws in Switzerland and the EU. What undertakings can already do, i.e. coordinate their defences in cartel-related investigations at a global level, Swiss and European competition authorities will also be able to do in the future when enforcing their competition laws.

The main value of the Agreement must not simply be seen as the exchange of confidential information or evidence in accordance with its Article 7. This exchange will only actually take place in a small number of cases. The value of the Agreement lies much more in the opportunity to access information previously protected by official secrecy[13]in the daily work of the competition authorities. In addition, the Agreement cements the principle of the equivalence of the two competition laws.

For Switzerland and the Swiss competition authorities, the new agreement is certainly a major step forward in international cooperation. Until now, there have been no formal means of cooperation and now cooperation with the EU is being raised to a level that is (so far) unique in global terms.

[11] Council Regulation (EC) 1/2003 of 16 December 2002 on the implementation of the rules laid down on competition in Articles 81 and 82 [now 101 and 102] of the Treaty, OJ. C 1 of 4.1.2003, 1 ff.

[12] See the detailed remarks in the Dispatch, BBl 2013, 3976 f.

[13] See also NZZ of 18.5.2013, 27.