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To the Federal Council

Annual Report 2014 of the Competition Commission

(in accordance with Article 49 paragraph 2 Cartel Act)

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1 Foreword from the President

Alongside the main task of the competition authorities, which is to expose and prohibit unlawful restraints of competition in individual cases, they are also called upon to act as advocates for fair competition in general. The competition authorities' advocacy activities are far less familiar to the general public than their decisions in specific cases. In order to explain this task of the competition authorities in proper detail, the priority theme in this year's annual report is the competition authorities' role as advocates.

The advocacy instruments available to the competition authorities under the Cartel Act (consultation proceedings, office consultation procedures, expert reports, and public relations, not to mention the market monitoring procedures and the advisory services provided by the Secretariat) are largely informal. They allow the Competition Commission and the Secretariat to raise awareness of restraints of competition, to point out unnecessary restraints imposed by the state, to answer questions of competition law in an expert capacity and to provide general information on their activities and on the vital economic importance of competition. The competition authorities fulfil the same task in relation to cantonal restrictions on market entry using the instruments provided by the Internal Market Act (IMA) (recommendations, investigations, expert reports and explanatory reports). In practical terms, advocacy activities have become an important instrument that brings concrete results in pro-actively preventing restraints of competition.

The most effective advocacy instrument has been and remains the prompt public announcement of decisions by the Competition Commission and their publication in full. The sanctioning of a bidding cartel or of a company that has prevented parallel imports into Switzerland, and the publication of the related decisions, naming the companies concerned and giving details of the fines they have received in the mass media, not only has a powerful deterrent effect but also raises awareness among businesses and consumers. The end result is that decisions become easier for the companies concerned to understand and it is simpler for the competition authority to explain the aims and objectives of any intervention by the Competition Commission and the consequences of disrupting competition by citing the examples of specific cases and decisions.

In the past year, the competition authorities again issued clear and concise decisions and began new proceedings. The sanctioning of the Swiss Press Agency (Schweizerische Depeschenagentur, SDA) for squeezing out a competitor or the opening of new investigations into the manipulation of competition in foreign exchange dealing and in the car leasing business are examples of this.

The revised Cartel Act failed to pass through parliament in September 2014. Although the draft of the revised Act contained elements, such as the partial per se prohibition of cartels or the modernisation the merger control procedure, which would have increased legal certainty and made the work of the competition authorities easier, from the point of view of the Competition Commission, the failure was not entirely bad news: the current Cartel Act contains the instruments required to expose and prevent restraints of competition and the competition authorities basically function well. This was established when the Cartel Act was evaluated in 2009 and nothing substantial has changed to alter this finding. As a result, the competition authorities will continue to fulfil their statutory tasks by issuing their decisions and through their targeted advocacy.

Prof. Dr. Vincent Martenet
President Competition Commission

2 Most important decisions in 2014

In a ruling dated 30 June 2014, the Competition Commission concluded its investigation into **Jura Elektroapparate AG** (Jura). Jura had entered into an agreement with its sales partners that prohibited them from selling Jura coffee machines on the internet. In line with the landmark decision of 11 July 2011 by the Competition Commission on online trading (Electrolux AG/V-Zug AG), Jura undertook in principle under an amicable settlement to allow the selective sale of coffee machines by authorised retailers via the internet.

In a decision dated 14 July 2014, the Competition Commission approved an amicable settlement between its Secretariat and the **Swiss Press Agency** (Schweizerische Depeschenagentur AG (SDA)), while at the same time imposing a sanction of CHF 1.88 million on the SDA. Under the amicable settlement, the SDA agreed not to enter into any more exclusivity agreements with its clients. In addition, the SDA will apply a transparent system of rebates, as well as granting various media non-discriminatory access to its services. This should ensure that the SDA treats all media in Switzerland in the same way, thus not distorting competition in the downstream media and advertising markets. The investigation had revealed that in the period from the end of 2008 to the beginning of 2010, the SDA concluded subscription agreements involving exclusivity discounts with selected media conglomerates in German-speaking Switzerland. These rebates were subject to the condition that the media concerned would take the basic news service exclusively from the SDA and not subscribe to the corresponding service from AP Switzerland at the same time. By granting exclusivity discounts, the SDA had abused its dominant position and obstructed its competitor at that time, AP Switzerland, in an unlawful manner.

In spring 2009, the Competition Commission began an investigation into **ETA SA Manufacture Horlogère Suisse** (ETA) in response to various complaints. The allegations were that ETA discriminated against customers outside its group by imposing higher prices and different supply terms when compared with Swatch Group companies. The investigation was suspended from June 2011 to November 2013 while enquiries were made into a phased-in reduction in supplies of mechanical watch movements. The Competition Commission terminated the investigation into ETA with a decision dated 14 July 2014, as there was insufficient evidence that ETA's conduct was discriminatory or inappropriately motivated. This was essentially because both the increases in prices and the changes in conditions of sale were applied consistently to all customers. In addition, in a decision dated 21 October 2013, the Competition Commission approved an amicable settlement regulating the phased-in reduction in supplies of mechanical watch movements. This also included provisions on price and sale conditions that will apply until ETA's obligation to supply expires on 31 December 2019.

In a ruling dated 8 August 2014, the Competition Commission, or more precisely one of its vice-presidents, approved the amicable settlement between its Secretariat and AMAG **Automobil- und Motoren AG** thus concluding the proceedings relating to this company. The investigation, opened in May 2013, related to possible agreements affecting competition and was directed towards various Swiss dealers in Volkswagen Group brands, in particular VW, Audi, Skoda and Seat; AMAG was one of the dealers concerned. The investigation focused on the allegation that discounts and delivery charges in retail sales of new vehicles of the brands in question were fixed. In the amicable settlement, AMAG undertook not to apply agreements on the fixing of discounts and delivery charges and not to exchange price-relevant information with its competitors. As AMAG had made a voluntary report of its own conduct, no sanction was imposed. The other parties to the proceedings have appealed against the decision.

In a judgment dated 23 September 2014, the **Federal Administrative Court** overruled the rulings and sanctions that the Competition Commission had issued against SFS unimarket

AG, Siegenia-Aubi AG and Paul Koch AG on 18 October 2010. The companies had agreed on the amount and timing of price increases for window fittings at a meeting on 22 September 2006; the Competition Commission held this to be an unlawful price-fixing agreement. In its judgment, the court essentially concludes that the question remained unanswered of whether the restraint of competition brought about by the agreement reached at the said meeting was the "sole cause" of a horizontal price-fixing agreement between the companies, or whether the agreement was due to the pricing requirements imposed by EU manufacturers, or indeed to both factors. As a consequence, it was not proven that the companies could be accused of entering into an unlawful price-fixing agreement under Art. 5 para. 3 lit. a Cartel Act. At the request of the Competition Commission, the Department of Economic Affairs, Education and Research (EAER) has filed a public law appeal in the Federal Supreme Court against two of the three judgments.

The investigation into **door products** was concluded in a decision dated 17 November 2014. The Competition Commission imposed sanctions amounting to CHF 185,000 on five Swiss companies trading in door fittings (door locks, handles and hinges), while exempting one company from any sanction at all, as it had initially reported itself voluntarily to the competition authorities. The Competition Commission terminated the investigation into the manufacturer without taking any action, as it was unable to prove any breach of competition law. In this case, five companies trading in door fittings met every year from 2002 to 2007 in order to agree to adhere to minimum margins when selling large volumes of door fittings. One further company attended the annual cartel meeting in 2007. This type of price-fixing agreement constitutes a hard horizontal cartel.

The Competition Commission concluded its investigation into the credit card market on 1 December 2014 with an amicable settlement. This provides for a reduction in the average **interchange fee for the credit cards** from MasterCard and Visa from 0.95% to 0.44%. All the parties involved in the investigation have signed the amicable settlement. These are on the one hand the companies that issue the credit cards and on the other the companies that persuade retailers to accept credit cards and enter into the corresponding contracts with them (the acquirers). The reduction relates to the interchange fee that applies in Switzerland. This is the fee that the acquirer must pay to the issuer when payment is made using a Swiss credit card at a Swiss retailer. The Competition Commission concluded back in 2005 that these interchange fees constitute an agreement restricting competition, as they are fixed and applied jointly by the companies concerned. The Competition Commission assumes, however, that this agreement restricting competition may be justified if the fees are so low that it is no longer an issue for retailers whether payment is made in cash or by credit card. The reduction in the fee will take place in two stages: an initial reduction will be made on 1 August 2015 to 0.7%, and the second on 1 August 2017 to 0.44%.When compared with the situation at the end of 2014, this means that retailers will pay around CHF 50–60 million less each year. The proceedings and the amicable settlement did not consider debit cards, and in particular the Maestro system, which works without charging an interchange fee.

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

In August 2014, the Secretariat concluded the preliminary investigation opened in 2013 into reporting systems used by cantonal building contractors' associations. The Secretariat examined whether and if so, which building contractors' associations use such reporting systems. It analysed their effect and reached the conclusion that they encourage bid rigging by construction companies and can adversely affect competition. Accordingly, the Secretariat urged building contractors' associations inter alia to make sure that participant companies are no longer able to use the reporting system to find out before the deadline for bids which other companies are submitting an offer. Based on the proposals, the cantonal building contractors' associations have either adapted their reporting systems or stopped using them.

On 30 October 2012, the Secretariat began the **Lower Engadin construction** investigation into various companies in the sector for road construction and civil engineering, surfacing work and building construction, as well as related upstream markets, and conducted unannounced inspections. 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, unannounced inspections were carried out.

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. The Secretariat evaluated the seized documents and bids and conducted a comprehensive market survey of the authorities responsible for awarding tunnel cleaning contracts. In November 2014, the Secretariat sent its draft decision for the Competition Commission in terms of Art. 30 para. 2 Cartel Act to the parties for their comments.

On 15 April 2013, the Secretariat opened the **Bauleistungen See-Gaster** investigation into six companies in the road construction and civil engineering sector by conducting unannounced inspections. 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 and again carried out unannounced inspections. Evaluation of the seized data has been completed. The parties were allowed to inspect the case files in December 2014.

As explained in the section on advocacy (see 5. below), raising awareness among procurement agencies is an important instrument in the fight against bid rigging. In 2014, awareness campaigns were carried out in the cantons of Basel Stadt and Basel Land, Bern, Glarus, Lucerne, Schaffhausen, Solothurn, Thurgau and Zurich. In addition, the Secretariat held various related meetings, gave a number of presentations and took part in podium debates for audiences such as businesses, lawyers and government agencies.

3.1.2 Other proceedings

In the investigation opened on 22 November 2011 into wholesalers of sanitary facilities, the Secretariat submitted its draft decision and the comments of the parties thereon to the Competition Commission in November 2014.

In a decision dated 17 November 2014, the Competition Commission fined the members of a suppliers' cartel in the **door products** sector. Five Swiss companies trading in door handles, locks and hinges (door fittings) met each year from 2002 to 2007 in order to agree to adhere to minimum margins for large volume sales of door fittings. One other company attended the annual cartel meeting in 2007. The agreed minimum margins related to products manufactured by the company Glutz AG and were intended to apply when selling fittings to door makers (e.g. joinery firms). The Competition Commission held this agreement to be unlawful and sanctioned the retailers with fines totalling CHF 185,500. The Competition Commission dropped the proceedings against the manufacturer Glutz AG, as it was not possible to prove that the company had breached competition law.

Following the two investigations into bid rigging in the **road construction 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 individual projects affected by the agreements are not disclosed or not specifically named in the published versions of the rulings). On 6 August 2014, the Competition Commission suspended the procedure concerning access to files in the investigation into road construction and civil engineering in the canton of Aargau, because this case is still ongoing before the Federal Administrative Court. On 8 September 2014, the Competition Commission decided on whether to grant access to the case files related to the investigation into road construction and civil engineering in Zurich (partial access to the case files was granted). Two of the companies concerned have appealed to the Federal Administrative Court against the decision to grant only partial access to the files.

The three appeals against the Competition Commission rulings relating to builders' supplies for windows and French doors were granted by the Federal Administrative Court in September 2014. Following a detailed review of these decisions, the Competition Commission and the EAER have appealed two of the three judgments (Paul Koch AG; Siegenia Aubi AG) to the Federal Supreme Court. In the view of the Federal Administrative Court in both of its judgments, it was not proven beyond doubt that a price-fixing agreement had been reached. On this point, the Competition Commission claims that there has been a violation of federal law, because the Federal Administrative Court is applying excessively strict legal requirements for proving the existence of horizontal price-fixing agreement (cartel). In the Competition Commission's opinion, the "unanswered questions of evidence" raised by the Federal Administrative Court with regard to a price-fixing agreement do not exist. In the judgment in the case of SFS AG, the Competition Commission decided against an appeal, because the issue of whether SFS took part in the price-fixing agreement in question, which the Federal Administrative Court answered in the negative, cannot be contested before the Federal Supreme Court as it is a question of fact.

3.2 Services

3.2.1 Financial services

In the financial services sector, the investigation relating to credit card interchange fees was successfully concluded in an amicable settlement approved by the Competition Commission on 1 December 2014. The amicable settlement provides for a reduction in the domestic interchange fees from the current 0.95% to 0.44%. The Competition Commission concluded in its first investigation back in 2005 (see RPW 2006/1, p. 65 ff.) that these interchange fees constitute an agreement restricting competition, as they are jointly fixed and applied by the companies concerned. The Competition Commission however held that this agreement restricting competition may be justified if the fees are so low that it is no longer an issue for retailers whether payment is made in cash or by credit card, i.e. if the retailers are indifferent as which means of payment is used. This "Merchant Indifference Test" (also known as the "Tourist Test") has a sound basis in scientific research as set out in a publication by this

year's winner of the Nobel Prize for Economics, Jean Tirole[1]. The amicable settlement was signed by all the subjects of the investigation, i.e. all the issuers and acquirers. It provides for the reduction in interchange fees to take place in two stages: an initial reduction on 1 August 2015 to 0.7%, and a second reduction on 1 August 2017 to 0.44%. Termination of the amicable settlement becomes possible for the first time on 1 August 2019. The amicable settlement also contains a dynamic adjustment mechanism: increases or reductions in the EU upper limit for interchange fees for credit cards of 0.3% will be applied in Switzerland at exactly the same level (e.g. if the rate in the EU is reduced to 0.2, this would result in a reduction in Switzerland to 0.34%). The dynamic adjustment mechanism is intended to ensure that the amicable settlement will continue to apply in the long term. Lastly, the ban on the "Non-Discrimination Rule" (NDR), introduced in 2005, was lifted. This means that acquirers again have the option of including a clause in their agreements with retailers that prohibits the retailers from setting different prices for different methods of payment. The lifting of this ban is related to the major reduction in the interchange fees, which should mean that retailers will not incur additional costs for accepting credit cards rather than cash payments.

Finally, the Secretariat continued to make progress with its investigation into agreements to influence the reference interest rates **Libor, Tibor** and **Euribor**, as well as derivatives based on these rates. In this investigation, the competition authorities have also for the first time requested mutual legal assistance in civil and commercial matters from France, based on the Hague Convention (see RPW 2014/2, p. 450 ff.). The French Ministry of Justice has approved the request and passed it on to the French courts for a decision to be made.

In the report year, two further investigations connected with financial services were begun. The first investigation, opened on 31 March 2014 and relating to currency trading (Forex) will examine whether various banks have concluded unlawful agreements relating to fixing various exchange rates. The possible practices include the following in particular: exchanging confidential information, general coordination of transactions with other market participants at agreed price levels, coordinated activities to influence the WM/Reuters Fix, and coordinating the purchase and sale of foreign exchange.

The second investigation relates to automobile leasing. The investigation was opened because of indications that finance companies belonging to manufacturing groups or importers (known as "captive banks") may have exchanged sensitive information relating to leasing rates and the financing of vehicles, and thus may have entered into price-fixing agreements. More specifically, it is suspected that the captive banks have exchanged information relating to interest rates, contractual conditions, the level of commission paid to car dealers and various other outlays.

3.2.2 Liberal professions and professional services

A preliminary investigation into maintenance and support services for network devices from Cisco Systems was successfully concluded after assurances were given relating to changes to communications made to end customers. The background to this preliminary investigation was a report made by provider of maintenance and support services independent from Cisco, alleging that Cisco Systems held a dominant position in relation to certain network devices, in particular routers and switches, which it was abusing in that operating system updates could only be obtained as part of comprehensive maintenance and support packages. In the course of the preliminary investigation, Cisco Systems demonstrated various options for end customers to purchase obtain operating system updates, or in some cases obtain them free of charge, without having to purchase other maintenance and support

[1] JEAN-CHARLES ROCHET/JEAN TIROLE, Must-take cards: Merchant discounts and avoided costs, in: Journal of the European Economic Association, 9(3), p. 462 ff., 2011.

services from Cisco Systems. In addition, Cisco Systems in principle allows the transfer of operating system-software licences between end customers – either directly or via third parties – within the European Economic Area and Switzerland. As Cisco Systems confirmed the foregoing matters in writing and at the same time expressed its willingness to implement a series of measures related to its communications to end customers, it was possible to terminate the preliminary investigation.

Considerable progress has been made in the ongoing investigation into Booking.com, Expedia and HRS in a case involving online booking platforms for hotels, which focuses in particular on the contractual terms that these companies impose on their partner hotels. In connection with this investigation, the Federal Administrative Court had to rule on whether a hotel industry association is entitled to party status, which would in particular confer the right to inspect the case files. In a judgment dated 1 July, the Federal Administrative Court ruled against this and thus upheld a related interim ruling by the Secretariat. Interviews with the parties were also held in the report year.

3.2.3 Health care

The Competition Commission has filed an appeal against the decision of the Federal Administrative Court in the case relating to off-list medicines. The judgment of the Federal Administrative Court is of fundamental importance, because it holds that the Cartel Act does not apply in this area, which in the view of the competition authority is incorrect.

In the investigation relating to the commercialisation of electronic medical information required for the distribution, supply and billing of medicines in Switzerland, parliament is currently debating medical information in connection with Art. 57a of the Therapeutic Products Act (RS 812.21), which is currently being revised. The fundamental issue is whether the Medicinal Product Information System (AIPS) set up by Swissmedic will continue to be the reference for publishing medical information or if this task should be taken over by the pharmaceutical companies in cooperation with the service providers.

In the preliminary investigation relating to the level of competition at all levels involved in the distribution of medicines in Switzerland, the activities of pre-wholesalers (PWS), i.e. of the companies who offer of the warehousing services to pharmaceutical companies that want to out-source this type of activity, was the focus of investigations. The distribution of medicines in Switzerland is notable on the one hand for the virtual impossibility of parallel imports of medicines, and on the other for increasing vertical integration in the distribution of medicines. In this context, certain financial services (e.g. acceptance of del credere agents) by the PWS are the subject of a special examination.

In relation to the hospital sector, the courts have taken certain key decisions in favour of competition. First of all, the Federal Administrative Court held that under the current financing system, hospitals should also be able to operate for profit under the system of basic health insurance, which is essential if the indirect competition that parliament wants is to have a positive effect. The competition authorities have also defended this view on a number of occasions. Secondly, the cantons are required to respect certain principles in relation to the intercantonal planning of highly specialised medicine. As the Competition Commission stressed in its opinion on the hospital planning, these principles must firstly guarantee the equality of treatment of public and private establishments and secondly that a method of selecting providers is applied that ensures that the system encourages competition.

3.3 Infrastructure

3.3.1 Telecommunications

At the request of the Federal Council, the Competition Commission prepared an expert report on proposed amendments to the Ordinance on Telecommunications Services (OTS) and commented on a number of controversial issues from the point of view of competition policy, such as the effect on investment incentives of the proposed regulation of the last mile, the intended introduction of the ban on a margin squeeze as a specific measure to prohibit discrimination in the sector, and the structure of a “glide path” when taking account of more efficient technologies, for example in interconnection or in relation to access to leased lines.

In the investigation into Swisscom relating to the provision of broadband internet to business customers, the Secretariat concluded its enquiries in December 2014 by sending its proposed decision under Art. 30 para. 2 Cartel Act to Swisscom for comment.

In the telecommunications sector, the Competition Commission also had to assess the merger between Swisscom Directories AG and Search.ch AG. In this case, Swisscom and Tamedia, following the takeover of Publigroupe SA, are planning to merge its subsidiaries local.ch and search.ch into a joint subsidiary undertaking. The Competition Commission’s preliminary investigation at the end of November 2014 revealed that the merger may establish or increase a dominant position in relation to address directories. Accordingly, the planned merger will be the subject of an investigation under Art. 10 Cartel Act, which will be completed by the end of March 2015.

In addition, the Competition Commission prepared an expert report at the request of OFCOM on the issue of whether Swisscom holds a dominant position in the field of IP interconnection. IP interconnection guarantees the connection of computers linked via the Internet.

In the appeal proceedings before the Federal Administrative Court in the case relating to ADSL pricing policy, the Competition Commission expressed its views on a list of questions that Swisscom had answered as part of a further exchange of submissions.

3.3.2 Media

In a decision dated 14 July 2014, the Competition Commission concluded the investigation into the Swiss Press Agency (Schweizerische Depeschenagentur (SDA) relating to pricing policy and other practices, and approved an amicable settlement between the Secretariat and the SDA. The investigation disclosed that from the end of 2008 to the start of 2010, the SDA had concluded subscription agreements with exclusivity discounts with selected media firms in the German-speaking part of Switzerland. These discounts were tied to the condition that the media firms concerned would obtain their basic news service exclusively from the SDA and would not subscribe to a corresponding service from a rival agency at the same time. In this way, the SDA had abused its dominant position and had thus unlawfully prevented its rivals from competing. In the amicable settlement, the SDA undertakes not to enter into any further exclusivity agreements with its customers. In addition, the SDA undertakes to apply a transparent system of rebates and to grant the various media companies non-discriminatory access to its services. This should ensure that the SDA treats all media firms in Switzerland equally, thus not distorting competition in the downstream media and advertising markets. The SDA was ordered to pay a sanction of CHF 1.88 million.

The investigation into the broadcasting of live sport on Pay-TV, opened in April 2013, made little progress in the report year largely as a result of various interim decision proceedings instigated by the parties and subsequent appeals against these decisions. The appeal filed by the cable network operators relating to the request for interim measures with regard to the

liberalisation of certain programme content and purchasing options was rejected by the Federal Administrative Court in a legally binding judgment dated 9 July 2014. In a judgment dated 2 October 2014, the Federal Administrative Court declined to consider the appeal relating to the ruling of 24 February 2014 on the matter of party status. This judgment has been appealed to the Federal Supreme Court.

The preliminary investigation into the Goldbach Group's TV/radio marketing was concluded with a final report dated 12 November 2014. This was possible primarily because the Goldbach Group gave the Secretariat a letter of undertaking relating to the future conduct of its subsidiaries when marketing or arranging TV and radio advertising airtime. In the letter of undertaking, the Goldbach Group confirmed that its subsidiaries, when selling TV and radio advertising airtime, will not make discounts or free space dependent on booking all or the majority of the advertising volume in any other media form (TV, radio, adscreen, online etc.) via a company in the Goldbach Group.

In 2014, the Competition Commission was also called on to assess several company mergers in the media sector: in the merger planned between Tamedia AG and the B2C division of Ticketportal AG, Tamedia reported its intention to take over the B2C division of Ticketportal via its subsidiary Starticket AG. In the case of Aurelius / Publicitas, Aurelius AG planned to take over the activities of Publigroupe in the field of media sales. In the case of Ringier / Le Temps, Ringier AG planned to acquire sole control of HE Publishing SA; this would result in Ringier having the sole control of Le Temps SA. In the case of Thomas Kirschner / Valora Mediaservices AG, Thomas Kirschner announced its intention to acquire indirect control of the Swiss press wholesaler Valora Mediaservices AG via its subsidiary Brillant Media Services GmbH. Subsequently, Thomas Kirschner / A and B XY / Valora Mediaservices AG reported the acquisition of joint control of Valora Mediaservices AG by Thomas Kirschner and the spouses XY – the latter via ATLAS Beteiligungen GmbH & Co. KG. In the case of Swisscom (Switzerland) AG / Publigroupe SA, Swisscom announced its intention, as part of a public takeover bid, to gain the sole control of the Publigroupe group of companies. In the case of Tamedia/home.ch, Tamedia planned to take over the sole control of the home.ch division. In relation to all these cases, the Competition Commission approved the mergers following a provisional assessment.

Following on from the merger proceedings in the case of Ringier/Le Temps, the Competition Commission in a ruling dated 8 September 2014 also lifted the conditions imposed by its decision of 20 October 2003 in the case of Edipresse/Ringier – Le Temps. The conditions were imposed due to the joint control of Ringier and Tamedia over HE Publishing and thus Le Temps, in order to guarantee the independence of Le Temps and to be able to control the effects of the cooperation in other media markets. With Ringier taking over sole control of Le Temps, the conditions were no longer required and thus had to be lifted.

Appeals have been filed in the Federal Administrative Court against the Competition Commission's ruling relating to book pricing in the French-speaking part of Switzerland. Also in dispute in this case was the extent to which the ruling of 27 May 2013 can actually be published. The parties concerned have filed an appeal in the Federal Administrative Court against the related Competition Commission decision.

3.3.3 Energy

The preliminary investigation into the ewb ownership strategy was concluded with a final report dated 10 January 2014. Following a meeting with the Secretariat in December 2013, ewb voluntarily made changes to resolve three potentially problematic competition law issues (written request to conduct a regular check of electrical installations, recommending its subsidiary Energie-Check Bern AG for safety checks on the ewb website, recommending in the ewb customer circular that its subsidiary [at the time] Bären Elektro AG should consolidate multiple electricity meters in buildings that are vacant). As a result, when the time

came for an assessment, there were insufficient indications of an unlawful restraint of competition under Art. 7 Cartel Act in connection with the possible exchange or use of commercially relevant information between the monopoly and competitive sectors of the ewb Group.

In the electricity sector, the Secretariat and the Competition Commission were again called upon on several occasions to provide expert reports as part of office consultation proceedings and legislative consultation proceedings and hearings respectively. Worth mentioning here are the federal decree on the second phase of the liberalisation of the electricity market and various partial revisions of the Energy Ordinance.

3.3.4 Other sectors

In the report year, various parties appealed to the Federal Administrative Court against the ruling of 2 December 2013 that concluded the investigation into air freight and which imposed fines totalling around CHF 11 million on 11 airlines for horizontal price-fixing agreements. In this case, there is also a dispute over whether and to what extent the ruling of 2 December 2013 should be published. Proceedings are also pending before the Federal Administrative Court in relation to this.

Significant progress was made with the investigation into the business customer pricing system for letter post services, which was opened in July 2013. In particular, the investigation is looking into the question of whether Swiss Post structured and applied its pricing system so as to obstruct competitors in the market, for example by making it difficult or even impossible for business customers to obtain services from Swiss Post competitors. In addition, it will be assessed whether Swiss Post discriminated against certain customers or otherwise placed them at a disadvantage.

3.4 Product markets

3.4.1 Consumer goods industry and retail trade

In a ruling dated 30 June 2014, the Competition Commission concluded its investigation into Jura Elektroapparate AG (Jura). The Competition Commission approved an amicable settlement in which Jura undertook in principle to allow its sales partners to sell its products online. In return, the Competition Commission terminated its investigation into Jura. An agreement had existed between Jura and its sales partners in which they undertook not to sell Jura coffee machines online. In accordance with the Competition Commission's landmark decision of 11 July 2011 on online trading (in the case of Elektrolux AG/V-Zug AG), Jura gave a formal commitment in principle under the amicable settlement to allow the selective sale of coffee machines by authorised retailers on the internet. In relation to restrictions that Jura placed on warranty services and its pricing policy, indications of an unlawful restraint of competition that had initially existed were not substantiated. On these matters, the Competition Commission also terminated proceedings.

The Secretariat largely concluded its enquiries in two investigations relating to musical instruments. One investigation related to pianos, including grand pianos. This was opened on 27 November 2012 as there were specific indications of horizontal and vertical price-fixing agreements, agreements relating to the foreclosure of sales territories and the obstruction or prevention of parallel and direct imports from neighbouring countries. The second investigation related to stringed instruments (guitars and basses) and accessories and was opened on 3 July 2013. This investigation aimed in particular to examine whether vertical price-fixing agreements had been reached relating to sales of guitars and accessories.

In connection with vertical agreements, at the end of 2014 the following appeals against Competition Commission decisions were pending before Federal Administrative Court:

Nikon, BMW, Alpine sports products/Roger Guénat SA. The Federal Administrative Court rejected the appeal in the case of GABA/Elmex in a judgment dated 19 December 2013. The case is now pending before the Federal Supreme Court.

On 21 August 2014, the Secretariat opened a preliminary investigation under Art. 26 Cartel Act in relation to imports of Coca-Cola products by retailers in Switzerland. It is investigating whether Coca-Cola prevented parallel imports by Denner and other consumers in Switzerland and thus infringed Art. 5 and/or 7 Cartel Act.

In relation to wheeled suitcases, the Secretariat dealt with allegations of the foreclosure of territories and price fixing agreements in its preliminary investigation. The investigation focuses on the prevention of cross-border online trading.

On 3 September 2014, the conditions that the Competition Commission imposed in 2007 in the Migros/Denner merger proceedings all expired, with one exception. The exception relates to the permanent requirement that Migros is basically not permitted to enter into exclusive agreements with its suppliers. The conditions were ordered on the one hand with the aim of ensuring that other operators in the market could take over Denner's previous role as Migros' most significant fringe competitor. On the other, the conditions were supposed to prevent it becoming more difficult for suppliers to gain access to sales markets. In the Competition Commission's view, the conditions have served their purpose; the conditions were enforced without any significant irregularities.

3.4.2 Watch industry

At the start of 2014, the Competition Commission, in accordance with the ruling issued in October 2013 in the case of Swatch Group Lieferstopp (termination of supply), appointed the audit company responsible for supervising compliance with the amicable settlement with the Swatch Group in accordance with Section 8 of the settlement. The first review of the conditions will be carried out in spring 2015. In the course of 2014, Secretariat did not receive any complaints that the Swatch Group was not complying with the amicable settlement.

In July 2014, the investigation opened in spring 2009 into ETA SA Manufacture Horlogère Suisse (ETA, a 100% subsidiary of the Swatch Group) was concluded. This investigation focused on unilateral changes in prices and changes in the sale conditions for mechanical watch movements that ETA introduced in 2009. The Competition Commission terminated the investigation into ETA, as there was insufficient evidence that ETA's conduct was discriminatory or unlawfully motivated. The investigation was suspended from June 2011 to November 2013 – for the duration of the Swatch Group Lieferstopp investigation.

In addition, at the end of October 2014 a preliminary investigation was opened into after-sales services for watches, in which the Secretariat will look into allegations of unlawful practices under competition law by various watch manufacturers.

3.4.3 Automotive sector

The Secretariat largely concluded its enquiries in the investigation opened on 22 May 2013 into various Swiss concessionaries for Volkswagen Group manufacturers (VW, Audi, Skoda, Seat, AMAG). The investigation focused on possible agreements affecting competition in connection with discounts and delivery charges in the retail sale of new vehicles. In a ruling dated 8 August 2014, the Competition Commission approved the amicable settlement between its Secretariat and AMAG, terminating proceedings against that party. In the amicable settlement, AMAG undertook not to implement agreements on fixing discounts and delivery charges and not to exchange price-relevant information with its competitors. As AMAG had filed a voluntary report, no sanctions were imposed. All the other parties have

appealed against the ruling. The investigation continues against the other parties under the ordinary procedure.

The Secretariat conducted two preliminary investigations in 2014 into the import of electric vehicles and sales of vehicle spare parts and concluded these without taking further measures. Two new preliminary investigations in connection with the selective sales network of certain automobile suppliers in Switzerland were opened and are still the subject of enquiries.

In the course of 2014, the Secretariat received around 50 enquiries from members of the public in connection with guarantees and warranties for vehicles purchased in member 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[2] (MV Notice).

In mid-July 2014, the Secretariat consulted interested groups on the future of the Notice on the competition law treatment of vertical agreements in the automobile trade (MV Notice). In November 2014, the Competition Commission held hearings with six trade associations and offered them the opportunity to explain their position orally and to answer questions from Competition Commission members directly. Based on this, the Competition Commission took a policy decision on 15 December 2014 to retain the MV Notice but to modify certain important points. The Secretariat was instructed to prepare a draft revision of the MV Notice. The Competition Commission will probably decide on the revised MV Notice (after hearing interested parties) in the second quarter of 2015, informing the industry at the same time.

3.4.4 Agriculture

The Secretariat expressed its views in around 30 office consultation procedures on amendments to acts and ordinances as well as on proposals from parliament. The various office consultation procedures in this sector related to regulating frontier protection, in relation to which the Secretariat again called for restrictions to be lifted this year. Examples include the several temporary increases in the partial tariff quota for potatoes requested by Swisspatat. The Secretariat supported each of these quota increases, but called for a permanent increase to be considered and for consumers to be consulted as an interested group when each of the partial tariff quotas is fixed, and not just representatives of producers, distributors and the processing industry.

3.5 Internal market

In relation to intercantonal access to the market, the Competence Centre for the Internal Market (CC IMA) concentrated on two cases relating to legal agents licensed to operate in the canton of Vaud who were seeking access to the market for representing clients in civil proceedings (Art. 68 para. 2 let. b of the Civil Procedure Code [CPC; RS 272]) in the cantons of Bern and Geneva. It also dealt with a case related to dental technicians.

Under the Internal Market Act (IMA), service providers are entitled to carry out their activities in other cantons according to the provisions that apply in their place of origin (place of origin principle). Pursuant to this principle, certain licensed legal agents in the canton of Vaud have formally applied for access to the market in the cantons of Geneva and Bern. These two applications were rejected. The Competition Commission appealed against these two negative decisions. As the cantonal courts also rejected these appeals, the Competition

[2] Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade (Decision of the Competition Commission of 21 October 2002), see RPW 2002/4, 770

Commission has exercised its right of appeal to submit the case to a decision of the Federal Supreme Court.

The Secretariat of the Competition Commission was contacted by the professional association for dental technicians in order to discuss difficulties encountered by providers in the market in obtaining education and training, which is not available to technicians as an independent profession (from that of dentists), in the canton of Zurich. The CC IMA also considered the case of a dental technician who wanted to work in this market in a canton that did not recognise his profession. The place of origin principle applies even if the profession does not exist at the place of destination (RPW 2013/4, 522).

In the field of government procurement, the Competition Commission filed two appeals. In the context of government procurement of IT services, a commune in the canton of Zurich made use of the invitation procedure when the market value exceeded the threshold from which the open procedure applies, without an exemption being invoked or the conditions being met. When one bidder appealed, the administrative court in Zurich decided that the appeal was not admissible. Without dwelling on the reason for rejecting the appeal, it should be pointed out that other cantons in identical circumstances overturned all the contract award decisions taken following a wrong choice of procedure. Accordingly, the Competition Commission agreed at the request of the CC IMA to exercise its right of appeal in order to establish whether applying the wrong government procurement procedure is a violation per se of the law on government procurement – and as such of the IMA – which must be determined ex officio, and if need be even against the will of the appellant. In another case, the Competition Commission, having been informed by a canton, appealed against a decision by mutual agreement to award a contract for IT services relating to a land register on the grounds that the awarding authority made its decision when there were reasons for invoking the urgency exception. However, the Competition Commission, just like the canton that had brought the case to its attention, takes the view that the conditions that permit the application of the exceptional clauses are not met. In order to have the question decided by the competent cantonal administrative court, the Competition Commission has exercised its right of appeal.

During the year under review, the Competition Commission was also called on to issue recommendations in the field of government procurement. One case concerned the limited company saint-galloise VRSG and was a response to the question of whether the company was subject to the law on government procurement (RPW 2014/2, 442). In addition, the Competition Commission was also approached in order to issue an expert report for a federal office. This again concerned again the law on government procurement, and in particular the conditions that awarding authorities must meet in order to be able to work together within an ad hoc entity that aims to provide IT services to public bodies (application of the “in state” exception; see RPW 2014/4, 785).

In connection with the adoption of the revised WTO Agreement on government procurement (GPA), the Federal Act and the cantonal law on government procurement will have to be amended. A working group made up of federal and cantonal representatives has begun to prepare a draft. The Secretariat is seeking to ensure that competition, legal remedies and the Competition Commission’s right of appeal are taken into account in the new legal provisions.

The consultation relating to the planned intercantonal agreement on government procurement was completed on 19 December 2014. The planned revision of the Swiss law on government procurement also has consequences for the Competition Commission’s duty to monitor government procurement at cantonal and communal levels. For this reason, the Competition Commission issued a recommendation to the Federal Council and the intercantonal authority for government procurement. The Competition Commission expressly pointed out that the supervision of the award of public contracts by the cantons and

communes may be weakened, and that there is no reason for doing this given the current practices.

The IMA requires the Competition Commission to monitor compliance with the rules on government procurement. To this end, the Competition Commission has been given various supervisory instruments. It can appeal against invitations for bids, award decisions, etc. in order to obtain a ruling on whether a government contract has been awarded in an unlawful manner. In addition, the Competition Commission can conduct investigations, issue recommendations, prepare expert reports, take a position in proceedings before the Federal Supreme Court and publish judgments. The Competition Commission's instruments, and in particular the right of appeal, have proven their value and must remain part of the revised law on government procurement, so the Competition Commission can continue to use them.

In relation to the award of licences, one Swiss town requested the assistance of the CC IMA in order to draft regulations on the allocating space in public places for carrying on a business in conformity with the IMA, in particular its Article 2 paragraph 7. Among the activities covered by these regulations are weekly markets in particular.

By virtue of Article 10 IMA, the Competition Commission can be consulted on the application of the IMA in ongoing proceedings. Paragraph 2 of this provision grants the same power to the Federal Supreme Court. During the year under review, the Federal Supreme Court invited the Competition Commission to provide its opinion on two cases related to government contracts (Judgment 2C_62/2014 of 7 October 2014; Judgment 2C_315/2013 of 18 September 2014, in: RPW 2014/4, 775).

3.6 Investigations

In 2014, a major series of unannounced inspections was carried out on the opening of the investigation into automobile leasing. Eight companies were the subject of unannounced inspections.

Interviews with parties and witnesses are becoming increasingly important and were carried out in various investigations.

In technical respects, it should be mentioned that the laboratory used to analyse the electronic data seized has been upgraded both with regard to hardware (a new server) and software (change to NUIX). Thanks to the investment, our specialist can now work more efficiently and in parallel at several work stations.

3.7 International

EU: On 1 December 2014, the Agreement between the Swiss Confederation and the European Union concerning Cooperation on the Application of their Competition Laws came into force. The Agreement will intensify cooperation between the competition authorities in Switzerland and the EU. With the increasing integration of the global economy, cross-border anti-competitive practices occur ever more frequently. The Swiss and EU competition authorities are increasingly required to investigate the same or related allegations. It is therefore appropriate that the two authorities should cooperate and exchange information in cases with cross-border effects.

In view of this, am 17 May 2013, Johann N. Schneider-Ammann, the head of the EAER, and Joaquín Almunia, vice-president of the EU Commission and its Competition Commissioner, signed an agreement on the cooperation between their competition authorities. The agreement allows the Competition Commission and the European Commission Directorate General Competition to notify each other of enforcement measures, to coordinate these and to exchange information. At the same time, it contains clear rules on compliance with the existing procedural guarantees for the undertakings concerned. The agreement is procedural

in nature and does not entail any harmonisation of substantive law, which is primarily why the issue of adopting EU law did not arise in this case. As Switzerland and the EU are closely integrated, this agreement will contribute to bringing better protection of competition both in Switzerland and in the EU. For more details on the Agreement, reference is made to the Annual Report for 2013 (see RPW 2014/1, 16 ff.).

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 2014, special attention was given to two strategic themes, "international cooperation" and "evaluating the activities and decisions of competition authorities". The new OECD recommendation on international cooperation in competition proceedings and investigations, which replaces the recommendation on international cooperation from 1995, was approved by the Council of Ministers on 16 September 2014. As the ICN/OECD survey on international cooperation in 2013 demonstrated, international cooperation has become more intense since 1995, due to the increasing globalisation of business. The new recommendation has taken account of these developments and has also been modified to take account of developments in electronic resources.

ICN: The cartel working groups on legal framework (Sub-group 1) and cartel enforcement (Sub-group 2) held several webinars, i.e. audio conferences with simultaneous PowerPoint presentations. Topics included techniques for interviews, investigative powers, methods for detecting cartels and the interplay between administrative and prosecution authorities in the prosecution of cartel offences. Sub-group 2 also sent out a questionnaire in order to draft a new chapter in the cartel enforcement manual on relations between competition authorities and contract awarding entities. Discussion points at this year's Cartel Workshop were the prevention of bidding cartels, cooperation with anti-corruption authorities and innovative methods for detecting cartels. The working group on agency effectiveness focused on handling confidential information (exchanges between authorities, disclosure to third parties and procedural, parties etc.). The working group on advocacy published a document with recommended approaches on evaluating the effects of legislation and policy on competition (Recommended Practices on Competition Assessment). The Competition Commission was represented at the ICN annual conference in Morocco.

UNCTAD: Representatives of the Competition Commission and the Secretariat attended the 14th Conference of the Intergovernmental Group of Experts on Competition Law and Policy. The topics discussed at the conference included informal cooperation between competition authorities and communication strategies as a means of effectively enforcing competition law (Agency Effectiveness).

3.8 No revision of the Cartel Act

Under Article 59a of the Cartel Act as revised in 2003, the Federal Council arranges for the evaluation of the effectiveness of measures and for the application of the Act. In view of this, the existing legislation was evaluated in 2008/2009. The evaluation revealed that the Cartel Act and the new instruments (direct sanctions, the bonus system, unannounced inspections and the objection procedure) had generally proven their value. At the same time, however, the evaluation also indicated a need for the revision of certain aspects. The institutional structure of the competition authorities above all, together with a range of substantive legal provisions were deemed to be in need of revision.

The Federal Council submitted a dispatch to parliament in February 2012 on the revision of the Cartel Act. In addition to the need for revision noted by the evaluation panel, the Federal Council raised further concerns in the dispatch: firstly it responded to the Schweiger Motion, which demanded a review of the sanctions system (compliance defence and criminal penalties for natural persons); secondly, in connection with the gain in value of the Swiss

franc, it considered measures to ensure that foreign exchange benefits are passed on to end customers. In relation to institutional reform, the Federal Council proposed guaranteeing the reduced size, professionalisation and independence of the decision-making authorities by having all cases – at the request of the investigating competition authority – decided by an independent competition court of first instance that is integrated into the Federal Administrative Court. In relation to the substantive law, the Federal Council proposed firstly to improve Article 5 Cartel Act by introducing a law prohibiting hard agreements (horizontal price, quantity and territorial agreements, as well as vertical price fixing agreements and the foreclosure of territories), but with a defence of justification. Secondly, in relation to civil competition law proceedings, it recommended that end customers should have the right to take legal action and that time bar limits should be extended. Thirdly, it called for merger control procedures to be made stricter and simpler (changeover to the SIEC test and more minor changes in relation to EU reports and time limits). Fourthly, it proposed, as a response to the acceptance of the Schweiger Motion, that appropriate compliance programmes be taken into account in assessing sanctions. Finally, it submitted proposals for an improved objection procedure and suggested various minor procedural improvements.

In the parliamentary debate, the Council of States approved the Federal Council draft for the revision of the Cartel Act at its first reading in March 2013, subject to various amendments. However, the National Council at its first reading in March 2014 decided not to consider the revision. After the Council of States adhered to its decision in June 2014, but the National Council again decided not to consider the revision in its second reading in September 2014, the final outcome is that the Cartel Act will not be revised.

The competition authorities take the view that rejecting the revised Cartel Act without even considering it is a missed opportunity to meet the need for reform highlighted in the evaluation. It also means that several improvements proposed by the Council of States, which in contrast to institutional reform and the substantive provisions (Articles 5, 7a and relative market power) were uncontroversial, are no longer on the table. They comprise the improvements to the merger control procedure, to civil competition law, to the opposition proceedings and to procedures in general. On the other hand, the outcome at the parliamentary stage does nothing to change the finding of the evaluation that the Cartel Act, as revised in the year 2003, basically works well.

4 Organisation and statistics

4.1 Competition Commission and Secretariat

In 2014, the **Competition Commission** held 11 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 2014, the **Secretariat** employed 75 (previous year 85) staff members (full-time and part-time), 45 per cent of whom were women (previous year 43). This corresponds to a total of 65.3 (previous year 75.8) full-time positions. The staff was made up as follows: 55 specialist officers (including the management board; this corresponds to 48.8 full-time positions; previous year 52.4); 6 (previous year 13) specialist trainees, which corresponds to 6 (previous year 13) full-time positions; and 14 members of staff in Resources and Logistics Division, which corresponds to 10.5 (previous year 10.4) full-time positions.

The Secretariat will relocate in June 2015 within Bern from Monbijoustrasse 43 to Hallwylstrasse 4.

4.2 Statistics

Investigations	2013	2014
Conducted during the year	24	21
Carried forward from previous year	17	19
Investigations opened	7	2
Final decisions	7	6
Amicable settlements	1	4
Administrative rulings	2	0
Sanctions under Art. 49a para. 1 Cartel Act	3	2
Procedural rulings	4	7
Other rulings (publication, costs, inspections, etc.)	-	10
Precautionary measures	0	1
Sanctions proceedings under Art. 50 ff. Cartel Act	0	0
Preliminary investigations		
Conducted during the year	27	20
Carried forward from previous year	18	16
Opened	9	4
Concluded	11	11
Investigations opened	3	1
Modification of conduct	1	8
No consequences	7	2
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	7	2
Advice	20	27
Market monitoring	76	61
Other enquiries	547	594
Mergers		
Notifications	32	30
No objection after preliminary examination	26	35
Investigations	0	1
Decisions of the Competition Commission	0	0
After preliminary examination	0	0
After investigation	0	0
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	14	25
Judgments of the Federal Administrative Court	4	7
Success for the competition authority	3	3
Partial success	0	1
Judgments of the Federal Supreme Court	1	0
Success for the competition authority	1	0
Partial success	0	0
Pending at the end of year (before Federal Administrative Court and Federal Supreme Court)	13	21
Expert reports, recommendations and opinions, etc.		
Expert reports (Art. 15 Cartel Act)	1	1
Recommendations (Art. 45 Cartel Act)	0	0

Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	1	2
Follow-up checks	1	6
Notices (Art. 6 Cartel Act)	0	0
Opinions (Art. 46 para. 1 Cartel Act)	217	254
Consultation proceedings (Art. 46 para. 2 Cartel Act)	5	5
IMA		
Recommendations / investigations (Art. 8 IMA)	1	3
Expert reports (Art. 10 I IMA)	2	1
Explanatory reports (Secretariat)	36	36
Appeals (Art. 9 para. 2^{bis} IMA)	6	5

A glance at the statistics and comparison with the figures of 2013 reveals the following:

- The number of investigations carried out has declined slightly and in the 2014 two new investigations were opened. The number of concluded investigations has however remained stable. The Secretariat focused on concluding or making progress with ongoing investigations. In addition, a large number of preliminary investigations were successfully concluded with a change in practice, without an investigation being required.
- In a new move, “other rulings” have now been included in the statistics. These statistics relate to published decisions, the allocation of costs outside investigations, or requests to inspect investigation files. The work involved behind these 10 rulings is considerable.
- There has been an increase in the advisory services provided, and in other enquiries dealt with. The number of market monitoring procedures has fallen. The overall amount of work in these areas has remained stable.
- The number notifications of planned mergers remains practically unchanged when compared with the previous year. The difference under the heading of “No objection after preliminary examination” is because a number of notifications were received in December 2013, but they were not declared unobjectionable until the start of 2014.
- The number of appeals before the Federal Administrative and Federal Supreme Court have increased considerably, because in addition to appeals against the Competition Commission’s final decisions, an increasing number of interim orders or publication rulings were contested. The number of appeals still pending at the end of 2014 is still high.
- The opinions of the Secretariat in office consultation procedures have also increased in number. This represents a significant portion of the advocacy activities carried out by the competition authorities as far as the deployment of resources is concerned (see below 5.).
- In relation to the Internal Market Act, the level of activity of the competition authorities was comparable with previous years.

5 The Competition Authorities' Advocacy Activities

5.1 What is advocacy?

Under the substantive provisions of the Cartel Act, the Swiss competition authorities have the primary task of intervening by ruling on unlawful cartels, the abuse of market power and on problematic company mergers. For this purpose, they have the relevant procedural means (investigation instruments in administrative procedure) and enforcement measures (conduct orders, sanctions) at their disposal. These activities of the competition authorities may be regarded as playing an enforcing and deterrent role.

The Cartel Act also assigns the competition authorities other secondary "duties and powers" in Art. 45-49. Under these provisions, the competition authorities have the task of being the **advocates of competition**. The instruments that the Cartel Act provides for this (see below 4.2) permit the competition authorities to explain restraints of competition, to point out unnecessary restraints of competition imposed by the state, to answer questions of competition law in an expert capacity and to provide general information on their activities and on the benefits of competition. Taken together, these are instruments that do not allow the competition authorities to intervene in a binding manner, but give them the general task, in a variety of ways, of promoting competition as protected by Article 96 of the Federal Constitution. The competition authorities' advocacy role in Switzerland dates back to the Cartel Act of 1962 (Art. 19), which at that time already gave the Cartels Commission the power to issue recommendations to the authorities and to prepare expert reports.

In an international context, on the other hand, the competition authorities role as advocates have only taken on greater importance in recent years. Other competition authorities such as the EU's Competition General Directorate for a long time limited themselves to their role as the enforcer, in that they act to stop private restraints of competition and if need be unlawful state assistance. An explanatory and preventive role in the form of advocacy was in most cases only recognised and acted on at a later stage.

When the International Competition Network (ICN) was established in 2002, an Advocacy Working Group was set up and given the task of developing "a toolkit to help [...] spread the gospel of competition"[3]. The ICN Advocacy Working Group fulfils its remit by using a variety of measures[4]. They include practical instructions and an exchange of information between competition authorities, so as to explain matters to consumers and businesses and also to deal with state restraints of competition. The main objective of these activities outside compulsory enforcement is to promote competition through contact with other state agencies and thus to achieve increased awareness among all concerned of the benefits of effective competition.

5.2 Means and instruments of advocacy

The most effective instrument of advocacy – though not specified as such in the Act – is publishing the **decisions of the Competition Commission**. Issuing high fines to penalise a bidding cartel or a company that prevents parallel imports, while naming the company responsible and reporting the case through the mass media of radio, television, internet and the newspapers, is a very clear way of highlighting what unlawful conduct is and of deterring other potential offenders. Not only are the decisions interesting for the media, because they have a high news content and in some cases are regarded as "spectacular", but it is also far

[3] See Practical Techniques: A Toolkit for Advocacy, p. 1 (http://www.internationalcompetitionnetwork.org/uploads/library/doc433.pdf).

[4] See http://www.internationalcompetitionnetwork.org/working-groups/current/advocacy.aspx.

easier to explain the aims and objectives of intervention by the Competition Commission and the consequences of disrupting competition by means of a concrete example. Attempting to explain the position to businesses or consumers by using abstract and theoretical examples of infringements of competition law would not be nearly as effective.

In Articles 45-49, under the heading "Other Duties and Powers of the Competition Authorities", the Cartel Act sets out the means and instruments for the advocacy activities of the competition authorities. They are as follows:

- **Market monitoring** (Art. 45 para. 1 Cartel Act): The constant monitoring of competitive relations is a key element in the competition authorities' work. The findings obtained in this way form the starting point for a systematic and focused competition policy in Switzerland. The task is carried out by the Secretariat of the Competition Commission, by conducting investigations independently, by assessing reports and complaints from private individuals, businesses, associations, the media, etc. and by conducting a triage to determine which cases require competition law proceedings. Monitoring the market involves a wide variety of dealings with businesses and private individuals. Commonly this is their first contact with the competition authority and in this way they learn what its responsibilities are. These individual contacts also allow the competition authority to explain what its role is.
- **Recommendations** (Art. 45 para. 2 Cartel Act): If the Competition Commission establishes the existence of an unnecessary restraint of competition by the state, or finds that the state intends to create such restraint, it can make recommendations to the authorities concerned on how to encourage effective competition, e.g. on how to create and enforce economic regulations. In particular, it may point the authorities concerned towards alternative solutions that are less restrictive of competition, in order to achieve an objective that is in the public interest.
- **Opinions** within the legislative procedure (Art. 46 Cartel Act): This provision relates on the one hand to the highly expedient **office consultation** and **joint reporting procedures**, which apply throughout the Federal Administration. Draft legislation from federal offices that may influence competition must first be submitted within the Administration to the Secretariat of the Competition Commission for assessment. The Secretariat of the Competition Commission will identify any competition problems and suggest alternative solutions. It only provides the arguments from its specific point of view, and has no right to decide on or veto the planned legislation. In the case of draft legislation that restricts competition or influences it in any other way, the Competition Commission can also comment during the **consultation procedure**. The Competition Commission subjects the draft legislation to a detailed examination from a competition point of view and points out any potential problems. The legislature is not required to follow the Competition Commission's opinion, but it must consider the arguments when it is considering its decision.
- **Expert reports** (Art. 47 Cartel Act): The Competition Commission provides expert reports for other authorities on competition issues that are of critical importance. The Secretariat prepares the expert opinion in cases of less importance. Specific provisions in Art. 15 Cartel Act, Art. 5 para. 4 of the Price Supervision Act and Art. 11a para. 2 of the Telecommunications Act also assign the Competition Commission the role of providing expert reports. The correct assessment of competitive relations is often a key factor in the decision on the specific structure of the type of regulation, as has been the case in the telecommunications, energy or health care sectors.
- **Publication** of decisions and judgments (Art. 48 Cartel Act): The competition authorities' power to publish their own decisions, along with judgments from courts that are based on the Cartel Act, forms the basis for the transparent application of the Cartel Act. They provide businesses, legal practitioners and academics with legal certainty in relation to the key provisions of the Cartel Act, the procedure and the legal consequences of an infringement, such as the level of sanctions.

- **Duties to provide information** (Art. 49 Cartel Act): The competition authorities inform the general public about their activities and provide the Federal Council with an annual report. The content of the information given to the public and of the annual report goes beyond the decision-making activities of the competition authority. It should provide general information on the effects of competition and thus help to promote competition as required by Art. 1 Cartel Act.

A further activity of the Secretariat that also has an advocacy function is the provision of **advice to businesses and government offices** on questions related to the Cartel Act (Art. 23 para. 2 Cartel Act). This advice plays an important role in preventing restraints of competition, in that businesses are aware of potential competition law problems before implementing a practice and avoid unlawful practices when they know that such problems will arise.

The Internal Market Act provides the Competition Commission with comparable advocacy instruments in relation to cantonal restrictions on market entry (recommendations, expert reports, explanatory reports, and publication of decisions).

5.3 Advocacy activities in practice

The resources available to the competition authorities are used to a lesser extent for advocacy, when compared with the primary task of exposure and deterrence. This is in line with the statutory remit, which designates the competition authorities' advocacy activities as "other duties and powers".

In the statistics in the annual reports of the Competition Commission, there are figures on the above-named instruments and means of advocacy. The exact figure however gives no indication of the level of resources used. From 2010 to 2014, there were

- 29 decisions published by the Competition Commission, including 15 with direct sanctions;
- 344 market monitoring procedures carried out by the Secretariat;
- 4 recommendations made by the Competition Commission (Cartel Act and IMA);
- 1126 office consultation procedures carried out by the Secretariat;
- 31 consultation proceedings carried out by the Competition Commission;
- 6 expert reports provided by the Competition Commission;
- 93 press releases issued by the competition authorities;
- 167 instances of advice provided by the Secretariat in return for a fee.

The following sections provide a number of examples of the competition authorities' advocacy activities in recent years. It is not an exhaustive list, nor is the full spectrum of examples discussed.

5.3.1 Example: Bidding procedures

A properly-functioning procurement system allows public funds to be used efficiently. From the point of view of competition policy, the proper functioning of the system must be guaranteed on both sides, that of the potential suppliers and that of the procurement agencies. On the suppliers' side, the framework conditions must be designed so that there is competition between bidders that in return leads to the best cost-benefit ratio in the bids. The Cartel Act, for example, provides such framework conditions by seeking to prevent bid rigging agreements, which are so harmful to competition. On the side of the procurement agencies, the regulations and incentives must be designed so that procurement agencies can secure the optimum cost-benefit ratio in the goods and services obtained. The Internal Market Act makes a particular contribution towards this, for example by prohibiting discrimination against non-local suppliers.

The following remarks consider the **combating of bid rigging** in more detail. Since 2008, it has been a priority for the Secretariat of the Competition Commission[5]. According to a survey carried out by the Secretariat of the Federal Procurement Commission (FPC) in 2004, around half of the interviewees had personal experience of bid-rigging agreements.[6] Bid rigging appears to have been widespread at that time. Competition Commission decisions demonstrating that for years companies systematically agreed on bids are evidence of the proliferation of bid rigging even in more recent times.[7] Bid rigging is generally associated with repercussions such as higher prices, undesirable business structures, lower efficiency and fewer incentives to innovate. The Competition Commission found in its investigation into the road surfacing business in the Ticino[8] that the bids for road surfacing work while the unlawful agreement applied were on average some 30% higher than after the agreement. Bid rigging is therefore clearly harmful to the national economy. It leads to excessive public expenditure, which has a direct or indirect effect on the tax burden shouldered by the general public and businesses. Given the annual budget for public procurement (by the Confederation, cantons, and communes) of around CHF 40 billion for buildings, goods and services, the potential losses that bid rigging can cause are clear.

The activities of the Secretariat are based on the following three pillars:

- **Prevention & information** involves measures aimed at raising awareness, prevention, providing information, exchanging expertise and consolidating the competition authorities' role as contact partner. The Secretariat gives presentations and offers training courses, in which it introduces participants to the problem of bid rigging for competition and businesses, outlines the Competition Commission's procedures and decisions on the matter and explains the indications that suggest the existence of cartels. The Secretariat has held meetings with most cantons on the subject of bid rigging and conducted a training course with them on the subject on one or more occasions. In the courses on public procurement given by the Competence Centre for Federal Public Procurement (CCPP) to staff of the Federal Administration and the federal public corporations, the Secretariat has since 2007 taught the module on "Guaranteeing competition in public procurement". Companies operating in the supply markets (suppliers) and lawyers are given information in lectures and publications. In addition, the competition authorities apply their experience and knowledge when revising the law on public procurement (currently in the context of the revision of the law on public procurement at federal and cantonal levels).
- **Exposure** involves measures aimed at exposing bid rigging. To this end the Secretariat evaluates data on decisions to award contracts and, using appropriate statistical methods, searches for anomalies in the bid data. This pillar is also useful to the public procurement agencies, which have an important role in the exposure of bid rigging.
- **Prosecution** lastly involves exposing, judging and imposing sanctions on bid rigging in accordance with the Cartel Act. If there are indications of bid rigging, the competition authorities follow these up in market monitoring procedures, preliminary investigations and full investigations. Examples of this can be found in the

[5] See Competition Commission Annual Report 2009, RPW 2010, p. 2.

[6] BESCHAFFUNGSKOMMISSION DES BUNDES (BKB) und KOORDINATION DER BAU- UND LIEGENSCHAFTSORGANE DES BUNDES (KBOB), «Das geltende Vergaberecht aus Sicht der Praxis», p. 40, Bern 2004. In the survey, awarding agencies, bidders and third parties (umbrella associations and business organisation, cantonal and communal representatives) were questioned.

[7] See *Strassen- und Tiefbau im Kanton Zürich* (FN ..), agreements restricting competition in *Strassen- und Tiefbau im Kanton Aargau* (FN ..) and *Elektroinstallationsbetriebe* Bern (RPW 2009/3, p. 196 ff.).

[8] RPW 2008/1, p. 102 f. para. 139 ff.

Competition Commission's decisions on road surfacing in the Ticino[9], electricians in the canton of Bern[10], road construction and civil engineering in the canton of Aargau[11] and road construction and civil engineering in the canton of Zurich[12]. Three current investigations involve the possible coordination of bids between construction companies: road construction and civil engineering in the canton of St. Gallen[13], civil engineering and road construction in the canton of Graubünden[14] and the tunnel cleaning case[15].

In various respects, there are indications that the investments that the competition authorities have made in recent years are now bearing fruit. The training courses and lectures previously mentioned clearly help not only procurement agencies at federal, cantonal and communal levels, but also businesses and other persons to gain more knowledge of competition law, particularly on the following points:

- What is a bid rigging agreement and why are these problematic in the procurement process?
- How can procurement agencies identify bid rigging? What are the most important indications?
- How can procurement agencies reduce the risk of bid rigging?
- What is the link between bidding procedures and competition law procedures?
- How can the procurement agency encourage competition in the procurement process?
- What are the dangers of a lack of competition?

Since 2007, staff at federal procurement agencies have benefited from a training module given by the competition authorities. The interest shown by the cantons and now the communes is constantly rising, especially in the most recent years. At training courses, participants ask more detailed questions than when the competition authorities first began their awareness courses. In addition, the competition authorities receive an increasing number of enquiries from procurement agencies about ongoing proceedings.

The procurement agencies' increased awareness is not only due to the training courses, but also to the proceedings that have been carried out. The investigations relating to road construction and civil engineering in the cantons of the Ticino, Aargau and Zurich in particular sent a jolt through that particular sector. This is not only perceptible among procurement agencies, but also among businesses and other affected parties. More enquiries are being received and more suspicions are being reported. The latter have also led to some of the most recent proceedings that the competition authorities have carried out in the procurement sector. There is an interplay between "prevention & information" and "prosecution". In relation to "exposure", it is worth mentioning that one of the most recent cases was opened thanks to the use of statistical methods.

On the side of the procurement agencies mentioned in the introduction, the competition authorities have been pressing for years to ensure that procurement agencies are committed to competition in the procurement process and to securing the optimum cost-benefit ratio in

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[9] RPW 2008/1, p. 102 f. Para. 139 ff.

[10] RPW 2009, p. 196 ff. (legally binding).

[11] RPW 2012, p. 270 ff. (in part not legally binding).

[12] RPW 2013, p. 524 ff. (legally binding).

[13] Information available under <https://www.shab.ch/DOWNLOADPART/N7077030/N2013.07161124.pdf>.

[14] Information available under <https://www.shab.ch/DOWNLOADPART/N7170944/N2013.07198688.pdf>.

[15] Information available under <https://www.shab.ch/DOWNLOADPART/N6992804/N2013.07063184.pdf>.

relation to the goods and services obtained[16]. This is a permanent element in the awareness-raising processes and training courses mentioned in this section. Part of this is the application of the Internal Market Act, which was the special topic in the annual report for 2012.

5.3.2 Example: Agriculture

Another example of how the years that the competition authorities have spent providing opinions, information and explanations have improved the awareness of basic competition concerns among businesses and authorities can be seen in the **agriculture sector**. The competition authorities have been closely involved in the discussions on liberalising the agriculture sector (up to the currently applicable AP 2014-2017), and have repeatedly stressed the positive effects of effective competition and the consequences of restraints of competition, whether state imposed or state tolerated.

A considerable number of the office consultation procedures mentioned in the statistics above originate from the Federal Office for Agriculture (FOAG). Whereas this office in the years before the new millennium gave the competition authorities the impression that it wanted to protect farms from too much market competition, the FOAG has repeatedly sought the support of the competition authorities in relation to the most recent revisions of the Agriculture Act and its implementing ordinances in order to make competition a key element in discussions with stakeholders in production, processing and commerce. The competition authorities' frequent instances of intervention, which no longer meet with a fundamentally negative attitude, and the varied contacts between the specialist staff at the FOAG and in the Secretariat have had a significant impact. In many cases, the competition authorities are contacted on questions unrelated to the office consultation procedures, because the level of awareness among staff at the FOAG leads them to recognise potential competition law problems.

When it comes to businesses and associations, the competition authorities' **permanent presence** on the agricultural scene also means that the competition authority must no longer wait until an infringement has taken place before learning of practices that are problematic to competition. For example, in advance of the abolition of the state milk quota system, Swissmilk, the Swiss milk producers federation, was planning to merge the supply of the major dairy companies under one milk trading company for all producers' organisations. The major dairies would have had practically no choice as to which producers' organisation they could purchase milk from and as to the price. The joint milk trading company would essentially have replaced the state system of quantity and price controls with a private system. The milk producers recognised the potential restraint of competition in this scenario and requested the Secretariat of the Competition Commission for advice under Art. 23 para. 2 Cartel Act. The Secretariat came to the conclusion that there were clear indications of a unlawful agreement restricting competition in relation to the joint marketing via the planned milk trading company and made it clear that an investigation under Art. 27 Cartel Act would be opened if the plan was implemented. In response to the advice, the milk producers decided to abandon the planned joint marketing system.

5.3.3 Example: Infrastructure markets

Another typical area for the competition authorities' advocacy activities are the sectors in which the Department of the Environment, Transport, Energy and Communications (DETEC) is responsible for policy. The markets concerned are, due to their special character as **network-based infrastructures**, characterised by issues of access and price regulation,

[16] See for example the competition policy analysis of public procurement in Switzerland, in particular federal public procurement law, carried out by the Secretariat of the Competition Commission (RPW 2006/2, p. 392 ff.).

competitive neutrality, the provision of public services, etc. Many of these issues arising from sector-specific regulations overlap with general competition issues and thus lead to regular contacts between the competition authorities and the responsible DETEC agencies. For example, in one case the competition authorities, working with the Federal Office of Communications (OFCOM) and the Communications Commission (ComCom) were required to clarify what the definition of a problematic concentration of media companies is (Art. 74f and 44 para. 1 lit. g RTVA) and when a concentration of media companies may be challenged under competition law.

Many of the contacts between the competition authorities and the DETEC offices take place in the form of office consultation procedures. The competition law opinions that are repeatedly provided are effective to the extent that they are actively being sought ever more frequently from the competition authorities even outside the legislative process. For example, in the run up to the revision of the Ordinance on Telecommunications Services, DETEC obtained an expert report from the Competition Commission on the competition issues that were regarded as controversial by the departments involved. In another area, the many opinions provided by the competition authorities have added a new dimension to the political debate surrounding the public service aspect of the media industry. Many activities carried out by state or quasi-state organisations are normally regarded as public service activities. When revising the related statutory principles, it is seldom the case that categorising the activities as public services and providing the associated state support measures are called into question. In view of technological change and in some cases the changed expectations of those concerned, the competition authorities have repeatedly called for a political debate on this issue (inter alia within the media industry), and for the comments and questions to be included in the Federal Council dispatches on revisions to the legislation.

5.3.4 Example: Health care

The advocacy activities of the competition authorities have been and remain complex and complicated in relation to the **health sector**, in which the state intervenes in order to regulate matters. Since it came into force, the Health Insurance Act has tried to establish a system of legally regulated competition, which should permit the principles of supply and demand to apply while providing protection against potentially adverse effects (false incentives). On the other hand, over the years, finding solutions to certain problems has increasingly led the legislation towards over-regulation, and sometimes towards errors in the form of misregulation, by reducing the scope within which competitive mechanisms can apply their positive effects. The health sector, even for those who defend the principles of healthy competition, seems inevitably to require close supervision by the authorities. Nevertheless, the competition authorities have exercised their powers and have continued to strive for a Swiss health system that remains oriented towards market rules. For example, since 2004, certain proposals made by the Competition Commission on the partial revision of the Health Insurance Act[17] (e.g. refining the system of risk compensation) have been implemented. Others issues have not yet lost their topicality, even after ten years, and are regularly discussed in parliamentary and public debates, such as the freedom of contract, monistic funding of hospitals or even the introduction of reference prices for the active ingredients in reimbursed medicines. These measures will perhaps find their way their place into the Health Insurance Act sooner or later, given the challenges that the health sector will have to contend with in Switzerland in future.

[17] DPC 2004, p. 848 ss

5.4 Conclusion

Generally speaking, the advocacy activities of the competition authorities can only expect to bear fruit in the longer term. Immediate successes are the exception – as the practical examples above indicate. What is rather required is the serious and targeted use of the available instruments to gain the attention of the groups concerned and to sensitise them to competition law issues. Only when the competition authorities succeed in convincing businesses and authorities in a specific sector that the principles of competition have a rightful place alongside other potential public interests will the mutual trust arise that allows the authorities and businesses to approach the competition authorities voluntarily in order to ask about the relevant issues. Once this mutual trust has been built, it must be cultivated and if possible extended into other sectors. All this – in addition to the main task of exposing unlawful restraints of competition – requires time and resources if the competition authorities, through advocacy, are to “promote competition in the interests of a liberal market economy” (Art. 1 Cartel Act) and thus fulfil the aim of the Cartel Act.