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# **To the Federal Council**

## **Annual Report 2015 of the Competition Commission**

**(in accordance with Article 49 paragraph 2 Cartel Act)**

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# 1 Foreword from the President

2015 was marked by important decisions and events. In several investigations, the Competition Commission imposed sanctions on horizontal price cartels (tunnel cleaning, wholesalers of sanitary facilities, VW Partners Association, pianos and grand pianos). It also took action against vertical price fixing agreements (stringed instruments) and uncovered a further instance of abuse of market dominance (Swisscom broadband internet) as well as revising the Motor Vehicle Notice and its own internal rules of procedure. The courts also issued some ground-breaking judgments:

- In the case concerning **off-list medicines**, the Federal Supreme Court upheld the appeal by the Federal Department of Economic Affairs, Education and Research (EAER) and reversed the judgment of the Federal Administrative Court. The Federal Supreme Court confirmed that the application of the Cartel Act can only be excluded by express statutory provisions, and not by the de facto circumstances in a specific market.
- In the cases concerning **Swisscom ADSL** and **BMW**, the Federal Administrative Court confirmed the substantive decisions of the Competition Commission in their entirety and rejected the related appeals. While it left the sanction imposed by the Competition Commission on BMW unchanged, in the case of Swisscom ADSL the court made a minor reduction to the sanction by applying a different calculation method. In the case on **alpine sports products**, it upheld the appeal against the Competition Commission ruling.
- In matters relating to the Internal Market Act, the Federal Supreme Court upheld two appeals by the Competition Commission in proceedings concerning **public procurements**.

Above all, the two Federal Administrative Court judgments in the Swisscom ADSL and BMW cases strengthen the Competition Commission's hand. In both cases the court rejected the extensive arguments from the unsuccessful companies that procedural guarantees had been violated, confirming the propriety of the proceedings before the Competition Commission. In addition, the court agreed with the Competition Commission's arguments and assessment in two important areas (prevention of parallel and direct imports and the existence of an unlawful "margin squeeze"). Decisions of this kind are important because they confirm that the competition authority has made the correct decisions in complex proceedings both in formal and substantive terms. In addition, the judgments create legal certainty – subject to the decision of the Federal Supreme Court to which the cases have now been appealed – for the companies in their own specialist sectors.

The fact that the competition authority can also gather the evidence required to reach a decision in large and complex cases within a reasonable time has a lot to do with the nature and quality of the instruments it uses in its investigations. In the priority theme for this year's annual report, we look at **searches**, a procedure that has been in use for more than ten years now. This investigation instrument has proved extremely effective, because a search gives access to all the available physical and electronic data connected with the case under investigation at the company concerned. However, the success of this instrument over the years has required time-consuming investment in developing a competence centre in the Secretariat and in providing comprehensive training for Secretariat staff. This investment has paid off all the more as the years have gone by. The possibility of carrying out a search has proved to be an important element in enforcing the Cartel Act.

Prof. Dr. Vincent Martenet  
President of the Competition Commission

## 2 Most important decisions of 2015

### 2.1 Decisions of the Competition Commission

The Competition Commission decided in a ruling dated 23 February 2015 that agreements concluded between 2008 and 2013 by three Swiss **tunnel cleaning companies** operating in several regions constitute price and territorial agreements contrary to competition law. In the agreements, the companies colluded over the terms of their bids in public tendering procedures and agreed who should be awarded the contract in a certain region. All three companies involved admitted their participation in this restraint of competition during the investigation and benefited from a reduced sanction, which in each case depended on when their voluntary reports were received and the quality of their cooperation with the competition authorities. The first company to report received a complete exemption from sanctions. In addition, each of the companies reached an amicable settlement with the competition authorities. The fines amount to a total of around CHF 161,000.-. The Competition Commission ruling has taken full legal effect.

In a ruling dated 29 June 2015, the Competition Commission imposed fines on the members of a cartel of **wholesale sanitary facilities companies** amounting in total to around CHF 80 million. Price and quantity agreements between the companies dated back as far as the 1990s. The majority of the wholesale sanitary facilities companies involved in the cartel made arrangements between 1997 and 2011 on price components and price-determining factors such as margins, gross prices, Euro exchange rates, transport costs, rebates and rebate categories. In addition, they reached a joint decision not to include in their catalogues manufacturers that did not sell their products exclusively through their sales channels. This prevented the companies affected from entering the market. The practices described constitute prohibited price and quantity agreements. The majority of the wholesale sanitary facilities companies are members of the Swiss Federation of Wholesalers in the Sanitary Facilities Industry (SGVSB), which served as the forum for negotiating the agreements. The decision is not yet legally binding.

On 29 June 2015, the Competition Commission completed the revision of the Notice of 21 October 2002 on the competition law treatment of vertical agreements in the automobile trade (below the **MV Notice**) and its explanatory guidelines. The Competition Commission took account of the new legal framework in the EU when conducting its revision. As a result of the legal and economic conditions prevailing in Switzerland in the automobile market, it was not considered appropriate to adopt every aspect of the European law. The Competition Commission has therefore decided in principle to retain the notice for the automobile sector that regulates the sale of new motor vehicles, repairs and servicing, and the sale of spare parts. This notice has however been adjusted to bring it in line with the applicable statutory provisions of the Cartel Act and revised to take account of experiences gained with the previous regulations. The Competition Commission is thus looking to encourage competition between and within brands in the markets for the sale of new motor vehicles, the sale of spare parts and the provision of repairs and servicing. The new MV Notice aims to prevent vertical agreements that are harmful to competition and avoid any foreclosure of the Swiss automobile market. Furthermore, it will ensure greater legal certainty for all market participants. The new notice came into force on 1 January 2016.

In a ruling dated 29 June 2015, the Competition Commission fined a general importer of musical instruments CHF 65,000 for entering into price-fixing arrangements for the sale of **stringed instruments**. The general importer and its retailers had agreed to make the general importer's price list for stringed instruments and accessories for different brands binding subject to the agreed discounting policy. This meant that agreements were reached on minimum prices (resale price maintenance agreements). The agreements prevented genuine price competition among retailers in Switzerland, which had a considerable negative effect on competition in this sector in Switzerland from the start of 2010 to mid-2013. The investigation was

concluded with an amicable settlement in which the general importer undertook not to exert any direct or indirect influence on the sale prices of his retailers. The Competition Commission ruling has taken full legal effect.

The Competition Commission fined four automobile dealer companies with flat-rate sanctions ranging from CHF 10,000 to CHF 320,000 due to price-fixing. The four companies, which deal in cars of the marques manufactured by the VW Group, and AMAG RETAIL (the retail division of the AMAG Automobil- und Motoren AG) agreed on a joint list of conditions at the start of 2013. These conditions related to discounts and delivery charges when issuing the initial offer for new VW Group marque cars. In its decision of 19 October 2015, the Competition Commission found that the dealer companies had given notice of the concerted discounting policy in March 2013 at regional gatherings of the **VW Partners Association**. The aim of these meetings was to ensure that all authorised dealers in VW Group marques in Switzerland implemented the agreed conditions. The fact that this price-fixing agreement was only in effect for a short period was taken into account when assessing the flat-rate sanctions. Three of the four companies have filed appeals to the Federal Administrative Court.

The Competition Commission prohibited three operators of **booking platforms**, Booking.com, Expedia and HRS, from placing comprehensive restrictions on hotels with which they have contracted. The focus of the investigation was the contractual clauses demanded by the platforms, under which hotels were prohibited from offering lower prices or a larger number of rooms through other sales channels. This meant that hotels were unable to make more attractive offers on sales channels with lower commission rates. The Competition Commission regards the use of these comprehensive contractual clauses as a breach of the Cartel Act and prohibited their use in a ruling dated 19 October 2015. In the summer of 2015, Booking.com and Expedia introduced less restrictive provisions throughout Europe. It is impossible to assess these new provisions at present due to the lack of pertinent empirical data. The Competition Commission will continue to monitor developments in this market and may intervene again if required. Booking.com and Expedia are prohibited from re-introducing the unlawful contractual clauses. Now that the ruling is legally binding, HRS is obliged to make the required modifications to its contracts.

In a ruling dated 21 September 2015, the Competition Commission fined Swisscom CHF 7,916,438 for abusing its dominant position in the **broadband access sector**. In 2008, Swiss Post invited bids for networking its locations. Swisscom won the contract as its offer was around 30 per cent lower than those of its competitors. These competitors, however, were reliant on obtaining advance services from Swisscom. In the bidding process, Swisscom fixed the advance service prices that it charged its competitors at such a high level that they could not possibly compete with the offer Swisscom made to the end customer. In addition, Swisscom used this pricing policy to force Swiss Post to pay excessive prices. Swisscom has appealed to the Federal Administrative Court against the ruling.

In a decision dated 14 December 2015, the Competition Commission fined two companies trading in **pianos and grand pianos** a total of CHF 518,000 for horizontal price-fixing arrangements on list prices and rebates for pianos and grand pianos manufactured by Steinway & Sons and Grotrian-Steinweg. A third company was held to have behaved unlawfully by adapting its policy to the horizontal price-fixing arrangements of the other two suppliers. Although the manufacturers Steinway & Sons and Grotrian-Steinweg did not stipulate any minimum or fixed prices, they supported the arrangements by printing the prices agreed by the suppliers.

## 2.2 Decisions in the courts

In a judgment dated 14 September 2015, the Federal Administrative Court imposed a fine of around CHF 186 million on the Swisscom Group for anti-competitive conduct in the **DSL broadband internet sector**. This essentially confirmed a sanction imposed earlier by the Competition Commission. On entering the broadband internet sector in 2000, the Swisscom

Group offered other telecommunications companies DSL wholesale products on the telephone network in order to encourage the spread of DSL internet access as opposed to cable-based internet access. The Swisscom Group secured a dominant position because it was the sole provider of the products concerned prior to the total deregulation of the telecommunications sector in 2007. All the other telecommunications companies that wished to sell broadband internet products on the retail market were reliant on using the DSL wholesale products offered by the Swisscom Group as preliminary products. At the same time the Swisscom Group also began to sell DSL internet products on the retail market. The prices that the Swisscom Group fixed for these preliminary products were set so high in comparison with their own DSL retail prices that from April 2004 to December 2007 other telecommunications companies could only operate in this market at a loss (a practice known as a "margin squeeze"). It was therefore impossible for other telecommunications companies to compete effectively with the Swisscom Group in the broadband internet market. The Swisscom Group's course of action thus amounted to unlawful conduct by a dominant company. The original sanction of around CHF 220 million that was set in the Competition Commission ruling was reduced to CHF 186,036,840 due to various corrections made in the original calculation. Swisscom has appealed to the Federal Supreme Court against the judgment.

In a judgment dated 13 November 2015, the Federal Administrative Court comprehensively rejected the appeal filed by **BMW** against the Competition Commission's decision of 7 May 2012. The Competition Commission had fined BMW around CHF 156 million for unlawfully preventing parallel and direct imports. The Federal Administrative Court concluded in its judgment that under the effects doctrine the Cartel Act applied to the circumstances concerned. In order to guarantee that Swiss law is effective, the Competition Commission must also be able to act if circumstances arise abroad that have an effect within Switzerland. The Federal Administrative Court thus upheld the lower instance's reasoning that territorial agreements that prevent active and passive sales in a particular region are among the most harmful agreements in competition law terms. These absolute territorial agreements must by their nature be regarded as agreements that cause considerable damage to the quality of competition. They may be justified on the grounds of economic efficiency, but that did not apply in this case. The court also upheld the view of the lower instance that these agreements fall under the sanction provisions of Article 49a Cartel Act, according to which a company may be fined up to 10 per cent of the turnover that it achieved in Switzerland in the previous three financial years. It therefore rejected BMW AG's appeal. BMW has further appealed this decision to the Federal Supreme Court.

In a judgment dated 17 December 2015, the Federal Administrative Court upheld the appeal against the Competition Commission ruling of 20 August 2012 in the case of **alpine sports products/Altimum SA**. The court essentially concluded that the agreement (minimum price) was only proven to apply to some of the dealer companies (56 of 333). It held that although the agreement between the general importer and the dealer companies fulfilled the qualitative criterion of relevance, it did not meet the quantitative criterion. In view of the low number of dealer companies that were bound by the agreement, the court assumed that there was adequate inter- and intra-brand competition and found there was no relevance. The Department has appealed to the Federal Supreme Court against the judgment.

In relation to the **law on the internal market and on public procurement**, the Competition Commission conducted two appeal cases before the Federal Supreme Court. The Federal Supreme Court found in favour of the Competition Commission in a judgment dated 31 March 2015, holding that the procedure carried out by Tridel SA for inviting bids for contracts to introduce and implement a charge on rubbish bags is governed by the law on public procurement. The procurement was also not so urgently required to justify carrying out a tender procedure by invitation instead of an open procedure. In the second case, the Federal Supreme Court in a judgment dated 21 August 2015 confirmed the Competition Commission's opinion that the conduct of the wrong procurement procedure – in this case a tender procedure by invitation

instead of an open procedure – constituted a serious deficiency. Accordingly the court had to uphold an application for the contract award to be revoked even though the appellant had not expressly alleged that the wrong procedure had been used.

### 3 Activities in individual sectors

#### 3.1 Construction

##### 3.1.1 Bid rigging

On 30 October 2012, the Secretariat conducted searches to open the Lower Engadin construction services investigation into various companies in the sectors for structural and civil engineering, road and surfacing work together with their upstream markets. The Secretariat had received allegations that several companies had entered into agreements aimed at coordinating bidding in response to invitations to tender and to allocate each other construction projects and clients. Based on its initial results, the investigation was extended on 22 April 2013 to cover the entire canton of Graubünden and to include seven further companies. Searches were again carried out. In November 2015, the investigation was further extended to include additional companies and thereafter, for reasons of procedural economy, divided into ten investigations. The focus was on two areas of investigation: **structural and civil engineering in the Engadin**, and **road construction in the entire canton of Graubünden**.

On 5 February 2013, the Secretariat opened the **tunnel cleaning** investigation into three companies operating in several regions, and began by conducting searches. The related Competition Commission ruling dated 23 February 2015 has already been mentioned as one of the most important decisions of 2015 (see above, p. 4).

On 15 April 2013, the Secretariat opened the **See-Gaster construction services** investigation into six companies operating in the roads and civil engineering sector and began by conducting searches. The investigation was extended in October 2013 to include two further companies. The Secretariat had received allegations that several companies had entered into agreements aimed at coordinating bidding in response to invitations to tender and to allocate each other construction projects and clients. The Secretariat will send its draft decision for the Competition Commission to the parties at the start of 2016 for their comments.

##### 3.1.2 Wholesalers of sanitary facilities

On 29 June 2015, the Competition Commission imposed fines amounting to around CHF 80 million on the members of a cartel of **wholesale sanitary facilities companies**. This ruling has already been mentioned as one of the most important decisions of 2015 (see above, p. 4). The legal grounds for the ruling will be sent to the parties at the start of 2016. The ruling is not yet legally binding.

##### 3.1.3 Building materials and landfills

On 12 January 2015, the Secretariat opened an investigation into various companies in the **building materials and landfill industry in the canton of Bern** and carried out searches. It is suspected that the companies concerned entered into price, quantity and territorial agreements. In addition, there are indications that these companies hold a dominant position, which they have abused by refusing to do business with third companies and discriminating against business partners, and by concluding contracts on the condition that additional services are accepted. On 19 May 2015, the investigation relating to the allegation of price, quantity and territorial agreements was extended to include an additional company.

### 3.1.4 Recommended fees, tariffs and prices

Publications, recommendations and agreements on tariffs, prices and fees in certain sectors have already been the subject matter of competition law investigations on various occasions. The **publication of fees, tariffs and prices and related recommendations by commercial federations and industry organisations** may lead to concerted practices and constitute unlawful price-fixing agreements between their members.

Nevertheless, federations may publish prices, tariffs and fees without the publication causing problems under competition law. On the one hand, they can produce “calculation aids”, in which individual services are listed without the precise tariff, fee or price information. These descriptions of services can be used by federation members as an aid in calculating costs and setting prices. Calculation aids that do not lead to effective behaviour by federation members provide a general basis for calculating individual prices and therefore have normally proven to be unobjectionable under competition law. On the other hand, tariffs and fees based on historical and representative data presented in aggregated form – preferably by independent third parties (for example by an accountants’ office, a consumer organisation or the Swiss Federal Statistical Office) – may be disclosed to the public. In addition to federation members, customers must normally also be able to access the published fees.

In 2015 the Secretariat was also in contact with various federations (the Swiss Builders’ Federation, Swiss Society of Engineers and Architects, the building service association Suissetec) and institutions (the Coordination Group for Construction and Property Services). It held preventive training sessions and discussed the problem under competition law of recommended fees, tariffs and prices.

## 3.2 Services

### 3.2.1 Financial services

On 28 September 2015, an investigation into the trade in **precious metals** was opened. Precious metals include gold, silver, platinum and palladium. The investigation aims to determine whether banks have been coordinating prices, and in particular so-called spreads (the difference between the bid and offer price).

In addition, the ongoing investigations into **currency trading (Forex)** and **automobile leasing agreements** were continued. Progress was also made in the fourth investigation relating to financial services, which concerns suspected agreements to influence the reference interest rates **Libor**, **Tibor** and **Euribor** as well as derivatives based on these.

On 1 August 2015, the ruling of December 2014 on the **credit card interchange fee** came into effect. The average domestic (= Swiss) interchange fee was reduced from 0.95 per cent to 0.7 per cent. Details of sector and transaction specific interchange fees are now available on the acquirers’ websites. In this connection, acquirers have reintroduced the “non-discrimination rule” (NDR) and banned their dealers from demanding different prices for different methods of payment. This practice and the in some cases misleading information provided by acquirers (according to which the NDR was allegedly introduced by the Competition Commission), led to numerous enquiries from dealers, who have been given a detailed explanation of the circumstances surrounding the Competition Commission’s decision.

### 3.2.2 Health care

In a judgment dated 28 January 2015, the Federal Supreme Court held that the Cartel Act applies to **off-list medicines** (i.e. the cost of which is not reimbursed by the compulsory health insurance according to the list) used to treat erectile dysfunction and remitted the case to the



Federal Administrative Court. The latter court had concluded in an earlier judgment that contingent statutory provisions excluded competition in the case of these medicines and that the Cartel Act therefore did not apply.

Enquiries in the investigation into the **commercialising of electronic information on medicines** were concluded in 2015. This information is required for the sale of medicines, the reimbursement of their costs and other related accounting procedures. The Secretariat will send its proposed decision to the parties for their comments in the first semester of 2016.

The Secretariat conducted a preliminary investigation into the degree of competition at all trading levels in the **sale of medicines** in Switzerland. In particular, it examined the pre-wholesaler (PWS) level in Switzerland, i.e. businesses that offer pharmaceutical companies warehousing services. Certain financial services (e.g. the acceptance of del credere) offered by the most important PWS company in Switzerland were the subject of a detailed examination. This company accepted a series of measures that the Secretariat proposed. This will have a signalling effect for all PWS companies in Switzerland and for their business partners.

In August 2015 the Secretariat opened a preliminary investigation into **framework agreements on daily sickness benefit insurance** concluded in the canton the Valais between professional associations and three health insurance companies. The Secretariat is examining whether this form of cooperation between employers and insurance institutions conforms to the Cartel Act.

### 3.2.3 Liberal professions and other services

The Competition Commission prohibited three operators of **booking platforms**, Booking.com, Expedia and HRS from imposing comprehensive restrictions on hotels with which they have contracted. The ruling has already been mentioned as one of the most important decisions made in 2015 (see above, p. 4).

## 3.3 Infrastructure

### 3.3.1 Telecommunications

In a decision dated 21 September 2015, the Competition Commission concluded the investigation into Swisscom in the **broadband internet** sector. The decision has already been mentioned as one of the most important of 2015 (see above, p. 4).

In the telecommunications industry, the Competition Commission was called on to assess two mergers, both of which were subjected to a detailed examination:

- In the merger between **Swisscom Directories AG / Search.ch AG**, the Competition Commission concluded that although Swisscom's takeover of Search.ch gave it a dominant position in relation to address directories, there was no reason to expect that effective competition would be eliminated. Accordingly, the statutory requirements for prohibiting the merger or for imposing specific conditions were not met and the planned merger was approved in March 2015.
- The Competition Commission also had to assess the joint venture between **Swisscom, SRG and Ringier**. In addition to expanding cooperation in marketing online, TV, print and radio advertising, the partners planned to introduce television advertising targeting specific groups in Switzerland via Swisscom TV. Although the Competition Commission expects that the joint venture will become one of the strongest market participants in the advertising marketing business, given the existing level of competition in advertising in the TV, online, radio and print sectors and the uncertainty as to how the market for targeted TV advertising will develop, the Competition Commission was unable to prove that effective competition could be eliminated. Accordingly, the statutory requirements

for prohibiting the merger or for imposing specific conditions were not met and the planned merger was approved in December 2015.

In the **ADSL pricing policy** case, the Federal Administrative Court issued its judgment on 14 September 2015, imposing a fine of CHF 186 million on Swisscom. The court thus upheld the Competition Commission's decision in its entirety and confirmed its sanction. Swisscom has appealed to the Federal Supreme Court against the judgment.

A preliminary investigation was opened based on the expert report submitted to OFCOM on the issue of Swisscom's dominant position in relation to **interconnect-peering (IP) interconnection**. IP interconnection guarantees the connection of computers linked via the Internet. In the course of the proceedings, Swisscom expressed its willingness to amend contracts in this sector. As a result of this agreement, it has not been necessary to open an investigation so far.

On 29 January 2015, the Secretariat opened a preliminary investigation into the cable network operator **Naxoo SA** (formerly 022 Télégenève SA). At issue is whether Naxoo SA is abusing a potentially dominant position by threatening owners of properties with negative consequences if they accept the installation of telecommunications services from third parties, or by imposing unfair conditions on such third parties.

### 3.3.2 Media

Considerable progress was made in the investigation into **sport on pay TV** following delays on the part of the parties. On 6 July 2015, the Federal Supreme Court dismissed the appeal on the question of party status. In the Competition Commission's proceedings, the parties have now responded to the Secretariats proposed decision. The Competition Commission's decision is expected in 2016.

Appeals to the Federal Administrative Court are still pending against the Competition Commission ruling on **book pricing in French-speaking Switzerland**. On 12 May 2015, a hearing took place in the Federal Administrative Court in response to an application from the parties. A further point of contention in this case is the extent to which the ruling of 27 May 2013 may be published, and proceedings in relation to this are also pending before the Federal Administrative Court.

Although the preliminary investigation into the **Goldbach Group TV/radio marketing** was terminated back in November 2014, there is still a dispute over the extent to which the final report of 12 November 2014 can be published. Publication remains the subject of proceedings before the Federal Administrative Court.

The Competition Commission subjected the purchase of **Ricardo by Tamedia** and the takeover of **JobScout24 by JobCloud** to a detailed examination, approving the two mergers in August 2015. The Competition Commission concluded that in both cases Tamedia and JobCloud held in a dominant position in the market for placing job advertisements. However, as there was no prospect that effective competition would be eliminated by either takeover, the statutory requirements for the Competition Commission to intervene were not met.

In the **media sector** the Competition Commission was also called on to assess the following **mergers**:

- In relation to the planned merger between Axel Springer Switzerland and Ringier, Axel Springer and Ringier announced the intention to combine their Swiss magazine business, the Axel Springer online portal activities, its stake in Presse TV AG and Ringier's stake in Le Temps SA in a joint venture.
- In the case of Tamedia AG / Swiss Classified Media AG, Tamedia planned to acquire the remaining 50 per cent of the shares in Schibsted and thus obtain exclusive control

of Swiss Classified Media. Swiss Classified Media operates the small ads website tutti.ch and the car sales website car4you.ch.

- In the case of Publicitas / xentive, Publicitas announced the acquisition of exclusive control of the media logistics service provider xentive.
- In the case of Tamedia / Tradono Denmark / Tradono Switzerland, Tamedia and Tradono Denmark planned to set up the joint venture Tradono Switzerland AG. Tradono Denmark runs an online forum for small ads in Denmark that primarily caters for users with mobile terminals (smartphones, tablets).
- In the case of Tamedia / ImmoStreet, Tamedia announced the acquisition of exclusive control of ImmoStreet.

The Competition Commission approved all these mergers following a preliminary assessment.

### 3.3.3 Other sectors

Appeal proceedings before the Federal Administrative Court remain pending in the **air freight** case. Various parties have filed appeals against the ruling of 2 December 2013, which concluded the air freight investigation and which resulted in eleven airlines receiving fines totalling CHF 11 million for concluding horizontal price-fixing agreements. The dispute in this case also concerns the issue of whether or to what extent the ruling of 2 December 2013 should be published. Proceedings are also pending in relation to this before the Federal Administrative Court, which is awaiting the Federal Supreme Court's decision on the issue of the publication in the cognate Nikon case.

Considerable progress was made with the investigation into the **business customer pricing system for letter post services**, which was opened in July 2013. Here the main issue is whether Swiss Post is obstructing competitors by structuring and applying its pricing system in such a way, for example, that business customers find it difficult or even impossible to obtain services from Swiss Post's competitors. It will also be examined whether Swiss Post has discriminated against certain customers or placed them at a disadvantage in other ways.

In addition, in the district heating business, the Competition Commission assessed the merger between **Groupe E and Celsius SA**. Groupe E, the city and canton of Fribourg and further smaller stakeholders intended to set up the joint venture Celsius SA in several stages in order to be able to offer renewable energies (district heating) in anticipation of the Energy Strategy 2050. Following a preliminary assessment of the project, the Competition Commission approved the plan.

## 3.4 Product markets

### 3.4.1 Consumer goods industry and retail trade

In August 2015, the Secretariat concluded the preliminary investigation into **imports of Coca-Cola products**. At issue was whether Coca-Cola has obstructed parallel imports by Denner AG and other customers in Switzerland. In the summer of 2015, Coca-Cola HBC Switzerland AG and Denner AG reached an agreement that allowed Denner AG to obtain Coca-Cola products at competitive market prices directly in Switzerland.

In December 2015, the Secretariat concluded a preliminary investigation into **Coca-Cola advertising allowances**, which it had opened in response to a complaint from the Wirtverband Basel-Stadt (Basel Landlords' Association). At issue was whether the differing terms for advertising allowances offered by bottling plants operated by The Coca-Cola-Company (TCCC) in neighbouring countries for customers in their own country and in Switzerland amounted to a breach of competition law. No indications of a territory protection agreement could be de-

tected. On the other hand, indications of an abuse of a dominant position could not be excluded. The required investigations would however have proved relatively costly and time-consuming, and could not reasonably have been carried out in view of the limited economic impact that any abuse might have caused.

The Secretariat's enquiries into the factual circumstances in the preliminary investigation on **wheeled suitcases** were concluded in June 2015. The focus was on the obstruction of cross-border online trading. As the judgment of the Federal Supreme Court in the Gaba/Elmex case is expected soon and is relevant to the assessment of the case, the Secretariat will make its competition law appraisal once the Supreme Court judgment is available.

On 5 November 2015, the Secretariat opened a preliminary investigation on **ski imports** against Fischer Sports GmbH and Völkl (Switzerland) AG following reports in the media that parallel imports of Fischer and Völkl skis were being obstructed or prevented. The allegations that parallel and direct imports were being prevented could not be substantiated, with the result that the preliminary investigation was terminated.

As of the end of 2015, the appeal against the Competition Commission's decision in the **Nikon** case in connection with vertical agreements was pending before the Federal Administrative Court. The appeal against the Competition Commission's decision in the case of **alpine sports products/Altimum SA** was upheld by the Federal Administrative Court in a judgment dated 17 December 2015 (see above, p. 5). The Competition Commission has appealed this judgment to Federal Supreme Court. The **GABA/Elmex** case is pending before the Federal Supreme Court.

### 3.4.2 Musical instruments

In a ruling dated 29 June 2015, the Competition Commission fined a general importer CHF 65,000 for unlawful price-fixing agreements relating to the sale of **stringed instruments**. The ruling has already been mentioned as one of the most important decisions of 2015 (see above, p. 4).

In a ruling dated 14 December 2015, the Competition Commission concluded the investigation into **pianos and grand pianos**. This ruling has likewise already been mentioned as one of the most important decisions of 2015 (see above, p. 4).

### 3.4.3 Watch industry

The reductions in supplies of mechanical watch movements to third-party customers by ETA SA Manufacture Horlogère Suisse, which is based on an amicable settlement between The **Swatch Group** AG and the Secretariat which was approved by the Competition Commission in a ruling dated 21 October 2013, have been made without any particular difficulties.

In relation to **after-sales services**, the Secretariat continued with its preliminary investigation. It has obtained and evaluated a substantial volume of information provided by market participants. The results and the decision on what further action will be taken should be made known by summer 2016.

### 3.4.4 Automobile sector

In a ruling dated 19 October 2015, the Competition Commission found that automobile dealer companies had given notice of a concerted discounting policy in March 2013 at regional gatherings of the **VW Partners Association**. This ruling has already been mentioned as one of the most important decisions of 2015 (see above, p. 4).

On 29 June 2015, the Competition Commission completed its revision of the notice on the competition law treatment of **vertical agreements in the automobile trade**, which has also

been mentioned already among the most important decisions of 2015 (see above, p. **Fehler! Textmarke nicht definiert.**).

The Secretariat opened a preliminary investigation into **AMAG** Automobil- und Motoren AG, following reports from dealer companies and workshops handling Volkswagen Group marques. The reports claimed that AMAG was attempting through arbitrary and discriminatory practices against its business partners to secure more favourable treatment for its AMAG RETAIL businesses and strengthen its position in the retail trade market.

In a judgment dated 13 November 2015, the Federal Administrative Court rejected the appeal by **BMW** against the Competition Commission's ruling of 7 May 2012 on the existence of an unlawful of vertical territorial agreement. This decision has already been mentioned as one of the most important decisions 2015 (see above, p. 5).

### 3.4.5 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, the Secretariat again calling for restrictions to be lifted this year. In addition, the Secretariat responded to five applications from industrial sector or producers' organisations for an extension of the general applicability of self-help measures. Since this option became available, the competition authorities have been committed to ensuring that the instrument is used only sparingly. From the Secretariat's point of view, the applications did not meet the strict requirements set out in the corresponding ordinance, with the result that it did not recommend their approval.

### 3.4.6 Other sectors

In the **medical technology** sector, on 10 March 2015 the competition authorities opened the GE Healthcare investigation into GE Medical Systems (Schweiz) AG and the companies affiliated to its group. The aim of this investigation is to establish whether parallel and direct imports of GE ultrasound scanners into Switzerland have been obstructed.

In the market for **fitness machines**, on 23 September 2015 the competition authorities opened an investigation into a manufacturer of fitness machines, gym80 International GmbH, and its exclusive Swiss importer, ratio AG. The investigation aims to establish whether parallel and/or direct imports of fitness machines into Switzerland are being obstructed or prevented.

In the **garden machinery** sector, on 16 December 2015 the Secretariat opened an investigation into Husqvarna. The investigation is focusing on an alleged attempt to influence the retail prices of Husqvarna's dealer companies and the possible prevention of parallel and direct imports.

Before **notifying mergers**, companies can submit a draft of the notification to the Secretariat as a form of consultation prior to the assessment. The Secretariat's practice is that the assessment of a draft notification is basically covered by the fixed fee for the preliminary assessment, provided that a formal notification is submitted thereafter. In one merger procedure, in addition to charging the fixed fee, the Secretariat invoiced the companies concerned separately for the assessment of several draft notifications, regarding its work as chargeable advisory activities due to the extremely large amount of work and expense involved. If the assessment of incomplete draft notifications involves a large amount of work, in future the Secretariat will invoice this as a **chargeable advisory activity**.

### 3.5 Internal market

On the issue of **freedom of movement**, the focus in 2015 fell on inter-cantonal access to the market for legal agents in the canton of Vaud. Legal agents who are permitted to provide professional representation for litigants in certain civil proceedings in the canton of Vaud have applied in the cantons Geneva and Bern for access to the market under the terms of the rules on origin. The Competition Commission appealed against the negative decisions handed down by the cantonal courts. On 13 April 2015, the Federal Supreme Court held that the provisions of the Swiss Civil Procedure Ordinance on party representation took precedence over the Internal Market Act (IMA) as it is the more recent and more specific provision. The IMA thus does not apply in relation to professional representation in civil proceedings.

In the light of the completed Competition Commission investigation into freedom of movement for notaries, the Federal Supreme Court invited the Competition Commission to comment on a case on the cantonal residence requirement for notaries. In a judgment dated 11 May 2015, the Federal Supreme Court concluded that the residence requirement in the case in question amounted to an unreasonable restriction on the freedom to establish a business (Art. 24 Federal Constitution). However, the Federal Supreme Court chose expressly not to comment on whether notarial activities within the meaning of the Competition Commission recommendation of 23 September 2013 on freedom of movement for notaries and public deeds no longer constitute sovereign activities and are governed by the IMA.

In the **public procurement** sector, the Competition Commission conducted various appeal proceedings. At cantonal level, the Competition Commission brought two appeals against direct IT procurements. The Competition Commission withdrew an appeal against the canton of Zug; in the course of the appeal proceedings, it became apparent that the direct award, in contrast to what had originally been claimed, was made not because of an urgent situation but due to special technical issues. In another case, the commune of Aadorf accepted that it had awarded a contract for new software for the commune privately and without publication in violation of the law on the internal market and on public procurement.

In relation to award of **concessions**, various cantons are in the process of enacting legislation on the use of the subsoil. In two recommendations, to the cantons of St Gallen and Fribourg respectively, the Competition Commission has held that concessions for using the subsoil (special use concessions) must in principle be subject to a public tendering process under Article 2 paragraph 7 IMA. The invitation to tender must include details of the concession, including its duration and the criteria for eligibility and for being awarded the contract, and the decision on the award must be issued in the form of a contestable ruling. The deadline for submitting tenders must take account of the technical complexity of the activity concerned, but in any case must be at least 90 days.

In February 2015, the Canton of Valais began consultation proceedings on the preliminary draft of an amendment to the cantonal act on the exploitation of hydro-electric power and of the cantonal act on the Valais Electricity Company, in which the Competition Commission took part. The reform of the legislation aims to exploit future cases of escheat due to the expiry of concessions to bring hydroelectric power more widely under the control of the Canton of Valais. The Competition Commission concluded that the measures planned in the revised legislation will lead to distortions of competition, which can be prevented by employing a non-discriminatory and transparent procedure. The most suitable approach is to issue a public invitation to tender for available concessions.

### 3.6 Investigations

In 2015, a major search was carried out on the opening of the investigation into gravel and landfill companies in the Bern area. At the same time five smaller searches were carried out in

connection with suspected violations of Article 5 paragraph 4 Cartel Act (price fixing agreements and demarcation of territories).

It is also worth mentioning that as a result of the Competition Commission's relocation to offices on Hallwylstrasse 4, the infrastructure for interviews and data-laboratory analyses has improved. Furthermore, at the end of 2015 a completely revised note on selected investigative measures was published on the website.

### 3.7 International

**EU:** The implementation of the Agreement between Switzerland and the EU on cooperation in applying their respective competition laws, which came into force on 1 December 2014, is generally well underway. The agreement has led to an exchange of information in various proceedings that previously would not have been possible due to official secrecy regulations. It has been applied both in the assessment of mergers and in proceedings to investigate restraints of competition. In relation to information disclosed in the context of a voluntary report or an amicable settlement, an exchange of information only takes place in cases where the company providing the information gives its express written consent. The exchange of information with the EU Commission has generally led to more efficiency in conducting proceedings, as was demonstrated for example in the merger of General Electric Company and Alstom Energy. In addition, in the financial markets sector several parallel proceedings are pending in which the agreement is being applied.

**OECD:** Representatives of the Competition Commission and the Secretariat took part in the two annual meetings of the OECD Competition Committee, for which various contributions were prepared in cooperation with SECO. In addition to the two strategic themes of "international cooperation" and "the evaluation of the activities and decisions of competition authorities", the issue of "disruptive innovation" was repeatedly addressed based on the examples of Uber and Airbnb. In relation to international cooperation, members drafted an OECD model for bilateral cooperation agreements. This included a detailed inventory of provisions that are already included in existing cooperation agreements, which was published online in a user-friendly form and should serve as a source of inspiration in efforts to conclude further international cooperation agreements.

**ICN:** The Competition Commission and Secretariat monitored developments in the International Competition Network. The working group on mergers published practical guidelines in 2015 on international cooperation on law enforcement in the case of mergers. The Secretariat revised its Merger Notification and Procedures Template. The cartel working groups on legal framework (Sub-Group 1) and cartel enforcement (Sub-Group 2) held several webinars. The cartel workshop this year was devoted to the subject of cooperation and convergence in penalising international cartels. The ICN annual conference was held in Sydney, Australia.

**UNCTAD:** Representatives of the Competition Commission and the Secretariat attended the 7<sup>th</sup> United Nations Conference to Review the UN Set on Competition Policy, which was held in Geneva from 6 to 10 July 2015. The topics addressed by the conference included capacity building and technical support on competition law and consumer protection.

### 3.8 Legislation

#### 3.8.1 Parliamentary proposals following the failed reform of the Cartel Act

In June 2014, after the Council of States adhered to its decision to revise the Cartel Act but the National Council in its second reading in September 2014 chose not to consider the matter, the revision of the Cartel Act, proposed by the Federal Council based on the Competition Commission evaluation, was formally abandoned. Subsequently individual parliamentary proposals were submitted with the aim of revising specific points in the Cartel Act. These include:

- The **Hans Altherr parliamentary initiative** of 25 September 2014 “Excessive import prices. End compulsory procurement on the domestic market” (14.449) plans in the style of German cartel law to introduce a provision into the Cartel Act on combating the abuse of relative market power. The committees of the Council of States and National Council have approved the parliamentary initiative and are now in the course of drafting the new legislation.
- The **Social Democratic Group motion** of 24 September 2014 “Fight Switzerland’s status as the island of high prices. A streamlined revision of the Cartel Act” (14.3780) demands that the Federal Council submit a streamlined version of the revised Cartel Act, in particular containing regulations against “excessive prices in Switzerland”, while other revision proposals (institutional reform, compliance rules, etc.) should be shelved. The proposal has not yet been debated in the Assembly.
- The **Viola Amherd motion** of 26 September 2014 “For a minor revision of the Cartel Act” (14.3946) calls on the Federal Council to re-submit the “uncontested articles in the failed revision of the Cartel Act”, in particular the introduction of processing deadlines, the regulations on the information given to the public, and the rules on considering the economic consequences and size of the company when imposing sanctions. The proposal has not yet been debated in the Assembly.
- The **Hans Hess motion** of 18 June 2015 “For a more effective Cassis de Dijon principle” (15.3631) requires the Federal Council to take measures to ensure that manufacturers in their distribution agreements expressly permit their sales partners in Switzerland to carry out installation, maintenance or guarantee work, etc. for their products as well if these have been purchased directly in the European Economic Area. The motion has been approved by the Council of States.

The State Secretariat for Economic Affairs (SECO) has overall responsibility for these proposals within the administration; the Secretariat of the Competition Commission is involved in the work.

### 3.8.2 Complete revision of the Competition Commission internal rules of procedure

Under Article 20 Cartel Act, the Competition Commission is required to issue internal rules of procedure, which in terms of the statutory requirements should regulate organisational matters and the responsibilities of the Competition Commission and its Secretariat. The current rules, dated 1 July 1996, were partially revised in 2009 and were subjected to a complete revision in 2015.

The key factor that led to the revision was the need to *introduce two chambers*: Article 19 Cartel Act provides that the Competition Commission may organise itself in chambers with independent decision-making powers, but does not regulate the issue of which decisions the chambers can take. Under the new Competition Commission rules of procedure, two new chambers will be constituted to deal with specific scenarios. These new chambers thus differ considerably from the three chambers abolished in the previous revision, which were each allocated specific sectors or markets.

**Chamber for part-rulings:** In competition proceedings, in practice the situation often arises where some parties agree at an early stage in an investigation on an amicable settlement to eliminate their anti-competitive conduct and want to conclude the proceedings as quickly as possible. Other parties to the same proceedings however dispute the proposed solution, and expect a full investigation of their competitive relations. Until now, the Competition Commission normally dealt with such cases in a single ruling, which meant that the former group of parties – to their mind unnecessarily – had to wait months if not years for the proceedings to be completed. The new Competition Commission rules of procedure provide – in full cognition of the requirement that justice be dispensed speedily and in the interests of these parties – for the option of issuing part-rulings at an early stage, thus accelerating the procedure, and concluding



parts of it at different stages. The introduction of a chamber specifically responsible for this should prevent a situation in which, due to earlier part-rulings being issued in respect of some of the parties, the competence of the entire Commission to take a subsequent decision on the remaining parties is called into question on the grounds of (alleged) partiality (“prior involvement”). The new chamber will decide in part-rulings on whether to terminate the proceedings or approve an amicable settlement with regard to certain of the parties, and on other measures, such as sanctions and fees. The decision against the other parties remains within the competence of the (full) Commission at the end of the investigation.

**Chamber for mergers:** The creation of this chamber is justified on the grounds that decisions on proposed mergers often have to be taken at very short notice. A preliminary assessment is subject to a tight time framework of one month, so that it appears expedient for a single chamber to decide whether a detailed examination should be started and whether the merger can be implemented ahead of the normal schedule. The Commission however retains a certain residual power in the preliminary assessment, in that it will be informed of the chamber’s decision and may conduct an examination independent of the chamber, and if need be overrule its decision. The Commission can delegate other tasks to the chamber if practical considerations indicate that this is appropriate.

In addition to the introduction of the two chambers, the following major changes should be mentioned:

- **New layout:** The layout of the Competition Commission rules of procedure is based on that of other sets of rules among the authorities and is structured according to the individual entities making up the Competition Commission.
- **Supplementing function:** The key to understanding the revised Competition Commission rules of procedure is that, in accordance with the regulations on legislative drafting, the rules only contain provisions that go beyond what is already regulated in the Cartel Act. This means that the Competition Commission rules of procedure are not always comprehensible in themselves, but must be read alongside the provisions of the Cartel Act.
- The revised Competition Commission rules of procedure contain new or more precise regulations based on the practices developed to date, in particular on decisions made by circulating a written draft, rights of signature, record-keeping and on the appointment of senior officials and Secretariat staff.

The totally revised Competition Commission rules of procedure were approved by the Competition Commission on 15 June 2011 and by the Federal Council on 25 September 2015, and came into force on 1 November 2015.

## 4 Organisation and statistics

### 4.1 Competition Commission and Secretariat

In 2015, the Competition Commission held 18 full-day plenary sessions. The numbers of decisions in investigations, merger proceedings under the Cartel Act and in application of the IMA are shown in the statistics (see 4.2).

At the end of 2015, the 2012-2015 term of office for the members of the Competition Commission expired. As members are permitted to hold office for a maximum of twelve years, the following members stood down from the Competition Commission: **Prof. Dr. Evelyne Clerc**, University of Neuchâtel; **Dr. Jürg Niklaus**, representative of the Swiss Farmers’ Union; **Thomas Pletscher**, representative of *economiesuisse* and **Dr. Johann Zürcher**, judge in the Canton of Zurich Court of Appeal and representative of the consumer protection organisations. **Prof. Dr. Stefan Bühler**, University of St. Gallen, did not stand for re-election.

In a decree dated 25 November 2015, the Federal Council elected the members of the Competition Commission for the **2016-2019 term of office**. The following seven members were re-elected: **Prof. Dr. Vincent Martenet**, President of the Competition Commission, University of Lausanne (Prof. Dr. Martenet will be required to stand down from the Competition Commission in two years' time as he will have served the maximum term of office); **Prof. Dr. Andreas Heinemann**, Vice President of the Competition Commission, University of Zurich; **Prof. Dr. Winand Emons**, University of Bern; **Prof. Dr. Andreas Kellerhals**, University of Zurich; **Dr. Daniel Lampart**, representative of the Swiss Federation of Trade Unions (Dr. Lampart will be required to stand down from the Competition Commission in two years' time as he will have served the maximum term of office); **Prof. Dr. Armin Schmutzler**, University of Zurich; **Henriette Schneider**, representative of the Swiss Union of Crafts and Small and Medium-sized Enterprises. Armin Schmutzler was appointed as a new Vice President of the Competition Commission. The Federal Council elected the following persons as new members:

**Dr. Pranvera Këllezi**: Dr Këllezi is fully qualified at the highest academic level in Swiss and European competition law (University of Geneva and College of Europe in Bruges). She has several years of practical experience in dealing with competition law matters in her own law practice (technical cooperation, counsel in competition law at an umbrella organisation, activity in a Swiss law firm).

**Danièle Wüthrich-Meyer**: Mrs Wüthrich is an attorney-at-law and judge at the Cantonal Court of Appeal in Bern and was the president of court for four years. She has served since 2010 as the vice president of the Commercial Court. Also relevant are her earlier activities at the Criminal Court for Economic Offences and the many years she served as president of the Arbitration Commission for Copyrights.

**Florence Bettschart-Narbel**: Mrs Bettschart-Narbel is an attorney-at-law. She worked for Gautier, Vuille & Associés in Geneva. She studied at the University of Lausanne with one year of studies at the University of Basel. She is a representative of the Consumers Association in French-speaking Switzerland (Fédération Romande des Consommateurs (FRC)), where she has been responsible for law and policy since 2008. Mrs Bettschart-Narbel is a member of the Lausanne city parliament.

**Prof. Dr. Rudolf Minsch**: Prof. Minsch is a representative of *economiesuisse*, where he is its Chief Economist and a member of its executive board. In addition, he is a visiting professor at the HTW Chur and responsible for the development of the SwissSim economic simulation model at the University of St. Gallen. He studied economics at the University of St. Gallen, and pursued postgraduate studies at the University of Boston.

**Martin Rufer**: Mr Rufer is a representative of the Swiss Farmers' Union (SBV), where he is the head of the Department of Production, Markets and Ecology. He is also a member of the SBV executive board. In addition, he is the secretary of the Swiss cattle producers SRP, a board member of Proviande, and president of AgroCleanTech AG and the AgroCleanTech association. He is also a member of the Federal "Chocolate Act" Steering Committee and the Federal Commission for Food Safety. He studied agronomics at the ETH Zurich, specialising in mixed farming.

On 2 September 2015, the Federal Council decided to extend **Dr. Rafael Corazza's** tenure as Director of the Secretariat beyond his statutory retirement age until July 2018 at the latest. In the next two to three years, Competition Commission is set to conclude a number of important cases and take certain significant strategic decisions. The extension of Dr. Rafael Corazza's employment contract will enable the Commission to deal with forthcoming business with an experienced and proven team of staff.

At the end of 2015, the **Secretariat** employed 76 (previous year 75) staff members (full-time and part-time), 42 per cent of whom were women (previous year 45). This corresponds to a

total of 66.7 (previous year 65.25) full-time positions. The staff was made up as follows: 55 specialist officers (including the executive management; this corresponds to 49.2 full-time positions; previous year 48.8); 8 (previous year 6) specialist trainees, which corresponds to 8 (previous year 6) full-time positions; 13 members of staff in the Resources and Logistics Division, which corresponds to 9.5 (previous year 10.5) full-time positions.

In June 2015, the Secretariat relocated within Bern from Monbijoustrasse 43 to Hallwylstrasse 4.

## 4.2 Statistics

	2014	2015
<b>Investigations</b>		
Conducted during the year	21	30
Carried forward from previous year	19	15
Investigations opened	2	6
New investigations from divided investigations	0	9
<b>Final decisions</b>	6	7
Amicable settlements	4	3
Administrative rulings	0	2
Sanctions under art. 49a para. 1 Cartel Act	2	6
Part-rulings	0	1
Procedural rulings	7	7
Other rulings (publication, costs, searches, etc.)	10	1
Precautionary measures	1	0
<b>Sanctions proceedings under Art. 50 ff. Cartel Act</b>	0	0
<b>Preliminary investigations</b>		
Conducted during the year	20	18
Carried forward from previous year	16	14
Opened	4	4
Concluded	11	7
Investigations opened	1	1
Modification of conduct	8	2
No consequences	2	4
<b>Other activities</b>		
Notifications under Art. 49a para. 3 let. a Cartel Act	2	2
Advice	27	17
Market monitoring	61	33
Freedom of information applications	13	23
Other enquiries	594	685
<b>Mergers</b>		
Notifications	30	29
No objection after preliminary examination	35	26
Investigations	1	3
<b>Decisions of the Competition Commission</b>	0	0
After preliminary examination	0	0
After investigation	0	0
Early implementation	0	0
<b>Appeal proceedings</b>		

Total number of appeals before the Federal Administrative Court and Federal Supreme Court	25	24
Judgments of the Federal Administrative Court	7	3
Success for the competition authority	3	2
Partial success	1	0
Judgments of the Federal Supreme Court	0	2
Success for the competition authority	0	2
Partial success	0	0
Pending at the end of year (before Federal Administrative Court and Federal Supreme Court)	21	22
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Cartel Act)	1	0
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	0
Follow-up checks	6	0
Notices (Art. 6 Cartel Act)	0	1
Opinions (Art. 46 para. 1 Cartel Act)	254	281
Consultation proceedings (Art. 46 para. 2 Cartel Act)	5	8
IMA		
Recommendations / Investigations (Art. 8 IMA)	3	2
Expert reports (Art. 10 I IMA)	1	1
Explanatory reports (Secretariat)	36	45
Appeals (Art. 9 para. 2 <sup>bis</sup> IMA)	5	1

A glance at the statistics and a comparison with the figures from the previous year reveals the following:

- The number of investigations carried out has clearly increased, which is due to the division of the investigation into bid rigging in the canton of Graubünden into ten different investigations (see above, p. 7). In 2015, more sanctions were imposed than in the previous year. Half of the investigations were concluded by amicable settlement.
- Under “Other activities”, the number of instances of providing advice and market monitoring procedures has declined by almost half. On the other hand, the number of “other enquiries”, which includes many enquiries from members of the public, has risen again to almost 700.
- The number of mergers notified is practically the same as in 2014. On the other hand, the Competition Commission conducted three complex reviews, at the end of which the mergers were permitted without additional requirements and conditions, because the strict statutory requirements for intervention – the potential elimination of the competition – were not met.
- The number of appeal proceedings before the Federal Administrative Court and Federal Supreme Court is still high. Although the Federal Administrative Court issued judgments in three cases (Swisscom ADSL, BMW and alpine sports products), all three decisions have been appealed to the Federal Supreme Court. At the end of 2015, therefore, 22 appeals were pending before the courts, i.e. almost as many as at the end of 2014.
- In 2015, a large number of opinions were provided during legislative procedures (office consultation procedures and consultation proceedings). This underlines the importance of the competition authorities’ advocacy activities, as highlighted in the Annual Report for 2014.

- The volume of work carried out in relation to the Internal Market Act was similar to that in previous years. Although the number of appeals declined, in 2015 the Secretariat issued more explanatory reports on IMA-related matters.

## 5 Ten years of searches

### 5.1 Searches carried out

On 14 February 2006, the Secretariat of the Competition Commission conducted searches of premises for the very first time. The aim of these searches was to find evidence of a suspected air freight cartel. The procedure had been triggered by a voluntary report, with the result that two new instruments in the then recently revised Cartel Act (revision of 2003; in force since 1 April 2004 with transition period to 31 March 2005) – searches and the bonus system – had their baptism of fire. Now, ten years later, it is time both to look back and to look ahead to the future.

Ahead of the first search, a competence centre for searches was set up to ensure that staff were prepared for their task by attending training sessions run by experts in the field from other countries. In addition, the competence centre drew up the guidelines and documents that were required to carry out these compulsory measures. In April 2005, the first “note on search procedures” was published on the authority’s website.

Since then, the Secretariat has conducted numerous searches and has continuously developed this practice from its initial solid basis, as the following table reveals:

Year	Case	Locations	Comments	Cantons
2006	Air freight	3	First ever search	ZH
2007	Builders’ supplies	4		ZH/SG/BE
2007	Haulage companies	8	Confirmed by Federal Criminal and Federal Supreme Courts	ZH/BS/SZ
2008	Electricians	7	First ever whistleblower	BE
2008	Water management	1		SZ
2009	Roads and civil engineering ZH/AG	10	Confirmed by Federal Criminal Court	ZH/AG
2010	Mountain sports	1	First time for Art. 5 para. 4 Cartel Act	VD
2010	Nikon	1		ZH
2011	Wholesalers of sanitary facilities	7	First ever interviews / Confirmed by Federal Criminal Court	BE/ZH/VS/VD
2012	Jura	1		SO
2012	Construction Lower Engadin	12	First every searches of private homes	GR/ZG
2012	Steinway & Sons	3		ZH/BE/TI
2013	Tunnel cleaning	5	First ever search before award of contract	OW/AG/ZH/TG/LU
2013	Construction St. Gallen	6		SG/GR/ZH
2013	Construction Graubünden	10	First ever use of scanning / Confirmed by Federal Criminal Court	SG/GR/ZH
2013	Stringed instruments	1		AG
2013	Construction St. Gallen 2	3		SG/SZ
2014	Car leasing and finance	8		ZH/AG/BE
2015	Gravel quarries and landfills BE	7		BE
2015	Company X	1		ZH
2015	Company Y	1	Only electronic data	SG
2015	Company Z	1	Only electronic data	LU
2015	Company Y	1	First ever second search at same location	SG
2015	Husqvarna	1		AG
<b>Total:</b>	<b>24</b>	<b>103</b>		<b>15</b>

In the course of these 24 procedures, the Secretariat has inspected over 100 locations. It is worth noting that in only four cases were proceedings before the Federal Criminal Court required for unsealing documents; the court upheld the Secretariat's course of action in every case. In the Panalpina case, the Federal Criminal Court's decision was appealed to the Federal Supreme Court, which also confirmed the Secretariat's practice.

The searches have not only been carried out correctly in procedural terms, but in virtually every case they have led to vital evidence being secured and/or have induced the companies concerned to make voluntary reports of unlawful conduct. An illustrative example is the case of the electricians companies in Bern (cf. RPW 2009/3, 196 ff.), which was triggered by a whistleblower report and in which three of the companies submitted voluntary reports during the searches. All the other parties also filed voluntary reports in the following days. A current example is the tunnel cleaning contracts case (cf. RPW 2015/2, 193 ff.), now confirmed by a binding court decision: in the judgment, numerous items of evidence were cited that had been seized during a search and which were decisive in proving a violation of competition law (see in particular, para. 87 ff. and 119 ff.). In this case too, the initial voluntary report was filed during the search.

Ten years after searches began, the results have therefore been highly positive. It has proven to be an effective measure for investigating suspected violations of competition law. At the same time, it is a measure that cannot be used indiscriminately. Firstly, searches constitute a substantial encroachment on the freedoms of those concerned. Conducting a search can have a serious adverse impact on the business operations of a company. Secondly, searches involve a substantial volume of work for the authority. In large coordinated operations involving several companies, the entire staff of the Secretariat may have to be deployed. Police officers and IT investigators (primarily from the Federal Criminal Police) are also required; they support the Secretariat under the system of administrative assistance and make an essential contribution to the smooth conduct of the search.

## 5.2 Important developments

The Secretariat's practices in relation to searches have been improved continuously over the years. The following remarks provide an outline of the most important developments:

**Adequate suspicion:** The first searches were carried out in response to information that persons filing voluntary reports had provided, i.e. very detailed and specific information from within the cartel. Later searches were carried out based on information provided by a whistleblower. For the whistleblowers' protection, it was crucial that the Federal Criminal Court accepted that a whistleblower's identity must not be disclosed (Decision BE.2009.21 of the Federal Criminal Court of 14 January 2010, E. 3.2.f.). The case relating to wholesalers of sanitary facilities was the first in which a search was carried out in response to a complaint from customers, combined with enquiries by the Secretariat. The Federal Criminal Court held that the level of detail in such complaints could not match that in voluntary reports, but what is decisive is that the reports and complaints are adequately specific and are first assessed by the Secretariat as to their validity based on its own observations (Decision BE.2012.4. of the Federal Criminal Court from 11 July 2012, E.3.2.f.).

**Lawyer-client confidentiality:** One of the most controversial issues in relation to searches concerns the protection of lawyers' correspondence. Until 30 April 2013, lawyers' correspondence was only protected from search and seizure if it was in a lawyer's safekeeping (the competition authorities relaxed their practice in this connection when the new Criminal Procedure

Code came into force on 1 January 2011). Since 1 May 2013, Article 46 paragraph 3 Administrative Criminal Law Act has applied, protecting articles and documents that are transmitted between a person and their lawyer irrespective of their location and of when they were created. The scope of protection covers documents (1) from dealings with a lawyer who is entitled under the Lawyers Act to represent clients in the Swiss courts (company in-house lawyers do not meet this requirement) and (2) which have been prepared in connection with a professional mandate.

**Removing seals:** In order to sort out which documents are protected by lawyer-client confidentiality, the Secretariat has developed some practical solutions. One is to separate these documents from others in a preliminary triage carried out by Secretariat staff who are not part of the case team.

**Interviews:** In the case relating to wholesalers of sanitary facilities in 2011, the Secretariat decided to start the investigation not only by carrying out searches, but by conducting interviews with the parties and witnesses.

**Scanning documents:** At the outset, the Secretariat normally seized the original documents and then gave the company the opportunity to copy these documents at the Secretariat's offices. Later, companies were permitted to make copies on their own premises, provided this did not obstruct the search. Nowadays, the Secretariat has efficient scanning devices. Normally most of the documents can be scanned at the locus of the search and the company concerned is allowed to keep the originals.

### 5.3 New guidelines

The opportunity to conduct interviews has broadened the focus of the former competence centre for searches and it has now been renamed the **Competence Centre for Investigations**. As a result of this expansion and the various developments outlined above, the guidelines on search procedures has been radically revised and expanded to become the "**Note on selected instruments of investigation**". This note has been available since the start of 2016 on the Competition Commission website.