



Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Wettbewerbskommission WEKO
Commission de la concurrence COMCO
Commissione della concorrenza COMCO
Competition Commission COMCO

To the Federal Council

Annual report 2016 of the Competition Commission

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

Table of Contents

1	Foreword from the President.....	4
2	Most important decisions of 2016.....	5
2.1	Decisions by the Competition Commission.....	5
2.2	Decisions in the courts.....	7
3	Activities in individual sectors.....	9
3.1	Construction.....	9
3.1.1	Bid rigging.....	9
3.1.2	Bathrooms / Wholesalers of sanitary facilities.....	9
3.1.3	Building materials and landfills.....	9
3.1.4	Galvanising.....	10
3.1.5	Further sectors.....	10
3.2	Services.....	10
3.2.1	Financial services.....	10
3.2.2	Health care.....	11
3.2.3	Liberal professions and other services.....	11
3.3	Infrastructure.....	12
3.3.1	Telecommunications.....	12
3.3.2	Media.....	13
3.3.3	Energy.....	13
3.3.4	Other sectors.....	13
3.4	Product markets.....	14
3.4.1	Consumer goods industry and retail trade.....	14
3.4.2	Musical instruments.....	14
3.4.3	Watch industry.....	15
3.4.4	Automotive sector.....	15
3.4.5	Agriculture.....	15
3.4.6	Other sectors.....	16
3.5	Internal market.....	16
3.6	Investigations.....	17
3.7	International.....	18
3.8	Legislation.....	19
3.8.1	Parliamentary proposals.....	19
3.8.2	Fair Price Initiative.....	20
3.8.3	Modernisation of merger control procedures.....	20
4	Organisation and Statistics.....	21
4.1	Competition Commission and Secretariat.....	21
4.2	Statistics.....	22
5	Digitalisation of the economy.....	24
5.1	Network infrastructure.....	24
5.2	Online trading.....	24

5.3 Digital platforms.....25
5.4 Big Data26
5.5 “The Sharing Economy”.....27
5.6 Conclusion28

1 Foreword from the President

In 2016, the Competition Commission took some significant decisions in order to guarantee free competition and keep markets open. The investigations that were completed included both **complex, time-consuming proceedings** and **smaller cases with signal character**, which should act as a deterrent. In line with the Competition Commission's priorities over many years, in 2016 the focus was on hard horizontal cartels, market foreclosures and improper practices by dominant companies.

2016 also saw the Competition Commission conduct competition law investigations in **the widest range of sectors** of the Swiss economy. In particular, it intervened in the construction industry, financial markets, health care, media and communication, the consumer goods industry and the retail trade, the watch industry and in the automotive sector. The diversity of industries affected by competition law proceedings is a clear indication of the comprehensive scope of the current Cartel Act. Special arrangements for specific sectors, as demanded in various political proposals, stand contrary to general character of the Cartel Act.

In its landmark decision of 28 June 2016 in the case of **Gaba/Elmex**, the Federal Supreme Court settled two fundamental issues of major importance to the future application of the Cartel Act by the Competition Commission and the courts. The court provided answers to long disputed questions. It clarified how the **seriousness of restraints of competition** should be assessed and whether **direct sanctions** may also be imposed in the case of hard agreements affecting competition that do not entirely eliminate effective competition, but nonetheless do considerable harm. The related judgment will facilitate Competition Commission proceedings against hard horizontal cartels as well as price fixing agreements and market foreclosures in distribution agreements, because the Commission will no longer have to prove the implementation and effects of such agreements in each individual case on the basis of quantitative criteria. The Federal Supreme Court, however, did not prohibit such agreements per se. They may still be justified on grounds of economic efficiency, provided the statutory presumption that competition will be eliminated can be rebutted. Moreover, the judgment does not necessarily apply to trivial cases.

In 2016, the competition authorities also conducted a detailed examination of the **digitalisation of the economy** and the resultant competition law issues, both in the form of a theoretical appraisal and analysis of the matter and by studying specific cases. Assessing the developments in the digital economy is complicated: the digital economy offers opportunities, but also harbours risks for competition. Misjudgements can lead to regulations that obstruct competition rather than provide a level playing field. The competition authorities are confronting these new challenges and taking account of the changing conditions and characteristics of the new business models. Innovative business models are highly desirable, but the competition authorities will issue warnings if they identify risks to competition, and intervene if competition is being restricted. This is demonstrated by the Competition Commission's practices in the sectors affected by digitalisation.

Prof. Dr. Vincent Martenet
President of the Competition Commission

2 Most important decisions of 2016

2.1 Decisions by the Competition Commission

In a ruling dated 9 May 2016, the Competition Commission fined **Swisscom** around CHF 71 million. The Commission found that in the **Pay TV** market, Swisscom and its subsidiaries dominate the market for the live broadcasting of matches in the Swiss football and ice hockey championships and of certain foreign football competitions. This is because the Swisscom subsidiary Cinetrade holds long-term, comprehensive and exclusive rights to transmit sports events on Swiss Pay TV. Swisscom has abused its market dominance in several respects. It has refused to allow a number of competitors to offer any live sports coverage on its platform. Other competitors, such as Cablecom, have only been allowed access to a reduced range of sports. In addition, in contrast to Swisscom, competitors have only been allowed to offer their customers sports coverage if it is coupled with the basic Teleclub package. Thanks to these practices, Swisscom has gained an unlawful advantage in competition among TV platforms. Swisscom has appealed to the Federal Administrative Court against the Competition Commission decision.

In a decision dated 23 May 2016, the Competition Commission approved an amicable settlement with the **General Electric Company (GE)** and its subsidiaries, GE Healthcare GmbH (Germany) and GE Medical Systems (Switzerland) AG. The investigation into the obstruction of Swiss direct imports of GE **ultrasound scanners**, which was based on a voluntary report by GE itself, revealed that in the period from April 2008 until the voluntary report was made in April 2014 there were unlawful agreements affecting competition between GE Healthcare (Germany) and its sales partners relating to absolute territorial protection. In an amicable settlement, GE's two subsidiaries undertook not to enter into any agreements in future that prohibit sales by German dealers to Swiss clients in response to their sales enquiries (known as passive sales). All contracts with German sales partners should if necessary be amended accordingly or their wording should be made clearer. No sanction was imposed because the investigation was based on a voluntary report.

In a ruling dated 8 July 2016, the Competition Commission fined eight **road construction and civil engineering companies** a total of around CHF 5 million. The companies had agreed on bids and determined who was to be awarded contracts in connection with several hundred invitations to tender in the districts of **See-Gaster** in canton St Gallen and **March and Höfe** in canton Schwyz between 2002 and 2009. The investigation began in April 2013 with searches of premises, largely based on a statistical analysis of minutes of bid opening procedures. As part of the arrangements that were uncovered, the companies had until mid- 2009 met regularly for "market assessment meetings". At these meetings they discussed lists that they had compiled themselves and continuously updated on the road and civil engineering projects that were being carried out for public or private clients. The eight companies discussed the projects that they were each interested in. If they reached agreement, a decision was taken on which company should be awarded the contract. The other companies submitted bids offering their services at higher prices. This type of manipulation in the award of contracts by means of price-fixing agreements is especially harmful in economic terms and constitutes a serious breach of the Cartel Act. Several companies have appealed the decision to the Federal Administrative Court.

In a decision dated 24 October 2016, the Competition Commission adhered to the amicable settlement 2013 reached with **The Swatch Group AG** (Swatch) in 2013 without making any changes. The settlement involves a duty to supply mechanical watch movements, but at the

same time allows the Swatch subsidiary ETA SA Manufacture Horlogère Suisse (ETA) to gradually reduce the supplies made to third parties until the end of 2019. The impetus for these proceedings was a request from Swatch for an amendment to the amicable settlement. The Competition Commission concluded on the basis of a comprehensive market survey that market conditions are developing in the expected direction. The Competition Commission could not identify any substantial changes that would justify an amendment of the amicable settlement. The market participants interviewed however claimed inter alia that the continuation of amicable settlement unchanged was essential to further market development. An amendment of the current supply arrangement would place the development and expansion plans of ETA's competitors at considerable risk. The Competition Commission agreed with these assessments. It took the view that the difficult economic environment that the watch industry faced in 2016 was an insufficient reason to amend the settlement reached in 2013.

On the basis of the Internal Market Act (IMA), on 21 November 2016 the Competition Commission filed an **appeal** against two rulings issued in connection with the Ticino Act on commercial enterprises (**Legge sulle imprese artigianali, LIA**). This act has been in force since 1 February 2016 and requires all handicraft businesses operating in the canton of Ticino to register by 1 October 2016 at the latest. Registration is tied to a series of conditions, including the requirement that managers must have specific professional qualifications and professional experience and work at least 50% of the week. An initial registration fee and recurrent annual fees are charged for registration. The responsible Ticino authorities only decided in October 2016 on the licence applications filed by handicraft businesses from other cantons and did not apply the IMA when doing so. In the opinion of the Competition Commission, the obligation to register, the registration requirements and the fees are incompatible with the IMA. In addition there is no simple and quick procedure for access to the market under the LIA. As a result, the Competition Commission appealed against two of these rulings to the administrative court of the Canton of the Ticino in order to have a judicial assessment of the issue.

In the investigation into the **commercialisation of electronic medical information** required for distribution, the Competition Commission decided on 19 December 2016 that Galenica AG, and in particular its branch HCI Solutions AG abused their dominant position by preventing competitors from accessing the market and in order to make their commercial partners accept combinations of services. The companies in question have been ordered to pay sanctions amounting to some CHF 4.5 million. They may challenge the decision in the Federal Administrative Court.

On 21 December 2016, the Competition Commission reported on its first seven rulings in the **IBOR proceedings**. These originate from an investigation that was opened on 2 February 2012. The investigation revealed that various practices without any factual connection had to be distinguished, with the result that the investigation was divided into five separate cases. In total, seven rulings have been issued in relation to these five investigations:

- Swiss franc LIBOR: An amicable settlement and sanctions were approved; the case against the brokers was abandoned. The proceedings have thus been concluded.
- Bid-ask spreads based on Swiss franc-interest rate derivatives: An amicable settlement and sanctions were approved. The proceedings have thus been concluded.
- EURIBOR: An amicable settlement with certain parties and sanctions were approved. Proceedings are continuing against several parties who have not signed the amicable settlement.
- Yen LIBOR/Euroyen TIBOR: An amicable settlement with some of the parties and sanctions were approved. The case against the Japanese banks was abandoned. The proceedings are continuing against several parties who have not signed an amicable settlement.
- Yen TIBOR proceedings: The case was abandoned against all parties.

The Competition Commission imposed sanctions amounting to CHF 99.1 million. Since the investigation was opened, this very complex series of cases has occupied the competition authorities intensively for more than four years. In this period, over 9 million pages of electronic and telephone communications were analysed. A total of 21 parties, 16 banks and 5 brokers have been involved in the various IBOR cases so far. The rulings have enabled three of the five cases to be concluded; it is only in the EURIBOR case and in the Yen LIBOR/Euroyen TIBOR case that investigations into individual banks or brokers are still ongoing. With this first round of decisions, it has been possible to conclude a significant portion of the proceedings.

2.2 Decisions in the courts

In its **landmark decision** of 28 June 2016, the Federal Supreme Court rejected the appeal by the **Elmex** manufacturer Colgate-Palmolive Europe Sàrl (formerly **Gaba** International AG) relating to the sanction of CHF 4.8 million imposed by the Competition Commission. The prohibition of parallel imports into Switzerland which Gaba International AG imposed on its licensees in Austria until 2006 was thus an unlawful agreement that significantly restricted competition. The Competition Commission was entitled to impose sanctions for this breach of the Cartel Act. The Federal Supreme Court held that agreements on prices, quantities and territories as mentioned in Article 5 paragraphs 3 and 4 of the Cartel Act, due to their very nature, **in principle constitute a significant restriction** of competition even if the presumption of the elimination of competition can be rebutted. This is basically the case **regardless of** quantitative criteria such as the size of the market share held by the undertakings concerned. Agreements of this type are therefore unlawful unless they can be justified on the grounds of economic efficiency. The Federal Supreme Court decided in the same judgment on a further fundamental issue relating to **direct sanctions** under Article 49a of the Cartel Act in the case of agreements under Article 5 paragraphs 3 and 4 of the Cartel Act. Direct sanctions may not only be imposed in cases of agreements that eliminate competition; they are also possible for agreements where the presumption of a total elimination of competition is rebutted and there is simply a significant restriction of competition which cannot be justified on grounds of efficiency. The written justification for the judgment has still to be issued.

In 2011, the Competition Commission imposed a sanction of around CHF 12.5 million on **Nikon AG** (Switzerland) for preventing parallel imports. In a judgment dated 16 September 2016, the Federal Administrative Court essentially rejected the appeal filed against this decision, but revised the sanction due to an error made in its assessment by the Competition Commission, reducing the amount by half a million francs to around CHF 12 million. The Federal Administrative Court held that it was proven that the Swiss branch of the group in 2008 and 2009 prevented the **parallel import** of Nikon products (cameras, interchangeable lenses and flash-light apparatus) from abroad into Switzerland, thus significantly restricting the effective competition in Switzerland. In reaching its decision, the court relied in part on the legal precedent set in the Gaba case by the Federal Supreme Court on the definition of the “seriousness” of a restriction of competition (see above) and dispensed with a quantitative examination of the effects of the contractual ban on parallel imports. Nikon decided not to file a further appeal against the judgment, with the result that the judgment of 16 September 2016 is now legally binding.

In a judgment dated 24 November 2016, the Federal Administrative Court overturned the Competition Commission ruling in the **Hallenstadion/Ticketcorner** case. Starticket and Ticketportal had reported Hallenstadion and Ticketcorner to the Competition Commission for alleged anti-competitive conduct in relation to the hiring of the Hallenstadion. In terms of a ticketing clause, the Hallenstadion had since 2009 required the organisers of public events to allow Ticketcorner to sell at least 50% of the tickets. The background to this requirement lay in a ticketing cooperation clause in a cooperation agreement between Hallenstadion and Ticketcorner. The Competition Commission abandoned the case in 2011, having failed to find any indications of an unlawful restraint of competition. Starticket and Ticketportal appealed

against this decision. After the two appellants' right to appeal was confirmed by the Federal Supreme Court in preliminary proceedings lasting several years, the Federal Administrative Court has now upheld the appeal on its merits. It held that there were adequate indications (i) that the ticketing cooperation agreement is an anti-competitive agreement, (ii) that the ticketing clause by the Hallenstadion amounts to conduct in abuse of the market, and (iii) that enforcing an obligation for promoters to conclude a ticket sales agreement constitutes conduct in abuse of the market by Ticketcorner. The matter has been referred back to the Competition Commission for reassessment because certain factual circumstances require a binding investigation by the competition authority, and the Commission is basically responsible for deciding on whether any sanctions should be imposed.

In a judgment dated 26 May 2016, the Federal Supreme Court rejected the appeal by **Nikon AG** (Switzerland) relating to the **publication** of the Competition Commission decision of 28 November 2011. Nikon had essentially claimed that the publication of e-mail correspondence in order to substantiate a ban on the prevention of parallel imports in the Competition Commission ruling would be a violation of the principle of proportionality, the law on personal privacy, Nikon's trade secrets, the Data Protection Act and the presumption of innocence. The Federal Supreme Court regarded all these arguments as unjustified. It held in principle that the Competition Commission can publish its rulings based on Article 48 paragraph 1 of the Cartel Act and that, given the purpose of the said provision, there was no reason why publication as such should be unlawful. In addition, the court stressed that there was no objective interest in treating evidence of conduct in breach of competition law as confidential under Article 25 paragraph 4 of the Cartel Act. Its disclosure allows the public to understand the Competition Commission's arguments. The Competition Commission did not infringe any of Nikon's trade secrets by publishing the e-mail correspondence examined in the investigation.

On 23 August 2016, the Federal Administrative Court pronounced on the question of whether and on what terms the Competition Commission is permitted to hand over **case files to victims of cartels**. The background to this was that on 22 April 2013, the Competition issued its ruling on sanctions in the investigation into road construction and civil engineering in the canton of Zurich and in the published version of the ruling redacted the names of the construction projects affected by unlawful agreements affecting competition. This meant that it was not clear to procurement agencies whether they were affected by the agreements or not. As a result, the Competition Commission received requests for access to the unredacted passages in the ruling and the investigation files. On 8 September 2014, the Competition Commission granted certain of these requests. The appeals filed against this by the construction companies were rejected by the Federal Administrative Court on 23 August 2016. These judgments have not been challenged. The ruling of the Competition Commission and the related judgments of the Federal Administrative Court of 23 August 2016 represent landmark decisions on the question of whether and if so to what extent the Competition Commission may disclose case information to victims of cartels. The Federal Administrative Court upheld the Competition Commission's decision. In principle, victims of cartels should be allowed access to case files (including the ruling) or to extracts from them, provided no information from voluntary admissions is disclosed. In relation to this specific case, this means that procurement agencies will be given access to extracts from the Competition Commission ruling and the case files provided they were affected by a bidding agreement in a specific procurement process and provided no voluntary admissions are disclosed.

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 construction and surfacing work together with their upstream markets. Based on its initial results, the Secretariat extended the investigation on 22 April 2013 to cover the entire canton of Graubünden and to include seven further companies. In November 2015, the investigation was further extended to include additional companies and thereafter, for reasons of procedural economy, divided into ten investigations. Further progress was made with the investigations in 2016. Several interim rulings had to be issued, some of which are still the object of appeals pending before Federal Administrative Court.

On 8 July 2016, the Competition Commission decided that the eight road construction and civil engineering companies in the districts of **See-Gaster in St Gallen and March and Höfe in Schwyz** had between 2002 and 2009 agreed on bids and determined who was to be awarded contracts in connection with several hundred invitations to tender (see above 2.1). Certain companies have challenged the Competition Commission decision in the Federal Administrative Court.

In the cases relating to **road construction and civil engineering in the canton of Zurich**, the Federal Administrative Court on 23 August 2016 issued landmark rulings on whether and subject to what requirements the Competition Commission may hand over case files to victims of cartels. The judgments are legally binding (see above 2.2).

In the cases relating to **road construction and civil engineering in the canton of Aargau**, various parties have challenged the Competition Commission decision of 16 December 2011. The proceedings are pending before the Federal Administrative Court.

3.1.2 Bathrooms / Wholesalers of sanitary facilities

In the investigation into **wholesalers of sanitary facilities**, which began on 22 November 2011 with a search of premises, the Competition Commission on 29 June 2015 imposed fines totalling CHF 80 million on the members of a cartel of sanitary facility wholesalers. The written grounds for the decision were sent to the parties at the start of 2016. All the companies have appealed to the Federal Administrative Court against the decision. Accordingly, the decision is not legally binding.

Four parties opposed any publication of the Competition Commission ruling and demanded a contestable ruling on publication. The Competition Commission issued this ruling in November 2016. A significant precedent for the publication ruling was the judgment by the Federal Supreme Court on 26 May 2016 in the case of Nikon AG, in which the Federal Supreme Court considered in detail the issue of the publication of Competition Commission decisions (see above 2.2). All parties that have received a ruling on publication from the Competition Commission have challenged the ruling in the Federal Administrative Court.

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 by 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 agreements on prices, quantities and territories was extended to include a further company. The investigation, which aims to establish whether there are actually any unlawful restraints of competition, was divided in November 2016 into two separate investigations for reasons of procedural economy.

3.1.4 Galvanising

On 15 February 2016, the Secretariat of the Competition Commission opened an investigation into various companies and the federation for the **galvanising industry**. There are indications of unlawful agreements involving direct or indirect fixing of prices and components of prices for galvanising processes and related services as well as the division of markets on the basis of customers and territories.

3.1.5 Further sectors

In the case relating to **door products**, the decision of the Competition Commission of 17 November 2014 has been challenged by one of the parties. The appeal is pending before the Federal Administrative Court.

In the case relating to **builders' supplies for windows and French doors**, the Federal Administrative Court in September 2014 upheld the appeals against the Competition Commission decision of 4 November 2010. The Competition Commission and the EAER have challenged two of the three appeal judgments in the Federal Supreme Court. The case is pending before the Federal Supreme Court.

3.2 Services

3.2.1 Financial services

In the decisions in the **IBOR cases** (see above 2.1), announced on 21 December 2016, the Competition Commission imposed sanctions of CHF 99.1 million. The Secretariat successfully reached amicable settlements with most of the parties, which were approved by the Competition Commission. Only the cases of EURIBOR and Yen LIBOR/Euroyen TIBOR are still ongoing.

The cases relating to possible arrangements in **foreign exchange dealing (Forex)**, in **precious metal trading** and in the **leasing** sector are currently in the investigation phase, albeit with different degrees of progress being made. In all the investigations, large numbers of electronic communications have to be evaluated.

In the report year, several merger plans had to be assessed, in particular that of **Paymit/TWINT**, which involved a merger between the two largest national players in the sector for electronic and mobile payments. Due to the strong momentum in these new markets, the existence of other providers, such as Apple Pay, and assurances from Paymit/TWINT that they will operate their system openly and in a non-discriminatory manner, the merger was approved at the preliminary assessment stage.

In relation to **credit cards**, the Secretariat was involved in the changeover in the system for determining the sector- and transaction-specific interchange fees for Mastercard. While the national issuers and acquirers were previously responsible, from 1 January 2017 Mastercard will set the interchange fees unilaterally. Mastercard undertook in a written assurance to the competition authorities to comply with the upper limits laid down in an amicable settlement (CRO III) in the Credit Card Interchange Fees II case. The next reduction in the average domestic interchange fee to 0.44 % is planned for 1 August 2017 in accordance with CRO III. In

relation to **debit cards**, Mastercard submitted notification in terms of Article 49a paragraph 3 letter a of the Cartel Act (objection procedure). According to the notification, MasterCard is planning to introduce an interchange fee for debit cards (Maestro; Debit Mastercard), but it will apply exclusively to electronic and mobile transactions. The deadline for the assessment expires in April 2017.

3.2.2 Health care

On 19 December 2016, the Competition Commission issued its decision in the investigation into the **commercialisation of electronic medical information** required for distribution (see above 2.1).

In September 2016, the preliminary investigation opened in the canton of Valais into the **framework contracts for loss of earnings insurance** concluded between professional associations, their members, and three health insurance companies was closed without action being taken. The analysis carried out by the Secretariat showed that the form of cooperation chosen by the employers and the insurers did not infringe the provisions of the Cartel Act provided: (i) any other insurer that agrees to meet the required conditions may sign the framework agreement; (ii) the insurers do not divide up the market in geographical terms or on the basis of their commercial partners; (iii) the members of the associations are free to choose whether to accept the framework agreement or to choose their own insurer; and (iv) companies that are not members of the association may also be covered by the contract.

3.2.3 Liberal professions and other services

The Competition Commission decision of 19 October 2015 in the case relating to contractual conditions for **online booking platforms for hotels** has been legally binding since the beginning of 2016. With the prohibition of what are known as broad parity clauses, partner hotels of Booking.com, HRS and Expedia are now permitted to offer a variety of prices and availabilities on different booking platforms. On the other hand, narrow parity clauses are not covered by this ban. As a result, Booking.com, HRS and Expedia still prevent their partner hotels from offering lower prices on the publicly accessible pages of their own websites. However the current arrangement allows their partner hotels to offer lower prices for offline bookings (e.g. by telephone) and on restricted access member pages on their own websites. The Competition Commission is monitoring related developments in Switzerland and abroad. The latest developments in relation to parity clauses however are not taking place in the field of competition law, but at a political level. In France, a statutory prohibition of all price parity clauses relating to hotels has been introduced, in Austria a ban comes into force on 1 January 2017 and in Italy a similar proposal is being debated in parliament. In Switzerland as well, a motion containing related proposals is currently pending in the Council of States.

In the course of 2016, the Secretariat was active in the field of **new information and communication technologies**. The Secretariat's attention was drawn by user complaints to the **WhatsApp** messaging service's policy of blocking users from sending certain links to competitors. The market monitoring procedure conducted in response to the complaints was concluded when the problem was resolved by updating the application. The preliminary investigation opened into **Google** relating in particular to the preference given to its own search services (e.g. Google Shopping) has been continued. At present, the authority is monitoring the situation abroad, where an investigation has also been opened by the EU authorities. The European Commission issued a statement of objections in July 2016.

The market monitoring procedure into the fees that programmers are charged by the distribution platforms for mobile phone applications (**Play Store, App Store, Windows Store**) did not uncover any evidence of agreements on prices.

In relation to the “**sharing economy**” (see 5.5), the Secretariat is analysing this economic paradigm and monitoring it as it develops. In specific terms, the Secretariat is observing **Uber’s** entry to the Swiss market, particularly in the canton of Geneva, where it has become aware of a high degree of market concentration and of potential entry barriers for new competitors.

In relation to airport services, the Secretariat is currently monitoring the market for **valet parking services at Geneva International Airport** with the aim of analysing the services offered at the airport. This in the light of the decision of 18 September 2006, in which the Competition Commission decided that Flughafen Zürich AG (Unique) had abused of its dominant position in the market of valet parking services by refusing to make available the essential airport-infrastructure for valet parking services and issuing the necessary permissions to competitors.

Finally, in November 2016, the Federal Administrative Court issued its decision in the case relating to **sales of tickets for the Zurich Hallenstadion**. This case focuses on a contract concluded between the company TicketCorner and the Hallenstadion (see above 2.2). The competition authorities intend to re-examine the case in the light of grounds given for the decision taken by the Federal Administrative Court.

3.3 Infrastructure

3.3.1 Telecommunications

In 2016, Swisscom filed an appeal against the decision of the Competition Commission of 21 September 2015 relating to **broadband internet** (Swisscom WAN connection). The Competition Commission had fined Swisscom CHF 7.9 million. The investigation reached the conclusion that Swisscom held a dominant position for business customers in the market for broadband connections and had abused this position in the bidding process for the SwissPost office network. Swisscom had won the contract because it offered a price that was around 30% lower than its competitors, which were all reliant on advance services from Swisscom. In the bidding process, Swisscom set the advance service prices charged to its competitors at such a high level that they could not compete with Swisscom’s offer to the end customer. In addition, Swisscom had used this pricing policy to make SwissPost pay excessive prices.

In March 2016, the Competition Commission opened the **Supermédian investigation** into Naxoo AG. The preliminary investigation had revealed indications that Naxoo AG held a dominant position in relation to the cable network in the city of Geneva and that it had abused this position. The investigation aims to establish whether Naxoo AG’s conduct actually restricted competition in an unlawful manner in terms of the Cartel Act, i.e. that Naxoo AG restricted or prevented third parties from accessing the network. There is evidence that Naxoo AG restricted or prevented third parties, such as suppliers of satellite-based services, from gaining access to the network for properties, even though access is necessary in order to transmit third parties’ services.

The preliminary investigation into **Interconnect-Peering** was closed, with a final report dated 12 December 2016. The preliminary investigation was opened after the Secretariat came across evidence of a possible unlawful restraint of competition when preparing an opinion for OFCOM on the issue of a dominant position held by Swisscom in relation to IP interconnection. IP interconnection is used to connect computers that are not normally part of a network. Swisscom made the amendments to the contracts that the Secretariat proposed, with the result that the preliminary investigation could be terminated.

Swisscom has appealed the judgment of the Federal Administrative Court of 14 September 2015 in the case relating to **ADSL pricing policy** to the Federal Supreme Court. The Federal Administrative Court had imposed a sanction amounting to around CHF 186 million against the Swisscom Group, thereby confirming the sanction imposed by the Competition Commission in its essential terms.

3.3.2 Media

In a decision dated 24 May 2016, the Competition Commission concluded the investigation into Swisscom relating to **sport on pay TV** and imposed a sanction of CHF 71.8 million on Swisscom (see above 2.1).

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. Two cases are pending before the Federal Administrative Court in relation to this matter.

In parallel to the investigation into sport on pay TV, the Secretariat has been conducting market monitoring procedures under the title **Central Marketing** in which it is observing the bidding procedure and award of media rights for the Swiss football and ice hockey championships for the period beginning with the 2017/18 season.

In relation to the media, the Competition Commission also had to assess the following **company mergers**: in the planned merger between Tamedia and Adextra, Tamedia AG planned to acquire exclusive control of Adextra AG. In the 7Days Group / Güll Gesellschaften case, the TK-group and the 7Days Group planned to take control of the two sister companies Güll GmbH and Presse-Service Güll GmbH. In the case relating to 7Days Media Services / Naville Dynapress, Presse-Import, the same parties announced the takeover of Naville Distribution SA, Dynapress Marketing SA and Presse-Import SA, companies previously controlled by Valora. All these mergers were approved by the Competition Commission at the preliminary assessment stage.

Appeals are pending before the Federal Administrative Court against the Competition Commission ruling of 27 May 2013 relating to **book pricing in the French-speaking part of Switzerland**. In addition there is a dispute in this case over the extent to which the ruling may be published. In relation to this, proceedings are also pending before the Federal Administrative Court.

3.3.3 Energy

Opinions were requested in connection with the electricity industry on several occasions from the Secretariat in the course of office consultation procedures and from the Competition Commission in the course of consultation procedures and hearings. In addition, the Secretariat took part in working groups on the planning of a **gas supply network** and on the revision of the **Electricity Supply Act**.

Also in relation to energy, the Competition Commission had to assess the **BKW / AEK** merger. BKW planned to acquire 53.22 % of the share capital of AEK Energie AG through several purchases, which when combined with its existing shareholding would mean it would own 93.19 % of AEK's share capital. The aim was diversification in anticipation of the liberalisation of the electricity market for all end customers and structural changes in the course of the energy transition. The Competition Commission approved the plan after a preliminary assessment.

3.3.4 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. A case is also pending in relation to this matter before the Federal Administrative Court.

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 SwissPost 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 SwissPost's competitors. It will also be examined whether Swiss Post has discriminated against certain customers or placed them at a disadvantage in other ways. It is planned to send the draft decision to the parties to the proceedings at the start of 2017 for their comments.

3.4 Product markets

3.4.1 Consumer goods industry and retail trade

In connection with **engine fuel**, on 31 May 2016 the competition authorities opened an investigation into Husqvarna Schweiz AG and Bucher AG Langenthal and affiliated group companies. The investigation primarily aims to clarify whether the companies under investigation colluded in setting prices for the sale of engine fuel under the trademark Aspen and in allocating themselves customers.

In a ruling dated 19 December 2016, the Competition Commission imposed sanctions of around CHF 33,000 on the Australian manufacturer and the Swiss exclusive importer of **Eflare safety beacons**. The two companies were involved in an unlawful vertical territory protection arrangement in order to prevent parallel imports of Eflare safety beacons. At the same time, the Competition Commission approved amicable settlements between the Secretariat and both the companies under investigation. The manufacturer and the exclusive importer undertook in the amicable settlement not to enter into any more unlawful agreements to prevent parallel imports.

In order to clarify the practical relevance of the **Hess Motion**, the Secretariat conducted a market survey. In the motion, the Federal Council has been "instructed to take measures so that manufacturers of products must expressly permit their sales partners in Switzerland in the distribution agreements to carry out installation, maintenance or guarantee works etc. for their products, if these have been purchased directly in the European Economic Area" (Motion of 18 June 2015 "For a more effective Cassis-de-Dijon principle" [15.3631]). According to the market survey, the main reasons for refusing to provide services related to directly imported products in various sectors are contractual liability risks and technical trade barriers. The market survey revealed only sporadic indications of refusals to provide services in respect of directly imported products that could be attributed to measures taken by manufacturers or importers. They all related to the refusal to provide warranty services because of inadequate reimbursement of costs by the manufacturers or importers.

In the **Gaba/Elmex** case, the Federal Supreme Court on 28 June 2016 issued a landmark decision on assessment of territorial agreements under Article 5 paragraph 4 of the Cartel Act. The written opinion has still to be issued (see above 2.2). In the **Nikon** case, the Federal Administrative Court on 16 September 2016 upheld the essential points of the Competition Commission's ruling on sanctions and the corresponding judgment is now legally binding (see above 2.2). In addition, the Federal Supreme Court on 26 May 2016 rejected the appeal by Nikon against the judgment of the Federal Administrative Court on the issue of publishing the ruling on sanctions (see above 2.2). The Competition Commission's appeal against the decision of the Federal Administrative Court in the case relating to **alpine sports products/Altium SA** is pending before the Federal Supreme Court.

3.4.2 Musical instruments

The Competition Commission ruling of 29 June 2015 in the case relating to **stringed instruments** is now legally binding. However the Competition Commission ruling of 14 December

2015 in the case relating to **grand pianos and pianos** has been challenged. The appeal is pending before the Federal Administrative Court.

3.4.3 Watch industry

At the start of 2016, **The Swatch Group AG** requested the Competition Commission to amend the amicable settlement approved on 21 October 2013. ETA SA Manufacture Horlogère Suisse (ETA), a subsidiary of The Swatch Group, had undertaken in the amicable settlement to supply mechanical watch movements to third-party customers until the end of 2019. At the same time, the amicable settlement allowed ETA to gradually reduce supplies of mechanical watch movements to third-party customers until the expiry the obligation to supply. The Competition Commission rejected the request (see above 2.1).

Following a request for reconsideration from The Swatch Group, the still pending preliminary investigation in relation to **after-sales services** was temporarily suspended. It will be continued in 2017.

3.4.4 Automotive sector

On 1 January 2016, the **new notice on the competition law treatment of vertical agreements in the automobile trade** came into force. In this connection, the Secretariat provided advice in 2016 on the amendment of distribution agreements and answered enquiries from market participants and members of the public.

In the case relating to the **VW Partners Association Gatherings/Project Repo 2013**, various appeal proceedings are pending before the Federal Administrative Court. In a ruling dated 19 October 2015, the Competition Commission imposed flat-rate sanctions ranging from CHF 10,000 to 320,000 on four dealers for price-fixing. Three of these dealers have filed appeals, which are pending before the Federal Administrative Court. The investigation was concluded ahead of schedule against the one party that had undertaken in terms of an amicable settlement with the Secretariat to adapt its conduct: a vice president of the Competition Commission approved the amicable settlement in a ruling dated 8 August 2014. However, in a judgment dated 13 April 2016, the Federal Administrative Court declared the ruling by the vice president to be null and void because he lacked jurisdiction and general decision-making powers. In response to this judgment, the Competition Commission approved the amicable settlement in a new ruling dated 6 June 2016. Two dealers not involved in the amicable settlement have appealed against the ruling to the Federal Administrative Court. These appeals are also pending.

In a preliminary investigation, the Secretariat examined whether there is any evidence of an unlawful restraint of competition by **AMAG Automobil- und Motoren AG**. Various dealers and workshops for brands in the Volkswagen Group had filed complaints alleging that AMAG was trying through arbitrary and discriminatory measures to secure better treatment for its AMAG RETAIL businesses in dealings with its commercial partners and to strengthen its position in the retail trade market.

In the case relating to **BMW**, appeal proceedings are pending before the Federal Supreme Court. In a judgment dated 13 November 2015, the Federal Administrative Court rejected BMW's appeal against the Competition Commission's ruling on sanctions of 7 May 2012. BMW has appealed this judgment to the Federal Supreme Court.

3.4.5 Agriculture

The Secretariat participated in around 80 office consultation procedures on draft legislation and parliamentary proposals on agriculture matters. In particular, it advocated a **reduction in border controls**. In addition, the Secretariat received several enquiries relating to agriculture matters, which led to meetings and/or market monitoring procedures.

3.4.6 Other sectors

In relation to **medical technology**, the investigation into GE Healthcare was concluded (see above 2.1).

In relation to **robot lawnmowers**, the Secretariat continued the investigation into Husqvarna opened in December 2015. The subjects of the investigation are a possible exertion of influence over the retail prices charged by its dealers and the possible prevention of parallel and direct imports.

In relation to **fitness machines**, the Secretariat opened a preliminary investigation in September 2016 into Trisport AG, the Swiss exclusive importer for the Kettler brand of products. The preliminary investigation will examine whether there are any indications of unlawful agreements affecting competition, in particular a requirement for minimum or fixed prices or a ban on online trading.

In relation to **badminton shuttlecocks**, the Secretariat opened a preliminary investigation in January 2016 into the Swiss Badminton Association. Several reports had been received that the association was insisting that its members play only with official shuttlecocks in certain matches; these shuttlecocks are only available from their Swiss importers. Swiss Badminton has adapted its conduct to some extent. The preliminary investigation revealed no indication of unlawful restraints of competition and was therefore concluded.

3.5 Internal market

The Internal Market Act (IMA) governs intercantonal freedom of movement and the public bidding processes for concessions and cantonal procurements.

In order to verify whether intercantonal freedom of movement in accordance with IMA is basically functioning, the Competition Commission carried out an **investigation** in the cantons of Bern, Vaud and Ticino. The cantonal authorities were requested to provide information on the **administrative practices relating to the authorisation of suppliers from outside their canton**. The focus was on the authorisation practices for the following branches of industry and professions: medical professions regulated under cantonal and federal law, security companies, the hotel and catering industry, childcare, fiduciaries, architects, engineers and handicraft businesses. The investigation revealed that the IMA is applied consistently in all sectors. The Competition Commission notified the cantons concerned of their results in the form of recommendations. The cantonal administrative authorities are under an obligation to inform the Competition Commission ex officio of rulings restricting market access.

In February 2016, the **Canton of Ticino** introduced a new **Commercial Enterprises Act (LIA)**. The LIA requires that all handicraft businesses operating in the canton of Ticino be registered. Registration is dependent on certain personal and professional requirements and subject to a fee. The Competition Commission is of the opinion that the IMA does not permit the LIA to apply to handicraft businesses from other cantons; as a result, it has filed an appeal with the Administrative Court of the Canton of Ticino (see above 2.1).

A further appeal relates to the **authorisation of multi-disciplinary law companies**. Multi-disciplinary law companies are not expressly regulated under federal law, with the result that differing practices have developed among the cantons. In the canton of Zurich, multi-disciplinary law companies are permitted, subject to certain requirements. According to the Cour de Justice in the canton of Geneva, however, they are unlawful, with the result that a law company registered in Zurich has no right under the law of the internal market to open a branch in the canton of Geneva. The administrative court of the canton of Vaud has also rejected any internal market right, but has held that multi-disciplinary law companies are permitted in principle according to its own criteria. The Competition Commission has appealed against the judgments

in the cantons of Geneva and Vaud in order to have this issue relating to the application of the IMA clarified by the appeal court.

In the **taxi business**, the Competition Commission issued a recommendation on the Canton of Geneva's draft of a new Taxi Act. Under the IMA, there must be a guarantee that taxi companies from other cantons can at any time accept orders to pick up and transport customers in the canton of Geneva. Taxi companies from other cantons that regularly solicit customers in the canton of Geneva require a Geneva taxi licence, but in principle have the right to have their licence from their place of origin recognised.

Lastly the Competition Commission provided an expert opinion on the application of the IMA to the planned **intercantonal agreement on the private security companies (APSC)**. The expert opinion examines the requirements that apply for security companies registered in cantons that are not parties to the APSC to be licensed in the cantons in which the agreement applies.

In relation to public **procurement**, the Competition Commission filed an appeal against the **award of a consultancy contract by the town of Wil**. Wil did not issue a public invitation for bids for the contract for an initial analysis (below the threshold) nor for the main consultancy contract (above the threshold). In the view of the Competition Commission, this amounted to a circumvention of procurement law.

The **Canton of Fribourg** has introduced an act on **public canteens** under which public canteens will be required to buy regional produce to cover a share of their food requirements. The aim of this provision is to promote regional farms and processing businesses and to encourage sustainability. The Competition Commission recommended that the cantonal government should not introduce this location-specific procurement criterion and should take account of the legitimate concerns relating to sustainable procurement by introducing non-discriminatory procurement criteria.

In relation to concessions, the question has arisen of whether the obligation to invite bids under Article 2 paragraph 7 IMA also applies, subject to certain requirements, to **special use concessions** in addition to monopoly concessions. The administrative court in the canton of **Vaud** confirmed the application of Article 2 paragraph 7 IMA to the award of concessions for advertising hoardings on public land. This judgment was appealed to the Federal Supreme Court. At the invitation of the Federal Supreme Court, the Competition Commission submitted a detailed opinion on the scope of Article 2 paragraph 7 IMA. The Supreme Court has yet to issue its judgment.

3.6 Investigations

The report year began for the Competence Centre for Investigations (CompC I) with a major-search of premises to start the investigation into various galvanising plants in northern, eastern and western Switzerland. A smaller scale search was also carried out at a company connected with the engine fuel case. In addition, the CompC I supported services in the processing of data and in the subsequent triage. In the triage of the electronic data in particular, the procedure is for the CompC I to single out confidential lawyers' correspondence rather than the case team directly involved. Thanks to process, it is usually possible, in consultation with the parties concerned, to avoid court proceedings for removing the seals on documents.

In addition to this regular work, the CompC I was involved in issuing various interim rulings relating in particular to interviews with witnesses and the bonus system. In three interim rulings in the case relating to construction services in the canton of Graubünden, the procedure for interviewing people were reviewed; in particular, it was decided that former company officers and current employees who are not company officers should be interviewed as witnesses and not as parties. Appeals have been filed against these interim rulings, but have yet to be decided

by the Federal Administrative Court. In relation to the bonus system, and again in the Graubünden case, a restriction on use was ordered for the first time, which requires that when inspecting files relating to voluntary reports, any information and documents received in this manner may only be used by the defence in competition law proceedings before the Competition Commission (or in subsequent appeal proceedings).

The highlight of the year for the CompC I was hosting the annual plenary meeting of the ECN FIT WG (ECN Forensic IT Working Group) in Bern. At this two-day meeting in Bern, some 60 experts from EU and EFTA states, Turkey and Albania, as well as from the EU Commission and the EFTA Surveillance Authority discussed current problems and developments in computer forensics. Switzerland has taken part in meetings of the ECN FIT WG since 2005 and benefited considerably when setting up the CompC I from the expertise that it had gained from these meetings, with the result that it was an appropriate time to make an active contribution to the Working Group by hosting the plenary meeting.

In order to make it easier for whistle-blowers who would like to contact the competition authorities, a new section has been added to the Competition Commission website for those who wish to provide information in confidence. In addition to a specific e-mail -address (whistleblowing@comco.admin.ch), the webpage also provides a substantial amount of useful information for potential whistle-blowers, and in particular on the general terms that apply when making this type of report.

3.7 International

EU: The competition authorities in Switzerland and the EU cooperate extensively and efficiently within the framework of the agreement between Switzerland and the EU on cooperation in applying their respective competition laws. The Competition Agreement came into force on 1 December 2014. Since then, the Secretariat has contacted the Directorate-General for Competition of the EU Commission in relation to various parallel investigations and merger cases, in order to discuss issues of procedure and substantive law (Art. 7 para. 2 Competition Agreement). These exchanges take place regularly in order to ensure that there are no unnecessary inconsistencies between parallel procedures in Bern and Brussels. In market monitoring procedures and preliminary investigations, contact has been made on numerous occasions in order to clarify whether similar competition law problems exist in the EU or in order to obtain further information that could assist as the cases progress. Overall, the Competition Agreement facilitates the enforcement of competition law in Switzerland in the cases that also involve issues of EU competition law.

OECD: Representatives of the Competition Commission and of the Secretariat attended the two annual meetings of the OECD Competition Committee, making various contributions which had been prepared in cooperation with the SECO. In addition to regular topics relating to the application of the law, such as settlements or sanctions, issues connected with new digital technologies were considered. Following discussions on online platforms for booking hotels and for financial services, the influence of technology on the services provided by lawyers and notaries was discussed. Other important topics in this reporting year included Big Data and market studies.

ICN: The Competition Commission and the Secretariat monitored developments in the International Competition Network. The Secretariat answered a questionnaire on the subject of sanctions for the latest edition of the ICN report on the subject of fines. The Secretariat also revised the ICN anti-cartel enforcement template, which is now available on the Competition Commission website. 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 “Improving the enforcement of cartel law”. Singapore hosted the ICN annual conference in 2016.

UNCTAD: The Secretariat again supported the activities of the Compal cooperation programme this year. Two people from El Salvador each completed a three-month internship in the Secretariat.

3.8 Legislation

3.8.1 Parliamentary proposals

Following the rejection of the planned reform of the Cartel Act in September 2014, the current status of the parliamentary proposals submitted in order to revise specific points of competition law is as follows:

- 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 the 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) was rejected by National Council and the matter is therefore regarded as concluded.
- 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”. The motion was abandoned because it had been pending for more than two years, and has therefore been concluded.
- 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 expressly permit their sales partners in Switzerland in their distribution agreements 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 both chambers of the Federal Assembly. The Secretariat examined whether the refusal to provide maintenance services by local tradesmen in relation to products imported directly from the European Economic Area is widespread problem (see above 3.4.1).
- The **Buman Parliamentary Initiative** of 18 March 2016 “For appropriate periodical prices in Switzerland” (16.420) calls for specific provision on price fixing for newspapers and magazines in the Cartel Act. It has still to be debated in the first chamber (National Council).
- The **Buman Parliamentary Initiative** of 30 September 2016 “Minor revision to the Cartel Act” (16.473) demands that four specific undisputed points in the rejected revision of 2014 be reintroduced, namely the merger control procedure for companies, civil proceedings on competition law matters, the consideration of compliance programmes when assessing sanctions, and the objection procedure. It has not yet been debated in parliament.

The **Bischof Motion** of 30 September 2016 “Ban adhesion contracts for online booking platforms for the hotel industry” (16.3902) aims to instruct the Federal Council to prepare amendments to the law that will prohibit price parity clauses in contracts between online booking platforms and hotels. The Council of States has referred the motion to the relevant committee (the Economic Affairs and Taxation Committee) for preliminary examination.

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 Fair Price Initiative

The Fair Price Initiative was launched on 20 September 2016 (official title: “Put an end to Switzerland as an island of high prices – for fair prices”) and calls for the federal government to enact “regulations against the economically or socially harmful effects of cartels and other restraints of competition. The government should in particular take measures to guarantee the non-discriminatory procurement of goods and services abroad and to prevent restraints of competition that are caused by the unilateral conduct of companies with significant market power”. It calls for several specific measures, in particular statutory rules for companies with relative market power that set higher prices in Switzerland than abroad, and on non-discriminatory purchases in online trading. The deadline for collecting signatures expires on 20 March 2018.

3.8.3 Modernisation of merger control procedures

Based on its report on preventing parallel imports¹, the Federal Council instructed the EAER to prepare a consultation bill by the end of 2017 on modernising the merger control procedures in the Cartel Act. The Federal Council takes the view that the current merger control procedures take too little account of the negative and positive effects of mergers, and that the test for market dominance currently provided for in the Cartel Act could be replaced by the SIEC (Significant Impediment to Effective Competition) test. The Federal Council expects this change to have positive effects in the medium to long term on the competitive environment in Switzerland.²

SECO has overall responsibility for drafting the bill to be submitted for consultation; the Secretariat of the Competition Commission is also involved in this work.

¹ Prevention of Parallel Imports, Federal Council Report of 22 June 2016 in response to Postulate 14.3014 “Simplifying customs clearance and promoting parallel imports by recognising additional documents as proof of origin” (referred to as the Federal Council Report of 22.6.2016), <<https://www.news.admin.ch/newsd/message/attachments/44557.pdf>> (14.12.2016).

² See Federal Council Report of 22.6.2016 (Fn 1), p. 41 f.

4 Organisation and Statistics

4.1 Competition Commission and Secretariat

The following twelve **Competition Commission members** have been elected for the **2016-2019 term of office**: Vincent Martenet, President; Andreas Heinemann and Armin Schmutzler, vice presidents; Florence Bettschart-Narbel, Winand Emons, Andreas Kellerhals, Pranvera Këllezi, Daniel Lampart, Danièle Wüthrich-Meyer, Rudolf Minsch, Martin Rufer, Henrique Schneider.

The members the Competition Commission met in 2016 for 14 plenary sessions. The number of decisions in investigations and mergers under the Cartel Act and in application of the Internal Market Act can be seen in the statistics (see 4.2).

At its first meeting in 2016 and pursuant to the new internal rules of procedure of 15 June 2015 which have been in force since 1 November 2015, the Competition Commission appointed the members of the new **Chamber for part-rulings** and **Chamber for company mergers** (see Annual Report 2015, RPW 2016/1, 11).

- Chamber for **part-rulings**: Vincent Martenet (President), Andreas Kellerhals and Daniel Lampart.
- Chamber for **company mergers**: Vincent Martenet (President), Andreas Heinemann and Armin Schmutzler.

In the **Secretariat**, two key positions in the management staff have been filled. **Niklaus Walimann** has since 1 September 2016 been the new **Chief Economist** in the Secretariat, replacing Marc Blatter who left at the end of June 2016; and on 1 January 2017 **Stefan Renfer** became the new **head of the Competence Centre for the Internal Market**, replacing Nicolas Diebold, who left at the end of 2016.

At the end of 2015, the **Secretariat** employed 73 (previous year 76) staff members (full-time and part-time), 40 per cent of whom were women (previous year 42%). This corresponds to a total of 62.7 (previous year 66.7) full-time positions. The staff was made up as follows: 51 specialist officers (including the executive management; this corresponds to 44.4 full-time positions; previous year 49.2); 9 (previous year 8) specialist trainees, which corresponds to 9 (previous year 8) full-time positions; 13 members of staff in the Resources and Logistics Division, which corresponds to 9.3 (previous year 9.5) full-time positions.

4.2 Statistics

	2015	2016
Investigations		
Conducted during the year	30	32
Carried forward from previous year	15	22
Investigations opened	6	4
New investigations from divided investigations	9	6
Final decisions	7	9
Amicable settlements	3	6
Administrative rulings	2	2
Sanctions under art. 49a para. 1 Cartel Act	6	8
Part-rulings	1	2
Procedural rulings	7	9
Other rulings (publication, costs, searches, etc.)	1	3
Precautionary measures	0	0
Sanctions proceedings under Art. 50 ff. Cartel Act	0	0
Preliminary investigations		
Conducted during the year	18	14
Carried forward from previous year	14	11
Opened	4	3
Concluded	7	6
Investigations opened	1	2
Modification of conduct	2	3
No consequences	4	1
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	2	0
Advice	17	27
Market monitoring	33	42
Freedom of information applications	23	16
Other enquiries	685	683
Mergers		
Notifications	29	22
No objection after preliminary examination	26	21
Investigations	3	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	24	39
Judgments of the Federal Administrative Court	3	9
Success for the competition authority	2	7
Partial success	0	0
Judgments of the Federal Supreme Court	2	2
Success for the competition authority	2	2
Partial success	0	0

Pending at the end of year (before Federal Administrative Court and Federal Supreme Court)	22	28
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Cartel Act)	0	0
Recommendations (Art. 45 Cartel Act)	0	1
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	0	0
Follow-up checks	0	0
Notices (Art. 6 Cartel Act)	1	0
Opinions (Art. 46 para. 1 Cartel Act)	281	278
Consultation proceedings (Art. 46 para. 2 Cartel Act)	8	8
IMA		
Recommendations / Investigations (Art. 8 IMA)	2	5
Expert reports (Art. 10 I IMA)	1	1
Explanatory reports (Secretariat)	45	46
Appeals (Art. 9 para. 2 ^{bis} IMA)	1	7

A glance at the statistics and a comparison with the figures from 2015 reveals the following:

- The number of investigations carried out shows a further small increase. Although fewer new investigations were opened, once again certain cases were divided into several separate investigations.
- The number of final decisions taken by the Competition Commission rose from seven to nine, six investigations being concluded with amicable settlements. In eight of the nine investigations, the Competition Commission imposed sanctions totalling around CHF 171 million.
- The number of preliminary investigations fell again. In 2016, the Secretariat conducted 14 of these and was able to conclude six of them, including two by opening an investigation.
- The provision of advice has on the other hand increased (from 17 cases to 27) as have market monitoring procedures (from 33 to 42). These activities are in some cases very time-consuming and certainly not to be underestimated from the point of view of resources expenditure. The number of other enquiries (telephone information, answering enquiries from members of the public, passing enquiries on to the responsible authorities, etc.) has remained high but practically unchanged, at 683 in comparison with 685 in 2015.
- However, there was a fall in the number of notifications of company mergers, with 22 reports this year in contrast to 29 the previous year. A long-term comparison shows that it was only in 2004 that the competition authority received fewer notifications of mergers: in that year, 21 were notified. With increasing M&A activity, the number of notifications is likely to return to the long term average of around 30 reports a year.
- Higher again than in the previous year is the number of appeal proceedings before the Federal Administrative Court and Federal Supreme Court. Their number rose from 24 to 39, mainly as a result of numerous appeals against interim rulings by the Competition Commission. Although the Federal Administrative Court issued significantly more judgments than in 2015, the increase is largely due to the judgments relating to interim rulings by the Competition Commission. At the end of 2016, 28 appeals were pending before the Federal Administrative Court and Federal Supreme Court (in contrast to 22 at the end of 2015).
- In application of the IMA, the number recommendations and appeal proceedings increased. Three investigations led to five recommendations being issued to cantons and from the seven appeals filed, three related to the canton of Ticino and three to the authorisation of law companies (see above 3.5).

5 Digitalisation of the economy

Digitalisation is transforming the economy. Companies are developing new business models and improving their services. Consumers now have a wider range to choose from and benefit from reduced costs and lower prices. However, the opportunities that digitalisation brings are also accompanied by risks to competition. New types of agreements may prevent participants in the new digital economy from developing as they might wish. Dominant companies can improperly attempt to restrict access to internet resources. Misunderstanding new developments could lead to regulations that limit competition rather than create a level playing field.

In 2016, the Competition Commission conducted a detailed examination of the digitalisation of the economy. On the one hand, it considered the fundamentals of this topic, while on the other it was confronted with a number of challenges pertaining to the digital economy in various cases that it dealt with. The Competition Commission is monitoring developments in the digital economy. The competition law assessment of these developments is complicated, requiring certain empirical values which the competition authorities are gathering during the ongoing investigations. The competition authorities will issue a warning if they see risks to competition and intervene if they perceive competition to be restricted. This is shown by their practices in the industries affected by digitalisation.

5.1 Network infrastructure

A good network infrastructure is the basis for the digital economy. Competition within the network must be ensured in order to guarantee the success of the best new innovations. Here, the competition authorities are presented with a double challenge. On the one hand they must make sure that competition is not excluded from the outset. On the other, they must not stand in the way of incentives for investing in infrastructure.

In cases so far, the competition authorities has had to perform this balancing act in relation to fibre-optic cooperation projects. Several regional energy supply companies and Swisscom agreed to cooperate in installing fibre optics in individual Swiss cities. Partners were able to share the investment risks and lower the construction costs through the efficient use of cable ducts. The danger was that contract clauses could represent a “Layer 1 exclusivity” and that price control clauses could amount to price and quantity agreements that would seriously restrict potential competition. A final assessment of whether a restriction of competition would actually occur within the 30-40 year term of the contracts could not, in view of the dynamic development of digital markets, be made. If it becomes apparent that the clauses actually limit competition, the Competition Commission can intervene to correct the situation. By monitoring cooperation, the competition authorities have ensured that the competition can operate and that the general conditions for using the networks are clear. The companies can thus make sure that they run the optical fibre networks without stifling competition.

However, access to competition in relation to network infrastructure remains an issue. The Secretariat investigated practices in the field of interconnect peering – communication between network providers – in 2016. Here too an admonitory approach, in which indicating potentially problematic agreements led to the amendment of contracts, proved its worth. Currently, the Competition Commission is focusing on the cable network in the city of Geneva in the Super-média investigation. The aim is to determine whether Naxoo AG holds a dominant position over Geneva’s cable network and whether third parties’ access to the network is being improperly restricted or prevented.

5.2 Online trading

Online trading has a positive effect on competition. Consumers barely face any costs if they use the Internet to make a purchase decision. They benefit from greater transparency and from

a broader offer. For distributors, the internet increases their (geographical) reach. Direct trading via the Internet reduces distribution costs and brings opportunities for innovative business models.

The Competition Commission is therefore very critical of restrictions on online trading. As early as 2011, it reached a landmark decision, stating that bans on online sales that certain manufacturers impose on their distributors violate the Cartel Act. However, the Competition Commission also recognises that under certain very restrictive conditions, online bans could be justified. In a selective sales network it can be justified to require online traders to adhere to the same rules as licensed specialised dealers and operate a physical sales outlet. However, online traders must always be free to set their retail prices autonomously. The Competition Commission reaffirmed this landmark decision in 2014 with the ruling against a manufacturer who had unlawfully agreed with its distributors that they could not sell its coffee machines online.

5.3 Digital platforms

Digitalisation has led to the increased emergence of platforms such as search services, trading and exchange sites, and social networks. The business model of these digital platforms is based on bringing differing customer groups together. Certain indirect network effects are created by the fact that the participation of one customer group depends on the participation of another. For suppliers, a platform becomes more attractive if there are more potential customers to be found there. Conversely, the attractiveness of a platform to customers increases with the number of sellers offering their wares on it.

These indirect network effects influence pricing. A platform organises its price structure in such a way as to encourage optimum participation from the two customer groups. This can mean that one customer group is enticed by free access in order to increase interest from the other customer group. For the competition authorities, this means that they must include in their competition assessment not only market share measured in the turnover on each side of the market, but also the number of participants from both sides as an indicator of the strength of the platform.

A further consequence of indirect network effects is the tendency towards a high concentration of platform markets. For example, the very strong position of leading suppliers can be observed in the case of search engines or hotel booking platforms. Here however it must be remembered that customers actually benefit as a result of indirect network effects if the other customer group is comprehensively represented on the platform. As a rule, in the case of online platforms, market power in its own right is not harmful. Only if a dominant company abuses its market power, or, in the case of a merger, a risk of the elimination of the competition arises, will the competition authorities intervene.

The competition authorities regularly assess platforms as part of their activities. Advertising placement platforms in particular have increasingly been the subject of mergers. A tendency towards a growing concentration of platform markets has become apparent. The Competition Commission closely examined Tamedia's purchase of the online platform Ricardo and its takeover of job platforms in 2015. Taking account of platform-related trends, the Competition Commission reached the conclusion that in both cases it could be assumed that Tamedia, or more precisely JobCloud, was in a dominant position in relation to job advertisements. However, it was not expected that either merger would eliminate effective competition, with the result that any intervention under the statutory terms of reference was deemed unnecessary.

With digital platforms, new types of restraints on competition emerge. As a result of the international reach of these platforms, the Competition Commission, like other European competition authorities, addressed the contract clauses used by online booking platforms for hotels. The parity clauses evaluated in the investigation required the hotels not to offer lower prices

or more rooms on other sales channels. This prevents the hotels from offering better deals on sales channels with lower commission rates. Therefore, these parity clauses restrict competition and the Competition Commission ruled that they violated the Cartel Act. The assessment of newly introduced, stricter parity clauses has not yet been possible in the absence of meaningful empirical data. The Competition Commission continues to monitor the developments and will intervene again if required.

5.4 Big Data

In digital economics, the term “Big Data” is not just used to describe “large volumes of data”. More often it is used to refer to business models that collect data as raw material and make it useable. These models usually connect the three characteristic ‘Vs’ of Big Data: volume, velocity and variety. Companies access large volumes of data, which can then be generated and recorded at high speed by various increasingly digitalised sources (web-based services, interconnected products such as printer systems, digitalised patient data, etc.). The processing of this data requires fast processors and suitable algorithms.

The essential added value of Big Data is reflected in the qualitative improvement of products. For example, a provider of navigation systems can combine the technical data of road networks with the driving speed of their users. If the system realises that the user’s speed on a certain stretch of road is much slower than usual, the algorithm concludes that there must be a traffic jam. Based on this, the system proposes alternative routes with less traffic congestion. Another example is the tailoring of a product to the needs of a customer. Internet search engines such as Google or digital market places like Amazon learn from the user’s usage pattern and target search results towards the user profile.

These examples demonstrate an important new characteristic within the markets using Big Data. Users of services pay not (only) with money, but (also) with their data. This data can be monetised by multi-purpose websites through the offer of targeted advertising, for example. For the competition authorities, this means that they cannot simply base their assessment of the economic position of a company on turnover figures, but must also take data streams into account.

The new opportunities for companies to adapt their offers to customer demand by means of Big Data also open new pricing possibilities. Based on a large volume of customer-specific data, personalised prices, such as individual rebates, could be offered. With the help of data from different points in time, demand highs and lows can be identified more easily and more quickly. A company can use this data to set higher prices in anticipation of a temporary rise in demand, and set lower prices in the event of a supply surplus. In addition, it is apparent that data-based pricing of this type is done by algorithms in various sectors such as civil aviation, online platforms or high frequency trading in the finance industry. These algorithms react not just to information collected on customers, but also to the observed activities of other companies.

For the competition authorities, these pricing possibilities raise new questions. Price differentiation by dominant companies has the potential to be restrictive or exploitative of potential competitors or consumers. However, it is often the case that certain goods and services can only be offered to less wealthy customer groups with the aid of price differentiation and selectively lowered rates. Automated pricing by algorithms on the one hand raises the question of whether computers can make dubious pricing arrangements or whether specific programming can lead to harmful coordinated conduct. On the other hand, automatic pricing can intensify the competition for customers. Ultimately, in view of the many opportunities that it brings, it remains hard to determine how Big Data will affect competition. At present, a conclusive assessment from a competition law perspective is not yet possible, in the absence of meaningful empirical data. The competition authorities must continue to follow the scientific debate and to monitor developments in the market.

Big Data can increase the influence of the network effects typical to platform markets, and with them the tendency towards concentrated markets. This can be attributed to two self-reinforcing circular mechanisms. Companies can improve their products for users with the aid of large and easily useable user data collections. This makes the offers more attractive to users and results in an increase in customers, which in turn leads to a further improvement in products. On the refinancing side, the process likewise begins with large amounts of user data, which enables more precisely targeted and therefore better advertising opportunities. This can generate higher advertising revenue, which can fund additional product improvements. In turn this attracts more users and increases the reach of advertising, improving advertising options and offers to the users.

This type of dynamic process presents a fundamental challenge to the competition authorities. It increases the potential for one company to attain a dominant position. Market dominance in itself however does not damage the national economy. Network effects, which can be increased by Big Data, imply a relatively higher concentration of (multilateral) markets. This higher concentration could be made more efficient as a result of the network effects. In addition, Big Data can help bring about an improvement in products and increased benefits. The danger lies in the abuse of a dominant position, against which the Competition Commission can take appropriate measures. Therefore it would be best to avoid overhasty interference in developing Big Data markets and to carefully consider the fundamental dynamics of these markets in individual cases.

In practice, therefore, the Competition Commission is taking a cautious approach. This was evidenced in the assessment of the Admira joint venture, undertaken by Swisscom, SRG and Ringier. The Competition Commission had, inter alia, to assess the effects on competition of user-data-based, target-audience-specific TV advertising. This is a form of data-driven advertising which is new to Switzerland and its market development is still uncertain. In its decision, the Competition Commission took account of the dynamic developments in the digitalising and converging media and advertising markets. It decided that the merger in its reported form would most probably not lead to a market dominant, competition-eliminating position within the observation period of the next 2-3 years. The Competition Commission approved the merger in December 2015.

5.5 “The Sharing Economy”

The new business models of the digital economy challenge established market participants. The taxi service Uber, the accommodation portal Airbnb or crowdfunding sites enable new suppliers to successfully bring their services to the market. This leads to more competition and in principle should therefore be welcomed. Established suppliers however point out that the market is not entirely a level playing field. They claim that new suppliers taking advantage of these new opportunities are not subject to any regulation. For example, the taxi industry is complaining that drivers working for Uber do not hold the qualifications normally required of taxi drivers.

The Competition Commission is not just a guardian of competition which intervenes in the case of unlawful restraints on competition. It is at the same time a champion of competition, defending the market against possible restrictions of competition. It is in this role that the Competition Commission is required to make it clear that a level playing field for all is more beneficial to competition than the indiscriminate application of old regulations to new developments in the economy. Thus the existing regulations must be critically scrutinised. For example, it should be considered whether, in a digital era with navigation systems, taxi drivers should be required to have local geographical knowledge. Likewise, differing local regulations must be reassessed. These hamper the introduction of innovative business models as part of the Sharing Economy, because compliance with different regulatory systems leads to unnecessarily high costs. It is also important to mention that suppliers based in Switzerland that conduct their

business lawfully locally are entitled to pursue this activity throughout Switzerland in accordance with the terms of the rules on origin. Commercial and industrial suppliers may rely on this principle of the Internal Market Act (Art. 2 para. 3 IMA) in relation to the Sharing Economy.

5.6 Conclusion

Digitalisation has created new opportunities for business and has generated new business models. This economic transformation results in opportunities and risks for competition and in new challenges for the competition authorities.

Markets are displaying new characteristics as a result of the digital transformation which must be taken into account in any competition law analysis. New characteristics in markets are primarily visible in digital websites and their indirect network effects among the various groups of customers.

In the case of Big Data this manifests itself in the fact that customers pay not only with money, but also with data. As a result of this, an assessment of the market strength of a company must also take account of presence on multiple market sites and in multiple data streams. In relation to turnover-based criteria for the merger control procedure, this means that a merger could still be approved even though a dominant position that might eliminate competition may occur as a result of customer data. The network effects typical of digital economics bring a tendency towards relatively higher concentrations in the markets, which could be more efficient.

Under the current merger control procedures, the competition authorities cannot consider efficiency within the same market. The competition authorities therefore welcome an evaluation of alternative regulation thresholds and the possibility of considering efficiency reasons by introducing an SIEC Test (see above 3.8.3). As indirect network effects can be mitigated by pricing on the platform, price structures as well as price levels must be considered in the internet economy.

The focus of the competition authorities is to recognise, how digital innovations encourage competition and to identify which new practices restrict competition. Contract clauses such as platform parities could be a source of new restraints on competition. The development of new opportunities in customer-specific price discrimination and the use of pricing algorithms must also be monitored.

The new forms of supply also challenge the competition authorities in their advocacy for effective competition. With the transformation of the economy and competition the question rises, whether and where regulation is necessary. It is an opportunity to analyse critically the appropriateness of existing regulations and to identify regulations that – due to the new possibilities – are out of date. It harms competition, when new business models are forced into old regulation-straitjackets. Therefore it is reasonable to dispense with outdated regulation and to check the necessity of new, lighter regulations, which are appropriate for traditional forms of competition as well as for the digitally transformed economy.