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To the Federal Council

Annual Report 2017 of the Competition Commission

(in accordance with Article 49 paragraph 2 Cartel Act)

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1 Foreword from the President

Vincent Martenet became a member of ComCo in 2005. In 2008 he was appointed its vice-president and from 2010 he was its president. On 31 December 2017, he stood down from the Commission because of the twelve-year term-of-office limit. His time as president will be remembered for the reform of the Cartel Act in 2003, and the power that it introduced to impose direct sanctions for hard-core restrictions in horizontal and vertical agreements affecting competition and for the abuse of dominant positions. Vincent Martenet deserves enormous credit for developing this new set of instruments and it was his constant concern that they achieved a practical effect and satisfied the strict constitutional requirements that apply. This annual report contains a comprehensive appreciation of the work of our outgoing president.

The activities and decisions of ComCo in 2017 cover the entire spectrum of competition law. Special emphasis must be given to the proceedings and sanctions related to bid rigging by construction companies, vertical price fixing in connection with robot lawnmowers, horizontal price-fixing agreements in the galvanising industry and the abuse of market dominance in relation to postal services and cable connections. In the field of merger controls, two planned mergers received a great deal of publicity, one involving ticket sales for major events and the other in-patient services. As always, numerous sectors of the economy were affected. In order to apply competition law correctly, it is vital to analyse the specifics of the market in precise detail. The ComCo Secretariat has acquired enormous expertise that allows it to reach clear conclusions and issue consistent decisions. This also applies in the case of new technologies: ComCo is aware of the special features of digital markets, observes the latest developments closely and takes special account of the potential for innovation in this sector in its decision-making processes.

Despite more than 20 years practical experience of enforcing the Cartel Act of 1995, it is only recently that the courts have clarified important issues on how the law should be applied. In particular, the Federal Supreme Court has now provided precise guidance on the GABA judgment of June 2016 - the grounds for the decision have been available since April 2017 - confirming that hard horizontal and vertical agreements affecting competition must in principle be regarded as ‘significant’ and will lead to sanctions unless they can be justified on the grounds of economic efficiency. In the BMW judgment, the Federal Supreme Court confirmed and consolidated this point of view, with the result that consistent case law on these issues can be expected in the future.

The clarification of the legal position allows the Secretariat to propose an amicable settlement to companies concerned in investigations into hard-core restrictions when the evidence is clear. Companies commonly respond positively to such proposals because they lead to a quicker and more favourable decision with reduced sanctions, which is clearly beneficial. This reduces the procedural workload for the authorities, as the investigations do not take so long and decisions can be explained in less detail. In addition, amicable settlements normally spare ComCo the work involved in protracted appeal proceedings, some cases going as far as the Federal Supreme Court. The amicable settlement, which follows the Swiss tradition of resolving disputes by mutual agreement, has proven its value in recent years and has steadily gained in practical importance, especially as the formal requirements have been more precisely specified. However, not all cases are suitable for amicable settlement. In particular, the need for a landmark decision or appeal proceedings to clarify the legal position can persuade the authority not to conclude an amicable settlement. Although the EU law on cartels exercises a considerable influence on many areas of the Swiss law (as was also confirmed by the Federal Supreme Court in the GABA decision mentioned above), it should be stressed that when it comes to the amicable settlement, the reverse is the case: when the EU introduced the option of settlements in cartel proceedings ten years ago, it created an instrument that had already been in existence in Swiss law in the form of the amicable settlement for a long time. Amicable settlements are the focus topic for this annual report.

Under its new president, ComCo will continue to adhere to the priorities of its current work: hard cartels are especially harmful for the national economy. The leniency programme has played a particularly important role in uncovering such cartels. In relation to vertical agreements affecting competition, the law places special emphasis on market foreclosures through absolute territorial protection and vertical price fixing. ComCo will be consistent in following up any indications of such practices. There is no clear pattern to cases of the abuse of market power: here ComCo has the task of ensuring that companies that hold a dominant position do not abuse it. Enormous commitment is required in the merger control procedure, which demands special flexibility because of the tight investigation deadlines. Lastly, making the Swiss internal market a reality is a constant task. Experience in recent years indicates that it cannot yet be said that the internal market has been achieved.

Above and beyond the task of applying the law to specific cases, ComCo has the general task of drawing attention to the fundamental importance that competition has for the national economy and of underlining its advantages in consultation proceedings and other reports. In this connection, it benefits most particularly from the economic expertise that is available within the authority, which is not only indispensable when applying the law but also when advocating the cause of healthy competition.

Prof. Andreas Heinemann
President of the Competition Commission

2 Most important decisions in 2017

2.1 ComCo decisions

In a ruling dated 22 May 2017, ComCo refused to permit the **planned merger between Ticketcorner and Starticket**. These companies offer to sell tickets for the promoters of concerts, shows, etc. Their services include the physical and online sale of tickets (primary ticketing) and the marketing of events (such as advertising in the media and a presence on social networks). In addition, Ticketcorner and Starticket provide promoters with software that allows them to sell tickets themselves (direct sales). The detailed review carried out by ComCo revealed that although the market for direct sales did not present any problems, in the market for primary ticketing there was clear evidence that Ticketcorner already has a dominant position. The merger would have allowed the two companies to control the Swiss market for primary ticketing and to eliminate effective competition. In its analysis, ComCo assessed the position of the companies active in the market and took account of the potential for new companies to enter the market. In addition, it analysed trends in the market and the role of companies such as Spotify, Facebook and Google. ComCo concluded that current and potential competitors, despite technological advances, would not have been able to exert sufficient competitive pressure on the conduct of the two companies. It could not conceive of any effective conditions to impose that would have allowed the merger to be approved. Accordingly, the statutory requirements for its refusal were met. Ticketcorner has challenged ComCo's decision in the Federal Administrative Court.

With a ruling dated 22 May 2017, ComCo concluded the investigation into **Husqvarna Switzerland AG** with an amicable settlement and a fine of CHF 656,667. The investigation showed that from 2009 to 2015 there were unlawful vertical price-fixing agreements between Husqvarna Schweiz AG and its dealers in connection with the sale of **robot lawnmowers**. The investigation into other suspicions of unlawful conduct was terminated. Immediately after the investigation opened, Husqvarna filed a voluntary report and then concluded an amicable settlement with the competition authority. The company undertook not to stipulate minimum or fixed retail prices to its specialist dealers in Switzerland, whether directly or indirectly. Recommended prices are expressly declared to be non-binding. Husqvarna's cooperation led to a substantial reduction in the sanctions imposed.

On 10 July 2017, ComCo concluded the first of ten investigations into **construction services in the canton of Graubünden**. Between 2004 and 2012, construction and civil engineering companies had agreed prices in relation to bids for more than a hundred public and private construction and civil engineering projects in the **Münstertal**. They discussed their respective interests in the various construction and civil engineering projects. If there was agreement, they decided which company should be awarded the contract. Thereafter, the other companies offered their services at higher prices. Until 2008, this collusion took place in the form of 'preliminary meetings' organised by the Graubünden Builders' Federation (GBV). In subsequent years, the companies involved continued their collision without the assistance of the GBV. ComCo decided not to impose sanctions. One company was not fined because it was first to report the agreements in the Münstertal and cooperated very openly. The second company also cooperated with ComCo and is also currently in receivership. The decision has taken full legal effect.

On 18 September 2017, ComCo approved the planned **merger between the University Hospital Basel and the Cantonal Hospital of Baselland** to a form a joint hospital group. In its detailed review, ComCo concluded that in relation to acute in-patient hospital services covered by basic and supplementary health insurance, the hospital group will attain a strong market position in the Basel area. However, it was not likely that the merger would eliminate effective competition in the region. Accordingly, the statutory requirements for ComCo to intervene were

not fulfilled. From the standpoint of competition law, there was nothing to prevent the planned merger from going ahead.

On 2 October 2017, ComCo issued six further decisions on **bid rigging in the canton of Graubünden**. These bid rigging agreements related to individual procurement contracts worth between CHF 80,000 and CHF 6 million. In contrast to the decision in relation to Münstertal, there was no overall arrangement underlying these agreements. However, the content of the agreements was similar: the companies involved agreed which company should be awarded the contract and then manipulated their offers. Six of the eight arranged awards involved private contracts, the two others involved a commune in the Engadin and the Canton itself. The total sanction imposed for all six decisions amounts to around CHF 1 Million. Two decisions are now legally binding. Appeals have been filed in the Federal Administrative Court in connection with four decisions.

In a ruling dated 30 October 2017, ComCo concluded its investigation into price-fixing agreements in the **galvanising industry** and imposed fines amounting in total to around CHF 8 million. ComCo found that between 2004 and the start of 2016 nine hot-dip galvanising companies from the German-speaking part of Switzerland and the French-speaking part of the Valais regularly entered into price-fixing agreements. The companies agreed to charge their customers certain premiums and to adhere to certain minimum prices. In addition, they repeatedly agreed on increases in prices. These agreements were reached at various meetings of the Swiss Galvanisers Association (VSV) or of their specialist body, the Schweizerische Fachstelle Feuerverzinken (SFF). The agreed premiums involved a raw materials and zinc price surcharge and a transport costs surcharge. One company avoided sanctions because it was first to report the cartel to ComCo and thus made it possible to open the investigation. The sanctions on the other companies were reduced because these companies made voluntary admissions immediately after the proceedings began. The investigation was opened in early 2016 with a search of premises. A swift conclusion was possible because all the galvanising companies still in business and the VSV were highly cooperative and agreeable to amicable settlements. In these agreements, clear practices have been adopted for the future. The decision has taken full legal effect.

ComCo penalised **SwissPost** in a ruling dated 30 October 2017, imposing sanctions of around CHF 22.6 million. SwissPost had abused its dominant position in the **business customer market for addressed bulk deliveries weighing over 50 grams**. ComCo held that SwissPost did not fairly apply both the 2009 pricing system, which applied from 1 July 2009 until 31 March 2011, and the CAPRI pricing system, which has applied since 1 April 2011. SwissPost granted special contractual conditions to business customers whose annual volume of postal deliveries exceeded CHF 100,000. Other customers with comparable characteristics, however, were treated differently and unlawfully discriminated against. In numerous contracts, discounts were agreed that were lower than those specified in the pricing system. Thus some customers had to pay higher prices than others. This meant firstly that they were unlawfully obstructed in their competition with other customers and secondly that they paid SwissPost excessive prices. With the CAPRI pricing system, which has applied since 1 April 2011, SwissPost introduced a supplementary discount. This was intended to reward customers that achieved or exceeded a monthly turnover target agreed with SwissPost. However, customers that failed to achieve the monthly target were penalised. Overall the pricing system was not sufficiently transparent for customers, which deterred them from outsourcing part of their postal deliveries to the competitor Quickmail. COMCO's decision can be appealed to the Federal Administrative Court.

In a decision dated 11 December 2017, ComCo concluded the **Supermédian investigation** into Naxoo AG. The investigation revealed that Naxoo held a dominant position in its area of operations, the market for cable connections, in particular in the city of Geneva. Naxoo had unlawfully exploited this position, firstly through unfair terms of business in cable contracts with house owners and secondly by obstructing third parties. This meant that house owners were

prevented from making free use of the infrastructure in their properties, for example by installing satellite systems. In addition, suppliers of satellite systems were obstructed and the technical development of these systems was restricted. Lastly, end consumers were prevented from using competing cable network services or supplementary telecommunications services. ComCo imposed a sanction of around CHF 3.6 million on Naxoo. COMCO's decision can be appealed to the Federal Administrative Court.

2.2 Decisions in the courts

Following its judgment of 28 June 2016 in the **GABA/Elmex** case, the **Federal Supreme Court** published the reasons for its decision on 21 April 2017 (BGE 143 II 297). In particular, the court clarified three previously disputed issues and provided detailed justification for its decisions on these points:

- Article 2 paragraph 2 Cartel Act simply makes it clear that matters that originate abroad but *might* have an effect in Switzerland fall under the Cartel Act; an assessment of the seriousness of the effect is neither required nor permitted under Article 2 paragraph 2 Cartel Act (E.3.7).
- The wording 'significantly restrict competition' in Article 5 paragraph 1 Cartel Act is intended to exclude trivial cases, thus reducing the authorities' workload. When assessing agreements affecting competition under Article 5, the focus is on their effect on competition and not their importance to the economy; an assessment of significance based on the economic effect is not permitted (E.5.1). With regard to the substantive effect of the significance, the Federal Supreme Court held that in agreements under Article 5 paragraphs 3 and 4 Cartel Act their qualitative harmfulness was, in principle, sufficient to reach the threshold of significance (E.5.2). It is enough that an agreement can potentially harm competition; the actual effects of the agreement and its implementation do not need to be assessed any further (E.5.4).
- Unlawful agreements of the type mentioned in Article 5 paragraphs 3 and 4 of the Cartel Act give rise to sanctions irrespective of whether they eliminate competition altogether or 'only' restrict it significantly (E.9.4). The extent of the distortion of competition should be taken into account when assessing the level of the fine. A significant restriction is dealt with more leniently than an elimination of competition (E.9.7).

In a judgment dated 9 October 2017, the **Federal Supreme Court** upheld the appeal by the EAER against the judgment of the Federal Administrative Court of 23 September 2014 in the case relating to **builders' supplies**. In October 2010, ComCo imposed sanctions on several companies for horizontal price-fixing agreements. The Federal Administrative Court, however, upheld the appeals filed in response on the grounds that ComCo had not investigated the circumstances of the case sufficiently and therefore there was inadequate proof of a price-fixing agreement. The Federal Supreme Court reminded the lower court that it had comprehensive rights of review and in principle it was responsible for establishing the legally significant facts that were allegedly missing. The court could refer the matter back to ComCo, if need be, if it had not investigated the circumstances thoroughly enough. According to the Federal Supreme Court, the Federal Administrative Court also based its judgments on certain 'incorrect premises' under competition law: firstly, agreements under Article 5 paragraph 3 Cartel Act are by their nature 'significant'. Secondly it is still possible to have an agreement at retail level even if it is based on a 'price dictate' from the manufacturer. What is decisive is simply whether participants at the same level of the market have entered into an agreement to fix prices at a certain level. Thirdly the Federal Administrative Court was wrong to assume that the agreement had to have a proven effect on competition. According to the Supreme Court, proof that effective competition has been eliminated is only relevant in relation to rebutting the presumption in Article 5 paragraph 3 Cartel Act. If the presumption is rebutted, there is a significant restriction of competition anyway. The Federal Supreme Court referred the case back to the

Federal Administrative Court so that it could investigate and establish the circumstances and reach a new decision.

In application of the GABA precedent, the **Federal Supreme Court**, in a judgment dated 24 October 2017, rejected the appeal filed by **BMW AG** against a judgment of the Federal Administrative Court and confirmed the sanction of CHF 157 million originally imposed by ComCo. According to the Federal Supreme Court, there is no dispute that the Cartel Act also applies to practices that originate abroad but have effects in Switzerland. The agreement restricting competition under assessment involved the contractual foreclosure of territory. The Federal Supreme Court confirmed that agreements in terms of Article 5 paragraph 3 and 4 Cartel Act by their nature constitute significant restrictions of competition in terms of Article 5 paragraph 1 Cartel Act. In their case, it is sufficient if the agreement has the potential to restrict competition. The actual effects of the agreement do not need to be verified. Under the Cartel Act, a territorial foreclosure agreement may be permitted if it is justified on the grounds of the economic efficiency. However, BMW had not presented any such grounds. The clause prohibiting exports in the agreements that BMW AG had entered into with dealers since 2003 was therefore unlawful. The Federal Supreme Court also confirmed that price, quantity and territorial agreements that significantly restrict competition without justification can be penalised by ComCo by means of a sanction under Article 49a Cartel Act. The lower courts had not misapplied federal law by assessing this specific case as a moderately serious violation and calculating the sanction accordingly.

In a further judgment dated 14 November 2017, the **Federal Administrative Court** upheld the appeal of a company against ComCo's decision of 17 November 2014 in the **door products** investigation. This company had only participated in the annual cartel meeting on one occasion, but ComCo regarded this as sufficient to be complicit in the unlawful agreement. The court recognised in principle that voluntary participation in a meeting of companies that results in an anti-competitive agreement constitutes participation in the agreement, unless the company concerned can show that it was only pursuing lawful objectives at the meeting and made this clear to the other companies involved. The court however held that every case depends on its specific circumstances and there must be proof of actual consensus or a concerted practice for an agreement to exist. In this particular case, there was no proof that the appellant had participated in any agreement.

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. ComCo concluded one investigation with a decision dated 10 July 2017, which has now taken full legal effect. It found that that construction and civil engineering companies in the **Münstertal** (GR) had rigged more than a hundred bidding processes between 2004 and 2012 (see 2.1 above). ComCo issued **six further decisions** on bid rigging in the construction and civil engineering sectors in the canton of Graubünden on 2 October 2017. These bid rigging agreements related to individual procurement contracts in the Engadin. Two decisions are now legally binding, while four are the subject of appeals pending before the Federal Administrative Court (see 2.1 above). The final three decisions are expected by summer 2018.

On 8 July 2016, ComCo decided that 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. Certain companies challenged ComCo's decision in the Federal Administrative Court. Some companies also took the view that ComCo's decision should not be published. One of the parties has filed an appeal in the Federal Administrative Court against two of ComCo's publication rulings dated 30 October 2017.

In the case involving **road construction and civil engineering in the canton of Aargau**, various parties have challenged ComCo's decision of 16 December 2011. The case is pending before the Federal Administrative Court. On 11 December 2017, ComCo decided on two requests to inspect the unredacted Competition Commission ruling and related files. The requests to access these documents were made by procurement agencies from the canton of Aargau. The decisions have been challenged in the Federal Administrative Court.

3.1.2 Bathrooms / Wholesale sanitary facilities

In the investigation into **wholesalers of sanitary facilities**, which began on 22 November 2011 with a search of premises, ComCo 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.

Four parties opposed any publication of ComCo ruling and demanded a contestable **ruling on publication**. ComCo issued this ruling in November 2016. Two parties appealed to the Federal Administrative Court. The Federal Administrative Court upheld the two Competition Commission rulings in a decision dated 24 October 2017. One party has appealed to the Federal Supreme 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, discriminating against business partners, and by concluding contracts on the condition that additional services are accepted.

On 19 May 2015, the investigation into allegations of price, quantity and territorial agreements was extended to include one further company. The investigation aims to establish whether there are any unlawful restraints of competition present. The investigation was split in November 2016 into two investigations for reasons of procedural economy. The **enquiries** were largely completed in 2017.

3.1.4 Galvanising industry

In connection with the galvanising industry, the competition authorities have since 15 February 2016 been conducting an investigation into various companies as well as the Swiss Galvanising Association (VSV). ComCo concluded the proceedings by issuing a decision on 30 October 2017 (see 2.1 above). The decision is now legally binding.

3.1.5 Fee, tariff and price recommendations

Partly as a result of the Federal Supreme Court's GABA judgment, the Secretariat was also in contact in 2017 with various associations (Swiss Builders' Federation, **SBV**, Swiss Society of

Engineers and Architects, **SIA**) and institutions (Coordination Group for Construction and Property Services, **KBOB**) while conducting its preliminary investigations (SIA) and market monitoring procedures (SBV) and providing advisory services (KBOB). The publication of fees, tariffs and prices and related recommendations may represent unlawful price-fixing agreements between the members of an association. As a consequence, both the SBV and the KBOB decided not to publish or recommend fees, tariffs and prices.

After opening a **preliminary investigation** into the SIA and its members in February 2017, the Secretariat notified the SIA in September 2017 of the conclusions of its preliminary competition law assessment. The investigation focused on the calculation formulae for architects' and engineers' fees, the terms of reference for calculating fees in competitions and the 'Fair fees for competent services' charter.

3.1.6 Other sectors

In the case relating to **door products**, the ComCo decision of 17 November 2014 has been challenged by one of the parties. The Federal Administrative Court upheld the appeal on 14 November 2017 (see 2.2 above).

In the case relating to **builders' supplies for windows and French doors**, the Federal Administrative Court in September 2014 upheld the appeals against ComCo's decision of 4 November 2010. ComCo and the EAER have challenged two of the three appeal judgments in the Federal Supreme Court. The Federal Supreme Court upheld these appeals on 9 October 2017 and referred the cases back to the Federal Administrative Court (see 2.2 above).

3.2 Services

3.2.1 Financial services

In the financial services sector, progress was made with the ongoing investigations (IBOR proceedings, Forex, precious metals and leasing), with the result that decisions can be expected in 2018.

In the meantime, two important cases on debit cards that were at the preliminary investigation stage were successfully concluded in 2017 by means of proposals under Article 26 paragraph 2 Cartel Act: with the **Mastercard Secure Digital Debit Interchange Fee (SDDIF)**, the requirements were put in place for the Maestro card to be used in online trading. The Secretariat approved the introduction of an interchange fee for transactions using Mastercard debit products in electronic and mobile trading (E & M commerce), provided certain conditions are complied with ('Safe Harbor'). This interchange fee will amount to 0.31% for five years and will then be reduced to 0.2%. At the same time, the Secretariat amended and extended the period of validity of the general conditions for a domestic interchange fee for the **V PAY** debit card product; these conditions were introduced in 2009. In contrast to Maestro, a limited interchange fee can still be charged for V PAY for transactions at the point of sale (POS). However, this fee has been reduced from CHF 0.20 to CHF 0.12 and applies in any case for the next five years. For E&M commerce payments, equivalent conditions to those for the Mastercard debit products have been introduced. Worth mentioning in this connection is that in both cases the introduction of a **no surcharging rule** according to European standards was permitted, i.e. a contractual regulation that prohibits retailers from demanding surcharges for using debit cards (discounts on the other hand must continue to be permitted without restrictions).

Surcharges for card payments were also an issue in relation to credit cards, as in August 2017 the domestic interchange fee for credit cards was reduced to 0.44% in compliance with ComCo's credit card decision from 2014. The competition authorities received numerous enquiries from members of the public and the media as to why, despite this reduction, certain dealers still imposed a surcharge for payments by credit card. The competition authorities

pointed out in their answers that there is no state ban on credit card surcharges, but that these bans are contractual in nature and must be contested through the civil courts.

Lastly, in the report year a new preliminary investigation was opened in the case of **Twint/Apple** in order to investigate potential competition problems in the mobile payment sector.

3.2.2 Healthcare

In 2017, the available resources in this sector were used up by appeal proceedings relating to ComCo's decision on the **commercialisation of information on medicines** and by the examination of the merger between **University Hospital Basel** and the **Cantonal Hospital of Baselland** (see 2.1). In response to the appeal filed by Vifor AG (formerly Galenica AG), the competition authorities argued their case in appeal proceedings before the Federal Administrative Court.

The Secretariat was also involved in more than eighty **consultation procedures** relating to legislative bills on compulsory health insurance and medicines. For several of these, an opinion had to be provided to the federal authorities responsible.

3.2.3 Liberal professions and other services

In 2017, the Secretariat worked actively on the subject of **search engines**.

The Secretariat continued its preliminary investigation into **Google**, while closely following the parallel proceedings conducted in Brussels by the European Commission. The latter concluded its investigation in 2017 by imposing a record fine of € 2.42 billion. Currently the Swiss authority is waiting to see the details of the European decision before deciding on how to continue its preliminary investigation.

In relation to the '**sharing economy**', the Secretariat is continuing to analyse this phenomenon and its recent developments. In addition and more specifically, the Secretariat is observing the developments with regard to **Uber** in Switzerland. At present, numerous questions are being considered by other Swiss judicial authorities, in particular the issue of whether Uber should be regarded as an employer.

The Secretariat closed its market observation procedure relating to **valet parking services at Geneva International Airport (GIA)**. In response to various complaints, the Secretariat met representatives of GIA on several occasions with the aim of ensuring effective competition in the valet parking business. These discussions led to a bidding process in mid-2017. The Secretariat also became aware of what is potentially a similar situation at Zurich Airport. In this case, although the Secretariat has not found any evidence of a potential restriction of competition, it is continuing to monitor developments in these markets.

3.3 Infrastructure

3.3.1 Telecommunications

In a decision dated 11 December 2017, ComCo imposed sanctions of around CHF 3.6 million on Naxoo AG for abusing its dominant position in the market for cable connections (see 2.1 above).

Appeal proceedings are still pending before the Federal Administrative Court in the case on **broadband internet** (Swisscom WAN connection). On 21 September 2015, ComCo fined Swisscom CHF 7.9 million after concluding in the investigation 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.

Following the aforementioned proceedings in the case on broadband internet, in December 2016 the Secretariat opened a preliminary investigation into Swisscom (Schweiz) AG in connection with the **broadband networking of business locations (WAN connection)**. The aim of the investigation is to establish if there is any evidence that Swisscom has generally forced competitors and end customers to pay unreasonable prices in the WAN connection sector and/or has discriminated against competitors and end customers in relation to prices.

In the report year, ComCo prepared an **expert opinion** for the Federal Office for Civil Protection (FOCP). The FOCP is planning to develop a mobile broadband network infrastructure for the Authorities and Organisations for Rescue and Security (**AORS**) and had presented ComCo with two potential solutions for a competition law assessment and to evaluate the possible effects on competition.

In the telecommunications sector, ComCo was called on to assess the **BuyIn S.A. merger**. In this case, the joint venture BuyIn S.A., set up in 2011 and jointly controlled by the German Telekom AG and Orange S.A., intended to enter the market as an independent entity. Following a provisional examination, ComCo gave the project the green light.

The Federal Supreme Court has still to issue a decision in the **ADSL pricing policy** case. On 14 September 2015, the Federal Administrative Court imposed a sanction of around CHF 186 million on the Swisscom Group, endorsing in full the reasoning in ComCo's decision and essentially confirming the sanction imposed.

3.3.2 Media

In May 2017, ComCo opened an investigation into UPC Switzerland GmbH in response to allegations that it was abusing a dominant position in relation to broadcasting **ice hockey on Pay TV**. In the summer of 2016, UPC acquired the broadcasting rights for the top Swiss ice hockey leagues from the Swiss Ice Hockey Federation for five years from season 2017/18. The key question in the investigation is whether UPC is unfairly preventing rival TV platform providers, in particular those not operating via the cable network, from broadcasting ice hockey matches. In a ruling dated 26 June 2017, ComCo rejected a request from Swisscom to order precautionary measures because it did not find that the alleged refusal by UPC posed any threat of lasting and irreversible change in the structure of the TV platform market. The decision on precautionary measures has taken full legal effect.

In response to the De Buman parliamentary initiative, which proposed the inclusion of an article 6a in the Cartel Act on price fixing in relation to newspapers and magazines, ComCo issued an expert opinion on behalf of the EAER on the **sale of foreign magazines in Switzerland**. This essentially comprised a competition law assessment of the current distribution system and possible options for action in competition law terms with regard to the differences between the prices for the magazines sold in Switzerland and those in their countries of origin.

ComCo was called on to assess two **company mergers** in the media and advertising sector: in the cases of Tamedia/Tradono Switzerland and Tamedia/Neo Advertising, Tamedia planned to acquire exclusive control of Tradono Switzerland and Neo Advertising AG respectively. Tradono Switzerland operates a digital market place for small ads, which can only be used by means of a small ad app. Neo Advertising AG on the other hand operates in the field of 'out-of-home' advertising. After a provisional examination, ComCo gave both plans the go-ahead.

The Federal Administrative Court has still to issue a decision in the case of **sport on Pay TV**. ComCo had concluded the investigation with a ruling dated 9 May 2016, imposing a sanction of around CHF 71 million on Swisscom.

Also pending before the Federal Administrative Court are the appeals against ComCo's ruling of 27 May 2013 in relation to **book pricing in French-speaking Switzerland**. In addition, there is a dispute in this case over the extent to which the ruling should be published. The

Federal Administrative Court rejected the appeal of one wholesaler in the report year. The matter is now pending before the Federal Supreme Court.

3.3.3 Energy

The Secretariat opened **two preliminary investigations** in the **gas** sector. In one case, the issue is various practices of a local gas network operator that could lead to the company's own end customers and those supplied by third parties paying different charges for using the network. The other case involves the refusal of two gas network operators to allow natural gas from third parties to pass through their system. In both preliminary investigations, the aim is to establish whether there is any evidence of unlawful conduct by the network operators in terms of Article 7 Cartel Act.

The Secretariat took part in the working group on the structure of a **gas supply network**.

In the **electricity** sector, both the Secretariat and ComCo were requested on several occasions to provide opinions in consultation procedures and in legislative consultation proceedings and hearings respectively.

In the energy sector, ComCo was called on to assess the following **company mergers**: in the case of Energiedienst Holding AG/Hälg & Co. AG/Inretis Beteiligungen AG, the companies involved planned to establish a joint venture for system solutions in relation to networked energy architecture. In the case of EDF/CDC/RTE, notice was given of the acquisition of joint control by Electricité de France (EDF) and Caisse des dépôts et consignations (CDU) of the RTE (Reseau de transport d'électricité), which had previously been under the EDF's exclusive control. Following the provisional examination, ComCo gave both projects the go-ahead.

3.3.4 Other sectors

In a decision dated 30 October 2017, ComCo concluded the investigation into SwissPost's **business customers pricing system for letter post services** and imposed a sanction on SwissPost of around CHF 22.6 million (see 2.1 above).

ComCo was also required to assess the following **company mergers**: In the container shipping sector, the Maersk Line A/S gave notice of the takeover of the Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG (HSDG). In connection with digital identity and certification services, SwissPost AG and the Swiss Federal Railways (SBB) gave notice of their acquisition of joint control over SwissSign AG. The merger between Tech Data/Avnet TS related to the sale of IT products. The Tech Data Corporation planned to acquire the Avnet Technology Solutions business division from Avnet Inc. Lastly, ComCo examined a merger planned by BLS AG and Transport Ferroviaire Holding SAS. Here the companies involved intended to acquire joint control of BLS Cargo AG, which was then under the exclusive control of BLS AG. After the provisional examination of these projects, ComCo gave them all the green light.

The Federal Administrative Court has still to issue a decision in the appeal proceedings in the case relating to **air freight**. Various parties have appealed against the ruling of 2 December 2013, which imposed sanctions totalling around CHF 11 million on 11 airlines for entering into horizontal price-fixing agreements. Also in dispute is whether and to what extent ComCo's ruling will be published. On 30 October 2017, the Federal Administrative Court partially upheld the nine appeals filed in relation to the extent of publication.

3.4 Product markets

3.4.1 Focus on vertical agreements

On 22 May 2017, ComCo amended its notice on the competition law treatment of vertical agreements, the '**Vertical Notice**', to bring it line with the case law of the Federal Supreme

Court as set out in Gaba (BGE 143 II 197). The Federal Supreme Court had reached a landmark decision in the Gaba judgment of 28 June 2016. The grounds for the judgment were published at the end of April 2017. The highest Swiss court made it clear that, as a matter of principle, hard horizontal and vertical agreements significantly affect competition, are unlawful and lead to sanctions, unless they can be justified on the grounds of the economic efficiency. ComCo also took this opportunity to issue **explanatory notes on the Vertical Notice**, in which it answered questions relating to the practical aspects of how Article 5 paragraph 4 Cartel Act should be interpreted. The explanatory notes indicate what forms of restraints of competition are liable to be penalised and how selective distribution systems and restrictions on online trading are assessed under competition law.

The Secretariat was involved in a public discussion of specific examples of excessive prices for imported products in connection with the launch of the **Fair Prices Initiative** ('Put an end to Switzerland as an island of high prices'; see below 3.8.2). No evidence of territorial protection agreements, potentially unlawful under Article 5 paragraph 4 Cartel Act, was found: most cases involved Swiss consumers asking foreign manufacturers directly about products and being told to contact their general importer, branch or subsidiary in Switzerland. In some cases, manufacturers would also have been prepared to deliver directly to Switzerland, but only at Swiss prices. It also emerged that certain examples that had come to public attention were cases which had not been preceded by a specific request for delivery from abroad or that no evidence of such a request was provided, despite repeated demands. Given the legal position, the Secretariat recommended that market participants that wish to make parallel imports should make their request to a foreign dealer that is independent of the manufacturer. Import difficulties that are possibly due to an agreement restricting competition – e.g. between a manufacturer and a foreign dealer independent of the manufacturer, can be reported to the Secretariat.

3.4.2 Consumer goods industry and retail trade

In a ruling dated 22 May 2017, ComCo concluded the investigation against **Husqvarna** after finding that there was an unlawful agreement restricting competition in terms of Article 5 paragraph 4 Cartel Act (see above 2.1)

On 4 July 2017, ComCo opened an investigation into the German company **RIMOWA GmbH**. There is evidence that RIMOWA GmbH has in the past restricted parallel and direct imports of RIMOWA products to Switzerland by means of an export ban in the agreements with its sales partners outside Switzerland. The investigation will assess whether there was an unlawful vertical territory protection agreement in terms of Article 5 paragraph 4 Cartel Act.

On 21 November 2017, ComCo opened an investigation into Bucher AG Langenthal and Brenntag Schweizerhall AG on suspicion of customer sharing in connection with the sale of **AdBlue®** in Switzerland. AdBlue® is a form of liquid urea used to reduce nitrogen oxide emissions in diesel vehicles. The investigation will examine whether the companies under investigation in fact entered into an unlawful agreement under Article 5 paragraph 3 Cartel Act.

3.4.3 Watch industry

In the course of the year, the competition authorities received several reports of restrictions on **purchasing spare parts** for watches. As a result, independent watchmakers were allegedly being limited in the after-sales services (in particular making revisions and repairs) they can provide. The allegations related to several different watch brands. The Secretariat added these reports to those in an ongoing preliminary investigation into potential Cartel Act violations relating to after-sales services and questioned the market participants about the market and the position as regards competition.

3.4.4 Automotive sector

In relation to the **sales and servicing of new vehicles**, a number of reports were received that the sales and service networks of various Swiss automobile importers had undergone restructuring that had led to the systematic termination of agreements with existing trade and servicing partners. The Secretariat conducted a preliminary investigation and several market monitoring procedures in order to clarify whether any infringements of the Cartel Act had taken place and examined in particular whether the rules in ComCo notice on the competition law treatment of vertical agreements in the automotive trade (MV Notice) had been complied with.

In connection with the **sale of spare parts**, several reports were received that Swiss automobile importers could be forcing their sales and service partners to purchase original spare parts or equivalent quality spare parts from manufacturers or dealers of their choice and to use these parts to repair or service vehicles. The Secretariat looked into these reports as part of a market monitoring procedure. Although it found no evidence of an infringement of the Cartel Act, it concluded that the rules on the sale of spare parts in the MV Notice leave a certain degree of discretion open.

Throughout the year, the Secretariat received many enquiries from end customers relating to a refusal to provide warranty or servicing work and to restrictions on direct imports. In addition, various dealers and workshops enquired about a possible right of access to sales and service networks. In order to answer most of these questions, the Secretariat could simply make reference to **Competition Commission's explanatory notes on the MV Notice**.

In the **BMW** case, in a decision dated 24 October 2017, the Federal Supreme Court rejected the appeal by BMW against the judgment of the Federal Administrative Court. The ruling on sanctions issued by ComCo on 7 May 2012 has therefore become legally binding (see 2.2 above).

3.4.5 Agriculture

On 13 March 2017, the competition authorities opened an investigation into Bucher Landtechnik AG in connection with spare parts for tractors. The investigation aims in particular to clarify whether Bucher prevented parallel imports of spare parts for New Holland tractors by tying the purchase of spare parts to the sale of tractors.

The Secretariat was involved in around 60 office consultation procedures on draft legislation and parliamentary proposals relating to agriculture. In particular, it advocated a reduction in border controls. In addition, the Secretariat received several enquiries on agricultural matters, which resulted in meetings, the provision of advisory services and/or market monitoring procedures. For example, the Secretariat was involved in advising on the potential effects on competition of measures taken by the dairy industry with a view to the abolition of export contributions from 1 January 2019 under the 'Chocolate Act'.

3.4.6 Other sectors

With a ruling dated 27 November 2017, ComCo terminated the investigation into gym80 International GmbH and ratio AG in connection with **fitness machines**. The original indications of unlawful vertical territorial protection agreements restricting imports of fitness machines into Switzerland either could not be substantiated in the investigation or proved to be unfounded.

The Secretariat terminated the preliminary investigation relating to **laboratory reagents** at the end of 2017 with no further action. Laboratory reagents produce a specific chemical reaction on contact with certain other substances. The preliminary investigation failed to reveal sufficient evidence of unlawful agreements on absolute territorial protection in terms of Article 5 paragraph 4 Cartel Act. In particular, a review of the distribution agreements of various foreign

manufacturers of laboratory reagents revealed no indications of export bans involving Switzerland. Where contact could be made with the American manufacturers, misleadingly formulated contractual clauses were clarified in correspondence with sales partners.

3.5 Internal market

The Federal Act on the Internal Market (Internal Market Act, IMA) guarantees intercantonal freedom of movement and a public bidding process for concessions and cantonal procurements. ComCo monitors compliance with the Internal Market Act.

In relation to inter-cantonal freedom of movement, the focus was on access of craftsmen to the market of the canton of Ticino. The Ticino Act on Commercial Enterprises (Legge sulle imprese artigianali, LIA) requires that all skilled trades businesses in the canton of Ticino must be registered. The entry in the LIA register is dependent on proving that personal and professional requirements have been met and is subject to a fee. In ComCo's view, applying the LIA to businesses from outside the canton is an infringement of the IMA. At the end of 2016, ComCo filed three appeals in the cantonal administrative court and made a recommendation to the Canton of Ticino with regard to issues in the LIA. The appeals are still pending before the cantonal administrative court. ComCo has been in contact with the Canton of Ticino with regard to implementing its recommendation. The Canton has promised to change the registration obligation for businesses from other cantons but has yet to implement this. ComCo has received numerous enquiries from skilled trades businesses from around Switzerland asking about registration under the LIA.

At the end of 2016, ComCo approved recommendations to the cantons of Bern, Vaud and Ticino on the authorisation procedure for providers of various liberal professional services from other cantons. ComCo assessed whether the recommendations were being followed in the cantons concerned. ComCo's recommendations were being implemented in some cases, in particular by making changes to authorisation practices.

In Switzerland there are differences in cantonal practices on authorising multi-disciplinary law practices incorporated as companies limited by shares (law firm companies). ComCo filed two appeals in connection with this in 2016, one involving a law firm company from the canton of Vaud and another involving one from Geneva. In a public hearing, the Federal Supreme Court held on 15 December 2017 in the Geneva case that only lawyers entered on the professional roll can be shareholders of a company of this type. The court explained that this resulted from the requirement to preserve independence and to comply with lawyers' professional confidentiality in terms of the Federal Act on Lawyers.

ComCo is entitled to express its views in proceedings before the Federal Supreme Court on internal market matters. The Federal Supreme Court gave ComCo the opportunity to comment in six cases. ComCo submitted four opinions. One related to the label 'Geneva Region – Terre Avenir' (GRTA), in which the question was whether the GRTA label is also available for bakery products in which the grain was ground outside the Geneva region (Federal Supreme Court judgment 2C_261/2017 of 2 November 2017). Another opinion related to the question of the extent to which a fiduciary can invoke the IMA or intercantonal matters to obtain authorisation to work in Ticino.

The two other opinions submitted to the Federal Supreme Court related to public procurement cases. Under the IMA, ComCo also has the task of monitoring compliance with the law on public procurement, in particular in the cantons and communes. ComCo submitted an opinion on the issue of the principle of plausibility in a procurement law matter. The main issue in question was the extent to which the authority awarding the contract can make a corrective valuation of the offers submitted (Federal Supreme Court judgment 2C_1021/2016 and 2D_39/2016 of 18 July 2017). ComCo also commented from the IMA standpoint on a prohibi-

tion of double sub-contracting and the sanctions imposed in relation to this. In relation to procurement, ComCo also voiced concerns on competition-related aspects of the revision of the law on public procurement.

At the request of the City of Geneva, ComCo prepared a recommendation on the structure of a school allowance. The allowance displayed protectionist character in favour of Geneva businesses. As far as providers from outside the City of Geneva were concerned, the way in which it was planned to pay the subsidy amounted to a restriction of market access, which was not compatible with the IMA. As a consequence of ComCo's recommendation, the City of Geneva has therefore planned to organise the school allowance so that suppliers from outside the City of Geneva are not discriminated against.

Under the IMA, cantonal monopolies can only be transferred in a non-discriminatory bidding procedure. In its judgment dated 6 March 2017, the Federal Supreme Court applied the rules of a public bidding process under Article 2 paragraph 7 IMA to the licensing of billboard advertising in Lausanne. ComCo had submitted a comprehensive opinion in the case. In another judgment, dated 1 September 2017, in a case relating to taxi services in the Lausanne region, the Federal Supreme Court held that Article 2 paragraph 7 IMA also applies to special use licences.

3.6 International

EU: The Competition Agreement with the EU, which came into force on 1 December 2014, has certainly proven its value in practice. Anti-competitive practices are increasingly taking on an international dimension. As a result, the Swiss competition authorities and their EU counterparts frequently investigate the same or related cases. In these cases, the Competition Agreement allows ComCo to work closely with the Directorate-General for Competition of the EU Commission, which has proven extremely worthwhile. In particular, the agreement permits an exchange of information that was previously not possible because of official secrecy. ComCo makes active use of the various forms of cooperation with Brussels provided for in the agreement, as this expedites proceedings. As a consequence, the companies involved in the parallel procedures also benefit from the agreement. Several companies have facilitated cooperation between ComCo and the EU Commission, even in cases where information may only be exchanged with their prior written consent, i.e. in the case of information from a voluntary report or amicable settlement. This shows that companies can also benefit in such cases from cooperation between ComCo and the EU Commission.

Germany: Exploratory meetings were successfully held with Germany with a view to a bilateral agreement on cooperation in the field of competition. Germany is by far Switzerland's most important trading partner world-wide. Furthermore, Germany is the most important reference market for price comparisons. As a result of large price differences, the potential for cross-border restraints of competition, for example in online trading, is considerable. Since the start of the Euro crisis in 2011, ComCo has addressed numerous enquiries to German manufacturers and retailers in the course of market investigations. Frequently these have related to the question of whether they prevent parallel and direct imports by Swiss companies or consumers. In view of this, from the point of view of ComCo, a competition agreement with Germany would be welcome.

OECD: Representatives of ComCo and the Secretariat attended the two annual meetings of the OECD Competition Committee in Paris. ComCo and SECO made various contributions. In addition to the two long-term topics of market studies and digitalisation, matters discussed included bilateral and multilateral markets. Multilateral markets involve a situation where a supplier (platform) sells two different products to two different customer groups, with the demand of one customer group depending on the demand of the other customer group (indirect network effects). In addition, the working groups of the OECD Competition Committee have begun a review of the OECD recommendations, with a view to revising them if required. The

review of the 1998 recommendation relating to combating hard-core cartels effectively is among those already underway.

ICN: The competition authorities monitored international developments in competition law as a member of the International Competition Network (ICN). In 2017, the Agency Effectiveness Working Group published two new works, on 'Competition Agency Staff Training Programmes' and 'Competition Agency Use of Social Media'. The cartel-working group held several webinars in which the Secretariat also took part. Among the topics discussed was the responsibility of parent companies for the conduct of their subsidiaries. In addition, the working group, with the assistance of the Swiss authorities, drew up a checklist on the efficiency and effectiveness of voluntary report programmes and a factsheet on calculating penalty sanctions. The Canadian competition authority held a cartel workshop in Ottawa from 4 to 6 October 2017 on the topic of combatting cartels in public procurement. The Head of the Secretariat's Centre of Excellence for Economics took part and made a presentation on the subject of data screening. In 2017, the Merger Working Group published a new version of its recommendation practices for merger notification and review procedures and on the analysis of planned mergers, and also held a workshop in December 2017 in Mexico City. The Unilateral Conduct Working Group is currently preparing a 'workbook' on the analysis of unilateral practices by dominant companies. At the workshop held by the Unilateral Working Group at the end of November 2017 in Rome, the enforcement of competition law in the digital era was one of the main topics. A delegation from ComCo attended the ICN annual conference, which was held in Porto from 10 to 12 May 2017.

UNCTAD: The Director of the Secretariat contributed to the fourth regional workshop of Latin American competition authorities on the subject of digitalisation. He made a presentation on the subject of digitalisation and market structures. The Secretariat also supported the activities of the COMPAL cooperation programme this year. One member of staff from the Chilean competition authority completed a three-month internship in the Secretariat.

3.7 Legislation

3.7.1 Parliamentary proposals

Following the rejection of the planned reform of the Cartel Act in September 2014, the current situation with **parliamentary proposals** for the revision of specific points in the Cartel Act that have been submitted but are still pending is as follows:

- The **Hans Altherr parliamentary initiative** of 25.9.2014 '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, but at present the proposal has been suspended.
- 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 Federal Council has prepared a report on abandoning the motion (17.050); the next stage will be for this report to be debated in the National Council.
- The two **de Buman parliamentary initiatives**, 'For appropriate periodical prices in Switzerland' dated 18.3.2016 (16.420) and 'Minor revision to the Cartel Act' dated 30 September 2016 (16.473) were not endorsed and withdrawn respectively.
- The **Fournier motion** of 15.12.2016, 'Improve the position of SMEs in competition proceedings' (16.4094), which demands deadlines for courts, procedural costs for parties, more lenient sanctions for SMEs and the publication of decisions only after they have

become legally enforceable, will now be debated in the National Council following its approval by the Council of States.

The **Bischof motion** of 30.9.2016, 'Ban adhesion contracts for online booking platforms for the hotel industry' (16.3902), according to which hotels should be allowed to offer cheaper prices on their websites than on online booking sites, has been approved by both chambers of parliament; the EAER is preparing a draft law.

In relation to the **WAK-N motion** of 14.8.2017, 'Create an effective instrument to prevent unreasonable periodical prices' (17.3629), the National Council is responsible as the first chamber.

3.7.2 Fair Prices Initiative

The **Fair Prices Initiative** ('Put an end to Switzerland as an island of high prices – For fair prices'), launched in autumn 2016, demands that the Confederation introduce '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'. The initiative was submitted to the Federal Chancellery in December 2017.

3.7.3 Modernising merger control procedures

The Federal Council has instructed the EAER to prepare a bill for submission for consultation on the **modernisation of merger control procedures** under the Cartel Act. The test of market dominance that is currently applied in Switzerland should be replaced by the SIEC test ('Significant Impediment of Effective Competition'), which is widely used in the EU. This test allows more account to be taken of the negative and positive effects of mergers, which is expected to have a positive effect on the competitive environment in Switzerland. Swiss Economics conducted a study on behalf of SECO on the introduction of the SIEC test in Switzerland and its effects on Swiss merger control.

SECO has overall responsibility for drafting the bill for submission to consultation SECO; the Secretariat is also involved in this work.

4 Organisation and Statistics

4.1 Competition Commission and Secretariat

The members of ComCo met for 17 full or half-day plenary sessions in 2017. 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).

The following staff changes occurred in ComCo during the report year:

- **Vincent Martenet** stepped down from his position as president on completing his twelve-year term of office and left ComCo at the end of 2017;
- The Federal Council appointed the incumbent vice-president **Andreas Heinemann** to the position of president of ComCo as of 1 January 2018;
- The Federal Council appointed **Danièle Wüthrich-Meyer** vice-president of ComCo as of 1 January 2018;
- **Daniel Lampart**, representative of the Swiss Federation of Trade Unions (SGB), left the Commission at the end of 2017;
- He has been replaced by **Isabel Martínez**, General Secretary for Economic Affairs at the SGB and project manager at the University of St Gallen;

- The vacant position as a member of ComCo created by the departure of the president has been advertised by the GS-EAER since 21 December 2017 and is expected to be filled by April 2018.

ComCo would like to thank **Vincent Martenet** for his tenure as a member and president of ComCo:

The Federal Council elected Vincent Martenet as a member of ComCo from 1 November 2005. In the same year, the University of Lausanne appointed him a professor of constitutional and competition law. It has been his expertise on constitutional matters above all that was the basis for his consistent support for the rule of law in procedures before the competition authorities.

One of his more important tasks came in the evaluation of the Cartel Act conducted from 2006 until the end of 2008. He represented ComCo in the steering group of the Cartel Act evaluation group and at the end of 2008 made a decisive contribution to the evaluation group's detailed report to the Federal Council and its recommendations for broad-based improvements to the Cartel Act in the fields of institutional matters, international cooperation, merger control procedures, vertical agreements and private law enforcement.

The Federal Council appointed Vincent Martenet vice-president of ComCo on 1 January 2008. He continued to fulfil his duty as the 'guardian of the rule of law' with greater responsibility in the presidium of ComCo and significantly helped to shape various landmark rulings during this time (such as the ComCo decisions on GABA/Elmex, Swisscom's pricing policy for ADSL, off-list medicines and the electricians bidding cartel in Bern).

The Federal Council appointed Vincent Martenet president of ComCo on 1 July 2010, as the successor to Walter A. Stoffel. He encountered a difficult moment soon after assuming office, when the Euro suffered a massive loss of value against the Swiss franc. Showing the public, the media and politicians what the competition authorities can and cannot do proved to be a major challenge. There were very high expectations that ComCo would tackle the problems created by increasing price differences. Vincent Martenet managed successfully to determine what competition law could contribute to solving the problem of high prices and to make it clear that competition policy is merely one element of the overall strategy. This insight will be of value to various political proposals aimed at amending the Cartel Act.

In his seven and a half years as president of ComCo, the competition authority has been able to consolidate and refine its practices pertaining to the most harmful forms of restraints of competition, in particular bid rigging, the foreclosure of the Swiss market and the abuse of market dominance. This has contributed to an increasing number of investigations by ComCo being concluded with amicable settlements and correspondingly brief decisions. Vincent Martenet's presidency can be aptly summarised in the three following points:

- **Procedures in accordance with the rule of law:** As a constitutional expert, Vincent Martenet was always concerned that procedures were properly carried out in constitutional terms. He guaranteed that the authorities conducted the procedures correctly. During his term of office, there were practically no complaints from the courts about procedural errors.
- **Quality of decisions:** His guiding principle was that ComCo's decisions must match the highest qualitative standards. On the one hand, the companies involved in the procedures are represented by top-class lawyers; on the other, the decisions of ComCo must be able to stand up to judicial scrutiny.
- **Concentration on the most serious forms of competition law infringements:** Vincent Martenet always gave priority to the worst infringements of competition law, namely hard cartels, market foreclosures such as the obstruction of parallel imports, and the abuse of market power. In these areas, ComCo reached a series of groundbreaking decisions under his leadership, which have cleared up open questions and

created a reliable body of precedent for companies. The decisions on the obstruction of online trading, obstruction of parallel imports, on bid rigging, on sport on pay TV, on the application of gross prices in the wholesale of sanitary facilities, and the first decisions in the LIBOR case are just a few examples.

Vincent Martenet always made sure that the decisions of ComCo were consistently and expertly defended before the appeal courts (the Federal Administrative Court and the Swiss Federal Supreme Court). This certainly contributed to the fact that the courts, with few exceptions, confirmed the Competitions Commission's decisions and that judgments such as GABA/Elmex, BMW, NIKON and Swisscom ADSL (not yet legally binding) are today considered to be highly effective landmark rulings.

His term of office also saw the conclusion of the bilateral Cooperation Agreement with the EU. This is one of the few areas in which a new agreement with the EU has successfully been concluded in recent years. In addition, it continues to be the only cooperation agreement worldwide that permits a comprehensive exchange of information and evidence. The agreement has been in force since 1 December 2014, and so far the competition authority has had very positive experiences with it. Currently, further efforts to expand formal cooperation with other competition authorities are being made. For example, an exploratory report with a view to negotiations on a cooperation agreement with Germany was concluded in autumn 2017. For Vincent Martenet, international cooperation and communication with other competition authorities were important general concerns. He always took time to represent Switzerland and explain the practices of ComCo at the most important meetings of the OECD, the International Competition Network ICN, the European Competition Authorities ECA and at the four-country meeting of the German-speaking competition authorities.

ComCo would like to thank Vincent Martenet for his exceptional service as a member, vice-president and for seven and a half years as president of ComCo. We wish him every success as he continues his professional career at the University of Lausanne and all the very best for his personal future.

There were no changes in key positions in the Secretariat in 2017.

At the end of 2017, the **Secretariat** employed 72 (previous year 73) staff members (full-time and part-time), 43 per cent of whom were women (previous year 40%). This corresponds to a total of 60.9 (previous year 62.7) full-time positions. The staff was made up as follows: 53 specialist officers (previous year 51) (including the executive management; this corresponds to 46.1 full-time positions; previous year 44.4); 5 specialist trainees (previous year 9), which corresponds to 5 (previous year 9) full-time positions; and 14 members of staff in the Resources and Logistics Division, which corresponds to 9.8 (previous year 9.3) full-time positions.

4.2 Statistics

	2016	2017
Investigations		
Conducted during the year	32	30
Carried forward from previous year	22	26
Investigations opened	4	4
New investigations from divided investigations	6	0
Final decisions	9	12
Amicable settlements	6	2
Administrative rulings	2	4
Sanctions under art. 49a para. 1 Cartel Act	8	11

Part-rulings	2	0
Procedural rulings	9	1
Other rulings (publications, costs, searches, etc.)	3	3
Precautionary measures	0	1
Sanctions proceedings under art. 50 ff. Cartel Act	0	0
Preliminary investigations		
Conducted during the year	14	18
Carried forward from previous year	11	9
Opened	3	9
Concluded	6	7
Investigations opened	2	1
Modification of conduct	3	3
No consequences	1	3
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	0	2
Advice	27	21
Market monitoring	42	63
Freedom of information applications	16	9
Other enquiries	683	635
Mergers		
Notifications	22	32
No objection after preliminary examination	21	27
Investigations	1	3
Decisions of ComCo after investigation	0	3
Authorisation refused	0	1
Authorised with conditions/requirements	0	0
Authorised without reservations	0	2
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	39	31
Judgments of the Federal Administrative Court	9	7
Success for the competition authority	7	5
Partial success	0	1
Judgments of the Swiss Federal Supreme Court	2	2
Success for the competition authority	2	2
Partial success	0	0
Pending at the end of the year (before Federal Administrative Court and Federal Supreme Court)	28	21
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Cartel Act)	0	1
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	0	3
Follow-up checks	0	0
Notices (Art. 6 Cartel Act)	1	1
Opinions (Art. 46 para. 1 Cartel Act)	281	210
Consultation proceedings (Art. 46 para. 2 Cartel Act)	8	8
IMA		
Recommendations / Investigations (Art. 8 IMA)	2	1

Expert reports (Art. 10 IMA)	1	5
Explanatory reports (Secretariat)	45	73
Appeals (Art. 9 para. 2bis IMA)	1	0

A glance at the statistics and a comparison with the figures from 2016 reveals the following:

- The number of concluded investigations increased to twelve, seven of which related to bid rigging in the canton of Graubünden. In eleven decisions, sanctions were imposed. The number of newly opened investigations remained unchanged in comparison with the previous year.
- More preliminary investigations were conducted and opened in 2017. The preliminary investigations serve primarily as a triage instrument and not necessarily as the preparation for an investigation. If there are indications of unlawful restraints of competition, e.g. as a result of a voluntary report or a report from a whistle-blower, an investigation can be opened, if necessary directly followed by a search of premises.
- Market monitoring procedures increased by 50% in comparison with the previous year. They serve primarily to determine whether a certain issue is relevant and potentially problematic under competition law.
- Notifications of planned mergers have reached the level of the years before 2016, at 32. Three detailed examinations is a high number in comparison with previous years and they brought a corresponding workload.
- The number of appeals before the Federal Administrative Court and the Federal Supreme Court remains high. The Federal Administrative Court only made one substantive decision in 2017 (regarding door products, see 2.2); the remaining six judgments concerned interim or publication rulings. The Federal Supreme Court delivered two substantive judgments (regarding BMW and builders' supplies, see 2.2), both with success for the competition authority. As of the end of 2017, 21 appeals are pending before the courts.
- A high number of explanatory reports was recorded in connection with the IMA. This is mainly due to the numerous enquiries by skilled trades businesses about the LIA (see 3.5). The number of expert reports has also risen significantly because ComCo is increasingly invited by the Federal Supreme Court to give an advisory opinion in appeal proceedings concerning the IMA.

5 Amicable settlements

Following the introduction of direct sanctions for the most serious violations of the Cartel Act in 2004, it was open to question whether there was any latitude left to reach amicable settlements with companies accused of hard horizontal or vertical agreements affecting competition or the abuse of a dominant position. At any rate, it was unclear what an amicable settlement would bring in such cases, because before direct sanctions were introduced, this instrument helped to speed up the conclusion of cartel proceedings: if a company was willing to adapt its unlawful conduct, the proceedings could be closed without consequences.

The current statutory basis for amicable settlements in Article 29 Cartel Act was introduced in the Cartel Act of 1995. The Federal Council dispatch on this legislation stated that the competition authorities should conclude proceedings as quickly as possible, which meant that reaching an amicable settlement was supposed to be the norm. The mission was clear, and accordingly the Secretariat adopted a practice of proposing measures to the companies under investigation that aimed to remove the suspected unlawful restraint of competition. Provided the company undertook to implement these measures, an amicable settlement had been reached and was submitted to ComCo for approval. ComCo approved the amicable settle-

ments by means of a ruling, which also concluded the investigation, normally without any further consequences. In most cases no conclusive decision was reached on the question of whether there had actually been an unlawful restraint of competition.

In 2003, the Cartel Act of 1995 underwent a revision. According to the Federal Council dispatch from 2001, the main aim of this was to introduce direct sanctions for particularly damaging violations of competition law. The legislative aim on the other hand was clear: companies involved in unlawful hard horizontal and vertical agreements affecting competition, and companies that had abused a dominant position were to be penalised by the competition authorities. It was therefore clear that in cases where there was evidence of Cartel Act violations that could give rise to sanctions, there was no longer any question of dispensing with a conclusive legal assessment, as had often happened previously when amicable settlements had been reached; this was now only possible in connection with agreements affecting competition under Article 5 paragraph 1 Cartel Act, which although unlawful, did not carry sanctions. It seemed that this brought an end to amicable settlements for violations subject to direct sanctions, but in fact this has not been the case; as is explained below, amicable settlements are still regularly used in sanctions cases and indeed are an attractive solution in these cases.

5.1 The competition authorities practice on amicable settlements

Since introduction of direct sanctions in 2004, the investigations carried out by the competition authorities have focused on the most serious violations of the Cartel Act, i.e. on hard horizontal and vertical agreements affecting competition and on the abuse of dominant positions, and as a consequence on restraints of competition that give rise to direct sanctions. Amicable settlements also play a major role in these investigations. Around half of the current sanctions proceedings are concluded by amicable settlements.

An amicable settlement is an option in investigations into all forms of unlawful restraints of competition that fall under Articles 5 and 7 Cartel Act. In the past, by far the majority of amicable settlements related to the elimination of horizontal agreements affecting competition under Article 5 paragraph 3 Cartel Act. But the elimination of vertical agreements affecting competition under Article 5 paragraph 4 Cartel Act and unlawful practices of dominant companies in terms of Article 7 Cartel Act were also the subject of amicable settlements. In all these cases, the companies reaching the amicable settlements undertook to implement specific measures to eliminate the restraint of competition, with the result that ComCo did not need to impose requirements or prohibit certain conduct unilaterally. Companies involved in cartels generally undertook not to exchange strategically relevant information any longer: dominant companies undertook, for example, to continue to supply customers with certain goods, and manufacturers undertook, for example, not to try to influence the retail prices paid by their customers or not to impose limits on passive sales with their partners in Switzerland. Although the amicable settlements led to the restraints of competition being eliminated, the competition authorities were still required in these cases to penalise the companies concerned for their past conduct. The competition authorities have a duty to assess whether sanctions should apply and if so to determine the level of the sanction, even in cases where amicable settlements are concluded.

5.2 The attraction of amicable settlements in sanctions cases

Reducing the sanction

From the company's point of view, concluding an amicable settlement can be of particular interest because it regularly leads to a reduced sanction. The competition authorities' current practice is to reduce the sanction by 5 to 20%, depending on how early the settlement is reached in the proceedings. For amicable settlements that can be concluded during the investigation, the sanction can be reduced by a maximum of 20%; for settlements reached while the draft decision is being prepared, the reduction is 10 to 15%, and for amicable settlements that are reached after the draft decision has been sent to the parties for their comments in terms

of Article 30 paragraph 2 Cartel Act, the sanction may still be reduced by around 5%. These differences in the reduction depending on the stage in the proceedings are intended to increase the incentive for the company to reach a settlement as early as possible in the proceedings.

However, concluding an amicable settlement is not the only scenario in which sanctions may be reduced:

- Where parties have submitted a voluntary report under the *leniency programme*, this can lead to no sanction being imposed at all (on the first party to file a voluntary report), a reduction of a maximum of 50% (for other undertakings that file voluntary reports) or a reduction of a maximum 80% ('Bonus Plus' reports). When added to the maximum reduction for the amicable settlement (20%), this results in a combined maximum reduction of 100% for the first party to report its conduct, up to 60% for other companies filing voluntary reports, or 84% for companies filing 'Bonus Plus' reports, as the reduction is calculated in steps. In practice, a combination of voluntary admissions and amicable settlements is quite common: around a half of the more than 50 companies which have concluded amicable settlements to date have been companies that had filed voluntary reports.
- Outside the leniency programme, it is normal practice, based on Article 6 paragraph 1 of the Cartel Act Sanctions Ordinance, to reward *particularly valuable cooperation* with a reduction in sanctions of up to 20%, which, when added to the maximum reduction for the amicable settlement itself, can result in a combined maximum reduction of 40%. Particularly valuable cooperation includes providing evidence voluntarily, making a formal admission, or agreeing not to dispute the circumstances of the case.

Shorter procedures and rulings

A further significant advantage for the company lies in saving time and money: when an amicable settlement is concluded, this normally makes the proceedings shorter and the ruling is normally more concise than in investigations that do not lead to an amicable settlement. The significant saving in time is due above all to the fact that the circumstances of the case do not have to be investigated as thoroughly if an amicable settlement is reached and the grounds for of the violation of competition law do not need to be explained in such detail, provided the company makes it clear that it is not intending to file an appeal. Even more time can be saved if the company admits its unlawful conduct. Provided that it appears that the facts of the case can be substantiated by the available evidence with legal sufficiency, when the amicable settlement is reached, no further procedures to gather evidence are required and the Secretariat can move on to drafting the decision in accordance with Article 30 paragraph 2 Cartel Act. Experience shows that the response of the company to the draft decision is shorter than in proceedings that do not involve an amicable settlement. The company can also waive its right, wholly or partly, to inspect the case files, and ComCo is normally not required to hold a hearing for the parties under Article 30 paragraph 2 Cartel Act. Normally there is no reason to contest the ruling and an appeal is unnecessary (see 5.2 Section 1 above). The company can put the cartel proceedings behind it quickly and go back to its normal business. The shorter proceedings bring savings on costs.

No appeals (normally)

The main advantage of amicable settlements from the authority's point of view is that proceedings in which there is an amicable settlement do not normally lead to an appeal. This applies in particular in sanctions proceedings, because in these cases the risk in filing an appeal is greater than in cases in which the company is not fined. Appeal proceedings can take several years in competition cases, tying up valuable resources at the same time.

To date, more than 50 companies have been involved in amicable settlements and only three of them have filed an appeal. The main reason was that they were not in agreement with the sanction imposed by ComCo. Two of those three appeals are currently pending before the Federal Administrative Court. This low percentage of cases taken to appeal shows that companies that reach amicable settlements normally have no reason to challenge ComCo's decision. This is in part because the Secretariat, before concluding an amicable settlement, advises the company concerned of the preliminary results of the investigation, the relevant facts and their significance in competition law and provides an indication of the general magnitude of the sanction that it will ask ComCo to impose. The company is therefore aware of the Secretariat's preliminary assessment and can then decide for or against an amicable settlement and thus whether to have the case dealt with quickly and easily or not.

If it decides to go for an amicable settlement, the competition authorities assume that in principle there are no grounds for contesting their decision, provided it is consistent with the preliminary assessment given by Secretariat. This explains why an amicable settlement does not in principle require an express admission of unlawful conduct or acceptance of the legal assessment: for the competition authorities, the main point is that ComCo's decision will not be challenged. Consequently, it should be enough to reach an amicable settlement for the company to indicate to the authorities that it does not intend to appeal. On the other hand, if a company indicates that it may appeal even if a settlement is reached, the Secretariat can demand an acknowledgement of the circumstances of the case or refuse to agree to a settlement. There is no such thing as a right to an amicable settlement.

From the company's perspective, concluding the proceedings with an amicable settlement becomes attractive when it sees from the preliminary results of the investigation presented by the Secretariat that the relevant facts have been established correctly and that it can expect ComCo and the courts to confirm the preliminary legal assessment. In other words, it makes sense for companies to reach an amicable settlement when they have to accept that there has been a breach of the Cartel Act. This will be the case, for example, when they have been part of a horizontal cartel on prices, territory or quantities, or party to a vertical agreement on prices (indirect price fixing) or territory (absolute territorial protection), which according to the legal precedent of the Federal Supreme Court in the *Gaba* cases are *a priori* significant because of the subject matter.

More positive public effect

Lastly, a willingness on the part of the companies involved to adapt their behaviour voluntarily under the terms of an amicable settlement will generally be regarded more positively by the public than if ComCo simply orders the companies not to act in a certain way. When ComCo announces a decision that involves an amicable settlement, the press release on the conclusion of the investigation regularly makes prominent mention of the fact that the company concerned has cooperated with the competition authorities.

5.3 The sanctions procedure with amicable settlements

Opening an investigation due to indications of unlawful restraints of competition

The basic requirement for the conclusion of an amicable settlement under Article 29 Cartel Act is that the competition authorities have opened an investigation under Article 27 Cartel Act due to indications of an unlawful restraint of competition. In addition, the Secretariat must in a preliminary legal appraisal of the circumstances have come to the conclusion that it is case of an unlawful restraint of competition in terms of Article 5 or 7 Cartel Act. However, this does not mean that an unlawful restraint of competition needs to have been proven entirely and beyond any doubt before the amicable settlement can be reached. The advantage of the amicable settlement lies in the very fact that a comprehensive investigation of the circumstances is no

longer necessary and that briefer justification can be given after the settlement is reached (see 1.2 above).

Decision on suitability for an amicable settlement

If the Secretariat in the preliminary assessment of evidence reaches the provisional conclusion that competition law has been violated, the first step is to decide whether the case is suitable for an amicable settlement. Generally, this is the case if the facts of the case and the legal position are clear to both the Secretariat and the companies concerned and if an appeal is therefore deemed unnecessary. Cases in which the companies involved are convinced that they have not violated competition law and wish to take the case to the appeal courts are unsuitable for an amicable settlement (see 5.2 above).

Examining the interest in an amicable settlement/agreeing the general conditions

If the case appears suitable for an amicable settlement and the companies show an interest in an amicable conclusion to the proceedings, the Secretariat first sends them the general conditions for negotiating on an amicable settlement and asks them to confirm they have received and read them with their signature. The general conditions can be described as the 'rules of the game'; by signing them, the company assumes no obligations other than agreeing not to use the information exchanged with the Secretariat during the amicable settlement negotiations against the competition authorities should these negotiations fail. Equally the Secretariat undertakes not to use the information from the amicable settlement negotiations against the company. The aim is to create a level of trust that permits as free an exchange of information as possible.

The topic of the amicable settlement meetings are measures for correcting conduct, the relevant circumstances of the case, their legal appraisal and the level of any sanction. The Secretariat presents its perspective and the parties may comment. Measures to prevent any future restraints of competition are discussed.

The general conditions reassure the companies concerned that their willingness to reach an amicable settlement will be regarded as cooperative conduct by the Secretariat and will be taken into account as a mitigating circumstance in the draft decision. In addition, the general conditions make it clear that appeal proceedings are generally unnecessary once an amicable settlement has been reached.

Indication of the preliminary outcome of investigations

If the companies agree to the 'rules of the game', the Secretariat will inform them as to the preliminary outcome of investigations. This enables the companies to make an informed decision for or against an amicable settlement depending on the relevant circumstances and their probable appraisal under competition law.

Decision for or against an amicable settlement

If the companies opt to conclude an amicable settlement, then they will be expected to do the following

- implement voluntary measures to eliminate the restraint of competition that the Secretariat regards as unlawful,
- cooperate with the Secretariat and refrain from making excessively long submissions in order facilitate a swift conclusion to the proceedings, and
- waive the right to appeal as long as the level of the sanction approximates to that proposed by the Secretariat.

In principle, the conclusion of an amicable settlement does not require an acknowledgement of the relevant circumstances and/or of the legal appraisal. However, an acknowledgement

can lead to a further reduction of the sanction (see 5.2 above). The Secretariat may for example demand an acknowledgement of the circumstances if there is an indication that the party plans to appeal despite the amicable settlement.

Draft of the amicable settlement/Negotiations on measures

The draft of the amicable settlement can be prepared by the Secretariat or by the companies themselves. The substance of the measures that the companies are obliged to implement is determined by their alleged conduct. The aim is to correct this conduct in future in order to prevent any further breach of competition law. The obligations must be as clear as possible, so that they can be easily implemented by the companies and so that their implementation can be easily confirmed by the competition authorities. The measures can also consist of an undertaking by the company that it will no longer carry out the alleged conduct, e.g. no longer insist on recommended prices; or no longer stipulate contractual export bans from the European Economic Area into Switzerland in its dealership agreements.

Conclusion of the amicable settlement

As soon as the Secretariat and the companies have reached an agreement on the substance of the commitments in the amicable settlement, the companies and the Secretariat sign the settlement. Ideally, the settlement takes effect during the investigations into the factual circumstances, for if the relevant facts of the case seem to be sufficiently substantiated by the available evidence, additional evidence gathering is no longer necessary after the conclusion of an amicable settlement, and this can speed up the process (see 5.2 above). After the conclusion of the amicable settlement, the Secretariat normally proceeds directly to prepare the draft decision.

The Secretariat's draft decision

The Secretariat includes the amicable settlement in its draft decision and requests ComCo to impose a sanction within a specified range, taking account of the conclusion of the amicable settlement by reducing the sanction (see 5.2 above). Before the Secretariat submits the draft decision to ComCo, the parties have the opportunity to comment on it in writing (Art. 30 para. 2 Cartel Act). The statements of the parties are usually much shorter than those in cases without an amicable settlement. In addition, in most cases a hearing by ComCo is rendered unnecessary (Art. 30 para. 2).

Approval and decision of ComCo

If ComCo or the relevant chamber agrees to the amicable settlement, it approves it and includes the companies' obligations agreed in the settlement in its decision. They replace official arrangements for adapting conduct. Along with the approval of the amicable settlement, in the same ruling, ComCo or the chamber decides on imposing any direct sanctions under Article 49a paragraph 1 Cartel Act. If ComCo or the chamber does not agree to the amicable settlement, it may return the draft decision to the Secretariat with proposals for its revision – something that has only ever occurred once in practice. If ComCo agrees to the amicable settlement, but not with the reasons for the decision, it may amend these.

Implementation of the measures by the companies

It is up to the companies to ensure that the measures they undertook to carry out in the amicable settlement are implemented after the ruling comes into legal effect. Violations of the amicable settlement can be penalised as violations of official orders (Article 50 and 54 Cartel Act).

5.4 Conclusion and outlook

Overall, amicable settlements are still attractive even after the introduction of direct sanctions, as they help to bring about a swift conclusion to proceedings. Much time is saved, particularly because, generally speaking, after the conclusion of an amicable settlement, a final examination and appeal proceedings are rendered unnecessary. This is just as advantageous to the authority as it is to the companies concerned.

An amicable settlement saves resources for both the competition authorities and the companies. It does not change the result of the investigation in any way, other than making official orders on adapting conduct unnecessary, and having a mitigating effect on the level of sanctions imposed. In particular, an amicable settlement does not mean that the authorities forego sanctions. However, the public generally regards a voluntary change in conduct in terms of an amicable settlement more positively than prohibitions handed down by ComCo.

Accordingly, from the point of view of the companies, there are many good reasons for reaching an amicable settlement. In order make the procedure for concluding an amicable settlement more transparent for companies, the Secretariat has published an information sheet on the ComCo website (www.weko.admin.ch > Bekanntmachungen/Erläuterungen > Merkblätter > Merkblatt des Sekretariats der WEKO: Einvernehmliche Regelungen).