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Commission de la concurrence COMCO
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Competition Commission COMCO

To the Federal Council

2019 Annual Report of the Competition Commission

(in accordance with Article 49 paragraph 2 Cartel Act)

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1 Foreword from the President

What would be the point of a sprint relay if it was agreed in advance which team was going to win? What would Geneva's Escalade Run be like, if the competitors worked out before the race who was going to take the first three places and in what times? How could we enjoy the Swiss wrestling championships if we already knew who would bite the dust in the final? There would be no top results and no prospect of genuine contests. The same applies in the world of business: companies that limit or indeed eliminate competition with each other, by agreeing on prices, for example, do not perform to their best. This has a negative effect on their value for money and their level of innovation. This is why various Swiss laws, such as the Cartel Act and the Internal Market Act, aim to encourage competition in markets and prevent restraints on competition. The Competition Commission (ComCo) once again dedicated itself to this task in 2019.

ComCo reached important decisions in the report period in a wide range of fields. From driving instructors to banks, from tractors to skis, from leasing payments to urea solution, from agreements and protection charges in public procurement to mergers between telecommunications providers, from transshipment centres to the Healthcare Occupations Act. Some cases are highly significant, others are of lesser importance. Some decisions are more beneficial for public authorities and taxpayers, others for consumers. All the activities serve to foster competition in Switzerland, as competition is the engine that drives Switzerland's success as a business location. What should also be highlighted at this point are the countless activities that are not so much in the public spotlight. For example, ComCo and its secretariat dealt with around 500 enquiries from businesses and members of the public in 2019, brought the issue of bid rigging to the attention of around 500 buyers of goods and services, and assessed in consultation procedures over 200 legislative projects, such as the Gas Supply Act.

The past two years have seen a substantial rise in the number of enquiries that ComCo has received from businesses, private individuals and public agencies in connection with bringing compensation claims following ComCo decisions on unlawful agreements. At times the debate has been quite heated, particularly about the recent decisions about unlawful agreements on automobile leasing and on bid rigging in the canton of Graubünden. For the first time, ComCo has taken account of compensation agreed during an ongoing procedure in order to reduce sanctions, in order to increase the incentives for similar payments to be made to other aggrieved parties.

The 2019 Annual Report aims to provide a concise account of the work that ComCo and its Secretariat have done in the past year. We hope to give you an insight into our activities and our dedication to ensuring the success of the Swiss economy.

Prof. Dr. Andreas Heinemann
President of the Competition Commission

2 The Most Important Decisions in 2019

2.1 ComCo Decisions

In the report year ComCo took two decisions in connection with **vertical agreements**:

Bucher Landtechnik contractually required its dealers to purchase all their spare parts for New Holland tractors from them. In addition to this purchase obligation, they ran an incentive scheme that linked the volume of spare parts purchased to the discount terms for New Holland tractors. The purchase obligation and the incentive scheme contractually prevented Bucher Landtechnik dealers from using foreign suppliers, and thus prevented competition. ComCo decided on 1 July 2019 that these practices, which had been followed from July 2016 until April 2017, constituted unlawful territorial protection agreements and fined Bucher Landtechnik around CHF 150,000. Bucher Landtechnik concluded a sanction-reducing amicable settlement with the competition authority. The company undertook in future not to stop dealers that sell New Holland tractors from purchasing New Holland spare parts from a source of their choice. The import of spare parts and tractors of the New Holland brand should now be possible without any restrictions.

On 19 August 2019 ComCo concluded an amicable settlement with Stöckli Swiss Sports. Between the end of 2003 and the end of 2018, unlawful vertical price-fixing agreements relating to **Stöckli skis** applied between Stöckli and its ski retailers, who were not permitted to undercut the Swiss sales prices that Stöckli stipulated. Agreements of this type inhibit competition and are in breach of the Cartel Act. ComCo imposed a sanction of around CHF 140,000 on Stöckli. The company cooperated with the competition authorities and undertook not to stipulate any minimum or fixed retail prices for dealers. An amicable agreement was also reached on online trading, cross-supplies between Stöckli retailers, and on direct and parallel imports of Stöckli products. Stöckli cooperated fully, which resulted in a substantial reduction in sanctions.

The following decisions were taken in 2019 in relation to **horizontal agreements**:

Based on a report from the Price Control Commission, in March 2018 ComCo opened an investigation into **driving instructors in the Oberwallis**. They had agreed recommended prices for practical driving instruction and for theory lessons. The information gathered in a search of houses and premises confirmed the agreements between the driving instructors. ComCo held in its decision of 25 February 2019 that these price recommendations constituted unlawful price-fixing agreements. At the same time, it approved the amicable settlement agreed with the Oberwallis Association of Driving Instructors (Fahrlehrerverband Oberwallis FVO). The FVO and its active members undertook not to issue recommended prices in future and to stop exchanging information on prices and tariffs. ComCo imposed a sanction totalling CHF 50,000.

In May 2019 ComCo's decided to terminate the investigation into suspected **agreements in the trade in precious metals**. Enquiries had failed to substantiate the suspicions that had led to the investigation being opened. The investigation related to possible agreements between Julius Bär, Barclays, Deutsche Bank, HSBC, Mitsui, Morgan Stanley and UBS relating to the trade in gold, silver, platinum and palladium.

At the beginning of June 2019, ComCo concluded two investigations in connection with agreements on **foreign exchange spot transactions between banks (FOREX)**. Traders at several international banks had sporadically coordinated their activities in relation to foreign exchange spot transactions involving certain G10 currencies in two separate cartels. Traders from Barclays, Citigroup, JP Morgan, the Royal Bank of Scotland (RBS) and UBS had participated in the "Three-way banana split" cartel between 2007 and 2013, while traders from Barclays, MUFG Bank, RBS and UBS were members of the "Essex express" cartel between 2009 and 2012. The coordination of certain G10 currencies was organised in chatrooms. The banks mentioned issued an amicable undertaking not to enter into agreements of this type in future. ComCo fined the cartels around CHF 90 million. An investigation into Credit Suisse is

continuing according to the ordinary procedure. The investigations against Julius Bär and the Zurich Cantonal Bank were stopped.

In February 2012, ComCo opened an investigation into numerous banks and brokers on suspicion of manipulating reference interest rates in the trade in interest rate derivatives. The investigation covers inter alia **Yen interest rate derivatives based on Yen LIBOR and Euroyen TIBOR**. At the end of 2016, certain enquiries were concluded with amicable settlements and fines. At the beginning of July 2019, ComCo's part-rulings chamber approved a further amicable settlement with Lloyds Bank and Rabobank. The fines amounted to just under CHF 700,000. The investigation relating to Yen interest rate derivatives based on Yen LIBOR and Euroyen TIBOR is continuing against UBS and HSBC and the brokers ICAP, RP Martin and Tullett Prebon.

In July 2019, ComCo's part-rulings chamber-imposed fines totalling CHF 30 million on eight finance companies that offer **vehicle leasing**. For several years they had exchanged information on special offers and on figures used to calculate leasing rates. With exception of Ford Credit Switzerland, all the companies under investigation reached an amicable settlement with ComCo and undertook not to enter into illegal agreements of this type again. No sanctions were imposed on the company that had been first to file a voluntary report, while sanctions were reduced on the other undertakings that had filed voluntary reports. The investigation is continuing under the rules of ordinary procedure against the company that did not conclude an amicable settlement.

In the summer of 2019, ComCo concluded the final two of ten investigations in the **canton of Graubünden**, "**Engadin II"** and "**Road construction"** (construction services in Graubünden). In the "**Engadin II"** decision, ComCo found that two, and in one case three, structural and civil engineering companies had agreed on bids in specific construction projects in the Oberengadin. The ten unlawful agreements affected construction and civil engineering projects for both private and public sector clients. The fines in this case amounted to just under CHF 500,000. In the larger "**Road construction**" investigation, ComCo found that in the period from 2004 to 2010 twelve road construction companies in Nord- and Südbünden had shared out the cantonal and communal road construction projects among themselves by agreeing on the bids they would submit. Agreements were reached on several hundred projects with a total value of at least CHF 190 million. Both the canton and its communes were affected by the agreements. On 19 August 2019 ComCo imposed fines totalling around CHF 11 million for this unlawful bid rigging. Nine of the twelve road construction companies had reached out-of-court settlements with the victims of their cartels before ComCo issued its decision. In the settlements they undertook to pay around CHF 6 million in total to the canton and the Graubünden communes affected (see Section 4.1). As a consequence, ComCo reduced the sanctions imposed on the nine companies by around CHF 3 million

In December 2019, ComCo concluded the investigation into Brenntag Schweizerhall and Bucher Langenthal by reaching an amicable settlement. From 2014 to 2017, the two companies shared out their customers for **AdBlue**. AdBlue is an aqueous urea solution that reduces the emissions nitrogen oxides from diesel engines. In the amicable settlement the two companies undertook not to share customers for AdBlue in future. In its decision ComCo took account of the fact that Brenntag is both a supplier and competitor of Bucher. As the vertical supply relationship between Brenntag and Bucher took precedence in the case in question, ComCo did not impose any sanctions.

ComCo made a detailed assessment of **two mergers** in the report year:

With their **Gateway Basel North** (GBN) project, SBB, Hupac and Rethmann want to create a hub for import and export movements and the trans-Alpine transit traffic of goods. When finally completed, the GBN should provide both landside (road and track) and ship-borne goods handling services. ComCo examined the plan in detail and decided not to raise any objections. Although the project may remove effective competition in the handling of containers, swap bodies and semi-trailers in the import and export business, this primarily relates to the turnover of goods transported by rail and that of goods transferred from ship to rail. However, the GBN will also result in substantial cost and time savings in combined transport. In view of statutory requirements for non-discriminatory access to the GBN and the other conditions imposed by the Federal Office of Transport (FOT), ComCo assumes that the GBN will

actually improve competition in import and export movements by rail. These advantages outweigh the disadvantages that the GBN's dominant position in the goods handling services sector will bring. Therefore, it was possible to approve the merger. In October 2019, the Federal Administrative Court upheld an appeal against the federal government's decision on funding for the GBN, with the result that CHF 83 million in federal funds will not be paid out for the project as yet, which has led to work being suspended.

ComCo also examined the planned merger between **Sunrise and Liberty Global** in detail. With the takeover of UPC and its cable network infrastructure, Sunrise would become the second largest telecommunications company in Switzerland. Like Swisscom, Sunrise would be able to offer fixed network, broadband internet and mobile telephony services, and digital television on its own infrastructure in Switzerland. ComCo examined the planned merger in detail to confirm whether there was potential for joint market dominance with Swisscom. It concluded that there would not be any collective dominance and that coordination between the two companies was unlikely, because the parties to the mergers and Swisscom are differently positioned. ComCo took the view that the merger would not lead to the creation or consolidation of a dominant position in any of the markets analysed. It therefore approved the planned merger.

ComCo issued two **recommendations under the Internal Market Act** in the report year.

From the start of 2020, the new **Healthcare Occupations Act** will regulate access to jobs for healthcare specialists in the cantons. The cantons will grant authorisation to work in various medical professions, such as nursing and physiotherapy. ComCo recommends that in principle the cantons should recognise professional licences from other cantons without further examination. Healthcare specialists should therefore be authorised to carry out their profession solely on the basis of the licence issued by their canton of origin. An additional review may only take place if there are specific indications that a person no longer meets the requirements for granting a licence in the canton of origin. Decisions on authorising healthcare specialists from another canton must be taken in a simple and quick procedure that is free of charge. After making these recommendations, the Secretariat was contacted by one association and persons who were affected. The action taken in the cantons made access possible in accordance with the internal market legislation, for midwives among other professions.

In spring ComCo issued a recommendation to the cantons that they should stop **imposing "protection charges" in connection with public invitations to tender**. These charges are levied by cantonal procurement offices in certain cases on companies interested in submitting a bid, partly in order to safeguard business secrets before the companies receive the tender invitation documents. The fee often amounts to several thousand francs. ComCo reviewed the legality of these charges from the viewpoint of the Internal Market Act. It has concluded that the imposing protection charges constitutes a barrier to market access and has a negative influence on competition. Potential bidders could be deterred from submitting offers. Any justification based on the Internal Market Act, for example that business secrets must be preserved, is basically out of the question. Normally less drastic methods are available, such as confidentiality agreements or issuing the tender invitation documents in stages. The solution ComCo has proposed has been adopted in the revised law act on public procurement.

2.2 Court judgments

In a ruling dated 6 June 2016, ComCo reached an amicable settlement with AMAG in the case "**VPVW Stammtische / Projekt Repo 2013"**. Two garages then challenged the ruling in the Federal Administrative Court. The Federal Administrative Court decided on 3 May 2018 not to consider the appeal brought by the companies that were not party to the amicable settlement on the grounds that they had no right to appeal. In the judgments dated 8 May 2019, the Federal Supreme Court confirmed the decision of the Federal Administrative Court. In an order dated 19 October 2015, ComCo had already imposed sanctions for participating in an unlawful agreement restricting competition on the four companies that had not reached an amicable settlement. Three of the four companies, including the two that had appealed to the Federal Supreme Court, have contested the ruling on sanctions; this appeal is currently pending before the Federal Administrative Court.

The Federal Supreme Court decided on 24 June 2019 on Ticketcorner's right of appeal against the ComCo decision to prohibit the **planned merger between Ticketcorner and Starticket**. The Federal Supreme Court reversed the judgment of the Federal Administrative Court and instructed the Federal Administrative Court to consider the appeal and reach a decision in the case.

In a judgment dated 26 June 2019, the Federal Supreme Court rejected the appeal by a party to the proceedings against the judgment of the Federal Administrative Court dated 24 October 2017 (ruling on publication). This allowed ComCo to publish its ruling on sanctions of 29 June 2015 in the case of **bathrooms (wholesalers of sanitary facilities)** in its entirety. With this judgment, the Federal Supreme Court confirmed its decision in the Nikon judgment and followed the arguments that ComCo had put forward.

On 30 January 2019, the Federal Administrative Court issued a decision in the case relating to the **publication of the final report on a preliminary investigation**. The Federal Administrative Court basically upheld the contested ruling: final reports on preliminary investigations are "decisions" within the meaning of Article 48 paragraph 1 Cartel Act and may be published (provided, as in the case in question, there is a public interest in publication). On two points, however, the Federal Administrative Court sided with the appellant and referred the matter back to ComCo for it to reassess the matters taken into consideration: on the one hand, the final report must be rendered anonymous (although appellants must accept that their identity may be obvious from the circumstances), while on the other the Federal Administrative Court regarded certain parts of the final report as business secrets, which therefore had to be redacted. The appellant has appealed the decision to the Federal Supreme Court.

On 29 November 2010, ComCo fined the company **SIX** around CHF 7 million because it had refused other terminal providers access to its **DCC** (Dynamic Currency Conversion) function. SIX Multipay had abused its dominant position in order to give preference to the debit/credit card terminals of its affiliated company SIX Card Solutions. The DCC function launched by SIX Multipay in 2005 was made available on the terminals of the affiliate, but not on those of other terminal providers. DCC involves the conversation of foreign currencies at retailers' card terminals. DCC allowed holders of foreign credit or debit cards to choose directly at the terminal whether they wanted to pay the cost of their purchase in Swiss francs or in their home currency. SIX had filed an appeal in the Federal Administrative Court against the ruling. In May 2019 the Federal Administrative Court published its decision, which for the most part confirmed the ComCo ruling. SIX has appealed this decision to the Federal Supreme Court.

On 24 October 2019, the Federal Administrative Court decided that **access to a voluntary report may only be granted** persons who are parties to proceedings in question. Whereas appeal proceedings in relation to granting access had until that point always been brought by the cartel members in order to prevent access, in this case for the first time a procurement agency, the Canton of Graubünden, requested more wide-ranging access. The background was its application for access to all the files in the Münstertal case, which has been concluded with full legal effect. ComCo had granted the applicant a limited right to inspect the files, preventing access to the voluntary admissions in particular. At the same time, it limited the use of the documents disclosed. The Federal Administrative Court followed ComCo's opinion, holding that the public interest in protecting the institution of voluntary reporting outweighed the interest of the procurement agency in gaining access to the files. The Canton of Graubünden has appealed the decision to the Federal Supreme Court.

On 27 May 2013, ComCo imposed fines amounting to around CHF 16.5 million on ten **sales partners/suppliers of French language books** in Switzerland for their obstruction of parallel imports. The wholesalers had built up distribution systems which they used to limit competition in the purchasing market for French language books. Because they had entered into agreements on exclusivity, bookshops were unable to purchase any books abroad during the period under investigation. As a result, between 2005 and 2011 hardly any parallel imports were made, as any efforts the bookshops made to obtain supplies directly from abroad at cheaper prices failed. On 30 October 2019, the Federal Administrative Court confirmed ComCo's decision, but reduced the sanctions imposed on the suppliers/sales partners in four cases. In total, the sanctions amounted to around CHF 14.5 million. Most of the parties have appealed the decision to the Federal Supreme Court.

In its decision of 9 December 2019, the Federal Supreme Court rejected the appeal by Swisscom against the decision of the Federal Administrative Court in the **ADSL** case, confirming the decision of the Federal Administrative Court, including the sanction of around CHF 186 million. The decisions of the two courts relate to a Competition Commission decision from 19 October 2009. ComCo concluded at the time that Swisscom had set the prices for advance service offers for broadband internet in comparison with the offers Swisscom made to end customers so high that other providers of telecommunications services were unable to make sufficient profits to survive in the market. This practice is known as margin squeezing. The sanction that ComCo imposed amounted to around CHF 220 million. On 14 September 2015 the Federal Administrative Court confirmed the substance of the decision that the Competition Commission had made in 2009, but reduced the sanction to CHF 186 million, a decision which has now been confirmed by the Federal Supreme Court.

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

Seven of the twelve parties in the case of **bid rigging in the canton of Graubünden** (see Section 1.1) have filed appeals in the Federal Administrative Court against the rulings issued by ComCo. Seven appeals relate to the decision on road construction, one to the Engadin II case.

In connection with the road construction investigation, it was suspected that road construction companies worked together as part of **"permanent consortiums"** in order to share out road construction projects among themselves in the longer term and to jointly agree on the level of bids submitted. ComCo has repeatedly stressed that from the standpoint of competition law, consortiums basically encourage competition and are therefore permitted. A permanent consortium, or the joint long-term cross-project allocation of construction projects and market splitting, however, has the potential to restrict competition in an unlawful manner and thus be contrary to competition law, but even so, it can still encourage competition. The Secretariat has therefore opened a preliminary investigation in order to clarify the facts in this case. The preliminary investigation will examine whether there are any indications of an unlawful restraint of competition or not.

The appeals against the ComCo decision from July 2016 that in several hundred tendering procedures between 2002 and 2009, eight road construction and civil engineering companies in the districts of **See-Gaster (SG) and March and Höfe (SZ)** had unlawfully discussed bids and decided which company was to be awarded the contract remain pending before the Federal Administrative Court. Some companies also took the view that ComCo's decision should not be published. One of the parties filed an appeal in the Federal Administrative Court against ComCo's two publication rulings from October 2017. In a judgement dated 25 June 2019, the Federal Administrative Court rejected the main parts of the appeal. The only part that was upheld related to individual passages of text in the ruling on sanctions, which contrary to ComCo's ruling on publication should be further redacted. The Federal Administrative Court decided that it was correct to publish the ruling, that there was no violation of the right to fair hearing, that there was no right to anonymity and that bandwidths were set correctly. The Federal Administrative Court has yet to issue its appeal decision in the main action.

On 25 May 2018, the Federal Administrative Court for the most part confirmed the ComCo ruling of 16 December 2011 in the case relating to **road construction and civil engineering in the canton of Aargau**, in which seventeen construction companies in the canton of Aargau had engaged in bid rigging and had therefore been fined by ComCo. One of the companies appealed the decision to the Federal Supreme Court; this appeal is pending. Two **procurement offices** from the canton of Aargau filed **requests to inspect** the unredacted ComCo ruling and the corresponding files. ComCo approved these requests for access in part. In a judgment dated 23 October 2018, the Federal Administrative Court upheld appeals filed by two construction companies against the ComCo decision and thus refused even

partial access. The EAER, working with ComCo, appealed these decisions relating to one of the procurement offices to the Federal Supreme Court. Clarification of the issue here is of fundamental importance, as it relates to the extent to which third parties, in particular victims of cartels, can be allowed inspect the files in order to assert their claims for damages before a ruling on sanctions takes full legal effect. ComCo has postponed its decision on several further requests for access while it awaits the decision of the Federal Supreme Court.

3.1.2 Building materials and landfills

In January 2015, ComCo opened an investigation into several companies in the building materials and landfill industry in the Bern area. After the investigation was divided into two cases (KTB-Werke and KAGA) for reasons of procedural economy, the smaller **KTB-Werke case** was concluded on 10 December 2018 with a ruling on sanctions from ComCo. The Kästli Group and the Alluvia Group had agreed on prices and price elements in the concrete and gravel industry for several years and divided up territories in the area in and around the city of Bern. Both parties to the proceedings appealed against the decision to the Federal Administrative Court. That case is pending. The larger of the two investigations, **KAGA**, has proven to be more time consuming in legal and factual terms but should be concluded in 2020.

On 5 March 2019, ComCo opened an investigation into **two surfacing works** in the Canton of Bern as well as against the shareholders of one of the two surfacing works. There are indications that the two surfacing works coordinated their market behaviour. A suspected agreement among the shareholders of one of the surfacing works not to compete with the jointly run surfacing works is also the subject of the investigation. In addition, there are indications that one of the surfacing works holds a dominant position that it has abused. More specifically, it is suspected that the company has given preferential treatment to its shareholders and has developed a long-term customer loyalty scheme to the prejudice of other surfacing works.

3.1.3 Waste disposal

Although the Office of the Price Supervisor found that there had been irregularities in connection with the incineration prices for the domestic waste disposal at the **Limeco waste incineration plant (KVA) in Dietikon**, it was unable to reach an amicable settlement with the company concerned. In order to issue a ruling, the Price Control Commission must consult ComCo on the issues of market power and effective competition. ComCo stated in its opinion dated 15 July 2019 to the Price Control Commission that Limeco had market power in the relevant market and that the prices in the relevant market were not the result of effective (price) competition.

Swiss Waste Incineration Plants (*Schweizer Kehrichtverbrennungsanlagen KVA*) are planning to build and run a joint **processing plant for hydroxide sludge**, a metal-rich residue from waste incineration. The SwissZinc AG has been set up in order to plan this plant, which is to be known as the SwissZinc Plant. SwissZinc has requested ComCo to assess its plans and has filed a report with ComCo under the objection procedure. The Secretariat opened a preliminary investigation on 29 October 2019. The result of the preliminary investigation is expected in the second quarter of 2020.

3.1.4 Raising awareness about bid rigging

In order not only to combat bid rigging, but to nip it in the bud, well-informed and trained procurement agencies are needed at all levels. The early recognition of signs of agreements is preferable to bringing proceedings under competition law. After **awareness-raising events on bid rigging** were held in 2009 and 2014 in the **German-speaking cantons**, the ComCo Secretariat went to visit the cantons again this year. Between May and December 2019, 22 events in 17 cantons were held on “Bid rigging and the Internal Market Act” (including some joint events in the half-cantons); around 500 people attended the events.

As in previous events, the aim was to raise awareness in procurement agencies about bid rigging, provide information about the more recent ComCo decisions, and equip the participants with instruments

they could use to recognise and prevent bid rigging. The events also focused on aspects of the Internal Market Act related to **procurements**. In particular, discussions covered definitions and procedures, as well as minimum standards and how they can be infringed.

In addition to this campaign, ComCo and the Secretariat made presentations at professional events held by associations, federal enterprises, etc.

3.2 Services

3.2.1 Financial services

In the financial services sector, two investigations in the case relating to currency exchange rates ("**Forex"**) were definitively concluded through amicable settlements. The case related firstly to the "Three-way banana split" cartel involving Barclays, Citigroup, JP Morgan, the Royal Bank of Scotland (RBS) and UBS, and secondly to the "Essex express" cartel, whose participants were Barclays, MUFG Bank, RBS and UBS. In total ComCo imposed sanctions of around CHF 90 million. An investigation is continuing against Credit Suisse under the ordinary procedure. Investigations into the Julius Bär Bank and the Zurich Cantonal Bank have been terminated (see Section 1.1).

The investigation into possible agreements between banks in the trade in **precious metals** has been terminated. The suspicions that had led to the investigation being opened were not substantiated in the course of the investigation.

In the IBOR investigations, a further milestone was successfully reached with the cases against Lloyds Bank and Rabobank relating to Yen interest rate derivatives based on **Yen LIBOR** being concluded with an amicable settlement and the payment of fines. The Yen LIBOR / Euroyen TIBOR and EURIBOR investigations continue against other parties (see Section 1.1).

In the investigation into **automobile leasing**, the chamber for part-rulings approved an amicable settlement in relation to eight of the nine parties, imposing sanctions of around CHF 30 million, because they had exchanged information on the level of leasing interest payments. No agreement could be reached with Ford Credit Switzerland GmbH, with the result that the investigation is continuing against this company under the ordinary procedure and will be concluded with a final ruling from the plenary Commission. One addressee of the partial ruling filed an appeal, with the result that proceedings have only reached a legally binding conclusion in respect of seven of the parties (see Section 1.1).

The investigation in the **Boycott Apple Pay** case, which was opened last year, was continued in the report year. A number of interviews conducted in this case were challenged. There is disagreement between the parties and the authority mainly in relation to the question of which of the current and former employees of one of the companies should be questioned as witnesses and which as parties. The Federal Administrative Court held in a judgment at the start of December that former senior executives should be questioned as witnesses, but could decline to make a statement on the basis of the company's right to remain silent (*nemo tenetur* principle). In order to resolve the issue of whether a non-statutory right to refuse to testify of this type exists, the authority referred the decision to the Federal Supreme Court.

The Secretariat chalked up a success in the appeal proceedings in the **DCC** case. In its judgment of 18 December 2018, the Federal Administrative Court confirmed ComCo's ruling on sanctions dated 29 November 2010 against the SIX Group and SIX Payment Services in its entirety. However, the appellants have referred the decision to the Federal Supreme Court.

In addition, the Secretariat received several requests for advice in relation to financial services. Worth mentioning here is the Secretariat's advice in relation to the replacement of the LIBOR reference interest rates by the **SARON** (Swiss Average Rate Overnight). The Secretariat was asked by the Swiss National Bank's national working group for reference interest rates to review the permissibility under competition law of certain recommendations in relation to credit products based on the SARON (e.g. mortgages).

Lastly in the financial services sector, various **company mergers** were assessed and permitted, including CS's sale of Investlab to Allfunds.

3.2.2 Healthcare

In September 2019, the competition authorities opened an investigation into various Swiss and international companies involved in the manufacture, distribution and sale of the pharmaceutical agent **scopolamine butylbromide**. There are indications that these companies have been keeping the sales prices of this agent at a high level and have been dividing up the markets by region. As part of the investigation, which is being conducted in cooperation with the European competition authorities, an assessment must be made of whether there actually are any unlawful restraints of competition.

In the course of the year, the Secretariat responded to five **requests for guidance** from the healthcare sector. Three were related to the possibility of fixing tariffs for hospital and out-patient services in the supplementary insurance sector. Based on the precedent of the competition authorities in relation to tariffs and prices, the Secretariat took a rather sceptical view of this.

In addition, ComCo was called on to assess the following **company mergers** in the healthcare sector: Migros / Topwell; Bristol Meyer Squibb / Celgene; Medbase AG / LUKS; Medbase AG / Spital STS AG; Medbase AG / Zur Rose. ComCo gave the green light to all these mergers following a preliminary assessment.

Numerous enquiries from members of the public in relation to healthcare services and more than 150 consultation procedures, for the most part relating to parliamentary proposals on social insurance and healthcare markets, claimed additional resources from the Secretariat.

3.2.3 Liberal professions and other services

The investigation opened at the start of 2018 into the **Oberwallis Driving Instructors Association (FVO)** and its members was concluded in spring with an amicable settlement. The active members agreed to pay a sanction of CHF 50,000 and procedural costs of CHF 30,000 for participating in an unlawful price agreement. This competition law investigation, which was triggered by a report made by a member of the public to the Office of the Price Supervisor, illustrated how well the Price Office of the Price Supervisor and ComCo work together (see Section 1.1).

The investigation opened in 2018 into ten **Geneva electrical companies** is continuing.

The rates of commission that the **online booking platform Booking.com** charges hotels in Switzerland are the subject matter of ongoing proceedings by the Price Supervisor. In the procedure provided for in the Price Supervision Act, the Price Supervisor consulted ComCo at the beginning of 2019 for its assessment of Booking.com's market position. ComCo concluded in its opinion in April 2019 that Booking.com is a company with significant market power in accordance with the Price Supervision Act and that the rates of commission charged by Booking.com are not the result of effective competition. Based on this analysis, the rates of commission charged by Booking.com fall within the Price Supervisor's jurisdiction. The Price Supervisor is now assessing whether the current rates of commission charged by Booking.com constitute an abuse under the Price Supervision Act.

Lastly, the Secretariat conducted several **proceedings in the field of sport**, in particular in relation to the International Federation of Mountain Guides Associations, tandem parachute jumping and tandem para-gliding and hang-gliding flights. As private associations regulate these activities, their organisation could make access to the market more difficult for companies which are not members.

3.3 Infrastructure

3.3.1 Telecommunications

In December 2019, the Secretariat opened a preliminary investigation in the case of **Swisscom Directories** into Swisscom and Swisscom Directories. The aim is to determine whether there is any evidence that Swisscom or Swisscom Directories holds a dominant position in relation to directories and digital marketing and if so, has unlawfully abused that position. The investigation is primarily based on a suspicion of data being withheld from third parties and of the linkage of various services.

Further progress was made in the preliminary investigation in connection with the **broadband networking of business locations (WAN connection)**.

ComCo subjected the planned merger between **Sunrise and Liberty Global** to a detailed examination, ultimately giving the merger the green light (see Section 1.1).

Also in the telecommunications sector, ComCo had to assess the merger between **Swisscom Directories and Websheep**. Here Swisscom Directories planned to take over 100% of the shares in Websheep from Swissvit. Following the preliminary assessment of the plan, ComCo gave it the go-ahead.

3.3.2 Media

The investigation opened by ComCo in May 2017 into UPC Switzerland GmbH in response to allegations that it was abusing a dominant position in relation to the broadcasting of **ice hockey on Pay TV** was continued and various procedural rulings had to be issued. 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.

ComCo assessed three company mergers in the media industry. In the merger between Tamedia and Zattoo International, Tamedia intended to acquire exclusive control of Zattoo International. Infront / Ringier II involved Ringier obtaining exclusive control of Infront Ringier Sports & Entertainment Switzerland. In the case of Tamedia / Planet 105, Tamedia planned to obtain exclusive control of the Planet 105 radio station business. In all these cases, ComCo gave the green light to the mergers following the preliminary assessment.

On 30 October 2019, the Federal Administrative Court essentially confirmed ComCo's decision of 27 May 2013 in the case of **book pricing in French-speaking Switzerland** (**marché du livre en français**). The court concluded that nine companies had entered into agreements with their business partners that amounted to a ban on passive sales by other authorised retailers, and had thus eliminated competition in the procurement market for French-language books (see Section 2.2).

3.3.3 Energy

On 30 January 2019, ComCo opened an investigation in the **network access** case into Erdgas Zentraschweiz (EGZ) and ewl Energie Wasser Lucerne Holding (ewl). The investigation will examine whether EGZ and ewl hold a dominant position in relation to the transport and in particular the supply of natural gas via their natural gas networks and have effectively abused this position by refusing to allow third parties access to their networks, thus preventing these third parties from supplying natural gas to certain end customers in the ewl network region.

The **preliminary investigation** into a **local gas network operator** was terminated with a final report dated 23 July 2019. Although the Secretariat concluded that there were signs of unlawful practices by a dominant company, the decision was taken not to open an investigation at present, provided that practices that had been criticised stopped as of 1 October 2019. The case relates primarily to the question

of the company's own end customers being charged different amounts for using the network in comparison with the charges paid by those supplied by third parties.

In September 2019, the Secretariat opened a preliminary investigation into an electricity grid operator. The preliminary investigation aims to establish whether there is any evidence that this operator has been using **data from its monopoly area** for activities in other markets, and in particular in relation to the installation and maintenance of photovoltaic systems. The case could involve an unlawful practice by a dominant company.

ComCo was required to assess two **mergers** in the energy sector: in the case of BKW Energie / swisspro group, BKW Energie planned to acquire 100% of the share capital in the swisspro group. The case of Gasverbund Mittelland / Gaznat / SET Swiss Energy Trading involved a planned merger relating to unbundling measures at SET Swiss Energy Trading. Swissgas and Erdgas Ostschweiz wanted to sell their shareholdings in SET to the other shareholders Gasverbund Mittelland, Gaznat and Erdgas Zentralschweiz. In both cases, ComCo gave the go-ahead to the projects after the preliminary assessment.

In the **electricity** sector, both the Secretariat and ComCo were requested on several occasions to provide opinions in office consultation procedures and in legislative consultation proceedings and hearings respectively, in particular with regard to the Federal Council's plan for complete market liberalisation in relation to the supply of end customers. In addition, the consultation period for the new **Gas Supply Act** will run until 14 February 2020.

3.3.4 Transport

In the goods transport sector ComCo subjected the planned **SBB / Hupac / Rethmann / GBN** merger to a detailed examination. ComCo ultimately decided to approve the merger (see Section 1.1).

In December 2019, ComCo also began a detailed examination of the planned **SBB Cargo** merger. In this merger plan, the SBB (Swiss Federal Railways), Planzer-Holding and Camion-Transport Wil CT intend to acquire joint control of SBB Cargo. The preliminary assessment of this takeover revealed signs that a dominant position would be established or strengthened. This would affect various markets for the transport of freight by rail, operator services and goods handling services. There are also indications that a collective dominant position would be established in relation to goods handling services. When it conducts a detailed examination, ComCo in each case has a statutory period of four months to assess the question of whether a dominant position will be established or strengthened with the potential for eliminating effective competition.

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 to the Federal Administrative Court against the ruling of 2 December 2013, which concluded the air freight investigation and led to sanctions totalling around CHF 11 million being imposed on 11 airlines for entering into horizontal price-fixing agreements. Also in dispute was whether and to what extent the ruling of 2 December 2013 will be published. On 30 October 2017, the Federal Administrative Court partly upheld the nine appeals filed in relation to the extent of publication. After the matter was referred back to ComCo, on 12 November 2018 ComCo ordered a revised version to be published. Once again appeals have been filed against this decision in the Federal Administrative Court.

3.4 Product Markets

3.4.1 Focus on vertical agreements

The prosecution of agreements affecting competition that prevent parallel and direct imports and/or limit the opportunity for resellers to set prices has been a priority activity for the competition authorities for several years. In 2019 ComCo concluded two investigations, **Bucher Landtechnik** and **Stöckli**, with amicable settlements (see Section 1.1).

On the subject of **"Switzerland as an island of high prices"**, the Secretariat conducted several market monitoring procedures in response to suspicions of price-fixing agreements, market foreclosures and the prevention of online trading. In several cases, contracts were revised and circulars sent to sales partners in order to achieve clarity and prevent misunderstandings.

3.4.2 Consumer goods industry and retail trade

The Secretariat conducted a survey of major Swiss retailers as part of a market monitoring procedure in order to clarify in particular whether retailers are confronted with restrictions of relevance to competition when **purchasing foodstuffs abroad**. The survey of retailers did not disclose any specific indications of unlawful restraints of competition in terms of the Cartel Act. On the other hand, the retailers interviewed pointed out that state trade barriers, such as high customs duties on agricultural products and regulations related to packaging, declaration and the proof of origin could obstruct parallel imports.

At the end of November 2019, the Federal Council proposed the **repeal of industrial tariffs** as part of a package of measures to counter Switzerland's reputation as an "island of high prices", and approved the related dispatch for the attention of Parliament. The abolition of industrial tariffs would mean that most industrial products could be imported duty-free. This would largely eliminate the need for proof of origin for the duty-free import of industrial products. However, for the import of foodstuffs, customs duties on agricultural products take priority, and will continue to apply. ComCo strongly supported the abolition of industrial tariffs in the consultation procedure. It regards the removal of tariff and non-tariff barriers to trade – in particular the unilateral abolition of industrial tariffs, the reduction of customs duties on agricultural products and the reduction of exceptions from the Cassis-de-Dijon Principle as well as of regulations and standards that apply specifically to Switzerland – as an obvious and potentially successful way of encouraging competition in Switzerland and thus of putting perceptible pressure on prices.

3.4.3 Watch industry

On 16 December 2019, ComCo ordered precautionary measures in the Swatch Group Supply Stop reassessment procedure, based on the **Swatch Group Supply Stop** investigation. In October 2013 ComCo approved an amicable settlement with the Swatch Group. This provided that the subsidiary ETA Manufacture Horlogère Suisse (ETA) would have to supply its customers until the end of 2019 with a gradually diminishing quantity of mechanical watch movements and thereafter would no longer be obliged to supply these parts. In the intervening period, it was expected that a competitor to ETA would establish itself in the market and be able to meet the demand for mechanical watch movements from independent watch manufacturers. ComCo reserved the right to take a new decision if by the start of 2020 there were insufficient alternative offers in the market to the watch movements produced by ETA. As there were indications that this was going to be the case, ComCo opened a reassessment procedure in November 2018. A decision before the end of 2019 was not possible. Accordingly, ComCo ordered **precautionary measures** until the time of the decision, but at the latest until 31 December 2020. These measures will ensure that the reassessment procedure can have various outcomes. They formally prolong ETA's obligation to supply until ComCo has made its final decision. Because of ETA's ordering process, deliveries are being temporarily halted. This means that ETA is temporarily not required to supply current customers, but at the same time it is not permitted to supply selected (major) customers either. This guarantees that ETA does not jeopardise the investments that its competitors have already made. ETA is also permitted to supply SMEs with mechanical watch movements on a voluntary basis. However, all SMEs must be treated equally if any supplies are made.

3.4.4 Automotive sector

On 9 December 2019, ComCo expanded the **Concessionari Volkswagen** investigation, which was opened in June 2018, to include further offences and further authorised dealers of VW Group vehicles in the canton of Ticino. The subject of the investigation, in addition to suspected unlawful bid rigging in the purchase of VW Group cars and commercial vehicles in the canton of Ticino, now includes potentially unlawful agreements on the conditions of sale for the vehicles and an allocation of markets by region.

In September 2019, ComCo updated the **MV Notice** and the related **explanatory guide**. Based on the judgment of the Federal Supreme Court in the case of *Gaba* and the Secretariat's latest decisions in connection with manufacturers' warranties, ComCo made various modifications to the Notice for reasons of legal certainty and transparency. It took the opportunity to extend the MV Notice's term of validity to 31 December 2023. The changes relate solely to updating the MV Notice and the explanatory guide to the Notice; the question of any revision will be considered in the run up to the expiry of the Notice at the end of 2023.

The Secretariat considered whether and how AMAG is implementing the measures proposed in the **AMAG Sales Network** preliminary investigation to eliminate and prevent the restraints of competition identified in the final report. The Secretariat will continue to monitor developments in this connection.

As part of a market monitoring procedure, the Secretariat examined the legality of **restricting manufacturers' warranties** to vehicles that have been sold through official dealers. It concluded that the invalidity of the manufacturer's warranty on directly or parallel imported vehicles may constitute an indirect absolute territorial protection. However, in the context of a selective distribution system that is permitted by the Cartel Act, a manufacturer or importer of vehicles is not in breach of the Cartel Act if it only grants the manufacturer's warranty on new vehicles that have been sold through authorised dealers. ComCo has amended the explanatory guide to the MV Notice to explain this point.

In addition, the Secretariat followed up several reports from dealers and workshops that an automobile manufacturer was imposing restrictions on the **purchase of spare parts** by its authorised sales partners. There was also a suspicion that the manufacturers of spare parts were being restricted in the sales they could make to the authorised dealers and workshops. Under the MV Notice, such restrictions are regarded as seriously harmful to competition. The Secretariat confronted the automobile manufacturer concerned with the accusations and issued recommendations on how to correct the situation, which the manufacturer has implemented.

In relation to various **terminations of dealership and service partner contracts**, the Secretariat assessed whether these had been terminated in accordance with the periods of notice laid down in the MV Notice. The competition authorities do not normally intervene if the periods of notice are honoured, unless there are specific indications of unlawful restraints of competition. The MV Notice ensures that workshops that are not tied to a specific brand can offer to carry out repairs and servicing. The Secretariat consistently follows up individual cases where there are indications of restrictions to the access that independent workshops have to spare parts or technical information.

The termination of contracts was also a priority in the discussion with the civil courts **on the parallel enforcement of the Cartel Act through civil and administrative proceedings** which was held in November 2019. A large percentage of the civil disputes based on competition law that the civil courts have considered in the past ten years related to terminations of service partner contracts. The representatives of the competition authorities pointed out that, unless the case is clear, the civil courts are required to refer the question of whether there is an unlawful restraint of competition to ComCo for an opinion. In addition, possible measures to strengthen the civil law on cartels were highlighted.

In two judgments dated 8 May 2019 in the case of **VPVW Stammtische / Projekt Repo 2013**, the Federal Supreme Court confirmed the decisions of the Federal Administrative Court that parties not participating in the amicable settlement were not entitled to contest the approval ruling (see Section 1.2).

3.4.5 Agriculture

ComCo took part in the consultation procedure on **Agriculture Policy from 2022 (AP22+)** and made several proposals. These included the further dismantling of frontier protection, the replacement of the award of tariff quota shares based on domestic performance with more competitively neutral award procedures, and the abolition of milk price subsidies.

In 2019, the Secretariat was involved in around 30 office consultation procedures relating to agriculture, for example with regard to amendments to ordinances, the AP22+ and around 20 proposals from Parliament. In addition, the Secretariat received a number of enquiries relating to agricultural topics, which led to meetings, the provision of advice and market monitoring procedures.

Furthermore, in 2019 ComCo dealt with several reports of planned mergers between companies operating in downstream agriculture markets. For example, ComCo assessed the setting up of a joint undertaking between IP-Suisse and the Migros Group in relation to the pig trade. The preliminary assessments of the reported planned mergers revealed no indications that they would establish or consolidate a dominant position, so ComCo decided against a detailed examination in each case.

3.4.6 Other sectors

On 2 December 2019, ComCo concluded the **AdBlue** investigation into Brenntag Schweizerhall and Bucher Langenthal with an amicable settlement (see Section 1.1).

In September 2019, the Secretariat opened a preliminary investigation into an exclusive importer in connection with the **sale of motorcycles and scooters**. The subject of the preliminary investigation includes indications of possible unlawful pricing and territorial protection agreements related to the sale of motorcycles and scooters.

On 30 January 2019 the Federal Administrative Court issued its decision in a case relating to the **publication of the final report of a preliminary investigation** (see Section 1.2). According to the judgment, the ComCo Secretariat may publish final reports from preliminary investigations, but they must be anonymised.

3.5 Internal Market

The Federal Act on the Internal Market (**Internal Market Act**) guarantees intercantonal freedom of movement and a public bidding process for concessions, as well as ensuring that certain minimum requirements apply to cantonal procurements. ComCo is responsible for supervising compliance with the Internal Market Act.

The Internal Market Act provides for a right of access to inter-cantonal markets according to the origin principle, i.e., that a person must in principle be allowed access to the market in a new canton if he or she is lawfully entitled to carry out the activity in question in the canton he or she has come from. One of the key areas in which ComCo is active on issues relating to intercantonal freedom of movement is the **healthcare sector**. ComCo issued a recommendation on the implementation of the Healthcare Occupations Act (see Section 1.1) and the Secretariat also conducted a market monitoring procedure on access to the market in the case of out-patient community nursing services (Spitex).

The **monitoring of the Spitex market** examined the access to the market granted to Spitex organisations from other cantons in 13 cantons. The market monitoring procedure was based on a report from a Spitex organisation that operates throughout Switzerland. The analysis revealed major cantonal differences, with only a minority of cantons applying the internal market requirements correctly. The majority of cantons did not properly comply with the requirements of the Internal Market Act on the authorisation of Spitex organisations from other cantons. Criticism relates in some cases to over-complicated procedures and slowness, and to charges being imposed for procedures in certain cantons. In addition, many cantons made the error of failing to grant authorisation based on the authorisation granted in the canton of origin, instead demanding additional documentation without having sufficient legal grounds for doing so. The Secretariat analysed practices in the individual cantons and reported the results to the cantonal departments of health.

ComCo also issued two **recommendations to the authorities in Ticino** on the subject of free market access. In a first recommendation dated 25 February 2019, ComCo considered the draft of a new Ticino Small Businesses Act (Legge sulle imprese artigianali, LIA). ComCo concluded in particular that the register based on the new LIA was not organised in accordance with internal market law. On 25 February

2019, ComCo issued a second recommendation to the cantonal authorities in Ticino on how to implement an amendment to the regulations of the Ticino Construction Management Act in accordance with internal market law. In particular, the recommendation dealt with the issue of how advance notice of an intended activity should be formulated in specific terms.

The Internal Market Act also contains minimum requirements for cantonal procurements. ComCo made a recommendation on the limited permissibility of **protection charges** (see Section 1.1) and on 21 October 2019 issued an expert opinion on the question of applying the **place of performance principle**. The ComCo opinion was a response to the cantons on the question of whether the place of performance principle applies to conditions of employment at cantonal level under the revised law on public procurement. On the basis of the Internal Market Act, the place of origin principle continues to apply.

The Federal Parliament approved the **revised law on public procurement** on 21 June 2019. On 15 November 2019, the cantons approved the revised Intercantonal Agreement on Public Procurement (IAPP), which largely harmonises cantonal law with the new federal law. ComCo has highlighted competition issues and in particular internal market law aspects in the course of the revision of the law on public procurement in the last few years. Most of the points that ComCo made were taken into account, including ComCo's right of appeal, which remains in the Internal Market Act. As part of the revision of federal public procurement law, the Internal Market Act was also selectively revised. In substantive terms, for example, concessions in the public interest will in future be made subject to the law on public procurement.

In addition, an increasing number of **reports** are coming in on practices adopted by contract awarding entities that may be contrary to the law on public procurement and the internal market. Where there are possible infringements of the minimum requirements on procurement in the Internal Market Act, the Secretariat normally makes requests for information and proposals to the contract awarding entities concerned. The question frequently comes up of whether the purchase of electricity is subject to the law on public procurement. In response to an enquiry, the Secretariat considered as part of a market monitoring procedure the extent to which the **procurement of electricity** by the city transport corporations in Bern is subject to the law on public procurement, and whether a contract for procurement can be awarded without a tendering process.

Under the Internal Market Act, the **transfer of cantonal monopolies** must be carried out by means of non-discriminatory invitations to tender. ComCo submitted an opinion to the Federal Supreme Court in a case relating to **emergency services** in the canton of Valais. The main question that had arisen there was whether a public tendering process was required to licence companies for providing rescue services.

The **campaign to raise awareness** of bid rigging and of the law on the internal market conducted in the cantons (see Section 2.1.4) has helped improve understanding of how the Internal Market Act applies.

3.6 Investigations

In 2019, three series of searches of premises were carried out. The first related to the investigation into surfacing works in the canton of Bern, while the second related to the scopolamine butylbromide investigation. This was the first series of searches that had taken place simultaneously in all three language regions of Switzerland. The third series of searches took place at the end of year in the canton of Ticino, when the Concessionari VW case was expanded to include additional companies.

In relation to the unanswered question of which former and current company employees and executives can claim the right to remain silent when questioned (*nemo tenetur*), the Federal Administrative Court issued a decision at the start of December confirming an earlier judgment according to which former executives could be interviewed as witnesses, but had the right to remain silent on any matters that could incriminate their company. This decision has been appealed to the Federal Supreme Court so that this issue can be resolved by a decision of the highest court (see Section 2.2.1).

Lastly, mention should be made of a regrettable development in an international context. In the report year, the current ECN Forensic IT Working Group changed to become the ECN Digital Investigations and Artificial Intelligence Working Group. The new group is open only to representatives of EU and EEA member states. The Secretariat will attempt to compensate at least in part for Switzerland's exclusion by stepping up bilateral contacts with the authorities in the member states and with the EU Commission.

3.7 International

EU: The competition law cooperation agreement between Switzerland and the EU, which has been in force since 1 December 2014, continues to prove its value. Particularly worthy of mention are the coordinated searches of houses and business premises that took place in the report year. In Switzerland, in various EU member states and in other countries where the EU cooperation agreement does not apply, however, searches were carried out simultaneously at various companies suspected of being involved in international price and territorial agreements. The EU cooperation agreement provides that the competition authorities in Switzerland and the EU can exchange information that they have obtained in their investigations provided the company that discloses the information expressly agrees in writing to its transmission. Without this consent, the information can only be transmitted, in particular for use as evidence, if both competition authorities are investigating the same or associated practices – which was the case in the proceedings mentioned above – and the requesting competition authority submits a specific written request. Information from voluntary admissions and from negotiations on a settlement is never passed on without the express written consent of the company concerned.

In June 2019, ComCo played host to the 10th EUROCOMP, a **conference of European competition authorities** that facilitates technical exchanges. The conference was inaugurated in 2010 by the Netherlands. It is held annually and attended by around ten national authorities, as well as representatives of the European Court of Justice and the EFTA Supervisory Authority. Workshops are held for participant authorities to present their most recent cases and the latest issues, which are then discussed. In 2019, in addition to ComCo as the host, the competition authorities from Portugal, Belgium, Serbia, Slovenia, Croatia, Denmark, Germany, France, Norway, Hungary, Italy and the Netherlands as well as the EFTA supervisory authority and the EU Court of Justice were represented. The programme was rounded off by two presentations: Dennis Oswald from the International Olympic Committee (IOC) and Philippe Dubey from Court of Arbitration for Sport spoke about the interaction between sports law and the law on cartels.

ECN: A representative of the Secretariat took part in the meetings of the banking and payment group of the European Competition Network (ECN). He provided regular updates on the implementation of the amicable settlement on reducing the interchange fee in Switzerland.

Germany: In the report year, talks continued with the aim of negotiating a bilateral agreement with Germany on cooperation in the field of competition.

OECD: The appointment of the President of the Competition Commission to the office of the OECD Competition Committee was formally confirmed. The office of the Competition Committee decides which issues are discussed in the Competition Committee and in the working groups on Competition and Regulation and on Cooperation and Enforcement. In the report year, the Secretariat prepared written contributions on the subjects of "Judicial review of sanctions in competition law cases" and "Access to files and protection of confidential information". At the six-monthly meeting in Paris, the following topics were among those discussed: "FinTech" and "Disruptive Innovation" in the financial markets, licensing of rights to intellectual property and competition law, and vertical mergers in the technology, media, and telecommunications sectors. One priority issue is competitive neutrality and how to deal with state measures that restrict competition.

ICN: In 2019, the competition authorities played an active role in the further development of the International Competition Network (ICN). The focus was on Switzerland's participation in the ICN Framework for Competition Agency Procedures (CAP), which came into force in 2019. The CAP is a non-binding

letter of intent signed by its founder members that regulates fundamental principles of procedural fairness. Recently, various Asiatic and African countries have joined the CAP, alongside the USA, Australia, the EU and most European countries. The current number of members is 72. The member authorities have confirmed their current practice of granting the parties to proceedings recognised fundamental rights. In addition to ensuring compliance with basic legal standards, the CAP aims to improve cooperation among the participant competition authorities and increase the transparency of the various national procedures. A delegation from the Swiss competition authorities attended the ICN annual conference in Cartagena, Colombia in May 2019. The event was devoted to the subject of the digital economy. The Director of the Secretariat made a presentation at the plenary session on how the Swiss competition authorities used ICN work products in their investigations. In addition, the Secretariat answered a complex OECD/ICN questionnaire on cooperation among competition authorities. The Secretariat staff in the ICN groups on advocacy, cartels, mergers and unilateral conduct participated in various conference calls, discussions that were ultimately reflected in various ICN information documents. The report year saw the publication of information documents on incentivising voluntary admissions, the civil law enforcement of competition law, recommended approaches to investigation proceedings and cooperation between competition authorities in assessing company mergers.

UNCTAD: At the UNCTAD annual conference, the draft of "Guiding Policies and Procedures under Section F of the UN Set on Competition" (GPP draft) was presented and approved by the members, who included the Director of the Secretariat. The Secretariat participated in the International Cooperation working group, which prepared the GPP draft and took turns with SECO in participating in the video conferences. The GPP draft will be presented for examination and approval next year at the UN Review Conference in New York and should help to promote international cooperation and to simplify coordination between competition authorities.

3.8 Legislation

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

- The **Altherr Parliamentary initiative** of 25 September 2014 "Excessive import prices. End compulsory procurement on the domestic market" (14.449), which was endorsed by the committees of both Councils, was abandoned in mid-September 2019 because of the pending popular initiative "Stop the island of high prices – for fair prices (Fair-price Initiative)" and the indirect counter-proposal by the Federal Council.

- The **Bischof Motion** of 30 September 2016 "Ban adhesion contracts between online booking platforms and the hotel industry" (16.3902) was approved by both Councils. The concern raised in the Motion should be resolved by an amendment to the Federal Act on Unfair Competition. The EAER is currently preparing a bill for submission to the consultative committee.

- The **Fournier Motion** of 15 December 2016 "Improve the position of SMEs in competition proceedings" (16.4094) demands deadlines for competition law administrative proceedings, compensation of party costs even in first instance administrative proceedings, more lenient sanctions for SMEs and the publication of decisions only after they have become legally enforceable. Following its approval by the Council of States, the National Council accepted the first two points and rejected the other two. The EAER is currently drafting a bill that will be submitted for consultation.

- The **National Council Economic Affairs and Taxation Committee Motion** of 14 August 2017 "Create an effective instrument to prevent unreasonable periodical prices" (17.3629) was abandoned after its rejection by the Council of States on 11 March 2019.

- The **Pfister Motion** of 27 September 2018 on the "Effective implementation of the Cartel Act in the motor vehicle sector" (18.3898) demands that the Federal Council enact an ordinance to protect consumers and SMEs from practices in the motor vehicle sector that distort competition. The Federal Council has called for the motion to be rejected, but the Councils have yet to consider it.

- The **Nantermod Motion** of 12 December 2018 on “Fair and effective procedures in competition law” (18.4183), which calls for changes to the procedural rules on inspecting files and compulsory fees in preliminary investigations, has not yet been considered in the Federal Assembly.

- The **Français Motion** of 13 December 2018 “The revision of the Cartel Act must take account of both qualitative and quantitative criteria in assessing the illegality of an agreement restricting competition” (18.4282), which calls for an amendment to Article 5 Cartel Act, was assigned by the Council of States to the Council of States Economic Affairs and Taxation Committee (EATC–S) on 20 March 2019 for preliminary discussion.

- The **Bauer Motion** of 14 December 2018 on “ComCo investigations: the presumption of innocence must take precedence” (18.4304) demands the repeal of Article 28 Cartel Act, which provides for the public announcement of the opening of an investigation, naming the parties. It has not yet been considered.

- The **Basel-Stadt cantonal initiative** dated 14 March 2018 “Switzerland as an island of high costs and high prices. For fair procurement prices” (18.304) was rejected by the Council of States on 18 June 2019.

- The **Molina postulate** of 9 May 2019 “Strengthen merger controls in the case of direct foreign investments” (19.3491) has yet to be debated in Parliament.

On 29 May 2019, the Federal Council approved its dispatch on the popular initiative “Put an end to Switzerland as an island of high prices – for fair prices (**Fair Prices Initiative**)” and on the indirect counter-proposal (an amendment of the Cartel Act) (19.037; BBl 2019 4877). The popular initiative is currently being debated by the National Council. The indirect counter-proposal, which expressly provides for the introduction of the concept of relative market power, but which is limited to preventing misconduct by companies in cross-border competition, was accepted by the National Council Economic Affairs and Taxation Committee (EATC-N) at the beginning of November 2019 with certain adaptations. The EATC-N has therefore called for the popular initiative to be rejected. The popular initiative and the indirect counter-proposal will probably be debated in the National Council’s spring session in 2020.

SECO has overall responsibility for drafting the revision bills for the Administration. The Secretariat plays a part in this work.

4 Organisation and Statistics

4.1 Competition Commission, Secretariat and Statistics

In 2019 ComCo held 14 full or half-day plenary sessions. At these meetings it took decisions on matters related to the Cartel Act and the Internal Market Act. More details of these can be found in the statistics below (see Section **Error! Reference source not found.**).

The following staff changes took place at ComCo: **Andreas Kellerhals** stood down from the Competition Commission at the end of 2019 as he had served the maximum term of office of twelve years.

4.2 Statistics

As of the end of 2019, the **Secretariat** employed 74 (previous year 68) staff members, 41.9 per cent of whom were women (previous year 39.7%). The 74 employees include both full-time and part-time staff representing a total of 64.2 (previous year 58.1) full-time positions. The number of employees involved in matters relating to the application of the Cartel and Internal Market Acts (including the executive board) is 57 (previous year 51), corresponding to 51.6 full-time positions (previous year 44.3). Seventeen employees (previous year 12) work in the Resources Division (until 30 September the Resources and Logistics Division), providing support for all ComCo’s work; this corresponds to 12.6 (previous year 8.8) full-time positions. The Secretariat also offers five (previous year five) internships. These five interns work full-time.

As part of its overall review of resources in June 2018, the Federal Council agreed to four additional positions in the Secretariat, which were filled in 2019. This increase was justified firstly by the more intensive workload, specifically to be able to conclude cases and conduct new investigations. Secondly, as a result of a decision taken by the Head of the EAER, ComCo has since 1 October 2019 provided additional services in the areas of staff, finances, information technology, business administration and logistics for the Federal Office for Housing (FOH) and the Federal Office for National Economic Supply (FONES).

The statistics on the work carried out by ComCo and its Secretariat in 2019 are as follows

	2019	2018
Investigations		
Conducted during the year	19	24
Carried forward from previous year	16	18
Investigations opened	3	6
New investigations from divided investigations	2	0
Final decisions	11	4
Amicable settlements	9	2
Administrative rulings	2	2
Sanctions under Art. 49a para. 1 Cartel Act	10	4
Part-rulings	5	0
Procedural rulings	2	0
Other rulings (publications, costs, searches, etc.)	6	2
Precautionary measures	1	0
Sanctions proceedings under Art. 50 ff. Cartel Act	0	0
Preliminary investigations		
Conducted during the year	14	15
Carried forward from previous year	8	10
Opened	6	5
Concluded	2	7
Investigations opened	1	2
Modification of conduct	3	3
No consequences	0	2
Other activities		
Notifications under Art. 49a para. 3 let. a Cartel Act	2	2
Advice	28	21
Market monitoring	63	72
Freedom of information applications	7	20
Other enquiries	488	581
Mergers		
Notifications	40	34
No objection after preliminary assessment	37	27
Investigations	3	3
Decisions of ComCo after investigation	2	3
Authorisation refused	0	0
Authorised with conditions/requirements	0	0
Authorised without reservations	2	3
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	46	38
Judgments of the Federal Administrative Court	4	7
Success for the competition authority	1	5
Partial success	2	1
Unsuccessful	1	1
Judgments of the Federal Supreme Court	6	1
Success for the competition authority	5	0

Partial success	0	1
Unsuccessful	1	0
Pending at the end of the year (before Federal Administrative Court and Federal Supreme Court)	26	33
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Cartel Act)	0	0
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	0
Follow-up checks	1	0
Notices (Art. 6 Cartel Act)	1	0
Opinions (Art. 46 para. 1 Cartel Act)	120	152
Consultation proceedings (Art. 46 para. 2 Cartel Act)	17	8
IMA		
Recommendations / Investigations (Art. 8 IMA)	3	0
Expert reports (Art. 10 IMA)	2	3
Provision of advice (Secretariat)	93	94
Appeals (Art. 9 para. 2^{bis} IMA)	0	0

A glance at the statistics for 2019 and a comparison with the figures from 2018 reveal the following:

- **In 2019** ComCo **concluded significantly more investigations with decisions** than in the previous year. This is because various investigations had been in their final stages in 2018.
- The number of **preliminary investigations** conducted remained much the same.
- In comparison with 2019, ComCo received **more reports of planned mergers**. It subjected a similar number to a detailed examination. No mergers were prohibited.
- Although, as in the comparison between 2017 and 2018 – the number of the **appeals before the Federal Administrative Court and Federal Supreme Court** increased in 2019, the total number of pending appeals fell below the 2018 level. In 2019, the Federal Supreme Court reached more decisions than in 2018, the Federal Administrative Court fewer.
- Although the number of **advisory procedures** increased, the number of **market monitoring procedures** fell. ComCo received significantly fewer **freedom of information requests**. The number of **enquiries** from members of the public, public offices and companies, as well as of office consultation procedures fell in comparison with the previous year.
- In relation to the **Internal Market Act**, ComCo conducted a similar number of advisory procedures as in 2018.

5 Special Topic: Violations of Competition Law and Damages

5.1 Introduction

In the past two years, ComCo and its Secretariat have experienced a growing number of enquiries from companies, private individuals and public authorities (e.g. cantons and communes) about bringing damages claims following Competition Commission decisions on unlawful agreements. In particular, potential claimants have discussed the possibility of obtaining damages following ComCo's decision relating to agreements on automobile leasing (see Sections 1.1 and 2.2.1) and after the various ComCo decisions on agreements in the construction sector in the canton of Graubünden (see Sections 1.1. and 2.1.1). On the latter, the competition authorities received numerous enquiries from construction project

clients as to whether they could claim compensation from the companies involved in the cartel and how much compensation that might be. Such actions for damages before a civil court in the aftermath of cartels are known as “follow-up” actions as they build on the findings of the administrative proceedings that ComCo has conducted.

The current law on cartels provides that victims of unlawful restraints of competition are entitled to claim damages and satisfaction in civil proceedings as well as the surrender of the profit that has been unlawfully achieved (“private enforcement” under Art. 12 Cartel Act). In practice, however, such actions are rarely filed in the cantonal civil courts, let alone successfully pursued. This is because the hurdles that must be cleared in Switzerland in order to enforce civil claims related to cartels are excessively high – even by international comparison (e.g. with the Netherlands, Germany or the United Kingdom).

- Proving a violation of competition law is commonly very complex and therefore expensive. The victim of an unlawful restraint of competition who brings a claim must furnish security in respect of procedural costs and runs the risk of having to pay these costs if they do not ultimately win the action.

- Civil claims related to cartels are subject to short prescriptive periods in the Code of Obligations. It is therefore difficult for victims of cartels to file a properly substantiated claim in the civil court in time.

- Furthermore, for the victims of unlawful restraints of competition, who must present and prove the facts of the case in court as the plaintiffs, it is often virtually impossible to obtain the required evidence. In most cases, this evidence is held exclusively by the cartel members or by the competition authorities. The right to obtain access to official documents is however limited firstly by official secrecy and secondly because the competition authorities have an interest in ensuring that there is an incentive for potential cartel members to make voluntary reports. For this reason, and in order to protect commercial secrets, even ComCo rulings are published with partially redacted passages.

- Even if a civil claimant succeeds in proving a breach of competition law to the satisfaction of the court, he or she must still quantify the loss sustained. The loss is determined by what is known in Swiss law as the “difference hypothesis”, in which the victim of a cartel must precisely quantify the difference between the current financial situation and the financial situation that would have existed if no breach of competition law had been committed. As a result of the complex interaction of economic factors, determining the hypothetical situation (and thus the loss) can be extremely difficult.

- According to the prevailing interpretation of the current Cartel Act, consumers, and in particular end consumers, do not have the right to take legal action.

- Moreover, civil proceedings face strong competition from administrative proceedings: the path via ComCo is attractive because it means that persons who have a complaint avoid the costs and risks of a civil action and because the competition authorities also have more powerful investigation instruments than the civil courts (e.g. the power to search houses and business premises).

For the foregoing reasons, in Switzerland the process of claiming damages for unlawful competitive practices remains in its infancy. If civil proceedings play a rather subordinate role, and if enforcing the Cartel Act in practice is left to the competition authorities, this brings a substantial disadvantage: victims of cartels receive no compensation from the cartel members for the losses they have suffered. The question therefore arises of how “private enforcement” can be improved.

5.2 Strengthening the current civil law on cartels

5.2.1 Conflict of objectives

The dual approach of the Cartel Act to combating violations of the Cartel Act makes sense: serious violations are penalised by ComCo through administrative proceedings by imposing fines. In addition, cartel members should compensate their victims in civil proceedings for the losses they have incurred. The objective of these measures is to ensure that violations of the Cartel Act do not pay: on the one hand there is compensation, i.e. a procedure between private individuals for the restitution of the losses caused, and on the other there is prevention, i.e. the deterrence of future offenders.

However, there is a certain conflict of objectives here. Under the Cartel Act, ComCo and its Secretariat are responsible for enforcing the administrative law on cartels. They may order state measures to prevent violations of the law, and impose substantial fines. They have effective instruments available to uncover and investigate violations, such as the power to question people, search houses and business premises, and the so-called leniency programme (voluntary report, “crown witness” programme). The latter means that a company that reports its own conduct and uncovers a cartel will receive a more lenient penalty, or no penalty at all. If the option of civil proceedings were to be too heavily promoted from now on, victims could certainly claim damages and, ultimately, they could make violating the Cartel Act appear unattractive; however, making civil actions easier would increase the risk to cartel members of having to pay damages, with the result that they might no longer be prepared to cooperate with the authorities and to provide information under the leniency programme. This in turn could mean that Cartel Act violations remained completely undetected, which would be equally unacceptable to the possible victims. The authorities must consequently seek to achieve a balance between the financial interests of the victims of cartels on the one hand and the state’s interest in detecting violations (and the related interest of offenders in confidentiality).

When strengthening the civil law on cartels, the competition authorities must not lose sight of this conflict of objectives: in other words, the facilitation of civil proceedings must not lead to a situation in which the detection and the proof of cartels is made excessively difficult, thus weakening competition law overall, in both its administrative and private law forms.

5.2.2 Access to information

This conflict of objectives comes into consideration in the information provided by the competition authorities: for example, ComCo and its Secretariat provide potential victims of Cartel Act-violations with a variety of information: in particular they publish their rulings, normally with a detailed statement of the grounds, and, subject to specific requirements, grant access to certain official internal documents and files.

To ensure that companies that cooperate are not placed in a worse position than those who do not, the authorities should however avoid giving potential civil claimants information that cartel members have submitted to the authority as part of a voluntary report. If the authorities disclose the content of voluntary reports, they will undermine the effectiveness of the leniency programme. This dilemma means that there is little incentive to encourage civil actions.

5.2.3 Reduced sanctions where damages are paid

In discussions on the reform of the Cartel Act in 2014, it was proposed that when determining sanctions, appropriate account should be taken of any payments a company made to victims based on a decision of a civil court (see Section 4.3). As the revision was not approved, the planned statutory provision and the new options were not introduced. However, based on the existing law, the authorities can create an incentive in ComCo proceedings for cartel members to compensate victims.

In its decision on 19 August 2019 in the investigation into construction services in Graubünden, ComCo for the first time decided that damages payments made to victims of an unlawful restraint of competition before ComCo had reached its decision should be taken into account as a factor that mitigates the

sanction. This possibility of a reduced sanction as a result of paying damages is an important incentive to compensate victims of cartels as quickly and fully as possible. It contributes to a situation in which the cartel members "voluntarily" return to the victims all or part of the profits achieved by infringing competition law. Under the current law, in order to secure a reduced sanction based on damages payments, in every case it is essential that the amount of damages is sufficiently settled and payment guaranteed before any ComCo decision is taken.

There is no express provision in the current Swiss law on cartels for a reduction of a sanction as a result of damages payments, but the practice has a basis in the existing provisions (in particular Art. 49a para. 1 sentences 3 and 4 of the Cartel Act and Art. 3 and 6 of the Cartel Act Sanctions Ordinance). The possibility of a reduced sanction as a result of paying damages to the victims of cartels is basically in line with the principles that apply in the fine or sanctions systems in other Swiss legal fields and in foreign legal systems. For example, in criminal law it is recognised that where an offender makes reparation, this can lead to a more lenient sentence. In EU competition law and in other foreign competition systems the possibility of a reduced sanction as a result of damages payments has recently been recognised in principle. Particular note should be taken of the EU directive on damages as well as the ECN+ directive, according to which competition authorities may take account of damages payments made in terms of a settlement before a fine is imposed when assessing the amount of the fine. However, experience with these provisions is still rather limited.

Where compensation payments made to victims of cartels are taken into account when assessing fines, the question arises of how precisely these payments should influence the assessment. In the case cited from the canton of Graubünden, ComCo made the reduction of the sanction dependent on the amount of damages effectively paid, based on the following principles:

- The starting point for the calculation in each case is always the specific amount that the offender has in fact paid to the victim.
- In each case, however, a competition law sanction must still be imposed to guarantee that the penal, deterrent, preventive element remains. Even if the damages were to exceed the normal competition law sanction, the company would still have to pay a fine. As a consequence, the actual amount paid in damages is not simply deducted in full from the fine, but only determines the percentage by which the fine is reduced.
- In addition, the overall fine and the amount of the reduction must be proportionate: This means that the reduction must be in reasonable proportion to the other criteria for measuring sanctions and to the total sanction.
- In order to protect the institution of voluntary reports, the incentive for companies to submit voluntary reports must remain sufficiently attractive.

As a result, the specific reduction in the sanction as a consequence of making damages payments was dependent on several factors in each decision. In future, the reduction in individual cases will still be assessed differently depending on the nature of the violation of competition and the level of damages paid.

Although offenders pay more than when they are only ordered to pay a fine under competition law, but are not required to pay damages, they pay less than they would if they had to pay the full fine plus damages. In simple terms, the Confederation is increasing the incentive to pay damages to those who have effectively lost money, by partially waiving its claim to sanctions income that would otherwise be paid into the federal coffers.

In the case cited from the canton of Graubünden, this approach was successful: instead of having to pay sanctions amounting to around CHF 14 million as originally calculated, the companies in the cartel were ultimately required to pay "only" CHF 11 million in sanctions to the Confederation. However, they also paid around CHF 6 million in damages to the victims of the cartel. The process was highly beneficial

to the victims more than anyone else: they received compensation relatively quickly and easily, without having to take protracted, expensive civil proceedings, whose outcome would have been uncertain.

5.3 Strengthening the civil law on cartels by revising the current law

The incentives to bring civil actions could be increased considerably by amending the Cartel Act while remaining within the present system. In this case the aim is not to strengthen the civil law on cartels at the expense of the administrative law on cartels. Instead the aim is to improve the enforcement of the law on cartels overall. Experiences in other European countries show that it is possible to increase the appeal of taking action in the civil courts, without creating an excessive culture of litigation. The aim of any reform should be to ensure that those who have been affected by restraints of competition are more readily able to obtain compensation for themselves (e.g. via “follow-up” actions) or can take action on their own initiative (e.g. by enforcing an injunction) and are thus no longer dependent on the competition authority’s discretion as to whether it pursues a case.

During the discussions (ultimately unsuccessful) on the reform of the Cartel Act in 2014, one of the Federal Council’s proposals was to expand the option of taking action in the civil courts, which is currently limited to competitors, to include all those affected by cartels. This would allow all end customers and public contractors (in particular the cantons and communes) to enforce their rights in the civil courts. In addition, the prescriptive period under the private law on cartels should be suspended from the opening of an investigation by the competition authority until a legally binding decision has been issued. This would prevent the situation where civil action cannot be effectively taken because the administrative law proceedings have gone on for too long. Because the reform of the Cartel Act in 2014 did not come to fruition, many problems remain unresolved.

5.4 Conclusion

Parliament originally planned that the administrative and the civil law procedures for dealing with cartels would exist in parallel, but in practice the two are not in balance: whereas the administrative procedures have been beefed up, especially with the introduction of sanctions, a leniency programme and searches of houses and business premises, enforcement in the civil courts has not achieved any genuine practical importance.

In order to change this situation, the competition authorities can in certain cases help to ensure that the victims of cartel offences are properly compensated by the perpetrators. With this in mind, in a pilot case ComCo reduced the sanction imposed on members of a construction industry cartel by around half of the damages that they paid to cartel victims before the ComCo decision. Even by international standards, this constituted a milestone in enforcing the civil law on cartels.

This measure in itself is only one element that will strengthen the civil law on cartels. The competition authorities are also committed to ensuring that the Federal Parliament begins work on the improvements required to modernise the civil law on cartels. Making it easier to bring civil actions under competition law must however not lead to a situation in which uncovering and proving the existence of cartels through voluntary admissions is made excessively difficult, thus weakening competition law overall, both in its administrative and civil law forms.