To the Federal Council

2020 Annual Report of the Competition Commission (ComCo)

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

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1 Foreword from the President

The abiding memories of 2020 will be the spread of SARS-CoV-2 and the accompanying distortions in society, government and business. Even though countermeasures were taken swiftly, and the market economy proved its ability to adapt quickly, the first half of the year saw an unprecedented fall in the gross domestic product. Some sectors suffered from the crisis more than others. This also had consequences for competition. There were calls for more cooperation. ComCo made it clear to the public that the law on cartels must continue to apply even during the COVID-19 pandemic. At the same time ComCo signalled its readiness to support the formulation of measures to combat the COVID situation that comply with competition law. For example, there is plenty of scope for cooperation between companies in developing treatments and vaccines or in overcoming shortages in supply.

After the special situation was declared on 16 March, ComCo, just like other authorities, businesses and organisations, had to change its working methods from one day to the next. Any technical difficulties were quickly overcome, as the authority had already comprehensively digitalised its operations. This meant that businesses and other authorities could easily contact ComCo's staff at any time. When it came to meeting deadlines, there was plenty of flexibility, with the result that no changes to the law were required. Staff were prepared to go the extra mile, as the rapid examination of state aid for the aviation industry showed, so that all concerned obtained clarity quickly.

Regardless of these challenges, ComCo has continued to make progress with its cases. In addition to the state aid assessments just mentioned, two investigations in particular occupied ComCo: in the watch market, it decided that the supply obligations and restrictions that have applied to Swatch for years will now expire; however, the Swatch subsidiary ETA remains dominant in the market for mechanical watch movements. In the natural gas market, it took a decision of major importance: it ordered network proprietors in Central Switzerland to allow the transit of natural gas through their systems. The end customers are now free to choose their gas supplier. This decision is important for the entire country and will lead to the complete liberalisation of the gas market.

Now is certainly not the time to celebrate. Nevertheless, a special jubilee is imminent: in 2021 not only the Cartel Act and the Internal Market Act, but also ComCo itself will be 25 years old. Its mission to protect competition remains unchanged. This annual report will give you an impression of the broad spectrum of this task.

Andreas Heinemann
President of the Competition Commission

2 Most Important Decisions of 2020

2.1 Decisions by the Competition Commission

On 14 December 2020, ComCo took interim measures against Swisscom and prohibited it with immediate effect from expanding its optical fibre network in a manner that makes it impossible for third parties to obtain Layer 1 access from Swisscom exchanges. At the same time, it opened an investigation into **Swisscom's network expansion strategy**.

ComCo is consistent in its efforts to combat agreements on procurement. In 2020 it investigated a bidding agreement in the IT sector for the first time, one that affected the Swiss National Bank (SNB). The SNB operates its own data network (**optical network**) that covers part of its data communication. To do this, the Bank purchases network components from IT companies. In one procurement project, the suppliers and manufacturers of these components colluded over the bids. However, all the companies cooperated in the investigation, which made it possible to reach an amicable solution, keep the proceedings to a brief ten months, and secure a significant reduction in the fine to a total of CHF 55,000. The decision of 16 November 2020 has taken full legal effect.

At the end of 2016 and in mid-2019 ComCo issued a series of partial decisions with sanctions in the financial sector and approved several amicable settlements. In October 2020 the ComCo Chamber for partial decisions approved additional amicable settlements. Firstly as part of the investigation into **Yen interest rate derivatives based on Yen LIBOR** with NEX (formerly the brokerage house ICAP plc): NEX's practices are unlawful under competition law, but cannot be penalised. In addition, the Chamber for partial decisions abandoned the investigation into NEX relating to Euroyen interest rate derivatives based on the Euroyen TIBOR. Secondly, in the investigation relating to **Euro interest rate derivatives based on EURIBOR**, the amicable settlement with Crédit Agricole and HSBC France was approved. The Chamber for partial decisions fined Crédit Agricole around CHF 4.5 million and HSBC France almost CHF 2 million. These decisions are now legally binding.

UPC holds exclusive rights to broadcast matches in the **Swiss ice hockey championship** for the period from 2017 to 2022. It thus has a dominant position for the live broadcasting of ice hockey matches on pay TV. UPC has abused its market position by refusing any Swisscom offers to transmit live ice hockey until summer 2020. Through this practice, UPC has unlawfully prevented Swisscom from competing. On 7 September 2020 ComCo fined UPC around CHF 30 million for its conduct. UPC contested the decision in the Federal Administrative Court (FAC). In May 2016 ComCo fined Swisscom for similar practices in relation to broadcasting live sport (football and ice hockey).

In a decision dated 13 July 2020, ComCo did not impose any new obligation to supply on the Swatch Group subsidiary **ETA** and did not place any further restrictions on the supply of **Swiss-made mechanical watch movements**. This latest decision is based on older decisions. At the end of 2013, ComCo approved an amicable settlement with the Swatch Group. This provided that its subsidiary ETA would have to supply its customers at that time with specific quantities of mechanical watch movements until the end of 2019. The amicable settlement was intended to create incentives to generate adequate competition by the end of 2019 and allow customers to find alternative sources of supply. On the expiry of this period, there was to be no further obligation to supply. However, in November 2018 ComCo opened a reassessment procedure as there were indications that the market for Swiss-made mechanical watch movements had not developed as expected. ComCo's complex investigations revealed that the market had reacted to the incentives put in place in 2013 and competitive relationships had largely established themselves as expected. For example, ETA's customers have expanded their number of suppliers. Based on a broad appraisal, ComCo concluded that no additional

obligations should be imposed on ETA. The Swatch Group subsidiary retains a dominant position in the market for Swiss-made mechanical watch movements, however, and continues to be monitored for any abuses. The decision has taken full legal effect.

With its legally binding decision of 25 May 2020, ComCo opened up the **natural gas market** in Central Switzerland. Under investigation was the question of whether decisions by energie wasser luzern (ewl) and Erdgas Zentralschweiz AG (EGZ) not to allow third parties to supply end customers through their pipeline networks constituted an unlawful refusal to do business. ComCo concluded in its investigation that ewl and EGZ had abused their dominant position for the transport and distribution of natural gas through their pipeline networks: when asked, they refused to allow a third-party supplier transit access to supply gas heating customers in the city of Lucerne. In the past ewl and EGZ only allowed a change of supplier in the case of major process gas customers connected to their networks who fulfilled the requirements of the associations' agreement on network access. This unlawful refusal to do business meant that ewl and EGZ received all the revenues from the sale of natural gas to their de facto tied end customers without being subjected to any competitive pressure. As ewl and EGZ eliminated any competition for supplying the majority of end customers in its network territory, they were able to make monopoly profits. ewl and EGZ cooperated with ComCo. They undertook amicably to make it possible in future for any end customers connected to their networks to change their supplier. In deciding on the sanction, ComCo took account of the fact that ewl and EGZ had opened up their network territory on their own initiative. The reduced fine amounted to around CHF 2.6 million. This ComCo-decision has had a signalling effect comparable to the decision against the Fribourg Electricity Board in 2001, which saw the electricity market open up under the rules in the Cartel Act.

On 23 March 2020 ComCo approved the participation of Planzer and Camion-Transport in **SBB Cargo**, after evaluating this merger in detail. Planzer and Camion-Transport held a 35% stake in SBB Cargo through their joint subsidiary Swiss Combi. Galliker and Bertschi also each have a 10% stake in Swiss Combi. With the merger, Planzer and Camion-Transport plan to use their logistics expertise to optimise SBB Cargo's existing products and develop new products. In this way, the SBB and the logistics companies intend to improve the profitability and competitiveness of SBB Cargo. Although the planned merger will lead to a dominant position for goods handling services in combined transport in the Gossau / St. Gallen area, it does not allow the participant companies to eliminate effective competition. As a consequence, ComCo approved the merger.

2.2 Court judgments

In July 2019, ComCo's Chamber for partial decisions imposed fines totalling CHF 30 million on eight finance companies that offer **vehicle leasing**. In response to this decision, FCA Capital Suisse SA (FCA, Fiat) filed both an action and an appeal in the Federal Administrative Court. In the action, it requested that the partial decision of around 45 pages be reduced to a maximum of five pages. It claimed that the ComCo Secretariat had in its preliminary remarks to the FAC promised to request a short ruling from ComCo. The FAC dismissed the action in a decision dated 13 October 2020.

Tamedia had appealed to the FAC against the order to pay costs of CHF 5,000 for the ComCo preliminary examination procedure into the **merger between Tamedia** (now the TXGroup) **and Adextra**. It demanded the order for the costs be quashed, arguing that ComCo had interpreted the obligation to notify under Article 9 paragraph 4 CartA too extensively, and that the merger did not have to be reported. The court rejected the appeal on 6 October 2020 and confirmed ComCo's interpretation. The actual effects on the markets in question did not have to be clarified as part of the notification procedure under Article 9 paragraph 4 CartA, but instead were the object of the substantive investigation proceedings under Article 32 f CartA. Tamedia has appealed the decision to the Federal Supreme Court (FSC).

With its decision on **road construction and civil engineering in the canton of Aargau** of 16 December 2011, ComCo took action against bid rigging. Fourteen construction companies operating in the canton of Aargau were fined around CHF 4 million in total for unlawful bid rigging relating to prices and dividing up markets between 2006 and 2009. Around 100 public and private construction projects were affected by the unlawful bids. Four companies contested the ComCo decision. The case was pending before the FAC for around six-and-a-half years. On 25 May 2018 the FAC upheld ComCo's decision against the Aargau construction companies on most points and clarified important fundamental issues, such as minimum legal requirements for the presentation and evaluation of evidence, dealing with information from voluntary admissions, and rules on imposing penalties for violations of the Cartel Act (in some cases not involving financial gain). One construction company appealed the judgment of the FAC to the FSC. The FSC rejected the appeal in a judgment dated 3 August 2020 as groundless and thus upheld the decision of the FAC.

Musik Hug filed an appeal with the FAC against the fine imposed in the ComCo decision on **pianos** of 14 December 2015 on the grounds that it was disproportionate and financially excessive. ComCo had already reduced the fine because of Musik Hug's financial situation from the original amount of around CHF 1.3 million to CHF 445,000. The FAC decided on 2 April 2020 that the fine that ComCo had imposed was reasonable, the assessment of the affordability of the fine was justified, and the reduction in the fine was not objectionable. Accordingly, the FAC rejected the appeal from Musik Hug.

On 17 September 2018, ComCo decided to permit the Canton of Graubünden to inspect only some of the files relating to its decision of 10 July 2017 on bid rigging by construction and civil engineering companies in the **Münstertal**. In particular, it did not allow inspection of the voluntary admission. On 24 October 2019 the FAC rejected the appeal by the Canton of Graubünden against the decision. On 29 November 2019, the Canton of Graubünden filed an appeal against this decision in the FSC, but withdrew this appeal on 20 March 2020. The FSC dismissed the proceedings accordingly.

The FSC decided on 12 February 2020 that **Aktiengesellschaft Hallenstadion** had infringed the Cartel Act in connection with the use of a ticketing clause in dealing with event organisers, and that Aktiengesellschaft Hallenstadion and **Ticketcorner AG** had entered into an anti-competitive agreement in the form of their ticketing cooperation clause. Hallenstadion and Ticketcorner had concluded a cooperation agreement in 2009 in which the Ticketcorner was granted the right to sell at least 50% of all tickets for events in the Hallenstadion. ComCo abandoned an investigation opened in this connection in 2011. In 2016, the FAC upheld an appeal against this decision raised by Starticket AG and ticketportal AG. It concluded that the ticketing cooperation clause was an anti-competitive agreement and that its use by Hallenstadion amounted to the abuse of a dominant position. However, the FSC partially upheld the appeals raised by Hallenstadion and Ticketcorner against this decision. In relation to Hallenstadion, the FSC confirmed the assessment of the FAC. It found that Hallenstadion held a dominant position that it had abused by using the ticketing clause in contracts with the event organisers (a tying transaction). The agreement between Hallenstadion and Ticketcorner constituted a breach of competition law both in the market for venues for rock and pop concerts (major events) and for the related ticketing market. However, the court took the view that it was not possible, based on the information available, to decide whether Ticketcorner held and had abused a dominant position. The FSC referred the case back to ComCo in order to decide on the required administrative sanctions or measures and for a further assessment of the facts. This means that ComCo is required to fine Hallenstadion for using the ticketing clause and clarify the question of whether Ticketcorner is also guilty of abusing a dominant position.

On 16 December 2019, ComCo issued interim orders in the **reassessment proceedings relating to the Swatch Group Supply Stop** (see 2019 Annual Report). The Swatch Group appealed against the decision. In an interim decision dated 13 May 2020, the FAC considered

the question of whether to revoke ComCo's interim measures, according to which certain supply restrictions imposed on the Swatch Group and more particularly its subsidiary ETA in relation to third-party customers should continue to apply with immediate effect, but temporarily. The FAC answered this question in the negative, thus agreeing with the view taken by ComCo. It justified its decision inter alia on the grounds that there was time-related and material urgency and an overriding public interest in awaiting the results of the investigation begun in November 2018 before the obligations and restrictions agreed in the 2013 amicable settlement should be allowed to lapse. Following ComCo's decision on 13 July 2020 not to impose any further obligations on the Swatch Group (see Section 2.1), the Swatch Group withdrew its appeal against the interim measures. The interim orders of 16 December 2019 have thus become legally binding.

The courts issued further judgments on the publication of ComCo decisions, confirming the legal precedent:

- The FAC considered the ComCo rulings of 12 November 2018, in which it once again – after the matter had been referred back by the FAC – ordered the publication of the ruling on sanctions dated 2 December 2013 in the **air freight** case. Of the ten parties that had demanded a ruling on publication, eight filed appeals against the ruling on publication. The FAC rejected all eight appeals in their entirety in judgments dated 1 September 2020. The parties have filed appeals in the FSC against four of these decisions.

- On 21 September 2020 the FAC decided on the appeal by Goldbach Media (Switzerland) AG against the ComCo ruling of 8 April 2019 relating to the publication of the ComCo report on the planned **Goldbach/Tamedia** merger. The FAC confirmed ComCo's arguments almost in their entirety. Goldbach has appealed the decision of the FAC to the FSC.

- In a judgment dated 17 July 2020, the FSC dismissed the appeal by the company concerned in a case relating to the **publication of the final report of a preliminary investigation**. The court held that the contested judgment by the FAC was not a final decision, but only an interim decision, as it was a decision to refer the matter back to the lower court. Appeals may only be filed against decisions to refer matters back to a lower court by way of exception, and no exception could be made in the case in question. As a result of this judgment by the FSC, the FAC's decision of 30 January 2019 to refer the matter back to the lower court once again applied. Since then, the Secretariat has reached a further decision to publish the final report in response to the decision to refer the matter back to the lower court and the decision is now legally binding.

- The FAC issued a decision on publication on 27 February 2020 relating to the ComCo interim ruling on Sunrise's participation as a third party in the investigation into **ice hockey on pay TV**. UPC had challenged the publication of the interim ruling in the FAC. The FAC rejected UPC's appeal against the ruling on publication dated 23 September 2019 in its entirety, confirming the previous legal precedent. The judgment has taken full legal effect.

- In its judgment of 11 February 2020, the FSC clarified the legal precedent to the effect that a company that did not yet exist at the time of the violation of competition law but which as the successor business was required to pay the sanction imposed on a cartel member company did not have a right to anonymity and had to accept that it would be named in the published version. As a result, the ComCo ruling on sanctions of 8 July 2016 in **See-Gaster construction services** case could be published.

3 Activities in Individual Sectors

3.1 Construction

3.1.1 Bid rigging

In response to indications of bid rigging between several companies, on 14 January 2020 ComCo opened a new investigation and conducted searches of business premises. The agreements related to hardware and software products for **optical networks** used by major customers to transmit data by fibre optics. ComCo closed this investigation on 16 November 2020 with an amicable settlement and sanctions (see Section **Fehler! Verweisquelle konnte nicht gefunden werden.**).

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). Seven of the twelve parties filed appeals in the FAC (one of which related to Engadin II). Of the remaining cases, Engadin I and five smaller decisions have been challenged in the FAC by certain of the parties. The exchange of written submissions with the FAC has basically been concluded. The FAC is expected to announce its first decisions in 2021.

In June 2020, the Secretariat opened a further investigation in the canton of Graubünden, as there are indications of bid rigging among several companies in the **Moesa** region. ComCo was acting on reports received from the cantonal authorities in Graubünden. The suspected agreements relate to bidding procedures in the building construction and civil engineering sector involving private and public owners. The case is in the investigation phase and has been opened against the three largest construction companies in the region.

In the Road Construction investigation, it was suspected that road construction companies had been colluding 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 stressed several times in the past that consortiums are normally unobjectionable under competition law and foster competition. In the preliminary investigation concluded in 2020, the Secretariat examined two more specific aspects of permanent consortiums, i.e. consortiums of companies that repeatedly submit joint bids for procurement projects on a large scale. In principle, it is also the case that permanent consortiums do not normally aim to restrain competition or cause such restraints and consequently they do not constitute agreements prohibited by the Cartel Act, provided they decide to submit bids on a case-by-case basis. There are a variety of reasons for forming consortiums for specific projects or for forming permanent consortiums, such as the consortium partners being unable to submit bids on their own, capacity or risk concerns, reasons of economic or commercial expediency, and the combined bid by the consortium partners being clearly better in economic terms than the individual bids. Permanent consortiums can become problematic if, despite submitting joint offers, the individual partners carry out a disproportionate number of projects on their own, or if the decision to submit a joint bid is not made on a case-by-case basis, but for example for specific types of project or territories.

The appeals against the ComCo decision of 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 FAC. Some companies also took the view that ComCo's decision should not be published. The FSC rejected the remaining appeal in this connection (see Section 2.2).

In a decision dated 3 August 2020, the FSC dealt with the last appeal against ComCo's decision in **Roads and Civil Engineering in the canton of Aargau** of 16 December 2011 (see Section 2.2). Still pending before the FSC is the question of the extent to which applicants who

wish to pursue claims for damages can be allowed to inspect an unredacted ComCo ruling on sanctions and the related files before the ruling becomes legally enforceable. ComCo has postponed its decision on several further requests for access while it awaits the decision of the FSC.

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. This decision has been appealed to the FAC and the exchange of written submissions has reached an advanced stage. The larger of the two investigations, **KAGA**, is in its final stages. The parties will receive the Secretariat's proposed decision in the summer of 2021 for their comments.

On 5 March 2019, ComCo opened an investigation into **two surfacing works** in the canton of Bern and against the shareholders 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. This investigation also has its origins in the **KAGA** investigation opened in 2015. The investigations were concluded in 2020. The Secretariat's proposed decision for ComCo will probably be sent to the parties for their comments by summer 2021. The ComCo decision is expected in the second half of 2021.

3.1.3 Environment and waste disposal

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. SwissZinc AG has been set up in order to plan this plant, which is to be known as the SwissZinc Plant. SwissZinc AG 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, which has found that SwissZinc AG would secure a dominant position through the project, which the company could potentially abuse. The following practices, among others, could be unlawful: charging different prices for identical services; imposing exclusive supply obligations and non-competition obligations on the companies participating in SwissZinc AG for a duration of 15 years; setting up a transport cost compensation system for the participant shareholders and benefactors, and fixing the level of the transport costs; allowing the board to set the gate fee. SwissZinc AG agreed to put the Secretariat proposals into practice, which means there are no prospects of unlawful restraints of competition, and the Secretariat has terminated the preliminary investigation.

In the environment sector, the Construction Division dealt with around 20 office consultation procedures. The majority related to the pursuit of climate targets.

3.1.4 Raising awareness of bid rigging

Bid rigging can be prevented and exposed. For this reason, the Secretariat has for many years been raising the awareness of this problem among employees of procurement agencies. In 2020, it made presentations to federal buyers as part of the training programme offered by the Federal Office for Buildings and Logistics, raised awareness among communal representatives from the Moesa region, and also made presentations as part of the CAS courses at the universities of Bern and Fribourg.

3.2 Services

3.2.1 Financial services

In the report year further partial decisions were issued in the IBOR investigations, in the **EURIBOR** investigation and in the **Yen LIBOR /Euroyen TIBOR** investigation (see Section **Fehler! Verweisquelle konnte nicht gefunden werden.**). Investigations are continuing against other parties in the Yen LIBOR / Euroyen TIBOR and EURIBOR cases.

In its 2019 annual report, ComCo announced that it had concluded two investigations into agreements affecting competition relating to **foreign exchange spot transactions** between banks (Forex). These involved the investigations relating firstly to the Essex Express chatroom and secondly to the "three-way banana split"; in both cases the parties concerned agreed to amicable settlements. The investigation against Credit Suisse in the same connection is continuing under the ordinary procedure. Progress was made with this investigation in 2020.

In the investigation into **automobile leasing**, FCA Capital Suisse took the decision of the Chamber for partial decisions to the FAC. FCA filed both an action and an appeal. In the action, FCA requested that the partial decision be shortened. The FAC dismissed the action (see Section 2.2). In the appeal pending before the FAC, FCA requested that that the ruling be quashed, or alternatively that the fine be reduced. The investigation into Ford Credit Switzerland GmbH (Ford) is continuing under the ordinary procedure.

The investigation in the case of **Boycott Apple Pay** continued in 2020. The FAC confirmed its case law in two judgments dated 8 November 2019, according to which former company officers can only be questioned as witnesses on a limited range of matters and, based on the *nemo tenetur* principle, are not required to answer questions that could incriminate the company. In another judgment dated 13 March 2020, the court held that current employees that are not company officers do not have the same right to refuse to testify. The FSC refused to consider an appeal by the company against the latter judgment. However, two appeals are pending against the judgments in which the FAC ruled that former company officers had a right to refuse to testify.

An appeal procedure begun in summer 2020 in connection with a virtual B2B-travel payment product based on a virtual user commercial account solution (**VUCA** solution) led to a preliminary investigation being opened in November 2020. The subject of the preliminary investigation is primarily the question of whether interchange fees incurred by making payments via a VUCA solution are covered by the amicable settlement that ComCo agreed in 2014 with various credit card issuers and merchant acquirers.

3.2.2 Health care

The investigations opened in September 2019 against several companies (Swiss and foreign) involved in the production, distribution and sale of the active pharmaceutical ingredient **scopolaminbutylbromide** are still ongoing. The aim of the investigation is to ascertain whether the indications of the coordination of sale prices for this active ingredient at an international level and of the allocation of global markets can be substantiated and, if so, whether they violate the Cartel Act.

At the end of 2020, the Secretariat concluded the preliminary investigation into biological medicines (**biologics**) without taking further action, because it did not at the time find any indication of a violation of Article 7 CartA by the pharmaceutical company which a rival had accused of abusing a possible dominant position by obstructing or even preventing it entry into the market.

At the end of 2020, the question of the **agreement between medical insurance companies** (industry agreement) that relates to a prohibition of telephone calls and remuneration for inter-

mediaries and brokers for acquiring new policyholders became topical again. This was primarily because the Federal Council at parliament's request submitted draft legislation that aims inter alia to allow the Federal Council to declare the general applicability of sectoral solutions for regulating commission payments relating to compulsory health insurance and supplementary health insurance. The competition-related concerns of the competition authority in relation to the industry agreement and the current and planned regulation of this field have been made clear to all concerned (parliament, FDHA/FOPH, santésuisse and curafutura as well as intermediaries and brokers) in opinions. The competition authority is now monitoring the legislative process.

More than 150 **consultation procedures**, for the most part involving parliamentary proposals on health care related to the COVID pandemic, and numerous **enquiries from members of the public** have made heavy demands on the Secretariat's resources.

In addition, ComCo was called on to assess the following **company mergers** in the healthcare sector: Medbase/HCH/SDH/Zahnarztzentrum, Medbase/Unilabs/Unilabs St. Gallen, Kohlberg/Mubadala/Partners Group/Pioneer Midco UK 1 Limited. ComCo approved all these mergers after a preliminary examination.

3.2.3 Liberal professions and other services

In a judgment dated 12 February 2020, the FSC confirmed that the contract concluded in 2009 between **Hallenstadion** and **Ticketcorner**, under which the latter was granted the right to sell 50% of all tickets for events organised in the Hallenstadion, amounted to an unlawful agreement on competition. The FSC referred the matter back to ComCo (see Section 2.2). The investigation is still ongoing.

The investigation opened in 2018 into several **Geneva electricity companies** has continued. Negotiations on an amicable settlement were conducted in the course of the year and a decision is expected in this respect in 2021. This decision will only concern the companies which decide to sign an amicable settlement.

Finally, the Secretariat conducted several proceedings in the **field of sport**. In **football**, the Secretariat was requested by FC Sion to take interim measures against the decision of the Swiss Football League (SFL) to resume the Super League Championship after it had been halted because of the coronavirus pandemic. The Secretariat concluded that this decision by the SFL did not contravene the Cartel Act. As a result, it did not agree to the request for interim measures.

In another case, the Services Division was also confronted with a possible price-fixing agreement that was justified on the grounds of the COVID-19 situation. The competition authorities therefore made it clear in March that it would not tolerate anyone exploiting the pandemic in order to impose restraints on competition. The general economic situation must not be abused in order to form cartels or coordinate prices. The competition rules create scope for efficient cooperation, both in normal times and in times of crisis. What is crucial is the purpose of any coordination between companies. Does it serve to restrain competition or does it make business more efficient? If traders were to coordinate the prices of their goods, this would be unlawful. On the other hand, if the same traders exchange information about their stocks in times of crisis, this can help to prevent a shortage of critical goods, and so would be legal. The same applies to cooperation on research to speed up the development of an urgently needed vaccine. Where there has been a lack of clarity about how to comply with the law in practices aimed at combating the COVID situation, ComCo has helped to answer questions and devise solutions, as in other sectors.

In addition, proceedings have been conducted in relation to **skiing**. They called into question certain preferential relationships that exist between ski lift operators and ski schools or hotels at various ski resorts. In one case, one ski school complained of differences in the treatment

of ski schools by one ski lift company, relating in particular to advertising for their activities and providing rooms in the ski lift building. In another case, a hotel complained that a ski lift company was favouring the holiday accommodation that it owned by allowing the businesses concerned to make promotional offers on the price of lift passes. Finally, a ski school complained that the tourist office in its region favoured the “traditional” ski school in the resort by directing any requests for information from tourists to that school. The Secretariat intervened in all three cases to clarify the situation and make the various companies aware of their duty to maintain competitive neutrality.

3.3 Infrastructure

3.3.1 Telecommunications

On 24 August 2020, ComCo opened an investigation into Swisscom (Switzerland) AG in the sector concerning **broadband access for business locations (WAN connection)**. There are indications that Swisscom has abused its market position. In various invitations to tender for business location networking projects, Swisscom allegedly charged competitors prices that were excessive. These Swisscom competitors, i.e. other telecommunications companies, rely on Swisscom’s network infrastructure for such projects and cannot make their customers a competitive offer if Swisscom’s prices are too high. ComCo fined Swisscom in 2015 for similar practices in relation to bids for networking the Swiss Post offices. That particular case is still pending before the FAC.

On 14 December 2020, ComCo opened an investigation into **Swisscom’s network expansion strategy** (see Section 2.1). There are indications that Swisscom’s conduct in relation to the expansion of the fibre optic network amounts to an unlawful practice by a dominant company, as Swisscom is now organising its optical fibre network in areas where it is the sole infrastructure provider in a tree structure (P2MP), and using this as justification for no longer allowing third parties any direct access to a Layer 1 “ALO” service. Instead, third parties must switch to Swisscom‘s Layer 3 “BBCS” service. ComCo has also taken interim measures and prohibited Swisscom with immediate effect from expanding its optical fibre network in such a way that third parties can no longer have Layer 1 access from the Swisscom exchanges.

Further progress was made in the preliminary investigation opened in December 2019 in the case of **Swisscom Directories** against Swisscom and Swisscom Directories AG.

ComCo assessed two mergers in the telecommunications sector: in the case of **Liberty Global/Sunrise**, ComCo approved the purchase of Sunrise by UPC (Liberty Global) without imposing any requirements or conditions. ComCo concluded that there was no assumption that UPC/Sunrise and Swisscom would coordinate their operations in future. As a result, there was no threat of effective competition being eliminated. The two companies had planned to merge the previous year, with Sunrise intending to take over UPC. ComCo assessed that takeover in detail and approved it. The takeover, however, failed to gain the approval of a majority of shareholders. ComCo investigated the market conditions relevant to the current merger once again, and found they had largely remained unchanged. In the case of **Swisscom Directories / OLMeRO**, Swisscom Directories intended to take over the Renovero division (www.renovero.ch), a website for finding tradespeople, from OLMeRO AG. Here too ComCo approved the project after a preliminary examination.

3.3.2 Media

ComCo fined **UPC** around CHF 30 million for abusing its dominant position in the live broadcasting of **ice hockey matches on pay TV**, in that it had refused all offers from Swisscom for rights to transmit live-ice hockey until summer 2020. UPC contested the decision in the FAC (see Section **Fehler! Verweisquelle konnte nicht gefunden werden.**). UPC also went to the FAC to challenge the publication of the interim ruling on the participation of Sunrise as a third

party. In a judgment dated 27 February 2020, the FAC rejected the appeal against the ComCo ruling on publication of 23 September 2019 in its entirety and confirmed the current legal precedent. The judgment has taken full legal effect (see Section 2.2).

ComCo assessed the **merger of Admeira and Ringier** in the media sector. Here Ringier AG intended to take over complete control of Admeira AG from Swisscom. ComCo granted the project approval in the course of the provisional examination.

In the case of the **merger between Tamedia** (now the TXGroup) **and Adextra,** the FAC rejected the appeal by the TX Group on 6 October and thus confirmed ComCO's interpretation of Article 9 paragraph 4 CartA. The judgment has been appealed to the FSC (see Section 2.2).

3.3.3 Energy

In a decision dated 25 May 2020, ComCo concluded the investigation against ewl and EGZ into **access to the natural gas network**. ewl and EGZ cooperated with ComCo and undertook amicably in future to allow any end customers connected to their networks to change supplier. The fine that ComCo imposed amounted to around CHF 2.6 million (see Section 2.1).

In autumn 2020, the Secretariat abandoned a preliminary investigation against an electricity grid operator that had been opened in September 2019 in relation to the possible **use of data from a monopoly sector for activities in other markets**. The investigations had revealed that the use of monopoly data could certainly lead to distortions of competition, in particular if data such as contact details and information on the characteristics, behaviour and the interests of customers is only accessible to the dominant company and can be used specifically to control customers and influence their purchasing behaviour. In this specific case, however, there was no indication that the conduct of the electricity grid operator was likely to distort competition unlawfully.

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 respectively. ComCo advocated in particular a market-oriented, competition- and technology-neutral system to guarantee the expansion of renewable energy sources and was thus against the current system of subsidies. ComCo was also consulted on the new **Gas Supply Act** and argued strongly in favour of complete market liberalisation.

3.3.4 Transport

In the goods transport sector, ComCo subjected the planned **SBB Cargo** merger to a detailed examination, ultimately approving the plan, which means that the SBB, Planzer and Camion-Transport now jointly control SBB Cargo (see Section 2.1).

The FAC has still to issue a decision in the appeal proceedings in the case relating to **air freight**. Various parties have appealed to the FAC against the ruling of 2 December 2013, which led to sanctions totalling around CHF 11 million being imposed on 11 airlines for entering into horizontal price-fixing agreements. In June 2020 a public hearing of the parties was held in relation to the case. Also in dispute in this case is whether and to what extent the ruling of 2 December 2013 may be published (see Section 2.2).

3.3.5 State aid

In the report year, ComCo was called on to assess two cases relating to alleged **state aid under the Air Transport Agreement** based on the Aviation Act. In such cases, ComCo examines the planned support measures with regard to their compatibility with the Air Transport Agreement. The authorities responsible for the decision have to take account of this assessment in their decision on granting the aid.

In the first case, the federal government intended to support the Swiss aviation industry, which has been badly affected by the COVID pandemic, by providing federal guarantees for loans to **Swiss International Air Lines AG** and **Edelweiss Air**. In its opinion dated 20 May 2020, ComCo concluded that the support measures announced are compatible with the Air Transport Agreement.

In the second case, the federal government planned to support businesses associated with the airline industry. In specific terms, this involved **SR Technics Switzerland AG**, a company that operates predominantly in the fields of maintenance, repair and overhaul services for commercial aircraft, component solutions and technical engine solutions. In its opinion dated 29 June 2020, ComCo concluded that the aid could not be declared compatible with the Air Transport Agreement. This was essentially because the company was already in financial difficulties on 31 December 2019.

In a **request for advice**, the Secretariat lastly had to consider the question of whether the planned federal support measures for **Skyguide AG** also had to be reported to ComCo. The Secretariat concluded that if an entity, such as Skyguide in this case, operated both as a government body and commercial enterprise, ComCo was only required to assess the support measure that related to the commercial activity.

As part of the **consultations on the COVID-19 Hardship Assistance Ordinance**, ComCo made it clear that any support measures in favour of **travel agents** did not fall under the Air Transport Agreement and that ComCo is consequently not responsible for assessing the compatibility of these measures with the Air Transport Agreement.

3.4 Product markets

3.4.1 Vertical agreements

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.

In August 2020 ComCo opened an investigation into a manufacturer of **tobacco products**. There are indications that there have been contractual export bans between the German manufacturer and certain sales partners in various countries outside Switzerland. These bans may obstruct parallel and direct imports of tobacco products into Switzerland.

3.4.2 Consumer goods industry and retail trade

In the retail trade, the competition authorities prioritised purchasing markets. On 1 September 2020 ComCo opened an investigation against a possible **demand-side cartel of trading companies**. The investigation focuses on the suspicion that wholesalers and retailers together with Markant Handels- und Industriewaren-Vermittlungs AG, which operates in the payment transactions sector, have exerted joint pressure on suppliers so that the suppliers use Markant for debt collection. These suspected collective measures of wholesalers and retailers go as far as threatening suppliers not to include their everyday products in the range offered by wholesalers and retailers. The amounts that suppliers pay Markant for debt collection and other services have apparently increased in recent years and a percentage of these revenues have been passed on to the traders.

In the course of the year, the Secretariat received numerous reports from suppliers complaining that the Coop would now be working with Markant Handels- und Industriewaren-Vermittlungs AG for the **processing of the payment transactions**. The suppliers complained in particular about the charges for debt collection and other services from Markant. These charges are calculated on the basis of the sales volume, and for many of these suppliers the

Coop is among the largest and therefore most important sales channels in Switzerland when it comes to volumes and sales. The Secretariat is examining as part of a market monitoring procedure whether there are any indications of violations of the Cartel Act in this connection.

3.4.3 Watch industry

ComCo concluded the reassessment procedure opened in November 2018 in the case of **Swatch Group Supply Stop** with a decision dated 13 July 2020 (see Section 2.1). As a result of this decision, the **interim measures** issued by ComCo on 16 December 2019 no longer apply (see Section 2.2).

From 2014 up to and including 2019, an audit company and the competition authorities regularly checked on **compliance** by the Swatch Group and more particularly ETA with the **amicable settlement** approved by ComCo in 2013. The checks did not reveal any violations of the amicable settlement.

3.4.4 Automotive sector

As part of various market monitoring procedures, the Secretariat has been verifying compliance with the **rules of the MV Notice**. Where necessary, the companies have adapted their conduct to comply with these rules. The intervention by the Secretariat has certainly reminded the companies of the principles laid down in the MV Notice. The Secretariat has made it clear in various cases that restricting the ability of a member of a distribution system to purchase original spare parts and equipment or spare parts of equivalent quality from a manufacturer or a distributor of these products of its choice and to use these parts for the maintenance or repair of motor vehicles must be regarded qualitatively as a serious restraint of competition.

The Secretariat received reports that a German **motor vehicle agent** had alleged to a Swiss customer that motor vehicles from a specific manufacturer had to be registered for at least four months at a German address, otherwise it could not give the Swiss customer a discount. This was apparently a requirement imposed by the manufacturer. The Secretariat followed up this information as part of a market monitoring procedure and found no evidence of any unlawful price or territorial protection agreements. In addition to the market monitoring procedures carried out, the Secretariat answered around 50 enquiries from market participants that relate to the MV Notice.

The Secretariat received a report from an association according to which automobile importers were passing on **CO_2 sanctions** to dealers in a way that was possibly unlawful under competition law. The Secretariat clarified the factual circumstances as part of a market monitoring procedure and concluded that there was no evidence that CO_2 sanctions had been passed on to dealers in a way that was improper under competition law, because the dealers can in turn pass on the higher prices to their end customers, which is line with the objective of the CO_2 sanctions.

3.4.5 Agriculture

In the agriculture sector in 2020, ComCo participated in two consultation procedures. The Secretariat took part in around 30 office consultation procedures that relate to agriculture. Several office consultation procedures were connected with the **COVID-19 pandemic**. In Switzerland the pandemic resulted in reduced demand for certain foodstuffs, such as Swiss AOC wines, but also in increased demand for certain other foodstuffs, and as a consequence to a request for a temporary increase in the partial tariff quotas for butter and other milk fats, for table eggs and for ware potatoes. The Secretariat responded positively to the request for a temporary increase in the partial tariff quotas mentioned.

As part of a market monitoring procedure in the **forestry and timber industry**, the Secretariat reviewed the practices of representatives of forest owners and the timber industry. Every few

months, the representatives held meetings to discuss prices of timber suppliers and timber consumers as well as quantities of timber. Following each of these meetings, recommended prices for timber suppliers and consumers together with recommendations on whether timber should be harvested or not were published. The Secretariat categorised these practices as potentially problematic under competition law and recommended that the representatives of the forest owners and the timber industry should adapt their practices to bring them in line with the Cartel Act – referring to the case law of the competition authorities relating to the publication of fees, tariffs and prices and corresponding recommendations by trade associations and industry organisations. In response, the representatives have stopped the behaviour that may be problematic under competition law.

3.5 Internal market

The Federal Act on the Internal Market (IMA) guarantees the **free exercise of professional activities** throughout Switzerland. This is ensured by granting a right of access to the market under the provisions on place of origin, through public tendering for concessions, and by maintaining legal minimum requirements for cantonal and communal procurements.

Free access to the market under the Internal Market Act has as its basic principle the right to offer goods and services anywhere in Switzerland provided the person concerned is permitted to carry on the same professional activity at their **place of origin**. Several private organisations providing out-patient community nursing services (Spitex) have reported difficulties in various cantons in obtaining the required authorisations and thus access to the market based on the terms of the Internal Market Act. Some cantons require providers from other cantons to produce the same proof that they would need for initial authorisation, for example by demanding extensive documentation. After the Secretariat intervened to discuss the matter with the cantonal public health authorities, the public health offices in the cantons concerned have in most cases formulated their requirements so that they are in conformity with internal market law. In one case involving a midwife, ComCo filed an appeal against the cantonal requirement to provide an extract from the register of criminal records. The appeal was rejected at cantonal level.

The Internal Market Act provides a simple, rapid **free of charge procedure** in cases relating to restrictions on market access. An official review of market access rights must be carried out without costs being imposed. For the most part, the authorities comply with this requirement not to charge fees. In one case involving a security services company from Western Switzerland, however, the cantonal executive authority charged fees for extending an authorisation, although the company concerned drew attention to its existing authorisations in other cantons of origin and to the requirement not to charge fees under the IMA. ComCo filed an appeal in this case against an apparent charging of costs that was contrary to internal market law. The appeal is pending before the cantonal courts.

As part of a market monitoring procedure, the Secretariat analysed the regulation of taxi services in German-speaking Switzerland from the standpoint of internal market law, by conducting a survey of 13 cities and cantons. The **taxi industry** is characterised by varying regulations, which make it difficult to provide services across communal or cantonal boundaries. The market monitoring focused on the one hand on the regulations covering app-based taxi orders and journeys. On the other, it examined whether the obligation based on decision made by the FSC on 1 September 2017 is being complied with: this requires a transparent and non-discriminatory tendering process for awarding taxi licences. Initial results indicate a tendency to comply closely with the internal market requirements. In certain towns and cities in French-speaking Switzerland and Ticino, the taxi industry is in contact with the licensing authorities in order to ensure that licensing practices conform with internal market law.

The Internal Market Act also lays down **minimum standards** for cantonal and communal **public procurements**. These minimum standards include a ban on discrimination. In addition,

Article 2 paragraph 7 IMA concerning the transfer of use from cantonal and communal **monopolies** to private parties, provides that this must be done by a public tendering process. Many of the cases dealt with in 2020 concerned both the law on public procurement and Article 2 paragraph 7 IMA. This can be explained firstly by the FSC case law, such as its judgments on public bicycle rental, which makes licensing-type cases subject to the law on public procurement. Secondly, in future concessions that are granted for public services will be subject to the revised public law on public procurement. Questions relating to the applicable law also arise in relation to the **emergency services**. The FSC decided on 21 August 2020 that the award of the licence to provide helicopter rescue services in the canton of Valais must be based on a public tendering process. In this case ComCo had submitted an opinion at the invitation of the FSC, which the court then followed. In the same field, the Secretariat conducted market monitoring procedures on **road breakdown recovery services** in two cantons in response to a report by a garage business. The cantonal police forces concerned rely on industry association members when allocating breakdown recovery jobs, which does not guarantee non-discriminatory access to the market. The Secretariat's legal analysis concluded that this does not conform with internal market law. The two cantons concerned therefore decided to carry out a public tendering process for breakdown recovery services in future.

In an appeal before the FSC, ComCo submitted an opinion on the issue of the legal requirements that apply to the transfer of the right to operate an **electricity distribution network** (RPW 2020/2, p. 861). A transfer of this kind could be subject to the law on public procurement, could be covered by Article 2 paragraph 7 IMA, or could be regulated by law on electricity supplies. Because of the outcome of the proceedings, the FSC was not required to rule conclusively on these questions in its judgment of 17 August 2020.

The Secretariat also acted as an observer in the **Federal Procurement Conference (FPC)**. The FPC is the Federal Administration's strategy-defining body for the procurement of goods and services. The FPC monitors and supports the further development of the federal law on public procurement and the harmonisation of the law on public procurement at national level. Ahead of the revised law on public procurement coming into force, important key documents on procurement (guidelines, directives, recommendations) had to be revised. The Secretariat actively lobbied for these documents to be formulated in conformity with internal market and competition law in a competition-friendly manner.

3.6 Investigations

In 2020 three searches of business premises were carried out. The first took place in January of the reporting year and related to an agreement in the IT sector (optical networks; see Section 3.1.1). This search laid the foundations for the investigation to be concluded very rapidly, within a year. The second was carried out following the first COVID wave in June, as part of the investigation into alleged bid rigging in the construction industry in the Moesa region (see Section 3.1.1). As a consequence, this operation was carried out subject to complex COVID-19 requirements. In order to protect the health of the persons involved, including its own staff, the Secretariat drew up a safety plan for conducting its investigative measures, which provides for masks to be worn and plexiglass panelling to be used when conducting interviews. The Federal Criminal Court (FCC) confirmed the legality of the search in the Moesa region in a case relating to the removal of seals. The third search operation took place in September in a case involving a possible cartel of trading companies (see Section 3.4.2), and was also subject to compliance with COVID-19 safety measures. One of the companies concerned had some of the seized documents sealed. In relation to this, proceedings relating to removing the seals are pending before the Federal Criminal Court. The company appealed to the FAC against the search in connection with the unsealed documents.

On the unanswered question of which former and current company employees and executives can claim the right to remain silent when questioned (*nemo tenetur*), the FAC added further

detail to its case law in March and noted that current employees can be questioned as witnesses. The question of the special rights to refuse to testify for former company officers is pending before the FSC (see Section 3.2.1).

Lastly, towards the end of the reporting year, new software came into use for conducting pre-triage procedures and data analyses in the Secretariat's forensic laboratory (Nuix Investigate). All the Secretariat's employees received online information on the data triages and the new software's features. A smaller group of ten employees was trained in using the new software in a one-day course.

3.7 International

EU: The ComCo Secretariat has regular exchanges with the Directorate General (DG) for Competition of the EU Commission. In the case of mergers reported in parallel in Switzerland and the EU, exchanges between the two competition authorities took place primarily during the provisional examination of the effects under competition law. In investigations of restraints of competition and in market monitoring procedures, the Secretariat contacted the DG for Competition to discuss abstract competition law issues, as envisaged by Article 7 paragraph 2 of the Cooperation Agreement on Competition Law between Switzerland and the EU. The Secretariat asked the GD for Competition, for example, how it assessed specific questions relating to the motor vehicle and foodstuffs trades. In addition, with a view to a revision of the notices on vertical agreements and motor vehicles, the Secretariat discussed the situation with regard to the GD's own revision projects in these fields. For their part, colleagues from the GD approached the Secretariat with specific questions on ComCo's practices in connection with the revision of its Market Definition Notice.

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: This year the OECD's meetings were held online. These virtual events proved advantageous to the Secretariat, because they made it possible for various specialists to take part and they saved time. At the virtual events in June and in December 2020, the following topics in particular were discussed: "The role of competition policy in promoting economic recovery", "Digital advertising markets", "Sustainability and competition", "Criminalisation of cartels and bid rigging" and "Competition in public procurement". The Secretariat presented a virtual contribution on the last topic. In relation to company mergers, "Start-ups, killer acquisitions and thresholds for merger control" as well as "conglomerate effects" were discussed. In addition, the OECD organised several webinars and issued a guide on support for competition authorities in coping with the COVID-19 pandemic. At the webinars that the Secretariat attended, "Legitimate cooperation between competitors", "Bid-rigging in public procurement" and "Improper practices – price abuse" were among the topics discussed.

ICN: In 2020, the Secretariat revised the form and content of its cooperation with the non-governmental advisors (NGAs), who are now appointed for three years. The five NGAs appointed in 2020 come from the legal profession and academia. At a virtual meeting, the authorities and the NGAs discussed their future cooperation and strategy. In addition, the official internal working group responsible for the ICN revised its organisational regulations and targets. The activities of the group members include passing on information from ICN webinars and information sheets to those with a particular interest. In addition, they chose the ICN training-on-demand offers that can be used for in-house staff training courses. As a result of the pandemic, instead of the ICN annual conference in Los Angeles that had been planned for spring, a daily virtual conference was held from 14 to 17 September. Representatives of the authorities and the Swiss NGAs took part in selected blocks of the event. The Secretariat staff in the ICN groups on advocacy, cartels, mergers and unilateral conduct also took part in various conference telephone calls on topics that have recently featured or will soon feature in ICN information sheets. A priority in the report year was the preparation and publication of a report

by the Unilateral Conduct Working Group on the subject of “Dominance/substantial market power in the digital market”. In compiling the report, the working group questioned competition authorities and NGAs.

UNCTAD: In October 2020, the 8th United Nations Review Conference on Competition and Consumer Protection was held both virtually and in Geneva. At the Review Conference, which takes place every five years, the Guiding Policies and Procedures under Section F of the UN Set on Competition were adopted, a document to which the competition authorities and the State Secretariat for Economic Affairs (SECO) contributed. In addition, it was decided to set up a new working group on cross-border cartels. These efforts should further consolidate international cooperation on competition matters and facilitate coordination between competition authorities. The competition authorities participated in the UNCTAD events on the current topics of “Leaving no one behind in the post-COVID-19 world”, “Combating cross-border cartels” and “Competitive neutrality”.

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 **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 Unfair Competition Act. The related consultations began in November 2020.

- The **Fournier Motion** of 15 December 2016 “Improve the position of SMEs in competition proceedings” (16.4094) demands deadlines for competition law administrative proceedings, 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 **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. After its acceptance by the National Council in September 2020, the motion is now before the Council of States.

- 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 CartA, was approved by the Council of States in December 2020 and is now before the National Council.

- 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 CartA, which provides for the public announcement of the opening of an investigation, naming the parties. It has not yet been considered.

- 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). Although the parliament previously rejected the popular initiative, it approved the indirect counter-proposal made by the Federal Council, which expressly provides for the introduction of the concept of relative market power, and had furthermore to a large extent accepted the demands of the initiative. In the final vote on 19 March 2021, the Council of States and the National Council resolved all differences.

Lastly the Federal Council is planning a partial revision of the Cartel Act: the main points are the modernisation of merger control procedures, the consolidation of civil competition law and the improvement of the opposition procedure. In addition, two proposals from the abovementioned Fournier Motion are being included in the revision work: official processing times and the award of legal costs in proceedings before ComCo.

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

4 Organisation and Statistics

4.1 ComCo, Secretariat and statistics

In 2020 ComCo held 13 full or half-day plenary sessions (including five online). At these meetings it took decisions on matters related to the Cartel Act and the Internal Market Act. More details on these can be found in the statistics below (see Section 4.2).

4.2 Statistics

As of the end of 2020, the **Secretariat** employed 75 (previous year 74) staff members, 45.3 per cent of whom were women (previous year 41.9%). The 75 employees include both full-time and part-time staff representing a total of 64.1 (previous year 64.2) 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 56 (previous year 57), corresponding to 49.8 full-time positions (previous year 51.6). Nineteen employees (previous year 17) work in the Resources Division, providing support for all ComCo's work; this corresponds to 14.3 (previous year 12.6) full-time positions. The Secretariat also offers four (previous year 5) internships. These four interns work full-time.

The statistics on the work carried out by ComCo and its Secretariat in 2020 are as follows:

	2020	2019	2018
Investigations			
Conducted during the year	20	19	24
Carried forward from previous year	13	16	18
Investigations opened	7	3	6
New investigations from divided investigation	0	2	0
Final decisions	6	11	4
Amicable settlements	4	9	2
Administrative rulings	1	2	2
Sanctions under Art. 49a para. 1 Cartel Act	4	10	4
Partial decisions	2	5	0
Procedural rulings	2	2	0
Other rulings (publications, costs, searches, etc.)	1	6	2
Precautionary measures	1	1	0

Sanctions proceedings under Art. 50 ff. Cartel Act	1	0	0
Preliminary investigations			
Conducted during the year	14	14	15
Carried forward from previous year	13	8	10
Investigations opened	1	6	5
Concluded	8	4	7
Investigations opened	1	1	2
Modification of conduct	4	3	3
No consequences	3	0	2
Other activities			
Notifications under Art. 49a para. 3 let. a Cartel Act	1	2	2
Advice	24	28	21
Market monitoring	80	63	72
Freedom of information applications	18	7	20
Other enquiries	565	488	581
Mergers			
Notifications	35	40	34
No objection after preliminary examination	34	37	27
Investigations	1	3	3
ComCo decisions after investigation	1	2	3
Authorisation refused	0	0	0
Authorised with conditions/requirements	0	0	0
Authorised without reservations	1	2	3
Early implementation	0	0	0
Appeal proceedings			
Total number of appeals before the FAC and FSC	42	46	37
Judgments of the FAC	9	4	7
Success for the competition authority	6	1	5
Partial success	2	2	1
Unsuccessful	1	1	1
Judgments of the FSC	7	6	1
Success the competition authority	6	5	0
Partial success	1	0	1
Unsuccessful	0	1	0
Pending at the end of year (before FAC and FSC)	29	36	33
Expert reports, recommendations and opinions, etc.			
Expert report (Art. 15 Cartel Act)	0	0	0
Recommendations (Art. 45 Cartel Act)	0	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	0	2	0
Follow-up checks	0	1	0
Notices (Art. 6 Cartel Act)	0	1	0
Opinions (Art. 46 para.. 1 Cartel Act)	327	120	152
Consultation proceedings (Art. 46 para. 2 Cartel Act)	12	17	8
state aid assessments	2	-	-
IMA			
Recommendations / Investigations (Art. 8 IMA)	0	3	0
Expert reports (Art. 10 IMA)	1	2	3
Provision of advice (Secretariat)	63	93	94
Appeals (Art. 9 para. 2^{bis} IMA)	2	0	0

The statistics for 2020 and a comparison with the figures from 2019 and 2018 reveal the following:

- Investigations: In 2020 the competition authorities conducted around the same number of investigations as in the two previous years. ComCo concluded a slightly below average number of cases in in their entirety (two of the six decisions are partial decisions by the relevant chamber), but opened more than the average number of cases thanks to the resources freed up as a result.

- Preliminary investigations and market monitoring procedures: In 2020 the Secretariat conducted around the same number of preliminary investigations as in recent years. The foregoing also applies to number of cases concluded. However, this year the Secretariat opened only one new preliminary investigation. The number of market monitoring procedures, which are normally instigated in response to complaints and reports, was higher than average in 2020.

- Mergers: The number of mergers that were assessed was within the usual range.

- Appeal proceedings: Although the number of appeals pending before the FAC and FSC remains relatively high, it has fallen slightly. What is positive in ComCo's view is that it is successful in most cases, either completely or at least in part.

- Expert reports, recommendations and opinions: ComCo prepared two expert reports for the Price Control Commission in 2019, but has not issued any recommendations or provided any expert opinions in the past three years. On the other hand, the Secretariat has been invited to give its opinion in a much larger number of office consultation procedures. This rise in the number of office consultation procedures is primarily due to the large number of political proposals and requests, together with matters related to COVID-19. The number of opinions that ComCo has provided in consultation procedure has remained fairly constant.

- IMA: The number of enquiries dealt with relating to the Internal Market Act fell within a similar range as in the past few years. The number of advisory procedures is around a third lower than in 2018 and 2019 however.

5 Special Topic: 25 years of the Cartel Act

5.1 The modernisation of Swiss competition law

5.1.1 Switzerland as a land of cartels and the consequences of voting no to the European Economic Area

Until the end of the 1980s, combating cartels and other restraints of competition in Switzerland was not given much priority. The Cartel Act of 1985, like the Cartel Act of 1962, took an approach that primarily aimed to protect individual companies, but nevertheless regarded functional protection, i.e. the protection of effective competition, as being of equal importance. The instruments that the Cartel Act provided for the fight against cartels were however inadequate. When using the balance method, the Cartels Commission had to weigh up interests in protecting competition against other public interests, there were no clear codes of behaviour for companies, and the law was only directed against cartels. Furthermore, the law was insufficiently enforced because the Secretariat was underfunded, the Commission could not issue rulings, but could only make recommendations, and procedures had shortcomings.

At the time, Switzerland was experiencing a recession, inflation rates were high, and a certain economic lethargy was widespread. Hopes of an economic upturn were pinned on Switzerland's efforts at the time to join the European Economic Area (EEA). From the standpoint of competition, this would also have meant breaking free from the inadequate Cartel Act of 1985. By joining the EEA, Switzerland would have adopted the strict rules on competition (ban on cartels, ban on abuse by dominant undertakings, merger control procedures) that applied at the time in the European Economic Community (now the European Union), as well as the associated case law.

As we all know, this is not what happened. On 6 December 1992, Swiss voters rejected the proposal to join the EEA by a narrow majority. This decisive event triggered the move towards a new and modern competition policy, based on economic principles. For within just a few days, the Federal Council announced its programme of "free-market renewal". The Federal Council had expected that joining the EEA would bring impetus to its competition policy, and this renewal was intended to compensate for that loss. Alongside a revision of the Cartel Act, the Internal Market Act (IMA), the Federal Act on Technical Barriers to Trade and the Public Procurement Act (PPA) were drawn up. In 1994, Switzerland also joined the World Trade Organisation (WTO). These steps and instruments led to markets opening up in hitherto protected economic sectors and to respect for competitive principles becoming mandatory.

5.1.2 Revision of 1995

The revision of the Cartel Act launched after the Federal Council announcement proceeded rapidly. In little under three years, parliament had approved the complete revision and with it a paradigm change. It completely redefined competition law, following the proven modern economic model provided by EU law: the substantive provisions covered the three main forms of restraints of competition (anti-competitive agreements, abuse of market power, mergers) and gave companies clear codes of behaviour. The priority was functional protection, i.e. the protection of effective competition. The newly created Competition Commission could issue rulings and was provided with a Secretariat that was much-expanded in staffing terms.

5.1.3 Fine tuning in the revision 2003

The heavy fines imposed on a vitamin cartel in several different countries exposed a serious deficiency in the law. In 1999 ComCo could only declare agreements affecting competition to be unlawful and impose procedural fees. In Switzerland it was not possible to impose direct sanctions or order the forfeiture of the profits made by cartels. The ComCo president at the time summed it up by saying: "You get away with your first murder".

Several parliamentary proposals, a clear concept from the Federal Council, and broad consensus in parliament led in June 2003 to the first revision of the Cartel Act. ComCo was authorised to impose direct sanctions for the most serious violations of the Cartel Act, the possibility of a voluntary admission (report under the leniency system, rules on principal witnesses) was intended to make it easier to detect cartels, and the Secretariat was given the power to conduct searches of business premises and seize evidence. What was not part of the Federal Council plan was the new Article 5 paragraph 4 on vertical agreements, which found its way into the Cartel Act after discussions in the lobby of the Parliament Building.

By sharpening the instruments available to ComCo, this revision was intended to increase the law's deterrent effect and the probability of violations being detected. As such it can be seen as a fine tuning of the approach taken up to that point. However, it had finally raised the Swiss law on cartels to place it on a par with EU competition law.

5.2 Goals of the Cartel Act and its practical implementation

5.2.1 Goals of the Cartel Act and the authority's objectives

The fundamental goal of the Cartel Act lies in protecting "free"[1] competition against abuse of market power, foreclosure and over-regulation. The Act consequently contains measures to deal with the three key practices that restrict competition: a ban on agreements that eliminate or seriously harm competition and which cannot be justified, a ban on the abuse of market dominance, and the power to stop mergers that lead to market dominance and may eliminate competition. In addition, it allows the competition authorities (ComCo and its Secretariat) to speak out against state regulations restricting competition.

ComCo made it known at a very early stage that it **primarily intended to take action against the most harmful restraints of competition**, not least because of the limited staff resources of its Secretariat. It therefore concentrated on combating the three most harmful forms of **horizontal agreements affecting competition** (price, quantity and territorial agreements), the **two key vertical agreements** (price fixing agreements and absolute territorial protection) and the **abuse of market dominance**. Examples from the fund of decisions taken and activities carried out by ComCo in these areas are provided below (see Sections 5.2.2 to 5.2.4).

In addition, in the initial years following the 1995 revision, ComCo tackled market concentrations that resulted from **mergers** with some vigour. It set itself the goal of stopping dominant positions from arising as a consequence of mergers (i.e. as opposed to those resulting from innovations or commercial success) in Switzerland's small, heavily specialised economy. Dominant companies formed by mergers weaken or eliminate competition. However, in 2007 the FSC put a brake on the competition authority, when the court concluded, based on a strict legal and literal interpretation of Article 10 paragraph 2 letter a CartA, that ComCo not only had to prove market dominance, but also that such dominance created the possibility that competition would be eliminated. The threshold for intervention, already rather high, was made considerably higher than for previous cases that ComCo had dealt with, and was clearly higher than in other countries. As a result, ComCo limited its use of resources in this field, making repeated references to the difference from the more restrictive, economically more sensible test applied in the EU, and calling for reform of the merger control procedure (see Section 5.3.2).

The competition authorities played an important role in connection with **state regulations**. Experience has shown that drawing attention to the possibility that competition may be restricted can have an influence on regulations. Sometimes the persistent highlighting of concerns and reservations can bring a result. What is crucial is that the competition authority is regarded in the regulatory process not as an unwanted spoilsport, but as a credible, reliable and impartial partner. ComCo and its Secretariat have worked over the years to secure this position. In addition, in economic sectors that have been gradually opened up to competition (such as infrastructure markets and agriculture), the competition authorities accompanied this process with measured interventions and have worked to maintain and expand competition.

Sometimes the action taken by a competition authority amounts to serious interference in the autonomy of companies and it is crucial that such action complies with the fundamental **constitutional guarantees**. It must therefore be subject to judicial scrutiny, which in Switzerland is a task for the FAC and the FSC. Even if the courts occasionally have to correct the substantive application of the law in ComCo's decisions, and ComCo had a great deal of groundwork

[1] There is no legal definition of competition, which is why adjectives such as "functioning" or "effective" are added to the term. There is agreement on what competition should achieve, namely the production of goods or the provision of services that meet consumers' needs and provide the best possible value for money.

to do in the early years, the courts' decisions have confirmed over the years that the competition authorities conduct their proceedings in accordance with the rule of law and that the rights of parties are fully guaranteed.

The globalisation of the economy has also left its mark on competition law. Restraints of competition do not stop at national borders and companies within and beyond a given continent collude with each other in order to restrict competition. The **international** reaction from competition authorities has been to create new bodies to discuss experiences, procedures and cases, even though authorities still apply rather different national laws in some cases. In 2002 the International Competition Network (ICN) was established, which now numbers over 120 competition authorities as members. The ICN and the Competition Committee of the Organisation for Economic Cooperation and Development (OECD) have become two key forums for exchanging information and experiences. Exchanges within these bodies, however, remain informal, and due to restrictions because of official secrecy and the procedural rights of parties, an exchange of evidence, for example, is not possible. An exchange of this type requires an express statutory or international treaty basis. Switzerland has achieved this with the EU, by concluding a cooperation agreement in 2013. This has allowed the competition authorities in Switzerland and the EU to enter into comprehensive exchanges, including the mutual transmission of evidence in parallel procedures.

In the following sections, some of the highlights from ComCo's case law are discussed, illustrating how it has pursued the goals of the Cartel Act and thus implemented the will of parliament. This analysis does not aim to cover ComCo's entire case history over the past 25 years, but rather to highlight the main areas of the competition authorities' activities on the basis of decisions that have received a high level of public attention (see Sections 5.2.2 to 5.2.5). The procedural law has also played a crucial role in this (see Section 5.2.6).

5.2.2 Parallel imports: Opening up to foreign markets

An important goal of the Cartel Act is to keep the Swiss market open to its neighbouring countries. Cross-border competition makes an important contribution to ensuring that domestic competition in Switzerland functions properly. Switzerland, with around 8.5 million inhabitants, has a relatively small domestic internal market that is heavily concentrated in various economic sectors which in some cases have small market volumes. As a result, a small number of powerful and successful companies cross swords in different markets. In addition, Switzerland is for several reasons an "island of high prices", in part due to various trade barriers. This situation can only be countered to a limited extent by interventions on the part of the competition authorities. For Switzerland, open markets – vis-à-vis other countries and within Switzerland – are the best form of competition. Open borders and the free movement of goods and services also compensate to some extent for the lack of competitive pressure in Switzerland.

ComCo has always tried, within the limits of the options that it has, to counter the prevention of parallel and direct imports and has thus made its contribution to keeping markets open. The trilogy of decisions, GABA-BMW-NIKON, played a crucial role in this. The GABA case concerned the prevention of parallel imports of the "Elmex" toothpaste. Although a rather insignificant case economically, it is the subject of a decision by the FSC which now has the status of a landmark judgment. The Federal Supreme Court not only confirmed the decision taken by ComCo and by the FAC. The highest Swiss court also held that any prevention of parallel imports can be presumed significant and unlawful, without any proof of its effects being required (as with other violations under Art. 5 para. 3 and 4 CartA), unless a justification of increased efficiency can be shown. The cases of BMW and NIKON involved "EEA clauses" in foreign distribution agreements, which prohibited dealers from supplying the products concerned to customers in Switzerland, or more precisely outside the EEA. These cases also demonstrated that the Cartel Act applies outside Switzerland, provided a restraint caused abroad has effects in Switzerland. The BMW case involved an economically significant market.

ComCo's intervention promoted the parallel and direct imports of cars and thus put pressure on the prices charged by Swiss importers and dealers.

5.2.3 Opening of procurement markets and bid rigging

Traditional "hard" horizontal agreements affecting competition are clearly harmful. They lead in many cases to higher prices, reduce quality and stifle innovation. Price-fixing agreements have always been a feature of the Swiss economy. ComCo takes action against these consistently and in numerous cases, both in larger economic sectors (e.g. agreements between banks and in public procurement), and in smaller markets (e.g. agreements between driving schools). The harm caused by agreements is impressively illustrated by the agreements in the construction sector in particular:

On joining the WTO in 1994, Switzerland accepted the requirement that public procurement contracts that exceeded certain thresholds had to be awarded in a transparent and competitive procedure. This meant that the principle of competition would be applied to a sector that had previously been very much characterised by the self-interests of the local communities and businesses involved. This meant that as far as the public sector was concerned, the conditions were in place to be able to award procurement contracts competitively - with positive consequences for the use of public funds.

This also meant that the businesses concerned had to be prepared to change their ways. From now on they had to compete for contracts that they had previously been awarded without much effort thanks to protectionist award procedures. The main feature of public tendering procedures is that companies have to try to assert themselves in an anonymous bidding competition. In this one-shot-game, the offer with the best cost-benefit ratio wins the day. It is therefore not hard to see why certain companies might try to circumvent the law on public procurement and control the bidding process for their own purposes, just as in the cartel era, deciding who is to be the "winner" and who will be the "losers" by colluding on what the bids will be. Since the 1995 revision, the competition authorities have received many reports of bid rigging. After uncovering a substantial road surfacing cartel in Ticino in 2007, ComCo announced that it would make bid rigging a major priority the following year.

In the following years, it conducted various successful investigations; electrical installations in Bern in 2009, roads and civil engineering in the canton of Aargau in 2011, roads and civil engineering in the canton of Zurich in 2013, tunnel cleaning in 2015, and roads and civil engineering in See-Gaster in 2016. It encountered the most widespread bid rigging case in the investigation opened in October 2012 relating to construction projects in the canton of Graubünden. Although the original investigation was limited to allegations of bid rigging in the Lower Engadin, following a series of voluntary admissions and further searches of business premises it was extended to cover the entire canton and ultimately divided into ten separate investigations. In its ten decisions (Engadin "I-VIII" together with the Münstertal and Graubünden road construction cases), ComCo concluded that in more than 1150 construction and civil engineering projects in the canton the award of contracts by communes and private individuals with a total value of several hundred million francs had been manipulated through bid rigging. The decisions generated a high level of media interest and drew public attention to the fact that horizontal price-fixing agreements are harmful, resulting in higher prices and unchanging structures, and are seriously detrimental to consumers. ComCo does not shy away from the effort required to deal with these complex cases and is consistent in pursuing bid rigging.

In addition to cracking down on bid rigging, the competition authorities have invested a great deal in prevention campaigns and raising awareness. In a series of campaigns, the Secretariat has provided federal and cantonal procurement agencies and other bodies with information on the subject of bid rigging in half-day or all-day events. Procurement agencies are now able to identify the signs and indications themselves. In addition, the competition authorities have developed a statistical instrument (a "screening tool") to help detect agreements. This instrument

has attracted interest in other countries and is used by a number of cantons. These various activities increase the overall deterrent effect, making bid rigging more difficult or preventing it altogether.

5.2.4 Support from the competition authorities for the liberalisation of infrastructure markets

Switzerland began to allow competition in its infrastructure markets in 1998. State monopolies were going to face competition from companies entering the market for the first time. In a first wave, the markets for telecommunications, postal services and goods transport by rail were opened up. In the telecommunications market, for example, the opening brought in new providers to challenge Swisscom, which had previously been the sole provider. Swisscom however began as an established company with a monopoly, or at least a dominant position. The main task for the competition authorities in this market was to prevent possible abuses against companies newly entering the market, in order to give competition any chance at all. As in other countries, some former monopolists came into conflict with the law on cartels. In the telecommunications market, the numerous ComCo investigations and decisions (not all legally binding) bear witness to this. A key decision was ADSL II, in which ComCo held there had been an unlawful margin squeeze, in that rivals were effectively being prevented from setting competitive prices for broadband services. The FSC confirmed the breach of competition law, and Swisscom was fined CHF 186 million for its conduct – the highest legally-enforceable sanction that ComCo had ever imposed.

In other infrastructure markets, market liberalisation came slowly, pushed along by decisions taken by the Competition Commission:

- In the electricity market, ComCo investigated the refusal by the Fribourg Electricity Board (FEW) to transmit electricity from other producers through its networks to end consumers. It judged this refusal in 2000 to be the abuse of a dominant position in the network sector. A proposal for market liberalisation in terms of a new electricity market act was rejected by voters in 2002, but when the FSC upheld the ComCo decision in the FEW case in June 2003, this opened the electricity market up to competition in practice. Case-by-case liberalisation of this sector came to an end at the start of 2008, when parliament enacted the Electricity Supply Act, formally liberalising the electricity market.

- Following the regulated liberalisation of the electricity market, the Federal Council intended to open up the gas market as well. However, this project was repeatedly delayed. At the same time, the number of complaints from gas consumers who wanted the freedom to choose their supplier was steadily growing. In June 2020, ComCo issued a key decision relating to the natural gas market in Central Switzerland. It fined the gas network operators ewl and EGZ for an unlawful refusal to transmit gas through their pipelines. The two companies agreed to allow gas from third-party suppliers to pass through their systems in future and concluded an amicable settlement with the competition authority to this effect. This meant that the gas market – like the electricity market in 2003 – had been opened up to competition by applying the Cartel Act case-by-case.

5.2.5 Keeping digitalised markets open

The spread of internet and broadband connections in Switzerland, which began at the start of the century and today covers almost the entire country, led to the creation of new markets under the buzzword “digitalisation”, and saw other markets being eroded or disappearing altogether. This transformation of the economy led and is still leading to opportunities for and risks to competition and to new challenges for the competition authorities. In the digitalised markets, network effects, digital platforms, data sovereignty and consumer behaviour commonly lead to

dominant positions, which are assessed ambivalently from a competition standpoint. On the one hand they can be the most efficient solution in economic terms if the markets have a natural tendency towards monopolies, and this is the only way that low prices and high quality can be achieved. On the other, dominant companies can exploit their position in these markets to the detriment of consumers and either force undesirable competitors out of the market or not allow them access in the first place, in order to consolidate and expand their market power.

In recent years, the competition authorities have increasingly had to deal with these ambivalent aspects of digital markets. In order to keep its principles for assessing digital markets up to date, the Secretariat set up an internal working group on digitalisation in 2014. This supports the authority in dealing with the questions that arise and monitors international developments and case law. In addition, in 2017 ComCo declared digitalisation to be its new priority, announcing that it would be devoting special attention to this sector.

As well as reorientating in terms of its organisation and priorities, the competition authorities have also conducted a range of proceedings in which digitalisation has played an important role. One of its most important decisions relates to hotel booking sites. These have become increasingly important. Websites such as booking.com initially forced hotels to accept restrictive conditions. In its decision in 2015, ComCo banned the websites from placing comprehensive restrictions on the offers that hotels could make. Hotels should be able to offer lower prices or a larger number of rooms through other sales channels. Another case related to the decision by Apple not to allow TWINT as an alternative digital payment solution on iPhones without imposing restrictions. Only after the Secretariat had intervened did Apple disclose the code required to allow TWINT to function on iPhones without restriction. A further case on digital payment solutions is still pending. There is a suspicion that the banks behind TWINT are boycotting the use of their credit cards in Apple Pay. It is likely that the competition authorities will have to deal with further issues relating to digitalisation in the near future.

5.2.6 Procedural challenges

Good substantive law can only be effective if it is applied using the correct legal procedures. This posed a major challenge for the competition authorities after the Cartel Act came into force in 1995. Staff had limited experience of administrative procedure law (APA) and first had to work out the basic principles. This led to some errors. In a landmark procedural judgment in 1998 the then Competition Appeals Commission provided instructions on the constitutionally correct procedure.

In response, the Secretariat introduced a process management system that harmonised the procedures within the authority, ensured compliance with the constitutional principles and institutionalised legal and economic quality control procedures. An external report on ComCo's procedure commissioned by the then Department of Economic Affairs confirmed in 2000 that there had been fundamental defects in the procedure, but that these had been eliminated.

Following this substantial correction to the procedure, the discussion turned to substantive issues. Even though parties to proceedings complain almost as a matter of course of "breaches of the right to a fair hearing", the FAC has regularly confirmed that ComCo's procedures are in fact correct.

A new front opened when the first decisions on sanctions were taken. In the "Publigroupe" case, it was claimed that the ComCo procedure violated the European Convention on Human Rights (ECHR) and that the sanction imposed should therefore be quashed. In ground-breaking judgments, the FAC and the FSC confirmed that the ComCo sanctions procedure was similar to criminal proceedings in nature and that the principles of the ECHR were applicable. Following judgments of the European Court of Human Rights, the Swiss courts held that the requirements of the ECHR were satisfied if the appeal process involved an independent court

that had full of rights of review over the decisions of the Competition Commission; in Switzerland the FAC is able to do this. It is therefore irrelevant if the Competition Commission and its representatives do not meet the requirements for an independent court within the meaning of the ECHR.

The searches of premises that the Secretariat has had the power to carry out since the 2003 revision have been a success story. They allow the Secretariat to gain access to evidence that is held by companies and which cannot be accessed using conventional investigative measures such as questionnaires and interviews. After staff had undergone a diligent process of training, the first search was carried out on 14 February 2006. Over the subsequent years, the instrument was fine-tuned, staff experience of the procedure steadily increased, and new digital aids came into use. Since then, the Secretariat has conducted around 40 search operations at over 150 companies. The evidence secured has in most cases allowed the Secretariat to prove an unlawful restraint of competition.

Switzerland reached a milestone in international respects when its cooperation agreement with the EU came into force on 1 December 2014. It was the first agreement anywhere in the world that not only enables an informal exchange of evidence, but also in specific circumstances an exchange without the consent of the company concerned. The agreement allows the competition authorities to discuss any issues and to coordinate searches in parallel proceedings, to discuss voluntary admissions with the consent of the companies concerned and to exchange evidence in a fixed procedure. The implementation of the agreement has proved – at least from a Swiss point of view – to be very successful, because it has led to a variety of contacts and exchanges that are extremely helpful in the fight against internationally active cartels, and it enables procedures to be harmonised.

5.3 Work in progress on the current Cartel Act

5.3.1 General Remarks

In the revision of 2003, Parliament introduced a duty to evaluate the new instruments (direct sanctions, voluntary admissions, leniency system, etc.) in the Cartel Act. The Federal Council fulfilled this duty by conducting a comprehensive review of the application of the Cartel Act and providing a detailed report in 2009. In the report, it outlined the remaining shortcomings, such as the competition authority's institutional set-up, the absence of the power to ban the most harmful forms of agreements, the substantive test in the merger control procedure, the barely noticeable enforcement of competition law through the civil courts, and certain procedural issues.

The revision of the Cartel Act initiated on the basis of the report was abandoned in 2014, after the National Council twice decided not to consider the substance of the proposals. This was essentially due to strongly diverging interests in Parliament, which meant that although there was majority support for individual points of the revision, there was no majority in favour of the overall package.

Although hard cartels are now prohibited in practice thanks to the FSC's decision in the GABA case, institutional reform has proved controversial. In future it may be difficult, despite international criticism, to find a majority in Parliament for a professionalised and slimmed-down ComCo or for a competition authority in the style of the German Federal Cartel Office. On the other hand, some issues were largely undisputed and there is still a need for their reform. These issues are discussed briefly below.

5.3.2 Merger control procedure

Swiss merger control procedures, with their high threshold for intervention (elimination of competition), contrasts with international merger control procedures, in particular that in the EU.

EU procedures were revised in 2004 and since then a “significant reduction in competition” has been sufficient for the competition authority to intervene. In turn, it enables an assessment of efficiencies to be carried out. In this particular field, the Swiss law on cartels, which is otherwise modelled on the EU in other areas, with its provisions being interpreted in line with European case law, differs in essential respects from the EU law. This makes it difficult to achieve a uniform assessment of international mergers. The very permissive test under the Swiss Cartel Act is not especially beneficial for SMEs, as it allows large companies that already have market power to form even larger concentrations, leading to power imbalances in the sectors concerned.

Since the revision of the law was abandoned, SECO has commissioned two studies to investigate the differences between the Swiss and the European thresholds for intervention and examine how the European provisions would have been applied to mergers approved by ComCo. For ComCo, the conclusions of these studies are clear. Adopting the European substantive tests would make it possible to better address the increasing concentration of the Swiss economy and also take suitable account of the efficiency considerations that are often raised in merger cases.

5.3.3 Civil actions against cartels

The regular detection of bid rigging (see Section 5.2.3) has turned the spotlight on the question of how public authorities and private individuals can take action against cartel members to recover the losses that they have sustained by having to pay excessive prices. The current Cartel Act provides that victims of unlawful restraints of competition are entitled to claim damages and satisfaction in civil proceedings and can force cartel members to surrender the profits that have been unlawfully made. 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 (see ComCo annual report for 2019).

Because of these high hurdles, “private enforcement” in Switzerland – in contrast to the considerably more robust legal framework in the EU – is practically non-existent. The incentives to bring civil actions could be increased considerably by amending the Cartel Act while remaining within present system. Attention must be paid to the risks, such as the risk to the vital voluntary admission procedure (leniency system) as a result of simplified access to official documents. 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 improve the incentives for 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 can take action on their own initiative and are thus no longer dependent on the competition authority’s discretion as to whether it pursues a case.

5.3.4 Revision 2021

In ComCo’s view it is reasonable to continue the work in progress on the current Cartel Act and to close the loopholes in a revision. The Federal Council has also committed itself to this and announced that in the first semester of 2021, unless there are delays because of the COVID situation, it will submit a revision proposal for consultation. The planned revision should address merger control procedures and civil actions against cartels along with other outstanding subordinate issues. The experience of past Cartel Act revisions has shown that a limited and slimmed down revision similar to that of 2003 is more likely to find favour. An “overloaded cart”, like the revision of 2012, is likely to tip over. From an economic and legal point of view, it is important that no extraneous elements find their way into the Cartel Act and that no key pillars of the law are weakened because of ComCo’s success in recent years.

5.4 Conclusion and outlook

The 25-year-old Cartel Act is a vital and solid cornerstone of Swiss economic policy. ComCo and its Secretariat have fought against price-fixing agreements and market foreclosures, opened markets and reinforced the internal market. The competition authorities have concentrated on the most harmful horizontal agreements affecting competition (price, quantity and territorial agreements), on the main vertical agreements (price fixing agreements and absolute territorial protection) and on abuses of market dominance. The valuable instruments that they have been entrusted with, such as sanctions, the leniency system (voluntary admissions) and powers of search have proved their value. This means that the key findings of the 2009 analysis report still hold true twelve years later:

"The impact analyses confirm […] that a modern law on cartels and an active and independent competition authority bring Switzerland major economic benefits. Parliament has chosen the right path. The law on cartels must be effective and the competition authority must be properly equipped to do its job."

"The new instruments in the revised Cartel Act (direct sanctions, leniency system, objection procedure, search powers) have generally proven to be useful. They help to prevent or uncover restraints of competition and to encourage competition, by increasing the preventive effect of the Cartel Act and compliance with competition law."

Swiss competition policy and its implementation in the current Cartel Act are effective and comply with the international standards. The work that is still required has been identified and is underway. Ultimately, however, it is the competition authority that puts the provisions into practice. It has the power to remedy violations of competition law through its decisions, thereby creating legal certainty and achieving a sufficiently high preventive effect. The Competition Commission is the guarantor of the modern-day enforcement of cartel law.