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**Directorate for Financial and Enterprise Affairs COMPETITION COMMITTEE** 

### ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN SWITZERLAND

-- 2009 --

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#### ANNUAL REPORT 2009 OF SWITZERLAND'S COMPETITION COMMISSION

(In accordance with Article 49 Paragraph 2 of the Cartel Act)

#### **Foreword from the President**

In 2009, the competition authorities were able to issue authoritative decisions on bid rigging and vertical agreements which I would like to discuss briefly in this introduction.

In relation to bid rigging, the competition authorities are pursuing a variety of approaches. These primarily involve explaining the importance of preventing bid rigging to the awarding authorities and enforcing the Cartel Act (CartA) against bid rigging on the contractor side. The aim is firstly to make it clear to both procurement agencies and the bidding companies that bid rigging is no longer a trivial offence. Secondly, it is intended that decisions and sanctions in specific cases will have such a deterrent effect that bid rigging will cease to occur.

In order to provide information on bid rigging to awarding authorities, the Secretariat contacted federal and cantonal procurement agencies. In addition to explaining how the CartA is applied to stop bid rigging, the Secretariat is offering training sessions to federal and cantonal procurement agencies in their own offices in order to provide them with the required information and expertise.

With regard to the enforcement of the CartA in specific instances of bid rigging, the Competition Commission concluded an investigation into eight Bernese electrical installation firms in the summer of 2009. On the basis of the reports submitted under the bonus system, it was possible to prove that the unlawful agreements covered 108 construction projects with a total value of around CHF 36 million. The companies involved received fines totalling CHF 1.24 million.

In the area of vertical agreements, the Competition Commission issued its first decisions on sanctions for violations of Art. 5 para. 4 CartA. In the case of Felco/Landi, it fined the companies for unlawful price fixing that had led to price increases for end customers. In the Gaba case, it issued penalties for preventing parallel imports into Switzerland after the company concerned imposed an export ban on its Austrian licensee. And lastly, in the off-list medicines case, the Competition Commission prohibited the further use of recommended retail prices because these had been adhered to by pharmacists and self-dispensing doctors, which had resulted in unlawful price fixing.

With these ground-breaking decisions on vertical agreements affecting competition (price fixing agreements and the prevention of parallel imports), the Competition Commission is helping to bring about greater legal certainty for businesses. The Competition Commission will continue to give priority to the pursuit of restraints on parallel imports, in particular because such restraints are expected to increase due to the revision of the Patent Act and the imminent introduction of the Cassis-de-Dijon principle.

Prof. Walter A. Stoffel

President of the Competition Commission

### 1. Activities in the various economic sectors

## 1.1 Focus on bid rigging

#### 1.1.1 Overview

- 1. Combating bid rigging has been a focus for the activities of the Secretariat since 2008. In practice, bid rigging arrangements are as widespread as they are harmful to the national economy. They lead to excessive public expenditure, which has a direct or indirect effect on the amount of taxes that businesses and ordinary people have to pay. When one realises that public authorities (at federal, cantonal and communal levels) each year procure a good CHF 30 billion in buildings, products and services, the potential losses that bid rigging can cause become clear.
- 2. The activities of the Secretariat in the area of bid rigging follow a strategy devised to deal with this specific problem, which is based on the following three approaches:
  - "Prevention & information", which involves measures intended to raise awareness, to prevent and provide information on bid rigging, to encourage the exchange of expertise and to strengthen the role of the competition authorities as a contact partner (e.g. through training and seminars). The target group and partners for these measures are public procurement agencies (consumers), the companies operating in the procurement markets (suppliers), the regulators in the public procurement sector and other interested parties.
  - "Exposure", which comprises measures designed to expose bid rigging (e.g. the collection and evaluation of bid data). The target group and partners for these measures are primarily public procurement agencies. They play a key role in the exposure of bid rigging.
  - "Prosecution" lastly covers the prosecution, dismantling and penalisation of bid rigging cartels using the procedures provided by the Cartel Act.
- 3. Last year, the Secretariat began with the targeted implementation of the above strategy.

### 1.1.2 Cooperation with the cantons

- 4. The Secretariat was able on its own initiative to conduct bilateral talks on the subject of bid rigging with 18 cantons. The purpose of these meetings conducted in the various cantonal capitals with representatives from the building departments was to discuss ways of cooperating in combating bid rigging.
- 5. The emphasis was firstly on possible cooperation in the evaluation of cantonal bid data. In addition, the Secretariat presented its "Public Procurement and Competition" training module, originally developed for the federal procurement agencies, and offered the cantons and the cantonal procurement agencies a version of the module that was adapted to their needs. Overall, the discussions met with a positive response, with the cantons expressing their interest in cooperating with the competition authorities in combating bid rigging. The Secretariat's education and training programme received an especially enthusiastic welcome.
- 6. At the end of October 2009, the Secretariat, in cooperation with the Building Department of the Canton of St. Gallen, held its first training event in St. Gallen. This "pilot event" may be regarded as a success, and in addition to the knowledge transfer, provided the opportunity for an intensive exchange of practical experiences that was highly beneficial for both sides. Building on the experience acquired and the

feedback received, the Secretariat intends to increase its education and training activities in the coming year. In 2010, the Secretariat further intends as part of a pilot project to evaluate cantonal bid data using suitable statistical methods. In practice, the focus will be on those procurement markets which may be regarded as being particularly susceptible to collusion.

#### 1.1.3 Information

7. In response to a proposal from the editorial team of the ECO magazine programme on SF DRS (Swiss television), ECO produced a television report on the work of the Competition Commission in the combating of bid rigging. The 11-minute report, which was broadcast on 23 November on SF DRS 1 and which focused on the case of the Bernese electrical installation firms (see B.3.5), provided viewers with an insight into the procedures and instruments used by the Competition Commission to expose and dismantle bid rigging arrangements. In addition, the report covered the efforts of the Competition Commission to initiate cooperation with the cantons in combating bid rigging, featuring footage of the training event in St. Gallen.

#### 1.1.4 Prosecution

8. Lastly, in relation to prosecution, the completed investigation into the cartel of Bernese electrical installation firms (see B.3.5) and the investigation into several firms of building contractors in the cantons of Zurich and Aargau, which began with the house searches, (see B.5.2) are of particular note.

### 1.2 Focus on vertical agreements

9. Vertical agreements were a priority area for the competition authorities in 2009. In the cases of "clippers and shears", "off-list medicines" and "Gaba", the Competition Commission issued three landmark rulings in relation to vertical agreements in application of Art. 5 para. 4 CartA and the related vertical notice of 2 July 2007. In the Gaba investigation, the Competition Commission specified how the presumption of the elimination of effective competition in the case of an absolute territorial protection agreement may be rebutted. In the "clippers and shears" case, the Competition Commission explained how the relevance of hard vertical agreements must be verified in the light of Art. 5 para. 1 CartA. In the off-list investigation, the Competition Commission lastly explained how recommended retail prices should be assessed where they have a decisive influence on the fixing of resale prices. These three ground-breaking decisions increase the level of legal certainty for businesses. Individually, the three investigations led to the following results:

### 1.2.1 Clippers and shears

- 10. In the decision in the clippers and shears case, the Competition Commission sanctioned two companies, Felco SA and Landi Switzerland AG, for an unlawful vertical agreement relating to a fixed retail price (for a detailed description of the decision, see B.3.3). For the first time, the Competition Commission imposed a fine for a vertical agreement that fixed a retail price, a practice regarded by Art. 5 para. 4 CartA as being particularly harmful to competition.
- 11. The decision confirms that fixed retail prices are generally illegal under Swiss law, just as they are under European law. They may only be justified in very exceptional cases, for example during the period in which a new product is launched on the Swiss market. The decision provides precise guidelines on the scope of Vertical Notice 2007.
- 12. The deliberations in the case focused mainly on the significance of the agreement. The Competition Commission noted in its decision that the issue of the significance of an agreement must be considered on a case-by-case basis, by examining the agreement's qualitative and quantitative aspects.

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However, in the case of hard agreements such as those mentioned in Art. 5 para. 4, the qualitative factor achieved by the agreement is of such importance that it will be deemed to have a significant effect on competition, even if the quantitative element is insignificant. The only restraints that do not meet the criterion of quantitative significance are those that only display effects on the market that prove to be insignificant in a given case, or that have no effects at all, and are not likely to lead to significant effects. For this type of agreement, the thresholds applicable to Ch. 13 Vertical Notice 2007 and in the SME Notice cannot be attained.

## 1.2.2 Off-list medicines

- 13. In the investigation into off-list medicines, the Competition Commission made its first decision relating to vertical price recommendations (see B.3.1). It established that the publication by pharmaceutical manufacturers of recommended retail prices (RRPs) for three medicines, when taken with the compliance with these prices by sales outlets constitute vertical concerted practices in accordance with Art. 4 para. 1 CartA. Due to the interests the parties, the influence of the former Sanphar cartel, and the widespread compliance with the RRPs, these apparent recommendations in fact constitute agreements fixing sales prices that satisfy the presumption of Art. 5 para. 4 CartA.
- 14. The widespread compliance with the RRPs by sales outlets meant that no pressure was placed on the ex works sales prices of the pharmaceutical companies. Effective price competition at the level of sales outlets would have caused the pharmacies to exercise pressure on wholesalers and pharmaceutical companies with the aim of be able to purchase the drugs on more favourable terms, and thus to retail them at lower prices. This would ultimately have resulted in a reduction in the ex works sales price charged by the pharmaceutical companies and a reduction of margins at all distribution levels. Both the pharmaceutical companies and the sales outlets benefitted from the current system and had a financial incentive to ensure its continued operation.
- 15. The collusion that manifested itself in the compliance with the RRPs was also encouraged by the role played by the e-mediat databases (Galdat and Pharmavista) in this sector. Galdat permitted the identification of the product when it was scanned at the cash desk, causing the RRP already stored in the system to appear. There was a strong temptation for a pharmacy to actually comply with the RRPs stored in the cash register memory, especially as the procedure was also beneficial to the pharmacy.
- 16. In its decision, the Competition Commission referred to the influence of Sanphar in connection with the publication of and compliance with the RRPs. The historical certainty at the time of Sanphar that a specific medicine in a defined unity of quantity, of a standard quality and at a given time would be offered in Switzerland at the same price (RPW 2000/3, p. 379 No. 142), still served as a factor encouraging cooperation at the time of the investigation. With its help, the manufacturers and sales outlets for the three medicines were able to anticipate and adjust to or match the behaviour of their competitors.

## 1.2.3 Gaba

- 17. With of its ruling against Gaba, the Competition Commission made its first ever decision relating to an absolute territorial protection agreement (see B.5.1). Until September 2006, the agreement between the manufacturer of Elmex toothpaste, Gaba International AG, and its licensee in Austria, Gebro Pharma GmbH, contained an export ban applicable to Gaba products manufactured by Gebro under licence. This contractual clause fulfilled the presumption of the elimination effective competition in accordance with Art. 5 para. 4 CartA.
- 18. In the view of the Competition Commission, this presumption may be rebutted if it can be proved that effective competition is not eliminated by the agreement in restraint of competition. A decision must

be made based on an overall consideration of the market conditions. In relation to vertical restraints of competition, such conditions are determined by both inter and intra-brand competition. Both forms of competition must be analysed on a case-by-case basis where there is a vertical restraint of competition.

19. In the investigation into Gaba, following a comprehensive analysis of the intra-brand competition in relation to the red Elmex brand and of the inter-brand competition in the Swiss market for toothpaste, the Competition Commission concluded that it was possible to rebut the presumption of Art. 5 para. 4 CartA by combining the available intra-brand and inter-brand competition; the intra-brand competition alone was not sufficient. However, the export ban significantly restricted competition (Art. 5 para. 1 CartA) to an extent that could not be justified on the grounds of the economic efficiency (Art. 5 para. 2 CartA). Therefore the contractual clause, valid until September 2006, constituted an unlawful prohibition of parallel imports into Switzerland.

### 1.2.4 Developments in the EU on vertical agreements

- 20. The EU General Regulation on Vertical Agreements (Commission Regulation (EC) No. 2790/1999 of 22 December 1999 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, referred to below as the Vertical Regulation) was revised in 2009. As the Ordinance will cease to apply at the end of May 2010, and given the experience acquired since its enactment, the EU intends to issue a new Vertical Regulation. The EU Commission will make a decision on this in early 2010.
- 21. To this end, the EU Commission has drawn up a revised version of the Vertical Regulation and the related guidelines, which was the subject of a public consultation procedure until the end of September 2009. In principle, the EU Commission is of the view that the rules and regulations of the old Vertical Regulation proved their worth, generally speaking, and should not be radically amended. The amendment proposals are essentially intended to take account of market trends in recent years, and above all of the increased purchasing power of large retail businesses and of the development of online sales.
- 22. In specific terms, the EU Commission is firstly proposing that a vertical agreement will only fall under the Vertical Regulation not simply (as at present) if the market share of the supplier does not exceed 30%, but also if the market share of the customer is below the same level. In contrast to the current version, this should take better account of the power of the market. In relation to the promotion of online sales, the proposed approach of the EU Commission makes a more specific distinction between sales that are the result of active marketing (active sales) and sales that are dependent on the initiative of retail consumers (passive sales). In addition, it is explained how conditions for Internet sales imposed by suppliers on retailers are to be treated under the new Vertical Regulation.
- 23. Like the Vertical Regulation, the sector-specific Group Exemption Regulation relating to vertical agreements in the motor vehicle sector (Commission Regulation (EC) No. 1400/2002 of 31 July 2002 on the application of Article 81 paragraph 3 of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector; referred to below as the MV-GER) ceases to apply at the end of May 2010. The EU Commission is proposing to extend the current MV-GER for the market for the sale of new vehicles (the primary market) by three years and thereafter to regulate that market through the provisions of the General Vertical Regulation. For the markets for repairs and servicing and for the sale of spare parts (the aftermarket), a new sector-specific group exemption regulation should come into effect from 1 June 2010. A draft of this regulation was undergoing a public consultation procedure as of the end of 2009.

### 1.3 Services

#### 1.3.1 Health

#### Off-list medicines

In November 2009, the Competition Commission completed its investigation relating to off-list medicines. The subject matter of this investigation was the recommended retail prices (RRPs) of Bayer (Switzerland) AG, Eli Lilly (Swiss) SA and Pfizer AG for their three drugs that combat erectile dysfunction, respectively Levitra, Cialis and Viagra.

These three drugs are prescription-only medicines that fall within Distribution Category B (repeated supply by medical prescription), and which do not appear on the list of pharmaceutical specialities (SL) issued by the Federal Office of Public Health (FOPH). Accordingly, they are not paid for by the health insurance companies under the system of mandatory basic insurance. As these three drugs are not on the SL, they do not have a maximum price fixed by the FOPH, but are subject to free competition. The price is determined by the sales outlet (in this case pharmacies and self-dispensing doctors [SD-doctors]).

The three pharmaceutical companies have calculated RRPs for their three medicines, notice of which is given to the sales outlets primarily via the e-mediat databases (Pharmavista and Galdat – both provide their information for a fee) and by means of the delivery invoices provided by wholesalers. The investigation found that 89.7% of pharmacies and 81.3% of SD-doctors were basically complying with the RRPs for these three drugs.

The publication of and compliance with the RRPs originates from the time of the Sanphar cartel, which was banned by the Competition Commission in 2000 (RPW 2000/2, p. 20 ff.). Sanphar was an agreement applicable to the entire industry, which in particular made it possible to fix retail prices on the basis of a system of margins. In the course of the proceedings, it was revealed that the three pharmaceutical companies calculated the RRPs using the Sanphar system of margins and that the sales outlets (and in particular the pharmacies) expected and complied with the RRPs calculated in this way. This allowed both sides to profit, as the system stabilised both the ex works sales price of the pharmaceutical companies and the margins achieved by the pharmacies.

The investigation found that in 2005 and 2006, 63.5% and 63.4% respectively of all packets of Cialis, Levitra and Viagra were sold by pharmacies at the recommended retail price. The packets sold at a discount – based on the recommended retail price and in the years mentioned – amounted to 18.9% and 19.1% respectively of all packets sold by pharmacies. These discounts were customer rather than product-related. Based on these effects on the market as well as the fact that there were three similar sets of agreements existing alongside each other that covered the entire materially relevant market, the Competition Commission came to the conclusion that effective competition in this market had been eliminated.

The Competition Commission held that the publication of and compliance with RRPs for these three medicines constitute unlawful vertical agreements affecting competition in accordance with Art. 5 para. 1 and 4 CartA that eliminate effective competition. The Competition Commission prohibited the pharmaceutical companies concerned from publishing any further RRPs for Cialis, Levitra and Viagra and imposed sanctions on the companies totalling CHF 5.7 million.

### • <u>Dietary feedstuffs</u>

The Secretariat opened a preliminary investigation into the sale of dietary feedstuffs for pets, after receiving reports that certain distributors of these feedstuffs were not responding to orders from pharmacies. The preliminary investigation indicated that dietary feedstuffs for sick animals

that eliminate the causes of the illness in the medium to long term or at least alleviate its symptoms are sold almost exclusively via veterinary surgeons. There were indications that the widespread exclusion of the pharmacies from the sales market could be the consequence of an unlawful agreement affecting competition.

The preliminary investigation was successfully concluded without consequences, because Royal Canin (Switzerland) AG and the other distributors (Dr. E. Graeub AG, Provet AG and Telion AG) gave undertakings to the Secretariat to supply their dietary feedstuffs for pets to Swiss pharmacies on the customary commercial terms. In addition, the distributors of dietary feedstuffs undertook to comply with a specific code of conduct with regard to recommended retail prices given to retailers.

### Mergers

Two mergers in the pharmaceutical sector have allowed to competition authorities to provide specific guidelines on its practice on the preliminary examination of mergers and thus move closer to the current European practice, bringing benefits to the companies concerned.

First of all, the Swiss competition authorities will in future require companies that report their merger at the same time to the European authorities that they comply with the same conditions and requirements (if any) in Switzerland as apply in the corresponding markets in the EU, provided these measures are appropriate for the Swiss market.

Secondly, the competition authorities have clarified the examination criteria for markets affected by takeovers in which only one of the participants operates with a market share of 30% or more. In such cases, the issue is the extent to which the other companies involved in the merger may be categorised as potential competitors. A planned takeover leads to the exclusion of potential competitors in three situations: 1) if a participant company is planning to enter the problematic market or if it has pursued this objective in the past two years (the development of competing medicines that has entered an advanced phase may be interpreted as the intention to enter a new market); 2) if this company holds important intellectual property rights in this market, even where it is not active in the market concerned. 3) Special attention must be given to cases in which a participant is active in an up or downstream product market or in a neighbouring market closely linked with the product market in which the participant company holds a market share of at least 30%.

#### 1.3.2 Financial services

# Credit cards

In the report year, the Secretariat opened a new investigation into the Visa and MasterCard credit cards and at the same time signed an amicable transitional settlement, which should guarantee legal certainty to companies operating in the credit card market for the duration of the investigation.

In December 2005, the Competition Commission completed its investigation in the Credit Card – interchange fee cases. The fixing of the domestic multilateral interchange fee (DMIF) in the Visa and MasterCard credit card committees was held to be a serious price-fixing agreement between the issuers and acquirers (see RPW 2006/1, S. 65 ff.). In justifying its decision, the Competition Commission assumed that the multilateral negotiations on the interchange fee brought advantages of efficiency when compared with bilateral negotiations. It can therefore be justified, provided a system is found to eliminate the negative effects of the multilateral negotiations, while at the same time preserving its advantages of efficiency. As a solution, in an amicable settlement (AS I) dated 29 March 2005, the DMIF was tied to the objective network costs of the issuer and a

competitive approach was chosen for the calculation method. In order to take account of future developments in the credit card market as well, the Competition Commission limited its approval to a period of four years. AS I expires in February 2010.

With a view to the expiry of AS I, in 2009 the Secretariat carried out an analysis of the effectiveness of the credit card decision. Due to the developments observed (in particular the network costs), the Secretariat opened a new investigation in July 2009 into the future assessment of the DMIF. In the course of the investigation, the Secretariat notified the parties that it was prepared to adopt a transitional solution as part of a new amicable settlement (AS II).

The aim of AS II is to continue to fix the DMIF for the transitional period on the basis of the objective cost-based procedure and to guarantee the status quo in relation to this. In addition, some adjustments have been made to the calculation model with the aim of improving the competitive approach to fixing the DMIF. AS II will replace AS I from 1 February 2010 and will apply either for 3 years or until the conclusion of the ongoing investigation.

### • <u>Debit cards</u>

Visa Europe has announced its intention to launch its debit card product V PAY in Switzerland. In order to implement this project, Visa Europe planned to introduce a DMIF in Switzerland. Visa Europe notified the Secretariat under Art. 49a para. 3 lit. a CartA of the DMIF for the debit card Visa V PAY, in response to which the Secretariat opened a preliminary investigation.

In the preliminary investigation, the Secretariat concluded that the DMIF for V PAY amounted to an agreement affecting competition. It took the form of a horizontal agreement between the issuers on the one hand and the acquirers on the other. Based on the current market situation and on specific assurances from Visa Europe in relation to the market entry phase, a solution was found that temporarily eliminates potential competition law problems in connection with the intended price-fixing agreement. As no bank in Switzerland has yet issued a V PAY card and because the Swiss debit card market is essentially dominated by Maestro, a product from MasterCard, the price-fixing agreement was shown to be acceptable during the market introduction phase. The Secretariat will only begin to regard the planned interchange fee as a concern in competition law terms when V PAY has established itself and has achieved a certain importance in the debit card market.

Following the report filed by Visa Europe, MasterCard Europe SPRL also made a report to the competition authorities. The subject of the report is also the introduction of an interchange fee, in this case for all domestic transactions carried out using a Maestro debit card. Currently the Maestro system in Switzerland works without an interchange fee. The Secretariat also opened a preliminary investigation into this case, this time in May 2009, which is still ongoing.

### • Too big to fail/Regulatory matters

Due to the events in 2008 in and around the financial markets and their critical effects on international financial centres, numerous authorities and institutions this year focused on the theme of "too big to fail" and its implications for competition law and economic stability. The OECD addressed the issue of the role of competition law in the financial services markets and its influence on the stability of the system. In its conclusions, it made the following significant findings, among others:

- the current crisis is neither the result of a market failure nor of effective competition, but rather the consequence of a lack of market regulation in the financial sector;
- the presence of oligopolistic financial markets, where the small number of banks means they are essential to the system ("too big to fail"), was a major factor in bringing about the crisis;

- the financial markets, despite their peculiarities and economic importance, are subject to the rules of competition law;
- even in the case of short-term state intervention, the rules of competition law should be applied when devising state measures and so-called exit strategies.
- As a consequence of the required UBS rescue package and the debate surrounding the issue of "too big to fail", the Federal Council in November 2009 appointed a panel of experts, on which the competition authorities are also represented. The aim is to analyse the "too big to fail" problem and to devise measures for reducing the associated problems and risks.
- In July 2009, FINMA opened a hearing on the amendment of the Capital Requirements Ordinance (CRO). The plan here is to abolish the so-called cantonal bank discount on regulatory capital (Art. 33 para. 3 CRO) along with the duty for cooperative banks to pay in further capital (Art. 16 para. 4 and Art. 28 para. 2 CRO). With the planned amendment, FINMA is in particular seeking to bolster the capital resources of cantonal and cooperative banks. At the same time, the intention is to bring an end to unequal treatment in comparison with the other financial institutions. The competition authorities pointed out the current unequal treatment as far back as the mid-1990s and are now pleased to note that FINMA is taking action to deal with this issue.

#### 1.3.3 Commercial and industrial services and other sectors

## • Clippers and shears

In the campaign against vertical agreements, the Competition Commission took its first decision in application of Art. 5 para. 4 CartA in May 2009. In accordance with the Article mentioned, there is a presumption that effective competition is eliminated by agreements between companies at different levels of the market that result in the adoption of minimum or fixed prices.

The Competition Commission imposed sanctions on Felco SA and Landi Schweiz AG in the "clippers and shears" case. Felco SA is a Swiss company that manufactures garden shears and hedge clippers. For several years, it has done business with Landi Schweiz AG, which sells certain of its products. In September 2006, the two companies entered into an agreement on fixed retail prices for certain Felco products already available on the Swiss market. After ascertaining that this agreement could violate the Cartel Act, Felco SA made use of the bonus system and reported the agreement to the competition authorities on 15 August 2007. In the course of the proceedings, the two companies signed an amicable settlement with the Secretariat to the Competition Commission. This was approved by the Competition Commission, which also penalised the two companies for their unlawful conduct.

This decision sees the Competition Commission penalise a hard vertical agreement for the first time (Art. 5 para. 4 CartA) and specifies the scope of the 2007 Vertical Notice. It is also the first case of a vertical agreement in which the bonus has been requested under the principal witness rule. As the company making the report was also held to be the instigator of the unlawful agreement, it was ineligible for a complete waiver of sanctions, receiving only a part reduction of the penalty. Nonetheless, thanks to the excellent cooperation received from the parties during the proceedings, it was possible to impose only symbolic fines.

### • Bidding cartels

In a decision in July 2009, the Competition Commission concluded its investigation into electrical installation firms in Bern after only one-and-a-half years. In doing so, it made its first decision on the combating of bid rigging, a matter designated a long-term priority issue in 2008.

The investigation, which began with house searches, was triggered by a report from a whistleblower, i.e. a third party not involved in the cartel. An intensive investigation phase, in which all the parties cooperated in terms of the bonus programme, provided proof of a multitude of individual bid rigging arrangements relating to larger electrical installation contracts in the Bern area between 2006 and 2008. The firms exchanged pricing and customer information and respected each other's wishes on projects by submitting bids for contracts that had been mutually agreed in advance. As a result, competition was repeatedly eliminated and the bidding procedure was rendered pointless. Furthermore, monthly meetings between the participant companies provided a permanent framework for the individual arrangements and thus justified the imposition of more severe sanctions.

In its decision, the Competition Commission fined the companies involved in the cartel a total of CHF 1.24 million. In addition, ComCo had the opportunity to make an in-depth assessment of how the bonus report instrument is working, as it was used by all the members of the cartel.

In the IT sector, the Secretariat conducted proceedings against SAP, a company active in the field of "Enterprise Resource Planning" (ERP) management software. In return for an annual fee, the company also provided support for its program, the price of this service being calculated on the basis of a certain percentage of the price for the software licence. Until the end of 2008, customers had a choice of various support contracts, offering a variety of services at different prices. However, SAP then decided that in future it would only offer the most expensive support contract. This decision would over a period of four years have brought a five per cent increase in the annual fee (from 17% to 22% of the licence fees). Both as a result of the reaction from customers and due to the intervention of the competition authorities, SAP reversed this decision and now offers several contract options again. It has therefore been possible to conclude the proceedings without taking any further action.

### 1.4 Infrastructure

#### 1.4.1 *Media*

- 24. In the media sector, the Competition Commission subjected two important mergers to a detailed examination.
- AG. As there were indications that a dominant position would be established or reinforced in the market for free commuter newspapers in the French-speaking part of Switzerland, the Competition Commission decided to carry out a detailed examination of the effects of the merger plan on competition. In its analysis, the Competition Commission concluded that in the French-speaking part of Switzerland, there was room for only one freesheet due to relatively small size of the market for newspaper advertising in the region. The independent expert called in by the Competition Commission confirmed this assessment. As a result of the considerable losses that Edipresse incurred from publishing its *Le Matin Bleu* freesheet, there is little doubt that *Le Matin Bleu* would have disappeared from the market even if its publisher had not merged with the publisher of *20minutes*, Tamedia AG, as no other publishing house was interested in taking over *Le Matin Bleu* in the current situation.
- 26. Given the circumstances, the Competition Commission regarded the criteria justifying a reorganisational merger as fulfilled and approved the merger without imposing any conditions or requirements. It is not the task of the Competition Commission to artificially maintain competition in a market. It should also be added that the Competition Commission in its detailed examination came to the conclusion that the merger did not lead to an increase in market share in the markets concerned. The reason for this is that Tamedia AG is active in the German-speaking part of Switzerland, while Edipresse operates in the French-speaking part.

- The second case related to the merging of the early morning distribution services of Tamedia, the NZZ Group and SwissPost. The Competition Commission also subjected this merger to a detailed examination in order to decide whether there is sufficient potential competition for Tamedia, NZZ and SwissPost in this sector. The Competition Commission concluded that the new organisation in its planned form would hold a dominant position unless adequate opportunities remained open for new competitors to enter the market. An alternative distributor would find it very difficult to establish itself in the market without the NZZ Group and Tamedia as clients. For this reason, the Competition Commission only permitted the merger subject to conditions. The early morning distribution activities can be merged, but the publishers will be prohibited from holding a stake in the new organisation and from running it along with SwissPost.
- 28. The Secretariat also continued its investigation into **book prices** in the French-speaking part of Switzerland. In the view of the Competition Commission, the responses received from wholesalers proved to be inadequate for it to be able to pass judgment on a possible dominant position. For this reason, new questionnaires were sent out.
- 29. In the same sector, the Competition Commission issued a negative response in the consultation procedure relating to the draft Book Price Regulation Act. In its view, there has been no market failure that would justify the need for regulation. In addition, the Competition Commission does not regard the regulation of book prices as expedient as there is no causal connection between the fixed price and the aims of culture policy.

#### 1.4.2 Telecommunications

- 30. In the telecommunications sector, the investigation into the pricing policy for ADSL services, in the course of which a sanction was imposed on Swisscom, formed the focus for the activities of the Competition Commission. Swisscom is not only a supplier of ADSL internet access to end customers through its Bluewin subsidiary, it is also the only supplier of the preparatory service that is essential for other internet access providers that wish to offer broadband services to their own customers. By keeping the price of the preparatory service very high in relation to the price of the ADSL service billed to end customers, the margin that the Bluewin competitors have been able to achieve has not enabled them to run their ADSL services profitably. Although Bluewin has also made losses in this sector, they have been overcompensated for by the profits made thanks to the preparatory service.
- 31. This pricing policy, pursued by Swisscom until the end of December 2007, has contributed to the high level of prices in Switzerland and constitutes the abuse of a dominant position (a "margin squeeze" or scissors effect). The Competition Commission fixed the amount of the sanction at CHF 220 million, taking account of the type and the seriousness of the restraint on competition. In this case, the fact that Swisscom's conduct continued for several years over the initial and growth phases of the market was considered to be an aggravating factor. Swisscom has filed an appeal against the decision with the Federal Administrative Court.
- 32. The takeover of Sun Microsystems, Inc. by Oracle Corporation was investigated by the Competition Commission. It decided to submit this merger to a detailed investigation due to indications that it could create or reinforce a dominant position, in particular in the market for database management systems. However, the Competition Commission decided to conduct the investigation according to a simplified procedure. The merger has effects on global markets and has therefore also been reported to the European Commission. Oracle gave an undertaking to the Competition Commission to implement the merger in the Swiss market in such a way as to respect any EU requirements, provided the effects on competition in Switzerland will not be different from those that may be observed elsewhere, and in Europe in particular. It was therefore possible to conclude the detailed examination.

- 33. Also in relation to mergers, the Competition Commission received notice of the planned merger between Orange and Sunrise at the end of the year. It decided to conduct a detailed investigation into this merger, which will be implemented over the first four months of 2010.
- 34. The Secretariat also carefully followed developments in the development of the fibre optic network, taking part in several consultation procedures relating to parliamentary procedures on the subject and by providing advice to the companies. The aim in this booming sector is firstly to ensure that state intervention has no discernable effect on competition. Secondly, ongoing cooperation between the various players in this market (telecommunications providers, electricity companies) must not constitute or encourage unlawful agreements. The other aim is to ensure that the companies do not abuse any dominant position that they may hold in the network in the future.

### 1.4.3 Energy

- 35. The Secretariat continued its monitoring of the market for system services, in particular the purchase of regulating energy, which is required to guarantee network stability. In an initial step, the Federal Electricity Commission, ElCom, requested the Competition Commission for advice on the legitimacy of the possible imposition of a price cap by Swissgrid SA for the purchase of system services. Without making a final judgment on the legitimacy of the introduction of a price cap, the Secretariat however pointed out that this decision could constitute an illegal agreement on prices if the Swissgrid board, on which energy producers are represented, or the energy industry was able to exert an influence on the maximum price fixed. In addition, the Secretariat pointed out that this type of instrument should be avoided on the grounds of competition policy as it interferes in the fixing of prices.
- 36. In a second step, Swissgrid submitted new conditions for inviting bids for the purchase of system services to the Competition Commission as part of opposition proceedings under Art. 49a para. 3 let. a CartA. In particular, these conditions include the introduction of a price cap for system services products. As a consequence, offers that exceed the price cap will not be considered. The Commission was of the view that even if the price cap is fixed by Swissgrid alone, without the participation of the players in the industry, and a priori does not constitute an agreement on prices, the introduction of a price cap is problematic under competition law, because it may encourage agreements in restraint of competition. As a result, Swissgrid indicated that it intended to abolish the price cap in mid-2010.
- 37. In addition, the Secretariat monitored the liberalised electricity market. Its attention has been drawn on several occasions to the fact that the major consumers of electricity to which the market is now open would not benefit from the possibility of changing supplier. It would seem that they are not receiving satisfactory offers from electricity providers, in that the prices offered are either too high, or their invitations for bids simply receive no response. The Secretariat therefore sent out a series of questionnaires in order to establish the reasons for this lack of competition. If there are indications of concerted practices between the various players in the market for electrical energy, the required proceedings will be opened.

### 1.4.4 Agriculture

38. In the agriculture sector, the Competition Commission continued its monitoring of the market for dairy products following the abolition of the milk production quota on 1 May 2009. In particular, it observed with interest the establishment of the Milk Industry Federation in June 2009. One particular aim of this trade federation is the introduction of a system to manage dairy milk in three stages (contractual, exchange and clearance milk) and to establish a milk price monitoring system. In addition, the Competition Commission expressed its opinion on various parliamentary proposals, and in particular those aiming to introduce mandatory measures to regulate milk production. If the Parliament declares such

measures to be generally applicable under the Agriculture Act, this would constitute a reservation in terms of Art. 3 Cart A.

- 39. The Competition Commission dealt with two takeovers by the Emmi Group under the merger control procedure.
- 40. The first case concerns the takeover of Nutrifrais SA, a subsidiary of Laiteries Réunies in Geneva that produces fresh dairy produce, such as yogurts and desserts. The Competition Commission assessed the current pressure of competition exercised by the foreign producers on the markets, which is expected to increase in the future, as being adequate to impose discipline on the Swiss market, and therefore approved the merger on the basis of the preliminary examination.
- The second case concerns the takeover of part of the activities of Kellenberger Frisch Service 41. (KFS) by Emmi Interfrais, a subsidiary of Emmi that distributes fresh products to independent retailers and to major consumers. Kellenberger Frisch Service is a subsidiary of Frigemo AG, which is itself a subsidiary of the fenaco cooperative, which is active in the purchase, distribution and transport of food products, and in particular fresh products. Provided that the market shares in the markets concerned (distribution of dairy products and cheese) are less than 20%, the Competition Commission is of the view that there is no indication that a dominant position is being created or reinforced. However, it concentrated on two secondary points relating to the takeover. The merger plan provides that for a period of two years, KFS and fenaco will not supply dairy products or cheese to customers that have been assigned to Emmi Interfrais. In addition, a fixed refund was agreed between the parties that would be payable if customers "acquired" as part of the merger were nevertheless supplied with dairy products and cheese by companies in the fenaco group over a period of 5 years from the implementation of the transaction. The Competition Commission held that these measures were necessary to ensure that the part of KFS transferred to Emmi Interfrais did not incur a loss in value. Nevertheless, it reduced the maximum duration of the measure to two years.

### 1.4.5 Other sectors

- 42. In the transport sector, the Competition Commission took part in the consultation procedure relating to Railways Reform 2, which primarily related to safety aspects, the harmonisation of Swiss legislation with the EU railway packages, the method of financing railway infrastructure and placing private railways on an equal footing with the SBB. The Competition Commission advocated a form of regulation that is as neutral as possible from a competition point of view. It particularly welcomed the move to broaden the scope of the appeal procedure to include the bidding process for the award of licences, and proposed that this procedure be made mandatory. The Competition Commission also stressed the importance of ensuring that the minimum price for train paths (the fee paid to the proprietor of the infrastructure for the right to use it) and the rules for calculating the price of train paths must not lead to a distortion of competition.
- 43. The Competition Commission finally expressed its opinion in relation to the total revision of the Postal Services Act. It opposed prices being fixed by the Federal Council or by the Postal Services Commission for the services offered within the framework of the universal service, in order to avoid a distortion of competition. In addition, it stressed the need to limit the competitive advantages accorded to providers of universal services to what is strictly necessary. It drew special attention to the problems that the prohibition of night and Sunday driving pose for competition, a matter that the Competition Commission had already mentioned in its 2008 recommendation.

### 1.5 Product markets

#### 1.5.1 Retail trade

- 44. With the decision in the Gaba case in November 2009, the Competition Commission made a policy decision on the prevention of parallel imports by means of vertical agreements. Gaba International AG and the Austrian Gebro Pharma GmbH were fined by the Competition Commission because Gaba had imposed an export ban on its Austrian licensee. This made it impossible to make parallel imports onto the Swiss market. The Competition Commission imposed a fine von CHF 4.8 million on Gaba for preventing parallel imports. Gebro was fined a token sum of CHF 10'000 because it did not itself benefit from the prevention of parallel imports.
- 45. Gaba and Gebro amended their agreement in September 2006 and removed the export ban. The new agreement obliged Gebro to notify Gaba whenever it made any exports. Such a clause could in certain circumstances also have the effect of an export ban, but this was not confirmed in the proceedings in question. Gaba and Gebro also confirmed in the proceedings that they would not obstruct parallel imports under the new agreement.
- 46. The Competition Commission opened the investigation in response to a complaint from Denner AG, in which Denner claimed that it was unable to make parallel imports of Elmex products from the Austrian market. Denner later distanced itself from the proceedings, after being supplied from within Switzerland. The Competition Commission nevertheless completed the investigation, because it raised certain fundamental issues. The Competition Commission will continue to make a top priority of pursuing contractual restraints on parallel imports, and in particular to prevent the revision of the Patent Act and the imminent introduction of the Cassis-de-Dijon principle from adversely affecting the situaiton.
- At the end of 2008, the discount supermarket chain Lidl, which has recently entered the Swiss market, contacted the Secretariat of the Competition Commission to claim that it was not being supplied by certain Swiss brand product manufacturers, allegedly due to attempts made by Coop to apply pressure. In a comprehensive investigation, the Secretariat came to the conclusion that there were indications that Coop held a dominant position in certain procurement markets. These indications were substantiated when consideration was given to Coop's position in relation to the introduction of new products. The Secretariat found that Coop threatened certain suppliers with retaliatory measures if they supplied Lidl. The attempts made by Coop to apply pressure were not, however, cited by any of the suppliers interviewed as the reason for a (total) failure to supply Lidl. The Competition Commission issued a warning to Coop in relation to this and announced that an investigation would be opened if such attempts to apply pressure led to a failure to supply competitors.
- 48. The company mergers in the retail trade that have been conditionally approved by the Competition Commission in recent years (Coop/Fust, Migros/Denner and Coop/Carrefour) again occupied the Secretariat in 2009. The independent audit companies Refindar Moore Stephens AG (Coop/Fust), Deloittes (Migros/Denner) and BDO Visura (Coop/Carrefour) were entrusted with the task of verifying compliance with the conditions. The condition in the Migros/Denner case with regard to a duty of disclosure analogous to Art. 9 para. 4 CartA led to the Competition Commission assessing two takeovers by Migros that would not have been subject to notification under Art. 9 para. 1. Both were declared unobjectionable.
- 49. As a result of various reports from consumers, the Secretariat questioned Procter & Gamble with regard to its pricing policy for Gillette razors. Procter & Gamble pointed out that although non-binding recommended prices existed, retailers are free to fix their own prices and the recommended prices are not linked to the application of any pressure or the granting of specific incentives. In response, the larger

retailers reduced their prices significantly on their own initiative in November 2009, i.e. without being granted lower cost prices from the manufacturer. The Secretariat will take account of this new situation in its competition law assessment.

50. Following various newspaper articles about the homogeneity of retail prices for Nivea products in Switzerland, which in certain cases are considerably higher than those charged in neighbouring countries, the Secretariat questioned both Beiersdorf AG and the retailers. The results will probably be made known in the first part of 2010.

## 1.5.2 Construction industry

- In June 2009, house searches were carried out at several construction companies in the cantons of Aargau and Zurich. The Secretariat had received an advance tip-off from a whistleblower that arrangements were being made among the construction companies in relation to major bids. Along with the house searches, the Secretariat opened an investigation into the road construction and civil engineering industry in the cantons of Aargau and Zurich. The investigation aims to show whether the companies entered into unlawful arrangements in relation to construction projects, in particular in order to coordinate bids in response to invitations to tender and thus to allocate themselves construction projects and clients. The investigations will be conducted by the Product Markets Service in the case of the Canton of Aargau and by the Services Service for the Canton of Zurich, as it is expected that extensive investigations will be required. The investigations also fall within the competition authorities' "bid rigging" priority area (see B.1).
- 52. In the investigation relating to the Canton of Aargau, a start was made in the second half of the year with the inspection and evaluation of the confiscated documents and data carriers, because no procedure for removing the seals on documents was required as was the case in the investigation relating to the Canton of Zurich. Various companies are cooperating with the Competition Authority. If companies involved in the agreements provide information or evidence voluntarily, this may lead to a considerable reduction in or complete dispensation from sanctions in accordance with the bonus system in Art. 49a para. 2 CartA.
- 53. In the investigation into builders' supplies, enquiries were completed in 2009. The proceedings focused on Switzerland's largest suppliers and dealers in window and door fittings. The Secretariat's proposal will be sent to the parties in the course of 2010 so that they can express their views. The agreements under investigation include price increases for fittings for windows and French doors. The information that came to light in the course of this investigation has led to the opening of a new investigation in the area of door fittings, such as door handles, locks, hinges, etc. A start has been made to the enquiries in this connection.

### 1.5.3 Watch industry

54. In September 2009, the Competition Commission opened an investigation into ETA Manufacture Horlogère Swiss SA, a subsidiary of the Swatch Group. The enquiries made in the preliminary investigation revealed indications that ETA held a dominant position in the market for mechanical watch movements and may have abused this position in relation to its trading partners through discriminatory practices involving changes in prices and terms. The investigation is a response to miscellaneous reports received by the Secretariat, after ETA had announced price increases for watch movements and changes to its payment terms. The market participants have shown a strong interest and willingness to provide the competition authorities with information, due in part to the difficult economic situation currently experienced by the watch industry.

55. From 2002 to 2004, ETA was also the subject of proceedings before the Competition Commission. That investigation related to ETA's announcement that it intended to reduce the supply volumes of ébauches and to stop supplies entirely from 2006. Ebauches are the basic components of a mechanical watch movement, and come in the form of an assembly set. When combined with the assortiment (the regulating element of a mechanical watch movement), each assembly set produces the full mechanical watch movement. The proceedings ended in 2004 with an amicable settlement between the Competition Commission and ETA. Basically this involved ETA undertaking to continue to supply its existing clients with ébauches until the end of 2010.

### 1.5.4 Automotive sector

- 56. In response to numerous enquiries from the automotive sector, in 2009 the Secretariat was required to examine dealer activities and access to technical information in the implementation of the Motor Vehicles Notice.
- 57. In terms of the MV Notice, manufacturers/importers may not place restrict their authorised dealers from selling new vehicles to agents acting for end customers. Nor may such restrictions be imposed by means of bonus schemes or other incentives that differentiate between a direct sale to an end customer and a sale via an agent instructed by that customer. In this connection, it is possible for resellers who are generally independent—if they act on behalf of an end customer—to act as agents. The Secretariat reached the conclusion that a basic obligation to bill the end customer goes too far and is incompatible with the Notice. There must at least be a possibility of diverging from the rules in justified exceptional cases. In such cases, the manufacturer may demand particularly detailed verification of the existence of an end customer.
- 58. The Secretariat received reports from independent workshops and associations of possible irregularities relating to access to technical information for independent market participants in the automotive sector. One of the specific competition policy goals of the MV Notice is to guarantee that independent workshops can compete with the manufacturers' authorised workshops, by ensuring unrestricted access for all competitors in the servicing and repair market to the technical information required for repairs and servicing work. Access must be given under equal conditions and in a way that meets the requirements of the independent market participants. Accordingly, the information must be provided to the independent market participants just as it is given to the authorised workshops, "unbundled and priced in a way that takes into account the extent to which they use it". The Secretariat is currently examining whether in the case of certain manufacturers/importers in Switzerland due to a lack of suitable communication channels or a result of a lack of transparency or the charging of unreasonable costs for the use of information, potentially considerable restraints of competition have arisen.
- In the middle of the year, the EU Commission made a statement on the future competition law framework for the automotive sector in the European area following the expiry of the MV-GER, the European counterpart to the MV Notice. It drew a distinction in principle between the primary and aftermarket and proposed that the provisions of the current MV-GER be extended for three years until 31 May 2013 for the primary market, i.e. the market for the sale of new vehicles. Thereafter, competition in the sale of new vehicles should be protected by the general rules on vertical restraints of competition. On the other hand, for the aftermarket, i.e. the markets for repairs and servicing and for the sale of spare parts, where competition is less pronounced due to the brand specifics, a new more targeted sector-specific group exemption regulation should come into effect from 1 June 2010, which contains rules on the following points in particular: (a) access to technical information; (b) access to spare parts; (c) misuse of warranties and (d) access to authorised workshop networks. Once the EU Commission has made a final decision, the Competition Commission will decide whether and to what extent an amendment of the MV Notice is necessary.

### 1.5.5 Other sectors

- 60. In response to a report from a dealer in the household appliances (white goods) sector, the Secretariat opened a preliminary investigation into the Electrolux AG sales network. Electrolux has prohibited its dealers from trading on the Internet, and threatened not to supply them if they do. The preliminary investigation should indicate the extent to which such conduct is covered by the Cartel Act and whether the obstruction of online trading by means of a selective distribution network is justified or can be justified by the free rider problem. It is expected that the Secretariat will receive an increasing number of reports relating to online trading.
- 61. The Secretariat carried out various market monitoring procedures in 2009. The market for video gaming consoles and video games was monitored and it was established that currently there are no indications of restraints of competition. The Secretariat will however continue to keep an eye on developments in the market for interactive entertainment, especially as the video games industry in recent years has been achieving turnovers in billions. It also examined the market for children's products, looking for possible pricing requirements imposed by manufacturers on dealers and/or territorial agreements aimed at preventing parallel trading. The enquiries carried out did not provide sufficient indications to justify the opening of a preliminary investigation or a full investigation. In addition, the Secretariat issued a warning to the ELITE Electro-Partner co-operative, as its catalogue for electrical appliances contained recommended prices that were not expressly labelled as non-binding. In the underwear market, Triumph International AG were required to provide clear evidence that they are not exerting an influence on the retail prices charged by retailers.

#### 1.6 Internal market

- 62. In 2009, the Competence Centre for the Internal Market concentrated on two priority areas. This first was participation in the development and implementation of the "bid rigging" strategy (see B.1). The focus was on the cooperation with the cantons initiated by the Secretariat. In addition to the bilateral talks with 18 cantonal building departments, special mention must be made of the training course that the Competence Centre devised for the cantonal procurement agencies, which it ran for the first time in St. Gallen. Building on the experience gained, next year several training events are planned in various cantons.
- A second priority was an evaluation of Art. 2 para. 7 of the Internal Market Act (IMA), which stipulates an obligation to have a bidding procedure for the transfer of cantonal and communal monopolies to private entities. In practice, the content and scope of this provision, introduced in the 2006 reform of the legislation, raise awkward fundamental issues. There is evidence for this in two enquiries submitted to the Competition Commission that are still under investigation relating to the renewal of water rights concessions and of concession agreements on the construction and operation of electrical distribution stations. The Competition Commission will announce its legal opinion next year on the fundamental issues raised. This should both increase legal certainty and facilitate the implementation of the provision by the cantons and communes.
- 64. Lastly, the Competence Centre for the Internal Market again dealt with numerous submissions and enquiries from private individuals and authorities. In relation to the former, issues connected with the exercise of the right to free access to the market predominated (in particular in relation to cantonally regulated medical professions and public procurement). With regard to the latter, the work related primarily to questions connected with the IMA-conformity of cantonal and communal regulations as well as administrative practices (in particular in connection with regulations on taxis).

# 1.7 Competence Centre for Investigations

- 65. The Competence Centre for Investigations assisted in the preparation and organisation of the most important search ever organised since the revision of the CartA in 2003. This was carried out in June 2007 in the Cantons of Zurich and Aargau at the headquarters of companies operating in road construction and civil engineering sector.
- 66. Over the past year, the Competence Centre trained new team leaders who can be deployed in future to head search teams
- 67. Finally, the competition authorities have stated their position on the bill for a Federal Act on Company Lawyers, which plans to grant them the benefits of professional secrecy currently enjoyed by lawyers in private practice. As a result, the documents that they draw up in the context of their employment could not be used as evidence of the existence of cartels. This type of regulation seriously complicates the task of the law enforcement authorities.

#### 1.8 Communication

68. The public relations work carried out by the Competition Authority continues to have high priority. Transparent decision-making processes with comprehensible explanations for journalists and the general public is essential. In the past year, the Competition Commission was required to publicise important decisions on vertical agreements, on bid rigging and on company mergers, which required a total of 18 press releases and two press conferences. In addition, the competition authorities provided journalists at the traditional autumn conference with information on internal procedures and with the opportunity ask general questions unrelated to specific proceedings.

### 1.9 International relations

69. International cooperation and coordination in competition policy is constantly gaining in importance. This is a consequence of globalisation, as with global market liberalisation the risk of cross-border restraints of competition increases. This makes a comprehensive exchange of ideas among the competition authorities essential. The Competition Commission and the Secretariat are active participants in this exchange, in particular as members of the International Competition Network (ICN), which held its 8th annual conference in Zurich in 2009. Cooperation agreements between competition authorities are also gaining in importance. The agreement with Japan mentioned in the last report year has been signed and has come into effect. Progress is also being made with the preliminary work with a view to formal cooperation with the EU

### 1.9.1 *OECD*

70. Representatives of the Competition Commission and of the Secretariat took part in the meetings of the OECD Competition Committee, which take place three times a year in Paris. In collaboration with SECO, the delegation prepared and presented various contributions. The key topics discussed in 2009 at various sessions and round tables included the effect of the financial crisis on competition policy, the banking sector and competition issues in bilateral markets. In 2009, the OECD issued its "Guidelines on bid-rigging in public procurement" and welcomed Chile, Estonia, Israel, Russia and Slovenia as new members.

### 1.9.2 ICN

71. From 3-5 June 2009, the eighth annual conference of the ICN took place in Zurich. Switzerland was the host this year and the Secretariat had the task of organising and running the event. For three days,

representatives of competition authorities from around the globe, representatives of international organisations, and national and international advisors met in Zurich. The opening meeting saw Federal Councillor Doris Leuthard welcome the 450 conference participants from more than 80 jurisdictions. The Federal Councillor reminded the audience of the importance of international cooperation between the competition authorities, as cartels are organising themselves internationally and inter-continentally as a part of the globalisation process. She also urged representatives of competition authorities not to react to the economic crisis with protectionist measures, but to continue to ensure unrestricted access to markets. The conference met with general approval and widespread appreciation among participants both in relation to the content and its organisational aspects.

### 1.9.3 *UNCTAD*

72. The Secretariat attended the conference on the development promotion programme benefiting five Latin American countries (COMPAL) under the auspices of UNCTAD. At the meeting, it was agreed that the programme had been a success.

### 1.9.4 Vietnam project

73. In the spring of 2008, the project "Strengthening the Vietnamese Competition Authorities" began, with aim of strengthening and supporting the Vietnamese Competition Authority (VCAD), which was established in 2006. The bilateral cooperation between the competition authorities in Vietnam and Switzerland includes the holding of workshops in Vietnam and providing support with market studies. In addition, Secretariat staff act as experts in Vietnam, in particular for devising guidelines on competition-relevant topics. The project will last for three years, with funding being provided by SECO.

#### 1.10 Outlook

- 74. In 2010, bid rigging will continue to be a key theme. The already pending and new proceedings on bid rigging will enjoy top priority. Information events will also be accorded high importance. The Competition Authority intends to complete the majority of the investigations pending at the end of 2009. In addition, in 2010 important decisions from the Federal Administrative Court are expected (Swisscom Mobile decision from 2007), which may have a considerable influence on other proceedings.
- 75. In relation to vertical agreements, it will be necessary to amend the general and the specific Notice on the Sale of Automobiles to take account of developments in the EU and to implement the notices in Swiss cases.

### 2. Organisation and statistics

### 2.1 Competition Commission

- 76. In 2009, the Competition Commission held 14 full-day and one two-day plenary sessions. In addition to dealing with the cases discussed in the preceding chapters, the Competition Commission also held various meetings to tackle the issue of organisational development (see immediately below in C.3).
- 77. On 11 December 2009, the Federal Council appointed Prof. Stefan Bühler to be the second Vice-President of the Competition Commission from 1 January 2010. Prof. Bühler is an economist and is the ideal addition to the presiding committee, which previously comprised only lawyers.

### 2.2 Secretariat

- 78. In the Secretariat to the Competition Commission, Mrs Carole Söhner-Bührer was appointed Vice-Director by the Competition Commission on 16 February 2009. Mrs Söhner-Bührer has worked in the Secretariat of the Competition Commission since November 1999. She takes over as head of the Infrastructure Service.
- 79. The Secretariat was involved in various working groups that are carrying out the work on organisational development with the aid of external consultants. Essentially the aim is to devise and implement a continuous procedural strategy within proceedings under the Cartel Act (see detailed C.3).
- 80. As of the end of 2009, the Secretariat employed 64 members of staff (full-time and part-time), 45 per cent of whom were women. This corresponds to a total of 58.2 full-time positions. The staff was made up as follows: 44 specialist officers (including the Executive Management; 40.7 full-time positions), 9 specialist trainees (9 full-time positions), and 11 members of staff in the Resources and Logistics Service (8.5 full-time positions).

### 2.3 Organisational development

- 2.3.1 Introduction: Evaluation of the Cartel Act
- 81. On 14 January 2009, the results of the evaluation of the Cartel Act were acknowledged and published by the Federal Council. The external Cartel Act Evaluation Group made 14 recommendations to parliament and the executive (the Federal Council, Federal Department of Economic Affairs and the Competition Authorities). The Competition Commission acknowledged the recommendations in January 2009.
- 82. One issue was institutional in its nature: according to the results presented by the Cartel Act Evaluation Group, improvements are required both in relation to the Commission and the Secretariat if they are basically to be able to do their work properly on the basis of the organisational structure prescribed by the law and by the internal regulations. In order for the professionalism and efficiency of the Competition Authorities to be improved, it is first of all imperative that the statutory provisions be amended. Until these amendments take effect (and to some extent irrespective of whether they do), substantial improvements could be achieved within the current systems by means of short to medium-term measures with regard to the organisation of the Commission and the handling of cases (i.e. in the working methods of the two competition authorities).
- 83. Based on these results, the Cartel Act Evaluation Group made two recommendations to the Federal Council and one to the competition authorities. It recommended that the competition authorities implement the short to medium-term measures devised in an evaluation study (known as the functions analysis) in a project supported by external consultants. This would lead to clear improvements in the work in the ongoing legislative period at a reasonable cost.
- 84. The Cartel Act Evaluation Group made the following recommendations to the Federal Council:
  - The competition authorities must be structured in such a way that they are independent of political and private sector influence and their decision-makers must be professional appointees. The Commission and Secretariat must be combined in a single-tier authority.

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1	See Section 0.

- An independent economist must be appointed to the Presiding Committee of the Competition Commission as soon as possible with as a second Vice-President in order to guarantee a balance between members from the legal profession and those with expertise in economic matters.
- 85. While the first recommendation made to the Federal Council is still under consideration (see C.4), the second recommendation has already been implemented with the appointment of Prof. Stefan Bühler as the second Vice-President.

### 2.3.2 Organisational development work in the Competition Commission

- 86. The Competition Commission and the Secretariat have devised a variety of measures in four working groups (Commission work, Management and Leadership in the Secretariat, Core processes, IT), and in particular the following:
  - For the improvement of the decision-making processes in the Competition Commission: review of the decision-making processes within the Commission (including internal management) and the coordinating management bodies (meetings of the Presiding Committee, meetings of the Executive Management) with the optimum integration the heads of service and the development of a process and project organisation system.
  - For the improvement of performance capabilities and internal management in the Competition Commission: delegation of standard cases within the Commission, development of a project control system, review of the working methods of the Commission in connection with project management.
  - For the improvement of the procedural strategy of the Secretariat of the Competition Commission: development of a continuous project management structure for all main processes (business; description of the activities of the Competition Authorities in the form of procedural specifications with milestones, deadlines and estimates of costs and time required), selection of appropriate software support, development of a system for checking progress with processes.
  - For the improvement of coordination between the Commission and Secretariat: clarification of tasks, competencies, roles and mutual expectations in relation to cases.
- 87. The working groups presented their results in the summer and autumn of 2009. The implementation of the results is underway. Some tasks, such as the implementation of the continuous project management structure, will continue into 2010.

## 2.3.3 Presiding committee model

- 88. On the basis in particular of the experience gained since 1 January 2008 following the reduction of the size of the Competition Commission and after the submission of important findings from the previously mentioned functions analysis, the Commission made the final decision on 15 September 2008 to opt for the presiding committee model and therefore approved the revised internal regulations of the Competition Commission on 17 November 2008.
- 89. In the presiding committee model, instead of there being five units at Commission level (Presiding Committee, three chambers, plenary session), there are now two (Presiding Committee, plenary session). Accordingly, the time and expense of allocating, providing information on and coordinating tasks are reduced. The Presiding Committee has to prepare the business of the plenary session, to provide support in important cases as far as is necessary and take the decisions delegated to it by the Commission

(for example the assessment of merger plans that do not require a detailed investigation). The fact that chamber meetings and the related preparation are no longer required and the delegation of decisions to the Presiding Committee relieve the burden placed on the members of the Commission. This permits more indepth discussions in the plenary session even though there is no change in the time available. In the Presiding Committee, there is increased responsibility rather than increased demands on time. These responsibilities were previously allocated to the appropriate chamber presidents. With the appointment of the second Vice-President by the Federal Council on 14 December 2009, a balance has been guaranteed between legal and economic expertise in the Presiding Committee.

### 2.3.4 Conclusion

90. The Competition Authorities have to a large extent implemented the recommendations of the Cartel Act Evaluation Group and thus achieved the potential for improvement that was identified. The measures taken will bring improvements, especially in the decision-making processes of the Competition Commission, the coordination between the Commission and Secretariat, the performance and internal management of the Competition Commission and the procedural strategy of the Secretariat of the Competition Commission. In addition, the choice of the presiding committee model for the organisation of the Commission has contributed to a reduction in the time and expense of allocating, providing information on and coordinating tasks. The measures will generally help to optimise and speed up working processes and thus the time taken to deal with cases.

# 2.4 Evaluation and partial revision of the CartA

- 91. In terms of Art. 59a of the revised Cartel Act of 2003, the Federal Council was required to arrange for an evaluation of the effectiveness of competition law measures and of the enforcement of the Cartel Act, submit a report on this to Parliament by the spring of 2009 and make proposals for what further action is required. The Cartel Act Evaluation Group, which also included staff from the competition authorities<sup>2</sup>, was made responsible for the conduct of the evaluation. On 14 January 2009 the Federal Council was notified of the content of the consolidated report<sup>3</sup> of the Cartel Act Evaluation Group. The Federal Department of Economic Affairs (DEA) thereafter examined the recommendations of the Cartel Act Evaluation Group and submitted proposals on the further action required to the Federal Council.
- 92. The Federal Council approved the related DEA report on 25 March 2009. In this report, the Federal Council proposes that Parliament should basically adhere to the current concept of the Cartel Act and to the new instruments (direct sanctions, bonus system, house searches and objection procedure). The new instruments under the revised Act fulfil the intention of Parliament to prevent the harmful economic or social effects of cartels and other restraints of competition by increasing the deterrent effect of the Act and thus encouraging competition in the interests of a liberal free-market system.

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The Cartels Act Evaluation Group comprised a Steering and a Core Group. The Steering Group comprised the following persons: Dr. R. Corazza (ComCo Secretariat, Director, Project Manager for the CartA Evaluation and Chairman of the Steering Group), Dr. U. Böge (former President of the German Federal Cartel Office and of the International Competition Network ICN), Prof. Dr. A. Brunetti (SECO, Head of the Economic Policy Directorate), Dr. W. Bussmann (FOJ, Specialist on Legislation Evaluation und Federalism Issues), Prof. Dr. D. Herren (University of Bern, Institute for Business Law) and Prof. Dr. V. Martenet (University of Lausanne, Vice-President of ComCo). The Core Group comprised F. Stüssi (ComCo Secretariat, Head of Section, Project Manager for the CartA Evaluation), Dr. B. Zirlick (ComCo Secretariat, Head of the Competence Centre for Law), S. Michal (SECO, Deputy Head of the Growth and Competition Policy Unit) and Dr. S. Rutz (ComCo Secretariat, Head of the Competence Centre for Economics).

The consolidated report is based on 15 report and studies and contains 14 recommendations (available on: www.weko.admin.ch/dokumentation/00216/index.html?lang=de).

- 93. However, the Federal Council is at the same time of the view that the Cartel Act has certain flaws and that there is a need for action. Accordingly, it has instructed the DEA to make specific proposals based on the recommendations of the Cartel Act Evaluation Group and taking account of the effects on funding and staffing requirements, and to draft amendments to the Cartel Act by spring 2010. The draft proposals should relate in particular to strengthening the Competition Commission as an independent institution, revising the merger control procedure, introducing differentiation in the treatment of vertical agreements and accelerating procedures. Other reforms urged by the Cartel Act Evaluation Group, which in certain cases have also been demanded in certain parliamentary procedural requests, should be subjected to detailed consideration and should, if necessary, be included in the proposals. In addition, the DEA and DFA should carry out further enquiries to enable the Federal Council to consider, from a European policy view as well, the opportunity for talks on a cooperation agreement with the EU on the formal exchange of confidential information between competition authorities.
- 94. Based on the proposals and reports to be prepared, the Federal Council will decide by spring 2010 on the opening of a consultative committee stage for a partial revision of the Cartel Act. In making its decision, the Federal Council will also take account of the conclusions drawn up to that point by the implementing authorities from the recommendations of the Cartel Act Evaluation Group, developments in the practices of the Competition Commission and the courts in the intervening period and the reactions of parliament to the report and the pending procedural requests.
- 95. The DEA has now instructed SECO to prepare the bill for submission to the consultative committee. The SECO has set up an independent working group, which will begin the work immediately. This working group also includes staff from the Secretariat of the Competition Commission.<sup>4</sup> The Competition Commission has taken note of the intentions of the Federal Council and of the tasks of the working group.

Dr. R. Corazza (Director) is a member of the senior project management team, F. Stüssi (Head of Directorate Affairs) and Dr. B. Zirlick (Head of the Competence Centre for Law) are members of the project team.

# 2.5 Statistics

Investigations	2009	2008
Carried out during the year	20	20
Carried over from the previous year	16	13
Opened	4	7
Final decisions	6	4
Amicable settlement	3	1
Administrative ruling	2	1
Sanctions under art. 49a para. 1 ACart	5	1
Precautionary measures	0	2
Sanctions proceedings under art. 50 ff. ACart	0	1
Preliminary investigations	·	_
Carried out during the year	19	19
Carried over from previous year	11	11
Opened	8	8
Concluded	7	12
Investigations opened	1	2
Modification of conduct	4	2
No consequences	2	8
Other activities	2	O
Reports under Art. 49a para. 3 let. a ACart	12	31
Advice	35	23
	87	36
Market monitoring		
Other enquiries	210	246
Mergers	26	40
Reports	26	40
No objection after preliminary examination	19	39
Investigations	5	3
Decisions of the Competition Commission	4	2
after preliminary investigation	1	0
after full investigation	3	2
Early implementation	0	0
Appeal proceedings		
Total of appeal proceedings	6	12
Concluded	1	8
Success for the Competition Authority	1	7
Partial success		1
Pending at the end of year	5	4
Expert reports, recommendations and opinions, etc.		
Expert reports (Art. 15 CartA)	2	2
Recommendations (Art. 45 CartA)	0	4
Expert opinions (Art. 47 CartA or 11 TCA)	0	3
Follow-up checks	4	1
Notices (Art. 6 CartA)	0	0
Opinions (Art. 46 para. 1 CartA)	186	71
Consultation proceedings (Art. 46 para. 2 CartA)	9	n.a.
IMA		
Recommendations / investigations (Art. 8 IMA)	0	0
Expert opinions (Art. 10 I IMA)	0	0
Explanatory reports (Secretariat)	27	31
Appeals (Art. 9 para. 2 <sup>bis</sup> IMA)	1	3