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1. Foreword from the President

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

2. 2016 also saw the Competition Commission conduct competition law investigations in **the widest range of sectors** of the Swiss economy. In particular, it intervened in the construction industry, financial markets, health care, media and communication, the consumer goods industry and the retail trade, the watch industry and in the automotive sector. The diversity of industries affected by competition law proceedings is a clear indication of the comprehensive scope of the current Cartel Act. Special arrangements for specific sectors, as demanded in various political proposals, stand contrary to general character of the Cartel Act.

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

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

Prof. Dr. Vincent Martenet

President of the Competition Commission

2. Most important decisions of 2016

2.1. Decisions by the Competition Commission

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

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

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

8. In a decision dated 24 October 2016, the Competition Commission adhered to the amicable settlement 2013 reached with **The Swatch Group AG** (Swatch) in 2013 without making any changes. The settlement involves a duty to supply mechanical watch movements, but at the same time allows the Swatch subsidiary ETA SA Manufacture Horlogère Suisse (ETA) to gradually reduce the supplies made to third parties until the end of 2019. The impetus for these proceedings was a request from Swatch for an amendment to the amicable settlement. The Competition Commission concluded on the basis of a comprehensive market survey that market conditions are developing in the expected direction. The Competition Commission could not identify any substantial changes that would justify an amendment of the amicable settlement. The market participants interviewed however claimed inter alia that the continuation of amicable settlement unchanged was essential to further market development. An amendment of the current supply arrangement would place the development and expansion plans of ETA's competitors at considerable risk. The Competition Commission agreed with these assessments. It took the view that the difficult economic environment that the watch industry faced in 2016 was an insufficient reason to amend the settlement reached in 2013.

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

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

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

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

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

2.2. Decisions in the courts

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

14. In 2011, the Competition Commission imposed a sanction of around CHF 12.5 million on **Nikon AG** (Switzerland) for preventing parallel imports. In a judgment dated

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

15. In a judgment dated 24 November 2016, the Federal Administrative Court overturned the Competition Commission ruling in the **Hallenstadion/Ticketcorner** case. Starticket and Ticketportal had reported Hallenstadion and Ticketcorner to the Competition Commission for alleged anti-competitive conduct in relation to the hiring of the Hallenstadion. In terms of a ticketing clause, the Hallenstadion had since 2009 required the organisers of public events to allow Ticketcorner to sell at least 50% of the tickets. The background to this requirement lay in a ticketing cooperation clause in a cooperation agreement between Hallenstadion and Ticketcorner. The Competition Commission abandoned the case in 2011, having failed to find any indications of an unlawful restraint of competition. Starticket and Ticketportal appealed against this decision. After the two appellants’ right to appeal was confirmed by the Federal Supreme Court in preliminary proceedings lasting several years, the Federal Administrative Court has now upheld the appeal on its merits. It held that there were adequate indications (i) that the ticketing cooperation agreement is an anti-competitive agreement, (ii) that the ticketing clause by the Hallenstadion amounts to conduct in abuse of the market, and (iii) that enforcing an obligation for promoters to conclude a ticket sales agreement constitutes conduct in abuse of the market by Ticketcorner. The matter has been referred back to the Competition Commission for reassessment because certain factual circumstances require a binding investigation by the competition authority, and the Commission is basically responsible for deciding on whether any sanctions should be imposed.

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

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

3. Activities in individual sectors

3.1. Construction [redacted]

3.2. Services [redacted]

3.3. Infrastructure [redacted]

3.4. Product markets [redacted]

3.5. Internal market [redacted]

3.6. Investigations [redacted]

3.7. International [redacted]

3.8. Legislation

3.8.1. Parliamentary proposals

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

- The **Hans Altherr parliamentary initiative** of 25 September 2014 “Excessive import prices. End compulsory procurement on the domestic market” (14.449) plans in the style of German cartel law to introduce a provision into the Cartel Act

on combating the abuse of relative market power. The committees of the Council of States and the National Council have approved the parliamentary initiative and are now in the course of drafting the new legislation.

- The **Social Democratic Group motion** of 24 September 2014 “Fight Switzerland’s status as the island of high prices. A streamlined revision of the Cartel Act” (14.3780) was rejected by National Council and the matter is therefore regarded as concluded.
- The **Viola Amherd motion** of 26 September 2014 “For a minor revision of the Cartel Act” (14.3946) calls on the Federal Council to re-submit the “uncontested articles in the failed revision of the Cartel Act”. The motion was abandoned because it had been pending for more than two years, and has therefore been concluded.
- The **Hans Hess motion** of 18 June 2015 “For a more effective Cassis de Dijon principle” (15.3631) requires the Federal Council to take measures to ensure that manufacturers expressly permit their sales partners in Switzerland in their distribution agreements to carry out installation, maintenance or guarantee work, etc. for their products as well if these have been purchased directly in the European Economic Area. The motion has been approved by both chambers of the Federal Assembly. The Secretariat examined whether the refusal to provide maintenance services by local tradesmen in relation to products imported directly from the European Economic Area is widespread problem (see above 3.4.1).
- The **Buman Parliamentary Initiative** of 18 March 2016 “For appropriate periodical prices in Switzerland” (16.420) calls for specific provision on price fixing for newspapers and magazines in the Cartel Act. It has still to be debated in the first chamber (National Council).
- The **Buman Parliamentary Initiative** of 30 September 2016 “Minor revision to the Cartel Act” (16.473) demands that four specific undisputed points in the rejected revision of 2014 be reintroduced, namely the merger control procedure for companies, civil proceedings on competition law matters, the consideration of compliance programmes when assessing sanctions, and the objection procedure. It has not yet been debated in parliament.

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

20. The State Secretariat for Economic Affairs (SECO) has overall responsibility for these proposals within the administration; the Secretariat of the Competition Commission is involved in the work.

3.8.2. Fair Price Initiative

21. The Fair Price Initiative was launched on 20 September 2016 (official title: “Put an end to Switzerland as an island of high prices – for fair prices”) and calls for the federal government to enact “regulations against the economically or socially harmful effects of cartels and other restraints of competition. The government should in particular take measures to guarantee the non-discriminatory procurement of goods and services abroad and to prevent restraints of competition that are caused by the unilateral conduct

of companies with significant market power”. It calls for several specific measures, in particular statutory rules for companies with relative market power that set higher prices in Switzerland than abroad, and on non-discriminatory purchases in online trading. The deadline for collecting signatures expires on 20 March 2018.

3.8.3. *Modernisation of merger control procedures*

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

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

4. Organisation and Statistics

4.1. Competition Commission and Secretariat

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

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

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

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

27. In the **Secretariat**, two key positions in the management staff have been filled. **Niklaus Wallimann** has since 1 September 2016 been the new **Chief Economist** in the

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

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

Secretariat, replacing Marc Blatter who left at the end of June 2016; and on 1 January 2017 **Stefan Renfer** became the new **head of the Competence Centre for the Internal Market**, replacing Nicolas Diebold, who left at the end of 2016.

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

4.2. Statistics

Table 1.

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

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

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

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

- In application of the IMA, the number recommendations and appeal proceedings increased. Three investigations led to five recommendations being issued to cantons and from the seven appeals filed, three related to the canton of Ticino and three to the authorisation of law companies (see above 3.5).

5. Digitalisation of the economy

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

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

5.1. Network infrastructure

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

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

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

5.2. Online trading

35. Online trading has a positive effect on competition. Consumers barely face any costs if they use the Internet to make a purchase decision. They benefit from greater transparency and from a broader offer. For distributors, the internet increases their (geographical) reach. Direct trading via the Internet reduces distribution costs and brings opportunities for innovative business models.

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

5.3. Digital platforms

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

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

39. A further consequence of indirect network effects is the tendency towards a high concentration of platform markets. For example, the very strong position of leading suppliers can be observed in the case of search engines or hotel booking platforms. Here however it must be remembered that customers actually benefit as a result of indirect network effects if the other customer group is comprehensively represented on the

platform. As a rule, in the case of online platforms, market power in its own right is not harmful. Only if a dominant company abuses its market power, or, in the case of a merger, a risk of the elimination of the competition arises, will the competition authorities intervene.

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

41. With digital platforms, new types of restraints on competition emerge. As a result of the international reach of these platforms, the Competition Commission, like other European competition authorities, addressed the contract clauses used by online booking platforms for hotels. The parity clauses evaluated in the investigation required the hotels not to offer lower prices or more rooms on other sales channels. This prevents the hotels from offering better deals on sales channels with lower commission rates. Therefore, these parity clauses restrict competition and the Competition Commission ruled that they violated the Cartel Act. The assessment of newly introduced, stricter parity clauses has not yet been possible in the absence of meaningful empirical data. The Competition Commission continues to monitor the developments and will intervene again if required.

5.4. Big Data

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

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

44. These examples demonstrate an important new characteristic within the markets using Big Data. Users of services pay not (only) with money, but (also) with their data. This data can be monetised by multi-purpose websites through the offer of targeted advertising, for example. For the competition authorities, this means that they cannot

simply base their assessment of the economic position of a company on turnover figures, but must also take data streams into account.

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

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

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

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

49. In practice, therefore, the Competition Commission is taking a cautious approach. This was evidenced in the assessment of the Admira joint venture, undertaken by

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

5.5. “The Sharing Economy”

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

51. The Competition Commission is not just a guardian of competition which intervenes in the case of unlawful restraints on competition. It is at the same time a champion of competition, defending the market against possible restrictions of competition. It is in this role that the Competition Commission is required to make it clear that a level playing field for all is more beneficial to competition than the indiscriminate application of old regulations to new developments in the economy. Thus the existing regulations must be critically scrutinised. For example, it should be considered whether, in a digital era with navigation systems, taxi drivers should be required to have local geographical knowledge. Likewise, differing local regulations must be reassessed. These hamper the introduction of innovative business models as part of the Sharing Economy, because compliance with different regulatory systems leads to unnecessarily high costs. It is also important to mention that suppliers based in Switzerland that conduct their business lawfully locally are entitled to pursue this activity throughout Switzerland in accordance with the terms of the rules on origin. Commercial and industrial suppliers may rely on this principle of the Internal Market Act (Art. 2 para. 3 IMA) in relation to the Sharing Economy.

5.6. Conclusion

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

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

54. In the case of Big Data this manifests itself in the fact that customers pay not only with money, but also with data. As a result of this, an assessment of the market strength of a company must also take account of presence on multiple market sites and in multiple data streams. In relation to turnover-based criteria for the merger control procedure, this

means that a merger could still be approved even though a dominant position that might eliminate competition may occur as a result of customer data. The network effects typical of digital economics bring a tendency towards relatively higher concentrations in the markets, which could be more efficient.

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

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

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