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Annual Report on Competition Policy Developments in Switzerland

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1. Foreword from the President

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

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

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

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

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

Prof. Andreas Heinemann
President of the Competition Commission

2. Most important decisions in 2017

2.1. ComCo decisions

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

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

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

9. On 18 September 2017, ComCo approved the planned **merger between the University Hospital Basel and the Cantonal Hospital of Baselland** to a form a joint hospital group. In its detailed review, ComCo concluded that in relation to acute in-patient hospital services covered by basic and supplementary health insurance, the hospital group will attain a strong market position in the Basel area. However, it was not likely that the merger would eliminate effective competition in the region. Accordingly, the statutory requirements for ComCo to intervene were not fulfilled. From the standpoint of competition law, there was nothing to prevent the planned merger from going ahead.

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

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

12. ComCo penalised **SwissPost** in a ruling dated 30 October 2017, imposing sanctions of around CHF 22.6 million. SwissPost had abused its dominant position in the **business customer market for addressed bulk deliveries weighing over 50 grams**. ComCo held that SwissPost did not fairly apply both the 2009 pricing system, which applied from 1 July 2009 until 31 March 2011, and the CAPRI pricing system, which has applied since 1 April 2011. SwissPost granted special contractual conditions to business customers whose annual volume of postal deliveries exceeded CHF 100,000. Other customers with comparable characteristics, however, were treated differently and unlawfully discriminated against. In numerous contracts, discounts were agreed that were lower than those specified in the pricing system. Thus some customers had to pay higher prices than others. This meant firstly that they were unlawfully obstructed in their competition with other customers and secondly that they paid SwissPost excessive prices. With the CAPRI pricing system, which has applied since 1 April 2011, SwissPost

introduced a supplementary discount. This was intended to reward customers that achieved or exceeded a monthly turnover target agreed with SwissPost. However, customers that failed to achieve the monthly target were penalised. Overall the pricing system was not sufficiently transparent for customers, which deterred them from outsourcing part of their postal deliveries to the competitor Quickmail. COMCO's decision can be appealed to the Federal Administrative Court.

13. In a decision dated 11 December 2017, ComCo concluded the **Supermédia investigation** into Naxoo AG. The investigation revealed that Naxoo held a dominant position in its area of operations, the market for cable connections, in particular in the city of Geneva. Naxoo had unlawfully exploited this position, firstly through unfair terms of business in cable contracts with house owners and secondly by obstructing third parties. This meant that house owners were prevented from making free use of the infrastructure in their properties, for example by installing satellite systems. In addition, suppliers of satellite systems were obstructed and the technical development of these systems was restricted. Lastly, end consumers were prevented from using competing cable network services or supplementary telecommunications services. ComCo imposed a sanction of around CHF 3.6 million on Naxoo. COMCO's decision can be appealed to the Federal Administrative Court.

2.2. Decisions in the courts

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

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

15. In a judgment dated 9 October 2017, the **Federal Supreme Court** upheld the appeal by the EAER against the judgment of the Federal Administrative Court of 23

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

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

17. In a further judgment dated 14 November 2017, the **Federal Administrative Court** upheld the appeal of a company against ComCo's decision of 17 November 2014 in the **door products** investigation. This company had only participated in the annual cartel meeting on one occasion, but ComCo regarded this as sufficient to be complicit in the unlawful agreement. The court recognised in principle that voluntary participation in a meeting of companies that results in an anti-competitive agreement constitutes participation in the agreement, unless the company concerned can show that it was only

pursuing lawful objectives at the meeting and made this clear to the other companies involved. The court however held that every case depends on its specific circumstances and there must be proof of actual consensus or a concerted practice for an agreement to exist. In this particular case, there was no proof that the appellant had participated in any agreement.

3. Legislation

3.1. Parliamentary proposals

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

- The **Hans Altherr parliamentary initiative** of 25.9.2014 ‘Excessive import prices. End compulsory procurement on the domestic market’ (14.449) plans in the style of German cartel law to introduce a provision into the Swiss Cartel Act on combating the abuse of relative market power. The committees of the Council of States and the National Council have approved the parliamentary initiative, but at present the proposal has been suspended.
- The **Hans Hess motion** of 18 June 2015 ‘For a more effective Cassis de Dijon principle’ (15.3631) requires the Federal Council to take measures to ensure that manufacturers expressly permit their sales partners in Switzerland in their distribution agreements to carry out installation, maintenance or guarantee work, etc. for their products as well if these have been purchased directly in the European Economic Area. The Federal Council has prepared a report on abandoning the motion (17.050); the next stage will be for this report to be debated in the National Council.
- The two **de Buman parliamentary initiatives**, ‘For appropriate periodical prices in Switzerland’ dated 18.3.2016 (16.420) and ‘Minor revision to the Swiss Cartel Act’ dated 30 September 2016 (16.473) were not endorsed and withdrawn respectively.
- The **Fournier motion** of 15.12.2016, ‘Improve the position of SMEs in competition proceedings’ (16.4094), which demands deadlines for courts, procedural costs for parties, more lenient sanctions for SMEs and the publication of decisions only after they have become legally enforceable, will now be debated in the National Council following its approval by the Council of States.

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

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

3.2. Fair Prices Initiative

21. The **Fair Prices Initiative** ('Put an end to Switzerland as an island of high prices – For fair prices'), launched in autumn 2016, demands that the Confederation introduce 'measures to guarantee the non-discriminatory procurement of goods and services abroad and to prevent restraints of competition that are caused by the unilateral conduct of companies with significant market power'. The initiative was submitted to the Federal Chancellery in December 2017.

3.3. Modernising merger control procedures

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

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

4. Organisation and Statistics

4.1. Annual budget

24. In 2017 ComCo had an overall budget, including personnel, material and investment costs, of 13 million Swiss francs respectively 13 million US dollars.

4.2. Competition Commission and Secretariat

25. The members of ComCo met for 17 full or half-day plenary sessions in 2017. The number of decisions in investigations and mergers under the Swiss Cartel Act and in application of the Internal Market Act can be seen in the statistics (see 4.3).

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

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

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

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

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

4.3. Statistics

Table 1.

	2016	2017
Investigations		
Conducted during the year	32	30
Carried forward from previous year	22	26
Investigations opened	4	4
New investigations from divided investigations	6	0
Final decisions	9	12
Amicable settlements	6	2
Administrative rulings	2	4
Sanctions under art. 49a para. 1 Swiss Cartel Act	8	11
Part-rulings	2	0
Procedural rulings	9	1
Other rulings (publications, costs, searches, etc.)	3	3
Precautionary measures	0	1
Sanctions proceedings under art. 50 ff. Swiss Cartel Act	0	0
Preliminary investigations		
Conducted during the year	14	18
Carried forward from previous year	11	9
Opened	3	9
Concluded	6	7
Investigations opened	2	1
Modification of conduct	3	3
No consequences	1	3
Other activities		
Notifications under Art. 49a para. 3 let. a Swiss Cartel Act	0	2
Advice	27	21
Market monitoring	42	63
Freedom of information applications	16	9
Other enquiries	683	635
Mergers		
Notifications	22	32
No objection after preliminary examination	21	27
Investigations	1	3
Decisions of ComCo after investigation	0	3
Authorisation refused	0	1
Authorised with conditions/requirements	0	0
Authorised without reservations	0	2
Early implementation	0	0
Appeal proceedings		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	39	31
Judgments of the Federal Administrative Court	9	7
Success for the competition authority	7	5

Partial success	0	1
Judgments of the Swiss Federal Supreme Court	2	2
Success for the competition authority	2	2
Partial success	0	0
Pending at the end of the year (before Federal Administrative Court and Federal Supreme Court)	28	21
Expert reports, recommendations and opinions etc.		
Expert reports (Art. 15 Swiss Cartel Act)	0	1
Recommendations (Art. 45 Swiss Cartel Act)	0	0
Expert opinions (Art. 47 Swiss Cartel Act, 5 para. 4 PMA or 11a TCA)	0	3
Follow-up checks	0	0
Notices (Art. 6 Swiss Cartel Act)	1	1
Opinions (Art. 46 para. 1 Swiss Cartel Act)	281	210
Consultation proceedings (Art. 46 para. 2 Swiss Cartel Act)	8	8
Swiss Internal Market Act (IMA)		
Recommendations / Investigations (Art. 8 IMA)	2	1
Expert reports (Art. 10 IMA)	1	5
Explanatory reports (Secretariat)	45	73
Appeals (Art. 9 para. 2 ^{bis} IMA)	1	0

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

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

- A high number of explanatory reports was recorded in connection with the Swiss Internal Market Act. This is mainly due to the numerous enquiries by skilled trades businesses about the Craft Businesses Act of Canton Ticino. The number of expert reports has also risen significantly because ComCo is increasingly invited by the Federal Supreme Court to give an advisory opinion in appeal proceedings concerning the Swiss Internal Market Act.