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## Annual Report on Competition Policy Developments in Switzerland

-- 2019 --

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## Switzerland

### Foreword from the President

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

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

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

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

Prof. Dr. Andreas Heinemann  
President of the Competition Commission

## 1. The Most Important Decisions in 2019

### 1.1. ComCo Decisions

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

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

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

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

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

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

reports. The investigation is continuing under the rules of ordinary procedure against the company that did not conclude an amicable settlement.

In the summer of 2019, ComCo concluded the final two of ten investigations in the **canton of Graubünden**, “**Engadin II**” and “**Road construction**” (construction services in Graubünden). In the “**Engadin II**” decision, ComCo found that two, and in one case three, structural and civil engineering companies had agreed on bids in specific construction projects in the Oberengadin. The ten unlawful agreements affected construction and civil engineering projects for both private and public sector clients. The fines in this case amounted to just under CHF 500,000. In the larger “**Road construction**” investigation, ComCo found that in the period from 2004 to 2010 twelve road construction companies in Nord- and Südbünden had shared out the cantonal and communal road construction projects among themselves by agreeing on the bids they would submit. Agreements were reached on several hundred projects with a total value of at least CHF 190 million. Both the canton and its communes were affected by the agreements. On 19 August 2019 ComCo imposed fines totalling around CHF 11 million for this unlawful bid rigging. Nine of the twelve road construction companies had reached out-of-court settlements with the victims of their cartels before ComCo issued its decision. In the settlements they undertook to pay around CHF 6 million in total to the canton and the Graubünden communes affected (see Section 5.1). As a consequence, ComCo reduced the sanctions imposed on the nine companies by around CHF 3 million

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

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

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

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

agreement was also reached on online trading, cross-supplies between Stöckli retailers, and on direct and parallel imports of Stöckli products. Stöckli cooperated fully, which resulted in a substantial reduction in sanctions.

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

With their **Gateway Basel North (GBN)** project, SBB, Hupac and Rethmann want to create a hub for import and export movements and the trans-Alpine transit traffic of goods. When finally completed, the GBN should provide both landside (road and track) and ship-borne goods handling services. ComCo examined the plan in detail and decided not to raise any objections. Although the project may remove effective competition in the handling of containers, swap bodies and semi-trailers in the import and export business, this primarily relates to the turnover of goods transported by rail and that of goods transferred from ship to rail. However, the GBN will also result in substantial cost and time savings in combined transport. In view of statutory requirements for non-discriminatory access to the GBN and the other conditions imposed by the Federal Office of Transport (FOT), ComCo assumes that the GBN will actually improve competition in import and export movements by rail. These advantages outweigh the disadvantages that the GBN's dominant position in the goods handling services sector will bring. Therefore, it was possible to approve the merger. In October 2019, the Federal Administrative Court upheld an appeal against the federal government's decision on funding for the GBN, with the result that CHF 83 million in federal funds will not be paid out for the project as yet, which has led to work being suspended.

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

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

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

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

## 1.2. Court judgments

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

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

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

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

business secrets, which therefore had to be redacted. The appellant has appealed the decision to the Federal Supreme Court.

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

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

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

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

the sanction to CHF 186 million, a decision which has now been confirmed by the Federal Supreme Court.

## 2. Legislation

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

- The **Altherr Parliamentary initiative** of 25 September 2014 “Excessive import prices. End compulsory procurement on the domestic market” (14.449), which was endorsed by the committees of both Councils, was abandoned in mid-September 2019 because of the pending popular initiative “Stop the island of high prices – for fair prices (Fair-price Initiative)” and the indirect counter-proposal by the Federal Council.
- The **Bischof Motion** of 30 September 2016 “Ban adhesion contracts between online booking platforms and the hotel industry” (16.3902) was approved by both Councils. The concern raised in the Motion should be resolved by an amendment to the Federal Act on Unfair Competition. The EAER is currently preparing a bill for submission to the consultative committee.
- The **Fournier Motion** of 15 December 2016 “Improve the position of SMEs in competition proceedings” (16.4094) demands deadlines for competition law administrative proceedings, compensation of party costs even in first instance administrative proceedings, more lenient sanctions for SMEs and the publication of decisions only after they have become legally enforceable. Following its approval by the Council of States, the National Council accepted the first two points and rejected the other two. The EAER is currently drafting a bill that will be submitted for consultation.
- The **National Council Economic Affairs and Taxation Committee Motion** of 14 August 2017 “Create an effective instrument to prevent unreasonable periodical prices” (17.3629) was abandoned after its rejection by the Council of States on 11 March 2019.
- The **Pfister Motion** of 27 September 2018 on the “Effective implementation of the Cartel Act in the motor vehicle sector” (18.3898) demands that the Federal Council enact an ordinance to protect consumers and SMEs from practices in the motor vehicle sector that distort competition. The Federal Council has called for the motion to be rejected, but the Councils have yet to consider it.
- The **Nantermod Motion** of 12 December 2018 on “Fair and effective procedures in competition law” (18.4183), which calls for changes to the procedural rules on inspecting files and compulsory fees in preliminary investigations, has not yet been considered in the Federal Assembly.
- The **Français Motion** of 13 December 2018 “The revision of the Cartel Act must take account of both qualitative and quantitative criteria in assessing the illegality of an agreement restricting competition” (18.4282), which calls for an amendment to Article 5 Cartel Act, was assigned by the Council of States to the Council of States Economic Affairs and Taxation Committee (EATC–S) on 20 March 2019 for preliminary discussion.

- The **Bauer Motion** of 14 December 2018 on “ComCo investigations: the presumption of innocence must take precedence” (18.4304) demands the repeal of Article 28 Cartel Act, which provides for the public announcement of the opening of an investigation, naming the parties. It has not yet been considered.
- The **Basel-Stadt cantonal initiative** dated 14 March 2018 “Switzerland as an island of high costs and high prices. For fair procurement prices” (18.304) was rejected by the Council of States on 18 June 2019.
- The **Molina postulate** of 9 May 2019 “Strengthen merger controls in the case of direct foreign investments” (19.3491) has yet to be debated in Parliament.

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

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

### 3. Organisation and Statistics

#### 3.1. Annual budget

In 2019 ComCo had an overall budget, including personnel, material and investment costs, of 13.8 million Swiss francs respectively 13.8 million US dollars.

#### 3.2. Competition Commission, Secretariat and Statistics

In 2019 ComCo held 14 full or half-day plenary sessions. At these meetings it took decisions on matters related to the Cartel Act and the Internal Market Act. More details of these can be found in the statistics below.

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

#### 3.3. Statistics

As of the end of 2019, the **Secretariat** employed 74 (previous year 68) staff members, 41.9 per cent of whom were women (previous year 39.7%). The 74 employees include both full-time and part-time staff representing a total of 64.2 (previous year 58.1) full-time positions. The number of employees involved in matters relating to the application of the Cartel and Internal Market Acts (including the executive board) is 57 (previous year 51), corresponding to 51.6 full-time positions (previous year 44.3). Seventeen employees (previous year 12) work in the Resources Division (until 30 September the Resources and

Logistics Division), providing support for all ComCo's work; this corresponds to 12.6 (previous year 8.8) full-time positions. The Secretariat also offers five (previous year five) internships. These five interns work full-time.

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

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

	2019	2018
<b>Investigations</b>		
Conducted during the year	19	24
Carried forward from previous year	16	18
Investigations opened	3	6
New investigations from divided investigations	2	0
Final decisions	11	4
Amicable settlements	9	2
Administrative rulings	2	2
Sanctions under Art. 49a para. 1 Cartel Act	10	4
Part-rulings	5	0
Procedural rulings	2	0
Other rulings (publications, costs, searches, etc.)	6	2
Precautionary measures	1	0
<b>Sanctions proceedings under Art. 50 ff. Cartel Act</b>	0	0
<b>Preliminary investigations</b>		
Conducted during the year	14	15
Carried forward from previous year	8	10
Opened	6	5
Concluded	2	7
Investigations opened	1	2
Modification of conduct	3	3
No consequences	0	2
<b>Other activities</b>		
Notifications under Art. 49a para. 3 let. a Cartel Act	2	2
Advice	28	21
Market monitoring	63	72
Freedom of information applications	7	20
Other enquiries	488	581
<b>Mergers</b>		
Notifications	40	34
No objection after preliminary assessment	37	27
Investigations	3	3
Decisions of ComCo after investigation	2	3

Authorisation refused	0	0
Authorised with conditions/requirements	0	0
Authorised without reservations	2	3
Early implementation	0	0
<b>Appeal proceedings</b>		
Total number of appeals before the Federal Administrative Court and Federal Supreme Court	46	38
Judgments of the Federal Administrative Court	4	7
Success for the competition authority	1	5
Partial success	2	1
Unsuccessful	1	1
Judgments of the Federal Supreme Court	6	1
Success for the competition authority	5	0
Partial success	0	1
Unsuccessful	1	0
Pending at the end of the year (before Federal Administrative Court and Federal Supreme Court)	26	33
<b>Expert reports, recommendations and opinions etc.</b>		
Expert reports (Art. 15 Cartel Act)	0	0
Recommendations (Art. 45 Cartel Act)	0	0
Expert opinions (Art. 47 Cartel Act, 5 para. 4 PMA or 11a TCA)	2	0
Follow-up checks	1	0
Notices (Art. 6 Cartel Act)	1	0
Opinions (Art. 46 para. 1 Cartel Act)	120	152
Consultation proceedings (Art. 46 para. 2 Cartel Act)	17	8
<b>IMA</b>		
Recommendations / Investigations (Art. 8 IMA)	3	0
Expert reports (Art. 10 IMA)	2	3
Provision of advice (Secretariat)	93	94
Appeals (Art. 9 para. 2 <sup>bis</sup> IMA)	0	0

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

- **In 2019 ComCo concluded significantly more investigations with decisions** than in the previous year. This is because various investigations had been in their final stages in 2018.
- The number of **preliminary investigations** conducted remained much the same.
- In comparison with 2019, ComCo received **more reports of planned mergers**. It subjected a similar number to a detailed examination. No mergers were prohibited.
- Although, as in the comparison between 2017 and 2018 – the number of the **appeals before the Federal Administrative Court and Federal Supreme Court** increased in 2019, the total number of pending appeals fell below the 2018 level. In 2019, the Federal Supreme Court reached more decisions than in 2018, the Federal Administrative Court fewer.

- Although the number of **advisory procedures** increased, the number of **market monitoring procedures** fell. ComCo received significantly fewer **freedom of information requests**. The number of **enquiries** from members of the public, public offices and companies, as well as of office consultation procedures fell in comparison with the previous year.
- In relation to the **Internal Market Act**, ComCo conducted a similar number of advisory procedures as in 2018.

## 4. Special Topic: Violations of Competition Law and Damages

### 4.1. Introduction

In the past two years, ComCo and its Secretariat have experienced a growing number of enquiries from companies, private individuals and public authorities (e.g. cantons and communes) about bringing damages claims following Competition Commission decisions on unlawful agreements. In particular, potential claimants have discussed the possibility of obtaining damages following ComCo's decision relating to agreements on automobile leasing (see Sections 2.1) and after the various ComCo decisions on agreements in the construction sector in the canton of Graubünden (see Sections 2.1). On the latter, the competition authorities received numerous enquiries from construction project clients as to whether they could claim compensation from the companies involved in the cartel and how much compensation that might be. Such actions for damages before a civil court in the aftermath of cartels are known as "follow-up" actions as they build on the findings of the administrative proceedings that ComCo has conducted.

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

- Proving a violation of competition law is commonly very complex and therefore expensive. The victim of an unlawful restraint of competition who brings a claim must furnish security in respect of procedural costs and runs the risk of having to pay these costs if they do not ultimately win the action.
- Civil claims related to cartels are subject to short prescriptive periods in the Code of Obligations. It is therefore difficult for victims of cartels to file a properly substantiated claim in the civil court in time.
- Furthermore, for the victims of unlawful restraints of competition, who must present and prove the facts of the case in court as the plaintiffs, it is often virtually impossible to obtain the required evidence. In most cases, this evidence is held exclusively by the cartel members or by the competition authorities. The right to obtain access to official documents is however limited firstly by official secrecy and secondly because the competition authorities have an interest in ensuring that there is an incentive for potential cartel members to make voluntary reports. For this reason, and in order to protect commercial secrets, even ComCo rulings are published with partially redacted passages.

- Even if a civil claimant succeeds in proving a breach of competition law to the satisfaction of the court, he or she must still quantify the loss sustained. The loss is determined by what is known in Swiss law as the “difference hypothesis”, in which the victim of a cartel must precisely quantify the difference between the current financial situation and the financial situation that would have existed if no breach of competition law had been committed. As a result of the complex interaction of economic factors, determining the hypothetical situation (and thus the loss) can be extremely difficult.
- According to the prevailing interpretation of the current Cartel Act, consumers, and in particular end consumers, do not have the right to take legal action.
- Moreover, civil proceedings face strong competition from administrative proceedings: the path via ComCo is attractive because it means that persons who have a complaint avoid the costs and risks of a civil action and because the competition authorities also have more powerful investigation instruments than the civil courts (e.g. the power to search houses and business premises).

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

## **4.2. Strengthening the current civil law on cartels**

### ***4.2.1. Conflict of objectives***

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

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

financial interests of the victims of cartels on the one hand and the state's interest in detecting violations (and the related interest of offenders in confidentiality).

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

#### *4.2.2. Access to information*

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

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

#### *4.2.3. Reduced sanctions where damages are paid*

In discussions on the reform of the Cartel Act in 2014, it was proposed that when determining sanctions, appropriate account should be taken of any payments a company made to victims based on a decision of a civil court (see Section 5.3). As the revision was not approved, the planned statutory provision and the new options were not introduced. However, based on the existing law, the authorities can create an incentive in ComCo proceedings for cartel members to compensate victims.

In its decision on 19 August 2019 in the investigation into construction services in Graubünden, ComCo for the first time decided that damages payments made to victims of an unlawful restraint of competition before ComCo had reached its decision should be taken into account as a factor that mitigates the sanction. This possibility of a reduced sanction as a result of paying damages is an important incentive to compensate victims of cartels as quickly and fully as possible. It contributes to a situation in which the cartel members “voluntarily” return to the victims all or part of the profits achieved by infringing competition law. Under the current law, in order to secure a reduced sanction based on damages payments, in every case it is essential that the amount of damages is sufficiently settled and payment guaranteed before any ComCo decision is taken.

There is no express provision in the current Swiss law on cartels for a reduction of a sanction as a result of damages payments, but the practice has a basis in the existing provisions (in particular Art. 49a para. 1 sentences 3 and 4 of the Cartel Act and Art. 3 and 6 of the Cartel Act Sanctions Ordinance). The possibility of a reduced sanction as a result of paying damages to the victims of cartels is basically in line with the principles that apply in the fine or sanctions systems in other Swiss legal fields and in foreign legal systems. For example, in criminal law it is recognised that where an offender makes reparation, this can lead to a more lenient sentence. In EU competition law and in other foreign competition systems the possibility of a reduced sanction as a result of damages payments has recently

been recognised in principle. Particular note should be taken of the EU directive on damages as well as the ECN+ directive, according to which competition authorities may take account of damages payments made in terms of a settlement before a fine is imposed when assessing the amount of the fine. However, experience with these provisions is still rather limited.

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

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

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

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

In the case cited from the canton of Graubünden, this approach was successful: instead of having to pay sanctions amounting to around CHF 14 million as originally calculated, the companies in the cartel were ultimately required to pay “only” CHF 11 million in sanctions to the Confederation. However, they also paid around CHF 6 million in damages to the victims of the cartel. The process was highly beneficial to the victims more than anyone else: they received compensation relatively quickly and easily, without having to take protracted, expensive civil proceedings, whose outcome would have been uncertain.

### **4.3. Strengthening the civil law on cartels by revising the current law**

The incentives to bring civil actions could be increased considerably by amending the Cartel Act while remaining within the present system. In this case the aim is not to strengthen the civil law on cartels at the expense of the administrative law on cartels. Instead the aim is to improve the enforcement of the law on cartels overall. Experiences in

other European countries show that it is possible to increase the appeal of taking action in the civil courts, without creating an excessive culture of litigation. The aim of any reform should be to ensure that those who have been affected by restraints of competition are more readily able to obtain compensation for themselves (e.g. via “follow-up” actions) or can take action on their own initiative (e.g. by enforcing an injunction) and are thus no longer dependent on the competition authority’s discretion as to whether it pursues a case.

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

#### 4.4. Conclusion

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

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

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