



## COUNTRY STUDIES

# Switzerland - The Role of Competition Policy in Regulatory Reform 2005

### Introduction

The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers. This report on the role of competition policy in regulatory reform analyses the institutional set-up and use of policy instruments in Switzerland. This report was prepared by Mr. Michael Wise for the OECD.

### Overview

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LE RÔLE DE LA POLITIQUE DE LA CONCURRENCE DANS LA RÉFORME DE LA RÉGLEMENTATION

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## FOREWORD

Regulatory reform has emerged as an important policy area in OECD and non-OECD countries. For regulatory reforms to be beneficial, the regulatory regimes need to be transparent, coherent, and comprehensive, spanning from establishing the appropriate institutional framework to liberalising network industries, advocating and enforcing competition policy and law and opening external and internal markets to trade and investment.

This report on *The Role of Competition Policy in Regulatory Reform* analyses the institutional set-up and use of policy instruments in Switzerland. It also includes the country-specific policy recommendations developed by the OECD during the review process.

The report was prepared for *The OECD Review of Regulatory Reform in Switzerland* published in March 2006. The Review is one of a series of country reports carried out under the OECD's Regulatory Reform Programme, in response to the 1997 mandate by OECD Ministers.

Since then, the OECD has assessed regulatory policies in 22 member countries as part of its Regulatory Reform programme. The Programme aims at assisting governments to improve regulatory quality — that is, to reform regulations to foster competition, innovation, economic growth and important social objectives. It assesses country's progresses relative to the principles endorsed by member countries in the 1997 *OECD Report on Regulatory Reform*.

The country reviews follow a multi-disciplinary approach and focus on the government's capacity to manage regulatory reform, on competition policy and enforcement, on market openness, specific sectors such as telecommunications, and on the domestic macro-economic context.

This report was prepared by Philippe Gugler, consultant to the Directorate for Financial and Enterprise Affairs of the OECD. It benefited from extensive comments provided by colleagues throughout the OECD Secretariat, as well as close consultations with a wide range of government officials, parliamentarians, business and trade union representatives, consumer groups, and academic experts in Switzerland. The report was peer reviewed by the 30 member countries of the OECD. It is published under the authority of the OECD Secretary-General.

## TABLE OF CONTENTS

Foundations of competition law .....	6
The period before 1985.....	6
The phase after 1985 and before the 1995 Cartel Act .....	7
Implementation of the 1995 Cartel Act .....	7
Entry into force of the 2003 Cartel Act .....	8
Substantive issues: content of the Cartel Act .....	9
Agreements affecting competition (cartels).....	10
Abuse of dominant position.....	14
Merger control .....	15
Unfair competition.....	17
Consumer protection.....	17
Institutional issues: implementing structures and practices .....	18
Competition policy institutions.....	18
Competition law enforcement.....	21
Other means of enforcement.....	26
International aspects of competition policy and policy enforcement .....	26
Resources, actions and implicit priorities .....	27
Limits of competition policy: exemptions and special regulatory arrangements.....	29
General exemptions and special treatment .....	29
Sectoral exclusions, rules and exemptions .....	33
Competition advocacy in regulatory reform .....	44
Comco's role .....	44
Reform of the Internal Market Act .....	45
Public procurement.....	47
Technical barriers to trade .....	49
Conclusions and possible measures .....	49
Possible measures .....	51
Abbreviations.....	53
BIBLIOGRAPHY .....	55
ANNEX 1 .....	61
ANNEX 2: COMCO'S ACTIVITIES IN 2003 AND 2004.....	63
ANNEX 3: COMCO'S ACTIVITIES RELATING TO RESTRAINTS OF COMPETITION (AGREEMENTS AND ABUSE OF DOMINANT POSITION) .....	64
ANNEX 4: COMCO'S MERGER CONTROL ACTIVITIES .....	65
NOTES .....	66

## THE ROLE OF COMPETITION POLICY IN REGULATORY REFORM

### Box 1. Summary of the Chapter

The causes of the relative weakness of Switzerland's economic performance over the last 20 years in comparison with other OECD countries are mainly structural: cyclical factors and adverse shocks have played only a secondary part.<sup>1</sup> The conditions offered by the broad competitive framework do not favour greater dynamism. The result is low productivity, which goes a long way towards explaining the lacklustre performance of the Swiss economy. Lack of competition is one of the main reasons for the high prices of many products and services on the Swiss market.<sup>2</sup> This in turn is partly due to attitudes that are still less critical of anticompetitive behaviour, tariff and non-tariff barriers at borders targeting certain food products for example, and other laws and regulations that segment markets within the country or shield them from competition through pricing or market systems and exclusive rights.<sup>3</sup>

Reforms to improve the competitive environment have been introduced since the early 1990s. However, the scope and pace of reform have been more timid than in most neighbouring countries. In some cases, attempted reforms have been halted or limited by popular vote.

Two major pieces of legislation were passed in 1995 with the aim of remedying this situation, namely the Act on cartels and other restraints of competition (Cartel Act) and the Act on the internal market (Internal Market Act), but they did not have all of the hoped-for effects. Consequently, the Federal Council decided to amend them.<sup>4</sup> The 2003 reform of the Cartel Act strengthened Swiss competition law, in particular by introducing direct sanctions for the most serious infringements and a leniency programme.<sup>5</sup> The Internal Market Act is currently being revised. As part of a set of measures to promote growth introduced by the Federal Council in February 2004, various reforms are under way in many areas totally or partly shielded from competition by various regulations.<sup>6</sup>

The revision of the Cartel Act marks the beginning of a new phase in Swiss competition law, bringing it closer to that of the European Union and of many other OECD countries. The Swiss competition authorities have been given considerable new powers to combat private restraints of competition. In an overall context where a competition culture still needs to be consolidated, the competition authorities will have to enforce the new laws strictly and resolutely if they are to check the anti-competitive practices that prevent many markets from operating efficiently. They will also have to step up their action to promote competition in order to influence current and future regulatory reforms.

To fulfil their assignment with rigour and determination, the competition authorities have to reckon with existing arrangements and mechanisms that temper their full independence. In the absence of international competition agreements, the Swiss competition authorities do not benefit from the networks of exchanges available to national competition authorities in EU Member States. This isolation makes their work all the harder, given their position in the heart of Europe. Matters are further complicated by a relative lack of resources.

## **Box 2. Role of competition policy in regulatory reform**

In addition to the threshold, general question of whether regulatory policy is **consistent** with the conception and purpose of competition policy, competition policy and regulation may interact in four particular ways:

Regulation can **contradict** competition policy. Some regulations may have encouraged or even imposed practices or conditions that under other circumstances would constitute breaches of competition law. For example, they may allow for the co-ordination of prices or prevent advertising or other forms of competition, or impose a territorial division of the market. Other examples are laws that prohibit sales below cost, which claim to promote competition but are often construed in an anti-competitive way, or the very broad category of regulations that restrict competition more than is necessary to achieve regulatory objectives. When such regulations are amended or abrogated, the enterprises concerned have to change their habits and expectations.

Regulation can **replace** competition policy. Especially where a monopoly seems inevitable, regulation may try to control market power directly by setting prices and controlling market entry and access. Technological developments and other institutional changes can lead to a reconsideration of the fundamental assumption underlying regulation, namely that competition policy and competition authorities would be inadequate to preventing monopoly and the exercise of market power.

Regulation can **reproduce** competition policy. Regulatory authorities may try to prevent co-ordination or abuse in a sector in the same way as competition authorities. For example, regulations may set standards of fair competition or tendering rules in order to ensure competitive bidding. However, different regulatory authorities may apply different standards, and changes in regulatory institutions may show that apparently similar policies have in fact produced different results.

Regulation can **use** the methods of competition policy. Some instruments that seek to achieve regulatory objectives may be designed to take advantage of incentives that derive from the market and the competitive dynamic. Co-ordination may be necessary to ensure that such instruments work as they are supposed to in relation to the requirements of competition law.

### **Foundations of competition law**

Swiss competition law is founded on Article 96 of the Constitution<sup>7</sup> which provides for freedom of trade and commerce and empowers the legislature to remedy any economically or socially harmful effects of cartels or similar groupings and hence to combat private restraints of competition.

There have been four phases of competition legislation: first, the period before the first revision of the cartel law in 1985; second, the phase between the revision of 1985 and the 1995 Act on cartels and other restraints of competition (1995 Cartel Act); third, the implementation of the 1995 Cartel Act, from 1 July 1996 to 31 March 2004; and finally, the phase marked by the revision of the law in 2003 and entry into force of the new law on 1 April 2004 (2003 Cartel Act).

#### ***The period before 1985***

Performing its constitutional duty, the federal legislature passed a first Cartel Act in 1962.<sup>8</sup> This period was marked by a philosophy of freedom of contract, under which companies could not be obliged to compete. So that a firm should have the possibility of competing with other firms, which might be joined in a cartel, the law prohibited boycotts. The cartel commission used a rule of balancing positive and negative effects of the conduct at issue. The cartel commission had no decision-making power, though; rather, it proposed measures for the federal department of economy to remedy challenged practices.

### *The phase after 1985 and before the 1995 Cartel Act*

A revised Cartel Act was passed in 1985.<sup>9</sup> The 1985 law, like the first, principally covered cartels and dealt only to a lesser extent with abuses by powerful firms on the market. The new law introduced a distinction between the suppression of effective competition, which it prohibited, and obstacles to competition, which it assessed along the lines that are now included in Art. 5.2 of the Cartel Act. This revision led toward the end of the 1980s to the decision by the minister of economy to prohibit cartel agreements in the banking sector (notably about brokerage). The Cartel Commission's lack of powers, coupled with the shortcomings of the investigation procedures instituted by the law, made it all the more difficult to enforce competition law effectively in Switzerland.<sup>10</sup>

Consequently, in 1992 the Federal Department of Economic Affairs asked a working group to draft a new competition law, resulting in a proposal for a Federal Act on cartels and other restraints of competition which was passed on 6 October 1995.<sup>11</sup>

### *Implementation of the 1995 Cartel Act*

The Cartel Act was passed at the same time as the Internal Market Act<sup>12</sup> and the Technical Barriers to Trade Act<sup>13</sup> as part of a programme to revitalise the Swiss economy, launched in 1992 after the voters and the cantons had rejected the agreement on the European Economic Area.

The Ordinance of 17 June 1996 on the control of mergers of enterprises<sup>14</sup> was adopted at the same time as the Cartel Act, supplementing the Act's provisions regarding business concentrations. An ordinance on emoluments within the framework of the Cartel Act was adopted in February 1998.<sup>15</sup>

When the Act was revised in 1995, the substantive law provisions for assessing restraints of competition drew extensively on EU competition law.<sup>16</sup> Although the Cartel Act is based on the principle of regulating abuse and EU competition law on the principle of prohibition, the revision brought the two bodies of law significantly closer together. Swiss competition law thus became closer to that of many other OECD countries which already had much stricter and more extensive competition legislation. Notably, the law clarified the distinction between the suppression of effective competition and obstacles to competition, by providing explicitly for a presumption (which had been implicit in the 1985 law) that agreements on price, quantities and geographic division of markets could not, as matter of principle, be justified by claims of economic efficiency.

One significant feature of the 1995 Cartel Act was to give the Competition Commission (Comco) the power to issue decisions prohibiting unlawful restraints of competition. Its decisions could be challenged before an appeal tribunal, before going to a federal court. The merger control provisions of the 1995 Cartel Act also give Comco the power to issue binding decisions.

However, the limits of the 1995 Cartel Act soon became apparent, the main one being that, while Comco could ascertain that behaviour was unlawful, it could do nothing to sanction it. A possibility existed for imposing fines on firms that infringed the law, but only if the offence was repeated. Unlike in most OECD countries, a first breach of competition law was "free" in Switzerland.

Media coverage of events like the discovery of an international vitamins cartel, which was heavily sanctioned in other countries whereas Comco was unable to impose the slightest penalty on the firms involved, and various moves in Parliament lent support to the case for giving the competition authorities more effective powers of enforcement. In early 2000, the Federal Council initiated a partial revision of the 1995 Cartel Act.

### ***Entry into force of the 2003 Cartel Act***

The amended Cartel Act was passed by Parliament on 20 June 2003 and came into force on 1 May 2004.<sup>17</sup> It provided for a transitional period until April 2005 to give firms time to adapt to the new system without being exposed to sanctions.

Amongst other things, the amended Act introduced direct sanctions and leniency provisions, which have done much to toughen up the fight against anti-competitive behaviour in Switzerland (Box 3). Swiss competition law has been brought closer to that of the EU and other OECD countries. In its determination to introduce more competition in Switzerland, the government has passed an important milestone.

The revised Act was followed by an implementing ordinance about sanctions against unlawful restraints of competition, adopted on 23 March 2004 and effective from 1 April 2004.<sup>18</sup> Two existing ordinances, on merger controls and emoluments, were also amended following revision of the Act.

The other laws that complete Switzerland's competition policy are the 1986 Unfair Competition Act,<sup>19</sup> the 1995 Internal Market Act<sup>20</sup> instituting the "Cassis de Dijon" principle for goods and services in Switzerland, and the 1985 Price Monitoring Act.<sup>21</sup> The Internal Market Act is currently being revised so as to make it more effective against the restraints of competition that still remain on Switzerland's domestic market (see Section 5.2).

#### **Box 3. Main features of the 2003 reform of the Cartel Act**

- Introduction of direct sanctions for hard-core horizontal and vertical cartels and abuse of dominant position. The sanction may amount to as much as 10 percent of turnover in Switzerland in the last three business years.
- Introduction of a leniency programme. Firms that have infringed the law may have their sanction reduced if they co-operate with Comco in bringing to light and eliminating unlawful restraints of competition.
- New presumption that certain types of vertical agreement on prices and markets preclude effective competition.
- More precise definition of market dominance (Article 4.2), according to which the power of independent action may be with respect to competitors, suppliers or purchasers.
- Repeal of previously lower threshold values for the requirement to notify concentrations in the media sector.
- Balance sheet total replaced by gross income for determining the requirement to notify concentrations in the banking and financial intermediation sector.
- Introduction of new methods of investigation, especially search and seizure operations ("dawn raids"), which the Comco Secretariat can apply if there are serious grounds for suspecting an infringement.
- Clarification of the reservation on intellectual property at Article 3.2 according to which the Cartel Act does not apply to effects on competition deriving exclusively from intellectual property law, so that the Cartel Act can apply to restrictions on parallel imports.
- Introduction of measures in favour of small businesses (Article 6.1). The conditions under which arrangements between SMEs designed to improve their ability to compete are justified for reasons of economic efficiency may be defined in ordinances or communications.
- Requirement for members of Comco to disclose their interests (*e.g.*, membership of company boards) in a special register.
- Introduction of provisions governing implementation of the EU-Switzerland agreement on air traffic.

## Substantive issues: content of the Cartel Act

The purpose of the Cartel Act is “to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interests of a market economy based on liberal principles” (Article 1). It applies to private and public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises (Article 2.1). The 2003 revision defined the notion of enterprise more precisely to ensure that certain institutions are not able to elude the law. A new clause (Article 2.1bis) states that “the term ‘enterprise’ means all customers or suppliers of goods or services in the commercial process regardless of their legal or organisational form.” The new definition was designed to include central and devolved entities of the Confederation, cantons and communes that do not have legal personality but operate on the market as customers or suppliers, especially where government procurement is concerned. However, experience will show the extent to which the new measure entails conflicts of competence with government procurement law and the extent to which Comco will really be able to act at federal level.<sup>22</sup>

The Cartel Act applies to restrictive practices whose effects are felt in Switzerland even if they originate in another country (Article 2). This principle of effects was endorsed by a Federal Court judgment of 24 April 2001, dismissing an appeal by firms that had not notified a merger transaction on the grounds that their registered office was in another country (Rhône-Poulenc S.A. & Merck).<sup>23</sup>

The Cartel Act is based on three pillars: agreements affecting competition (cartels), abuse of dominant position and business concentrations.

### Box 4. The competition policy tool-kit

General competition laws usually address the problems of monopoly power in three formal settings: relationships and agreements among otherwise independent firms, actions by a single firm, and structural combinations of independent firms. The first category, **agreements**, is often subdivided for analytic purposes into two groups: “horizontal” agreements among firms that do the same things, and “vertical” agreements among firms at different stages of production or distribution. The second category is termed “**monopolisation**” in some laws, and “**abuse of dominant position**” in others; the legal systems that use different labels have developed somewhat different approaches to the problem of single-firm economic power. The third category, often called “**mergers**” or “**concentrations**,” usually includes other kinds of structural combination, such as share or asset acquisitions, joint ventures, cross-shareholdings and interlocking directorates.

**Agreements** may permit the group of firms acting together to achieve some of the attributes of monopoly, of raising prices, limiting output, and preventing entry or innovation. The most troublesome **horizontal** agreements are those that prevent rivalry about the fundamental dynamics of market competition, price and output. Most contemporary competition laws treat naked agreements to fix prices, limit output, rig bids, or divide markets very harshly. To enforce such agreements, competitors may also agree on tactics to prevent new competition or to discipline firms that do not go along; thus, the laws also try to prevent and punish boycotts. Horizontal co-operation on other issues, such as product standards, research, and quality, may also affect competition, but whether the effect is positive or negative can depend on market conditions. Thus, most laws deal with these other kinds of agreement by assessing a larger range of possible benefits and harms, or by trying to design more detailed rules to identify and exempt beneficial conduct.

**Vertical agreements** try to control aspects of distribution. The reasons for concern are the same—that the agreements might lead to increased prices, lower quantity (or poorer quality), or prevention of entry and innovation. Because the competitive effects of vertical agreements can be more complex than those of horizontal agreements, the legal treatment of different kinds of vertical agreements varies even more than for horizontal agreements. One basic type of

### **The competition policy tool-kit (cont'd)**

agreement is resale price maintenance: vertical agreements can control minimum, or maximum, prices. In some settings, the result can be to curb market abuses by distributors. In others, though, it can be to duplicate or enforce a horizontal cartel. Agreements granting exclusive dealing rights or territories can encourage greater effort to sell the supplier's product, or they can protect distributors from competition or prevent entry by other suppliers. Depending on the circumstances, agreements about product combinations, such as requiring distributors to carry full lines or tying different products together, can either facilitate or discourage introduction of new products. Franchising often involves a complex of vertical agreements with potential competitive significance: a franchise agreement may contain provisions about competition within geographic territories, about exclusive dealing for supplies, and about rights to intellectual property such as trademarks.

**Abuse of dominance** or **monopolisation** are categories that are concerned principally with the conduct and circumstances of individual firms. A true monopoly, which faces no competition or threat of competition, will charge higher prices and produce less or lower quality output; it may also be less likely to introduce more efficient methods or innovative products. Laws against monopolisation are typically aimed at exclusionary tactics by which firms might try to obtain or protect monopoly positions. Laws against abuse of dominance address the same issues, and may also try to address the actual exercise of market power. For example under some abuse of dominance systems, charging unreasonably high prices can be a violation of the law.

**Merger control** tries to prevent the creation, through acquisitions or other structural combinations, of undertakings that will have the incentive and ability to exercise market power. In some cases, the test of legality is derived from the laws about dominance or restraints; in others, there is a separate test phrased in terms of likely effect on competition generally. The analytic process applied typically calls for characterising the products that compete, the firms that might offer competition, and the relative shares and strategic importance of those firms with respect to the product markets. An important factor is the likelihood of new entry and the existence of effective barriers to new entry. Most systems apply some form of market share test, either to guide further investigation or as a presumption about legality. Mergers in unusually concentrated markets, or that create firms with unusually high market shares, are thought more likely to affect competition. And most systems specify procedures for pre-notification to enforcement authorities in advance of larger, more important transactions, and special processes for expedited investigation, so problems can be identified and resolved before the restructuring is actually undertaken.

### ***Agreements affecting competition (cartels)***

In contrast to the competition law of many other countries, Swiss law on cartels is based on the prevention of abuse, not prohibition. One effect of this stance was to preclude certain stricter rules from the Cartel Act (direct sanctions were introduced only for certain types of anticompetitive behaviour); another is to slow down Comco's decision-taking process for hard cartels (a Federal Court judgment of 14 August 2002, making specific reference to the principle of preventing abuse, overturned a Comco decision prohibiting a hard-core cartel).<sup>24</sup> Another consequence relates to the burden of proof which, in a system based on preventing abuse, lies entirely with the competition authorities.

By an agreement affecting competition, the Cartel Act means binding or non-binding agreements and concerted practices between enterprises operating at the same or different levels of the market (horizontal agreements in the former case, vertical in the latter), the purpose or effect of which is to restrain competition (Article 4.1).

Agreements affecting competition are deemed to be unlawful when they significantly affect competition in the market for certain goods or services and are not justified on grounds of economic efficiency or lead to the suppression of effective competition (Article 5.1). An agreement that significantly affects competition is deemed to be justified on grounds of economic efficiency when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote

research into or dissemination of technical or professional know-how, or exploit resources more rationally, and when such an agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition (Article 5.2). Article 6.1 states that the conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications (see below).

Under the Cartel Act there is a presumption that certain horizontal agreements and, since the 2003 reform, certain vertical agreements are unlawful.<sup>25</sup> For these types of horizontal and vertical agreement, the presumption brings Swiss law closer to laws based on the principle of prohibition.<sup>26</sup>

Concerning horizontal agreements, Article 5.3 of the Cartel Act states that agreements among actual or potential competitors are presumed to lead to the elimination of effective competition when they directly or indirectly fix prices or restrict the quantities of goods or services to be produced, bought or supplied or allocate markets geographically or according to trading partners.

The 2003 reform introduced a new presumption that certain types of vertical agreement are unlawful. Parliament expressly wanted the new measure to prevent vertical restrictions that cause high prices in Switzerland by compartmentalising the national market.<sup>27</sup> Article 5.4 of the Cartel Act states that the elimination of effective competition is also presumed in the case of agreements between enterprises at different levels in the market regarding fixed or minimum prices as well as in the case of agreements in distribution contracts regarding the allocation of territories insofar as sales by other distributors into these territories are not permitted. If the presumption is true, the agreement is unlawful. However, even if the presumption of the elimination of competition is refuted, the agreement can still be deemed unlawful if it constitutes a significant restraint of competition and cannot be justified on grounds of economic efficiency. The conditions for assessing vertical agreements are laid down in two Comco communications.

**Table 1. Determining whether an agreement affecting competition is lawful or unlawful**

Stage 1: Does the agreement eliminate effective competition (no internal or external competition)?	Stage 2: Does the agreement significantly affect competition?	Stage 3: Is the agreement justified on grounds of economic efficiency?	Result
Yes	-	-	<b>Unlawful</b>
No	No	-	<b>Lawful</b>
No	Yes	Yes	<b>Lawful</b>
No	Yes	No	<b>Unlawful</b>

Comco prohibited 11 horizontal cartels and concluded 6 consent settlements between July 1996 and March 2005 (Box 5 and Annex 3). Except in a handful of cases, like the Sanphar drugs cartel, the prohibited cartels were relatively unimportant from an economic standpoint (printed music, cattle insemination, etc.). Although the issue of vertical restraints is regarded as one of the explanations for certain price differentials between Switzerland and neighbouring countries and is seen as shackling the competitiveness of small businesses in Switzerland, Comco has prohibited only a very small number of vertical agreements in the last nine years.<sup>28</sup> Some practices condemned by the European Commission, especially in the automobile sector, have been declared lawful by Comco, which had opened investigations into similar complaints, such as refusals to deal.<sup>29</sup>

Comco issued two communications relating to vertical agreements in 2002 (Annex I), marking a greater determination on its part to combat harmful vertical agreements.<sup>30</sup> The two communications are due to be amended in the light of the 2003 reform of the Cartel Act. Adoption of the communication on assessing vertical agreements (CommVert)<sup>31</sup> in February 2002 has caused a significant increase in the Secretariat's workload.

In CommVert, Comco acknowledges that the main problems caused by vertical agreements relate to contracts prohibiting parallel imports or imposing resale prices.<sup>32</sup> The content of CommVert is close to EU law.

Comco considers that vertical agreements have a significant effect on competition and are unlawful, if they cannot be justified on grounds of economic effectiveness, when they contain clauses or obligations that a) directly or indirectly impose fixed or minimum prices on distributors for the sale of goods or services; b) limit directly or indirectly the territory or distribution zone or the client base of distributors; c) limit sale to the final consumer, when such limit is imposed on an authorised distributor under a selective distribution system; d) limit cross-deliveries between authorised distributors within a selective distribution system, even if they operate at different levels of the market; e) prevent a supplier from delivering components or spare parts to third parties who are not distributors party to the agreement; f) contain a non-competition obligation lasting more than five years or more than one year after the vertical agreement expires.

Enterprises may not prohibit imports into exclusive territories on the basis of intellectual property law. As will be seen in Section 4.1.1, Article 3 exemptions from the scope of the Cartel Act do not apply to restrictions on imports based on intellectual property rights (Article 3.2).

According to Comco, other vertical agreements do not as a general rule affect competition if the market shares of all the enterprises taking part do not exceed 10% on any of the markets concerned. However, an exception to this principle is deemed to exist when competition on the market concerned is limited by the cumulative effects of several similar vertical distribution networks operating side by side, if the suppliers and/or distributors taking part are actual or potential competitors.

**Table 2. Cases treated in the framework of CommVert (February 2002 – December 2003)**

Total number of cases	120	100%
Cases closed because the Cartel Act did not apply	22	18%
Cases closed or preliminary investigation when the Cartel Act did apply	58	49%
Cases currently proceeding	40	33%

*Source: Comco (2004), 2003 Annual Report of the Competition Commission, Bern.*

Table 2 shows cases treated in the framework of CommVert from February 2002 to December 2003. 120 cases had been closed or were proceeding at 31 December 2003. 22 cases (18%) were closed because the Cartel Act did not apply. The exceptions set forth at Article 3 of the Cartel Act applied to nine cases; in most of the other cases, the agreements did not correspond to the definition given at Article 4.1.

CommVert applied in 58 cases (49%) and the matters were closed for three main reasons: no restraint of competition (40 cases), opening of a preliminary investigation (12 cases, 8 of them already closed by 31 December 2003), conclusion of a consent settlement with the enterprise concerned under Article 29 (6 cases).

In the 40 cases proceeding at 31 December 2003, the competition authorities still had to rule whether the Cartel Act and CommVert applied.

As Comco notes, despite the large number of cases treated under CommVert, the Secretariat was not able to identify the problematical ones, or to open a single investigation.<sup>33</sup> Comco has pointed out that the introduction of CommVert could have had a preventive effect by encouraging the business community to ensure that their agreements comply with the new rules.<sup>34</sup> But as regards both vertical agreements and other types of anticompetitive behaviour, these results raise questions. Moreover, the tendency of Comco to favour many consent settlements could also undermine the deterrent effect of the Cartel Act.

The second communication relating to vertical restraints was issued on 21 October 2002, becoming partly effective on 1 November 2002 and fully effective on 1 January 2005. It concerns the assessment of vertical agreements in motor vehicle distribution.<sup>35</sup> The communication, which is consistent with Commission Regulation (EC) No 1400/2002, is designed to promote competition in the market for motor vehicles, spare parts and after-sales service. It identifies rigid vertical restrictions, namely price fixing and the restriction of dealers to a single brand. It considers that categories of restraints of competition depend on whether the restriction is selective or exclusive. Its essential thrust is: a) to oblige the motor vehicle industry to allow imports of vehicles from the EEA; b) to dissociate sales from after-sales service; c) to facilitate sales and parallel imports of spare parts; d) to offer the possibility of choice between a selective or exclusive distribution system; e) to give independent repairers easier access to spare parts, information (including training) and diagnostic tools; f) to oblige the motor vehicle industry to allow a vendor to offer several brands in the same establishment.<sup>36</sup>

#### **Box 5. Prohibitions and consent settlements relating to agreements affecting competition**

**(July 1996 – March 2005)**

##### **Horizontal agreements**

###### **Prohibitions**

- Fuel-oil and gas burners (1999)
- Printed music (1997)
- Oil and gas stove repair services (1998)
- Drugs (Sanphar) (2000)
- Asphalt laying in north-eastern Switzerland (2000)
- Driving instructors in the canton of Freiburg (2000)
- Vitamins (2000)
- Supplementary insurance in the canton of Aargau (2001); appeal; case closed because the parties have terminated the agreement
- Civil works tenders for the national library (2001); appeal pending
- Driving school instructors in Graubunden (2003)

###### ***Prohibitions and consent settlements relating to agreements affecting competition (suite)***

- German books (1999); appeal; new prohibition decision by Comco on 21 March 2005

###### **Consent settlements**

- Newspapers in Tessin (2000)

- Beverages and coffee (2000)
- SUMRA, distribution of watches, (2001)
- Asphalt laying in the canton of Geneva (2001)
- Driving instructors in the canton of Graubunden (2003)
- Distribution of veterinary products (2004)

#### **Vertical agreements**

##### **Prohibition decisions**

- None

##### **Consent settlements**

- Citroën (2002)

Source: DPC de 1997-2005, [www.weko.ch](http://www.weko.ch).

### ***Abuse of dominant position***

The provisions of the Cartel Act relating to abuse of dominant position are very similar to those of the European Union. Article 4.2 states that “the term 'enterprises having a dominant position on the market' means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market.” The Act therefore covers both individual and collective dominant positions. In the 2003 reform, the notion of dominant position was defined more precisely by adding "competitors, suppliers or customers" in brackets. It was clearly stated that "data concerning the market structure are not the only criteria for assessing the existence of a dominant position; consideration must also be given to the real links of dependence on the market. In particular, a dominant position may exist when an enterprise has a preponderant place on the market or when other enterprises depend on it as customers or suppliers, for example."<sup>37</sup> It is difficult to estimate the practical consequences of the new definition, which may go further than the mere refining detail suggested by the Federal Council Message.<sup>38</sup> No clear guidelines emerge from the documentation for the parliamentary debates that led to the passing of the new law, which does little to facilitate any assessment of the scope of the amendment.<sup>39</sup>

Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners (Article 7.1). The following in particular are deemed unlawful (Article 7.2): refusal to deal; discrimination between trading partners with regard to prices or other conditions of trade; the imposition of unfair prices or other unfair conditions of trade; the under-cutting of prices or other conditions directed against a specific competitor; restrictions on production, outlets or technical development; the conclusion of contractors only on condition that partners agree to supply additional goods or services.

An abuse of dominant position may be justified for legitimate business reasons, in which case it will be lawful (see Section 4.1.3).

Comco issued decisions prohibiting abuse of dominant position in nine cases and reached amicable settlements in four cases between July 1996 and January 2005 (Box 6 and Annex 3). Comco has tackled some relatively difficult cases, notably that of abuse of dominant position by a public enterprise, the Swiss Meteorological Institute (SMA),<sup>40</sup> and by EEF, a Freiburg power utility which refused to allow power from the WATT group to pass through its network.<sup>41</sup> Comco's first decision was overturned by the Federal Court in 2001,<sup>42</sup> but the appeal against the second was dismissed by the Federal Court in June 2003 (see Section 4.2.1).

The limited extent of the case law relating to abuse of dominant position should be compensated by the precision of the definition of dominant enterprise introduced in the 2003 reform of the Cartel Act. According to the revised law, a dominant position can exist if an enterprise has a position of strength on the market in relation to its competitors, especially if other enterprises depend on the first as customer or supplier. In practice this should facilitate the defence of enterprises that are dependent for reasons of market structure, which may be the case for small businesses.<sup>43</sup> By adding this provision the Federal Council, followed by Parliament, has sent a clear message to Comco to take more account of structural aspects in assessing whether an enterprise has a dominant position. Comco's existing practice in certain cases, especially the Coca Cola - Feldschlöchen case,<sup>44</sup> suggests that the criteria used to decide that a market position is dominant are particularly elevated, which reduces the number of cases of abuse relating to a dominant position. In the case, which was also investigated by the European Commission, Comco's findings were at odds with the Commission's. Finding that Coca Cola had a dominant position in various national markets for carbonated drinks, the Commission obtained significant undertakings from Coca Cola in various fields. In contrast, as a competition law specialist has pointed out, "the Swiss competition authorities closed their investigation after four years without taking any action against Coca Cola and without reaching an amicable settlement with the company".<sup>45</sup> Although the facts established by the Comco investigation differed somewhat from the Commission's, this raised questions not only about the length and outcome of the procedure but also about the criteria used to determine absence of a dominant position.<sup>46</sup>

**Box 6. Prohibitions and consent settlements relating to abuse of dominant position**

(July 1996 – January 2005)

**Prohibitions**

- Telecom PTT / Bluewindow (1997)
- Artificial insemination of cattle (1999)
- Telecom PTT / specialist distributor agreements (1997)
- SMA (1999)\*
- Distribution of dental equipment / Intensiv SA (2000)
- Credit cards (2002); appeal pending
- Entreprises électriques fribourgeoises (EEF) (2001)
- Ticket Corner (2003); appeal pending
- Swisscom (ADSL) (2003); appeal pending

**Consent settlements**

- Swisscom Centrex (1998)
- Swisscom (2002)
- ETA (2004)
- Co-opForte (2004)

\* Decision overturned by the Federal Court

Source: DPC 1997-2005, [www.weko.ch](http://www.weko.ch)

***Merger control***

The 1995 Cartel Act introduced merger control into Switzerland for the first time. The merger control ordinance completed the provisions of the Act, giving certain definitions and specifying the information to be provided when notifying concentrations to the competition authorities.

According to Article 4.3 of the Cartel Act, a concentration of enterprises means the merger of two or more enterprises hitherto independent of each other, or any transaction whereby one or more enterprises acquire, in particular by the acquisition of an equity interest or conclusion of an agreement, direct or indirect control of one or more hitherto independent enterprises or a part thereof.

Mergers must be notified to Comco before they take place if, in the last accounting period before the merger, the enterprises concerned reported joint turnover of at least 2 billion Swiss francs or turnover in Switzerland of at least 500 million Swiss francs and at least two of the enterprises concerned reported individual turnover in Switzerland of at least 100 million Swiss francs (Article 9.1). Turnover is replaced by the total amount of gross annual premiums for insurance companies and by gross income for banks and other financial intermediaries (Article 9.2). The 1995 Act provided for lower notification thresholds for media enterprises, but this provision, designed to protect media diversity, was repealed in the 2003 reform because practical experience showed that it generated substantial procedural costs and was not necessary in order to achieve the desired aims.<sup>47</sup>

Article 9.4 states that notification is mandatory even if the above-mentioned thresholds are not reached, when, on termination of a procedure initiated under the Act, a legally enforceable Comco decision establishes that a participating enterprise occupies a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream.

Comco has issued guidelines specifying the information that the parties to the merger should provide to the competition authorities.<sup>48</sup>

When mergers take place in the banking sector, Article 10.3 states that if the Federal Banking Commission deems that such a concentration is necessary in order to protect the interests of creditors, such interests may be given priority. In that case, the Federal Banking Commission takes the place of Comco, which it invites to submit an opinion.

Comco may prohibit the merger or authorise it under certain conditions if it finds that the merger creates or strengthens a dominant position capable of eliminating effective competition and does not improve the conditions of competition on another market, such that the benefits outweigh the disadvantages of the dominant position. The Swiss merger control system is more "permissive" than the system in the EU or in other OECD countries, since only mergers likely to eliminate, and not merely substantially affect, competition can be prohibited.<sup>49</sup> However, to date Comco has not applied this additional criterion of eliminating effective competition in the strict meaning of the term.

When the Cartel Act was passed, Parliament had not foreseen that such a large number of mergers would have to be notified. In its message presenting the Cartel Act in 1995, the Federal Council estimated that there would be 10 to 15 notifications a year,<sup>50</sup> whereas Comco has received 30 to 35 notifications a year on average since 1996 (Annex 4).

Comco has prohibited only one merger to date, that of 20 Minuten – Berner Zeitung – Tamedia.<sup>51</sup> However, some firms have dropped their merger plans after the authorities raised serious doubts during pre-notification contacts. Some mergers, like UBS (banking), Le Temps (press) and Bell-SEG (chicken slaughtering), were authorised subject to conditions. Authorised mergers of firms in relatively concentrated sectors, like commercial credit, the press in French-speaking Switzerland, food and retailing, have been criticised by some specialists who have questioned whether Comco plays an effective role in controlling mergers in Switzerland.<sup>52</sup> In the case of the Co-op-Waro merger in the retail sector, a study has found that the operation, authorised by Comco in Switzerland, would have been prohibited by the European Commission if the same facts had been put before the European competition authorities.<sup>53</sup>

## *Unfair competition*

The Cartel Act is distinct from the Federal Unfair Competition Act of 19 December 1986.<sup>54</sup> The Competition Commission has no powers relating to unfair competition or misleading business practices. The Unfair Competition Act, which applies to any deceptive trade practice or infringement of the rules of good faith, is governed by private law. Consequently, neither the Confederation nor the cantons can take action against abusive business practices. In contrast, players on the market, meaning competitors, customers, trade or business associations and consumer organisations have various means of action at their disposal under the Unfair Competition Act (Articles 9, 10 and 23). They can bring a criminal or civil action before the competent court, in which case the court will decide whether a behaviour or practice is fair or not. Thus, the Swiss system relating to unfair competition is based on self-regulation by the players on the market. Nonetheless, SECO has the power to initiate a civil or criminal action if foreign consumers are affected by fraudulent or deceptive commercial practices originating in Switzerland. SECO is also the point of contact to facilitate international co-operation about OECD guidelines about consumer protection against transborder fraudulent and deceptive practices.

Although the aim of the Unfair Competition Act is to protect the general interests of all economic agents, it gives particular consideration to consumer interests. It contains provisions against various fraudulent and dishonest practices that could adversely affect consumers. It also lays down basic rules on prices, expanded in the ordinance on the notification of prices which is applied by cantonal authorities.<sup>55</sup> The ordinance ensures that consumers will be given a clear indication of prices for the purposes of comparison, to ensure that they are not misled.

## *Consumer protection*

Robust consumer protection depends as much on regulation as on competition. A high level of protection through strict standards helps to make the domestic economy more competitive by causing firms to improve the quality and security of the goods and services they offer (Michael Porter, 1998, p. 187).<sup>56</sup> There is comparatively less overlap between competition and consumer protection policies in Switzerland than in other countries and the European Union. Comco, whose task is to protect competition, does not have any direct consumer protection responsibilities, though one of its members has always been a representative of a consumer organisation. Consumer groups can also refer cases to Comco where appropriate.

Consumer protection in Switzerland is governed by private law and public law.<sup>57</sup> Private law governs legal relations between citizens. Contractual relations between customers and suppliers are governed by the Code of Obligations, which is a Federal Act. The Federal Unfair Competition Act applies to unfair trading practices which affect relations between customers and suppliers at the point where goods and services are offered. Judicial examination of compliance with the rules of private law takes place only if an action is brought in the civil courts. The state does not intervene on its own initiative. In Switzerland, which is a federal state, civil procedure is a matter for the twenty-six cantons, each of which has its own code (although some rules of procedure have been unified). Consequently, consumers with a complaint have the advantage of being able to bring an action in the court of their domicile. In addition, each canton is required to institute a conciliation procedure or a simple and quick small claims procedure (up to a value of 8,000 Swiss francs) for disputes arising out of contracts between customers and suppliers.

Public consumer protection law imposes certain rules on suppliers. In this case it is not up to consumers to bring legal action to defend their rights: the competent cantonal or federal authority takes action by carrying out controls or taking decisions relating, for example, to food products, tobacco, toxic substances, drugs, alcohol, weights and measures, electricity, prices, etc. The Swiss government has created two central bodies to advise it on consumer protection policy: the Federal Office of Consumer

Affairs, a permanent administrative body, and the Federal Consumer Affairs Commission, a non-permanent advisory body consisting of consumer groups, umbrella business organisations, trade unions and scientific experts.

The Federal Office of Consumer Affairs is the central government department responsible for consumer policy. Created in 1965, it is attached to the General Secretariat of the Federal Department of Economic Affairs. It defends the collective interests of consumers while safeguarding the public interest and helps to prepare and implement legislation relating to consumer affairs.<sup>58</sup>

The Federal Office of Consumer Affairs is staffed by a team of seven, one of the smallest in comparison with its European counterparts. It provides the secretariat for the Federal Commission of Consumer Affairs.

In international comparisons, consumer protection appears not to be a priority for the federal authorities. The National Council Management Commission has noted certain shortcomings and, in 2002, asked the Parliamentary Control of the Administration (PCA) to review the way in which Swiss food safety legislation is implemented.<sup>59</sup>

The current consumer protection system is based on three separate institutions (Comco, the Price Monitoring Office and the Federal Office/Commission of Consumer Affairs) dealing with the same sets of issues on the same markets. Likewise, all three take part in consultations on new legislation or amendments to existing laws.

There are four main consumer groups in Switzerland, financed by membership subscriptions, various actions and a federal subsidy, the terms of which are contained in an ordinance on financial support for consumer groups.<sup>60</sup> Their resources are limited.

## **Institutional issues: implementing structures and practices**

### ***Competition policy institutions***

The competition authorities comprise the Competition Commission (Comco) and its Secretariat (an organisation chart is given in Annex 1). Comco is the decision-taking body and the Secretariat is the investigative arm. Under Article 18 of the Cartel Act, Comco takes all decisions that are not expressly reserved for another authority. Comco has three chambers, with competence respectively for services, manufactured goods and infrastructure.

Comco also has powers to ensure that the Confederation, the cantons, the communes and other bodies performing public duties comply with the Federal Internal Market Act.<sup>61</sup> It can make recommendations to them concerning planned or existing legislative acts and conduct enquiries and forward the recommendations to the Authorities concerned (Article 8 of the Internal Market Act).

The Federal Council institutes Comco and appoints the members of the presiding body (Article 18.1 of the Cartel Act). Comco has between eleven and fifteen members, the majority of whom are experts, that is, not representatives of a particular interest group (Article 18.2). Membership of Comco, including of the presiding body, is a non-occupational public service activity.

Comco currently has fifteen members, seven of whom represent interest groups (SMEs, trade and industry, trade unions, retailers, small farmers and consumers). As Comco is a public service body, membership is a non-occupational activity for all its members except the President, who spends about half his time on Comco affairs.

Comco's members may hold directorships and several of them do so. Some so-called "independent" members sit on the boards of several companies.

The Cartel Act states that members of Comco must recuse themselves if grounds for disqualification exist pursuant to Article 10 of the Federal Act on Administrative Procedure.<sup>62</sup> The 2003 reform introduced a requirement for members of Comco to declare their interests in a special register (Article 18.2bis). The list is published on Comco's website.<sup>63</sup>

The fact that some of Comco's members represent interested parties has been challenged for many years.<sup>64</sup> Already in 1981, the Message from the Federal Council echoed these criticisms.<sup>65</sup> On the question of the presence of representatives of interest groups, the PCA report noted that "this situation raises the issue of Comco's independence. There may be a fear that members of Comco appointed as representatives of particular interests will put those interests ahead of the interests of preserving competition".<sup>66</sup> In the first draft of its revision of the Cartel Act, which culminated in the 2003 reform, the government, aware of the problem, proposed cutting the number of commissioners and eliminating representatives of interest groups. The covering letter launching the consultation procedure for the Cartel Act reform noted: "The members [of Comco] must be as independent as possible. (...) It is not surprising that the fear mentioned in the message on the existing law on cartels, namely of stormy plenary meetings (of a commission comprising 11 or even 15 members), has been realised. Comco's structures have to be modified if procedures are to be made more efficient. A commission of seven independent members would make it possible to remedy this situation through the greater cohesion of its members and more professional working methods".<sup>67</sup> However, it became apparent during the first consultation procedure on the draft amendment to the Act that those concerned and the political parties very firmly opposed the elimination of representatives of interest groups. The government therefore decided not to ask Parliament to approve a change to the arrangements for Comco's membership. However, a smaller Commission could have been more effective and more professional, while eliminating representatives of interest groups would have increased its independence and credibility.<sup>68</sup>

Given the structure and conditions of membership, with a large minority of members representing interest groups and the possibility of members holding directorships, it seems difficult for Comco to guarantee full independence when taking decisions.<sup>69</sup>

Comco's membership will raise problems when the newly introduced sanctions are put into effect, since representatives of umbrella associations will be deciding the amount of fines to be imposed on firms that are members of their associations, or perhaps even firms managed by their superiors.<sup>70</sup> Conflicts of interest will also arise in applying the leniency programme when reported firms are members of associations represented by a Comco member. Such a situation could seriously undermine the effectiveness of the leniency programme.

The Comco Secretariat has a staff of about 60 whose conditions of service are governed by the laws applicable to federal government employees. The Federal Council appoints the Secretariat's directors and the Commission the remainder of the staff (Article 24). The Secretariat has three departments corresponding to Comco's three chambers. It also has "competence centres", which do not have the appropriate staff. Thus their tasks are fulfilled by staff from the three departments.

Before the 1995 Cartel Act came into effect, the Comco Secretariat was a unit of the General Secretariat of the Federal Department of Economic Affairs (DEA). Although the 1995 Cartel Act separated the two bodies, the habits of close co-operation seem to have survived. For example, the Comco Secretariat does work for the General Secretariat, such as drafting answers to parliamentary questions and position papers for the head of the DEA. While such links could in certain cases have beneficial effects in terms of competition advocacy, there is a grey area in the separation of powers between the executive and the

competition authorities that could be harmful to the objectives defined in the Cartel Act. Moreover, the links between the DEA and Comco may give rise to uncertainty as to the total separation of powers.<sup>71</sup> The publication of Comco decisions on the first page of the DEA's website also reflects a confusion of roles and powers. The assistant directors are appointed by Comco, and the Federal Council must approve the nominations.

The way in which procedures are organised at present makes no provision for a clear separation between the activities of the Secretariat (which processes information and conducts investigations) and those of the Commission itself (which takes decisions). This arrangement could encounter various problems with the introduction of direct sanctions, such as incompatibility with Article 6 of the European Convention on Human Rights, which provides for total separation between "prosecution" and judging in such cases. In order to ensure that the workings of the Cartel Act, especially those relating to direct sanctions, are not paralysed by organisational issues, the necessary changes should be made quickly.

Other authorities may have cause to intervene in competition matters. They include cantonal civil courts (see Section 3.3), appeal bodies like the Appeals Commission for Competition Matters (Section 3.2.4), the Federal Court (Section 3.2.4), the Federal Council (Sections 3.2.4 and 4.1.4), and bodies whose powers are determined by laws other than the Cartel Act and that have an influence on competition matters, such as the Price Monitoring Office, the Federal Communication Commission, and the Postal Services Regulatory Authority.

The Price Inspector's task is to prevent increases in or the maintenance of abusive prices set by cartels and enterprises with market power.<sup>72</sup> The Price Monitoring Office focuses mainly on prices administered by the government and set by powerful enterprises. Measures to eliminate or prevent abuse are taken with the consent of the interested parties, but firms or associations that fail to comply with recommendations (decreed negotiated prices) may be fined up to 100 000 Swiss francs (WTO, 2004, p. 94).

When Comco and the Price Monitoring Office carry out parallel procedures, procedures under the Cartel Act take precedence over procedures under the Price Monitoring Act except in the event of a decision to the contrary taken by common consent by the Competition Commission and the Price Inspector (Article 3.3 of the Cartel Act). The Federal Council's appointment of the Price Inspector depends to a considerable extent on political considerations. As a rule, the Price Inspector is a member of Parliament. He attends Comco meetings in an advisory capacity. The two authorities' powers rarely overlap, since market regimes or government-set prices and special rights granted to enterprises performing public tasks are often exempt from direct application of the Cartel Act. However, given the limited resources available to the bodies responsible for monitoring markets, it is legitimate to wonder whether the separation between Comco and the Price Monitoring Office is the most efficient solution, especially as the two bodies sometimes conduct investigations on the same markets. In the light of current developments in regulatory reform in Switzerland, the question of whether price monitoring in its current form is necessary to guarantee public interest objectives should be addressed. The question arose again in 2004. After reviewing the organisation and considering the views of interest groups, the Federal Council decided to retain the office, while acknowledging that a more in-depth examination would be needed. If that examination confirmed the need to maintain this function, a second assessment should be made on a cost-efficiency basis of the options for changes to the current system, including the integration of price monitoring into other sectoral regulatory authorities and into Comco.

The Federal Communication Commission (ComCom) was created in September 1997 as the licensing authority for the liberalised telecommunications market. Under the Telecommunications Act of 30 April 1997, it has the following powers: a) to issue licences to telecommunications service operators (Article 4), universal service licences (Article 18) and licences to use radio communications frequencies (Article 22); b) to fix the conditions for interconnection at first instance when service providers are unable to reach

agreement (Article 11); c) to approve the national frequency allocation plan (Article 25) and national numbering plans and to set terms and conditions for number portability and the free choice of service provider (Article 28); d) to decide measures in the event of an infringement of the prevailing legislation and, where appropriate, to withdraw the licence (Article 58). ComCom is an independent authority instituted by the Federal Council. It has seven members, who must be independent experts. It is not subject to any guidelines from the Federal Council or DETEC, the Federal Department responsible for communication matters. It has its own secretariat.

ComCom co-operates with Comco on matters relating to interconnection. Comco has been given an advisory role in this sphere. Only enterprises in a dominant position can be required to provide interconnection. Comco has to rule on the question of dominant position on ComCom's behalf (Article 11.3 of the Telecommunications Act).

Ofcom deals with matters relating to telecommunications and broadcasting (radio and television). In these areas, Ofcom is both the regulator and the national authority. As an office of DETEC, the Federal Department of the Environment, Transport, Energy and Communications, Ofcom prepares the decisions of the Swiss government (Federal Council), DETEC and ComCom.

As the Swiss Post Office is owned by the Confederation, the Confederation found itself with a dual role when opening up of the postal market to competition: that of owner of the Post Office and that of market regulator. The Federal Council therefore created PostReg, a regulatory authority. Its main tasks are defined at Article 41 of the ordinance on the post office,<sup>73</sup> namely to monitor the quality of universal service provision and access to universal service, to review compliance with accounting principles and the prohibition on cross-subsidy, and to deal with complaints to the supervisory authority relating to universal service.

### ***Competition law enforcement***

#### *Procedures*

A distinction needs to be made between procedures relating to restraints of competition (agreements affecting competition and abuse of dominant position) and merger control procedures.

Restraint of competition procedures are carried out by means of preliminary reviews and investigations. The competition authorities are free to initiate a procedure or not. The decision to initiate a procedure cannot be appealed. The Comco Secretariat is not obliged to give a complainant its reasons for not initiating a procedure. However, under Article 39 of the Cartel Act and Article 71 of the Federal Act on Administrative Procedure,<sup>74</sup> complainants can ask Comco to examine the grounds for the Secretariat's decision. There is no provision for any form of discrimination with regard to the treatment of complaints according to the complainant's origin, whether Swiss or foreign.

The Secretariat may conduct preliminary reviews on its own initiative, at the request of enterprises concerned or on information received from third parties (Article 26 of the Cartel Act). If there are signs of an unlawful restraint of competition (revealed by a preliminary investigation or from other sources), the Secretariat opens an investigation with the consent of a member of Comco's presiding body. It opens an investigation in all events if asked to do so by the Commission or by the Department (Article 27.1). Comco determines the order in which investigations that have been opened should be conducted (Article 27.2). The Secretariat gives notice of the opening of an investigation in an official publication (Article 28.1).

Should the Secretariat consider that a restraint of competition is unlawful, it may propose an amicable settlement to the enterprises involved concerning ways of removing the restraint (Article 29.1). However, such a settlement must be in writing and approved by Comco (Article 29.2).

On a proposal from the Secretariat, Comco takes its decision on measures to be taken (for example, prohibition of the behaviour in question) or on approval of the amicable settlement (Article 30.1). Comco tends to prefer amicable settlements, a stance which could reduce the Act's preventive effect. The participants in the investigation may furnish in writing their opinions on the Secretariat's proposal. Comco may also conduct hearings and instruct the Secretariat to take additional steps for the requirements of the investigation (Article 30.2). Comco takes its decision on the basis of all these elements, either in plenary session or in a Chamber. Managers and staff members concerned by the cases involved attend Comco's decision-taking sessions.

Decisions on agreements affecting competition are mainly based on the following criteria: the elimination of effective competition, which is deemed to exist when there is no longer any internal or external competition (meaning internal or external to the agreement); material effects on competition, which are assessed according to qualitative criteria (the aims of the agreement) and quantitative criteria based on analysis of the current and potential competitive situation and the power of the partners involved. For decisions concerning abuse of dominant position, dominant position is assessed mainly on the basis of the current and potential competitive situation and the power of the partners involved.

For concentrations of enterprises, transactions subject to notification are investigated (in detail) by Comco if a preliminary review reveals signs that they create or strengthen a dominant position (Article 10.1). The procedure is thus in two phases: a preliminary review lasting no more than one month, and a detailed investigation lasting no more than four months.

During the review phase, the participating enterprises must refrain from carrying out the concentration for one month following notification unless, at their request, Comco has authorised them to do so for important reasons (Article 32.2). If an investigation is initiated, Comco decides at the outset whether the concentration may be carried out provisionally by way of exception or whether it should remain suspended.

The review and investigation consider the effects of the merger in principle on the markets for the products and on the geographical markets affected by it. Under Article 11.1.c of the merger control ordinance, a market is deemed to be affected by a merger if two or more of the enterprises involved jointly hold 20 per cent or more of the Swiss market or if one of the enterprises involved holds 30 per cent or more. On these markets, the creation or strengthening of a dominant position capable of eliminating effective competition is considered in the light of three criteria: current competition, potential competition and the power of the partners involved.

The main methods for investigating restraints of competition (agreements and abuses of dominant position) and mergers are written requests for information, questionnaires and, in some cases, interviews of those involved and third parties. The competition authorities may hear third parties as witnesses and require the parties to the investigation to make statements (Article 42.1). Documentary evidence is also taken from the parties involved, spontaneously or in the context of a merger notification procedure or disclosure of a possible restraint of competition, or from third parties.<sup>75</sup> However, questionnaires remain the principle source of information.

There are limits to the effectiveness of such methods, especially in the context of hard-core cartels. The 1995 Cartel Act already provided for the possibility of searches (Article 42), though no use has been made of the option to date. Some commentators have wondered whether the Comco Secretariat has never embarked on this type of operation because of the lack of clear and specific procedures.<sup>76</sup> Article 42.2 of the 2003 Cartel Act states that Articles 45 to 50 of the Federal Act on Administrative Criminal Law of 22 March 1974<sup>77</sup> apply by analogy to the enforcement measures implied by searches and seizures. However, as one expert in the field has noted, the fact that the 2003 Cartel Act is more precise does not make it clearer.<sup>78</sup> The situation could change, however, following the creation of a "competence centre" for searches in 2004.

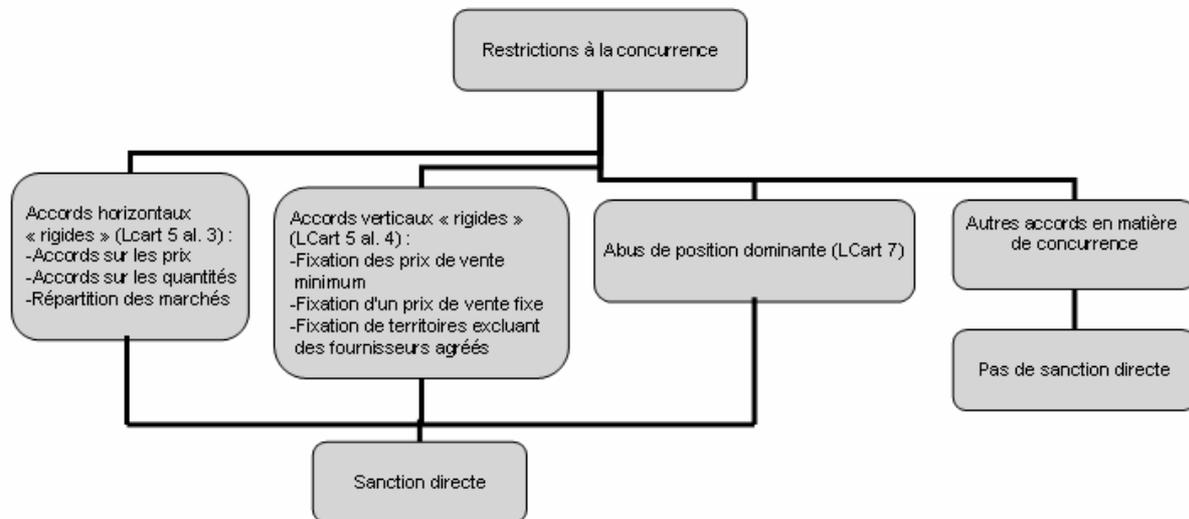
*New direct sanctions*

Direct sanctions were introduced as part of the 2003 reform of the Cartel Act, though only the most serious infringements are liable to them. The Comco Secretariat justifies the limited application of sanctions on two grounds: proportionality, according to which sanctions should apply only to the most serious infringements, and legal precision and clarity, according to which "the principle of sanction must be delineated in such a way that enterprises are aware of the limits on their freedom and know precisely what is not allowed".<sup>79</sup>

Under the 2003 Cartel Act, the following infringements are liable to direct sanctions (Figure 1):

- participation in a hard-core cartel (Article 5.3), a category which covers enterprises that enter into agreement with direct competitors on prices or quantities of goods and services or allocate markets geographically;
- participation in a hard-core vertical cartel (Article 5.4), which covers distribution systems that set fixed or minimum prices and distribution contracts that allocate territories insofar as sales by other distributors are excluded;
- abuse of dominant position (Article 7).

**Figure 1. New system of direct sanctions**



Sanctions are administrative by nature and take the form of fines. Under Article 49.1, an enterprise that participates in an unlawful agreement within the meaning of Article 5.3 (horizontal hard-core cartel) or 5.4 (vertical hard-core cartel) or that behaves unlawfully within the meaning of Article 7 (abuse of dominant position) is required to pay an amount equal to up to 10 per cent of its aggregate turnover in Switzerland on the relevant markets in the previous three business years.<sup>80</sup> This differs from the system in some jurisdictions, notably the EU, which bases sanctions not on turnover on the national markets concerned but on the global turnover of the enterprise concerned.

This provision of Article 49.1 sets the maximum possible sanction, which is unlikely to be the actual sanction in practice. The Federal Council ordinance of 12 March 2003 on sanctions for unlawful restraints of competition (Sanctions Ordinance) sets the criteria to be used for deciding the actual amount of the fine.<sup>81</sup> Under Article 2.1 of the ordinance, the sanction is calculated in several stages.

First, a base amount (starting point) is determined. Depending on the severity and type of the violation, it may be up to 10% of turnover by the relevant enterprise on the relevant markets in Switzerland in the last three business years (Article 3 of the Sanctions Ordinance).

Second, the base amount is adjusted according to the length of the violation. If the anticompetitive practice has lasted for between one and five years, it is increased by up to 50%. If the anticompetitive practice has lasted longer than five years, it is increased by a supplement of up to 10 per cent per year (Article 4 of the Sanctions Ordinance).

Third, any aggravating circumstances are taken into consideration on a case-by-case basis.

If there are aggravating circumstances, the amount calculated in the first two phases is increased further, in particular when an enterprise repeatedly breaches the Cartel Act, has achieved a particularly high profit through the violation, refuses to co-operate with the authorities or otherwise attempts to obstruct the investigation (Article 5.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount calculated in the first two phases is additionally increased if the enterprise has instigated the restriction of competition or played a leading role or has instructed or carried out retaliatory measures against the other participants to the restriction of competition in order to implement the anticompetitive agreement (Article 5.2 of the Sanctions Ordinance).

If there are mitigating circumstances the amount calculated in the first two phases is reduced, in particular if the enterprise terminates the restraint of competition after the first involvement of the Comco Secretariat, and at latest before the opening of a procedure (Article 6.1 of the Sanctions Ordinance). In the case of horizontal and vertical agreements that eliminate effective competition, the amount is reduced if the enterprise has played an exclusively passive role or has not carried out retaliatory measures that had been agreed in order to impose the agreement (Article 6.2 of the Sanctions Ordinance).

Article 7 of the Sanctions Ordinance states that the sanction may not in any case amount to more than 10 per cent of the enterprise's turnover in the last three business years in Switzerland.

The law contains a mechanism for exemption from or reduction of direct sanctions which is mainly invoked when notification is voluntary (exemption from the sanction) and when a leniency programme applies (total or partial remittance of the sanction).<sup>82</sup>

Any enterprise may voluntarily notify a possible restraint of competition due to a specific project, such as a research and development or distribution contract, before it takes effect (Article 49a.3a of the Cartel Act). Notification may enable the enterprise to avoid the risk of a direct sanction. The new system has many similarities with the EU's notification system, dropped when the new regulation EC No 1/2003 came into effect. The law contains a provision to prevent enterprises from misusing the system by notifying a blatant restraint of competition and deploying it immediately afterwards in order to gain a rent until the competition authority decides whether it is unlawful or not (Article 49a.3a of the Cartel Act). To date enterprises have not made much use of the system, whose real cost-effectiveness still needs to be proved.

### *Leniency programme*

Under the leniency programme instituted by the 2003 Cartel Act, Comco may wholly or partially waive a direct sanction if an enterprise that is a member of a cartel assists in the discovery and removal of the cartel concerned (Article 49a.2 of the Cartel Act). The introduction of this whistle-blowing mechanism occasioned much debate in Parliament since it is not consistent with Switzerland's judicial culture. Inclusion of the clause, which reflects Parliament's determination to strengthen competition policy in Switzerland, is to be applauded since it involved a paradigm shift in the Swiss judicial system. The terms of the leniency programme are defined at Article 8 of the Sanctions Ordinance, which sets out the conditions under which an enterprise may be completely or partially exempted from sanctions.

The system for total exemption from sanctions was inspired by existing practice in other countries and studied in the framework of the OECD's Competition Committee. At a time when the competition authority has no knowledge of the cartel, the enterprise must acknowledge its involvement and be the first to deliver information which enables the competition authority to open an investigation. If an investigation has already been opened, the enterprise must provide the necessary evidence to prove a violation. The other conditions are ongoing co-operation with the competition authorities and cessation of the unlawful behaviour at the latest at the time of self-notification, unless the competition authorities instruct it not to in order not to compromise the investigation. However, if the enterprise was the instigator or leader of the cartel, a total exemption is not possible.

A sanction may be reduced by up to 50 per cent if an enterprise voluntarily provides information or documents. A partial reduction is also possible when the competition authorities have already opened a procedure on their own initiative or when another member of the cartel has already qualified for a complete exemption.

### *Appeals*

There are two legal channels for appeals against decisions taken by the competition authorities. An appeal may be lodged with the Appeals Commission for Competition Matters (REKO/WEF), the first instance of appeal in administrative matters against decisions by Comco or the Secretariat and for the enforcement measures at Article 42.2 relating to proceedings initiated in respect of the treaty between Switzerland the EC regarding air traffic. It is competent in first instance (Article 44 of the Cartel Act).

The Federal Court is the supreme court of appeal against decisions taken by the Appeals Commission and cantonal civil courts.

In contrast to procedures relating to unlawful restraints of competition (agreements affecting competition and abuse of dominant position), third-party enterprises that are not the participants in a merger are not treated as parties. Consequently, they do not have access to files and have no power of appeal.

When Comco issues a decision finding that a restraint of competition is unlawful, the interested parties may request an exceptional authorisation from the Federal Council on the grounds of compelling public interests (Articles 8, 11 and 31 of the Cartel Act). Such a request may also be submitted if appeals to the above-mentioned appeals authorities have failed. The procedure is examined in Section 4.1.4. A request to the Federal Council is based on political considerations and is not therefore a legal remedy.

Switzerland does not have procedural rules specific to competition law. The administrative authorities have to use the ordinary rules set out in the Federal Act on Administrative Procedure, including those on proof, which are not appropriate to competition law disputes. Thus appeals against Comco decisions can go before the Appeals Commission for Competition Matters, and then the Federal Tribunal. In practice, all

Comco decisions lead to appeals, which makes for lengthier procedures. As the law stands at present, competition-related appeals have a suspensive effect which cannot be changed unless highly restrictive conditions under case law are met. The anticompetitive impact of cartels and abuse of dominant position therefore continues to be felt on the market until the entry into force of the ruling on the merits, i.e. long after Comco's decision. Furthermore, as Comco is obliged to hand down interim decisions, in particular on issues regarding its remit (Article 3), the parties may use appeal procedures in relation to these formal decisions, thereby suspending the procedure on the merits of the case until the formal questions have been resolved. The President of Comco has in fact drawn attention to the need for a comprehensive reform of competition procedural law. Finally, members of the Appeals Commission for Competition Matters currently include judges specializing in competition law. This situation will soon be changing with the thorough overhaul of the federal legal system and the establishment of a Federal Administrative Court in St Gall. This raises the question of whether Switzerland should not maintain a special court to hear competition-related appeals at first instance.

### *Disclosure policy*

Article 48.1 of the Cartel Act states that the competition authorities may publish their decisions. Article 48.2 states that the courts must furnish a complete copy of any judgments they may render pursuant to the Cartel Act to the Secretariat without being asked to do so. The Secretariat collects such judgments and may publish them periodically.

Comco has a very open disclosure policy. Its decisions and those of other authorities with powers in competition matters (Appeals Commission, Price Inspector, etc.) are published in a journal of competition law and policy (*Droit et Politique de la Concurrence*) which appears five times a year.<sup>83</sup> Comco's activities and publications (communications, ordinances, etc.) are also published on its website ([www.weko.ch](http://www.weko.ch)).

Under Article 49.2, Comco draws up an annual report for the Federal Council.

### *Other means of enforcement*

The cantonal civil courts are the specific civil law authorities in competition matters. Since the 1995 Cartel Act took effect, the assessment criteria in civil and administrative law have been based on uniform substantive norms. In a civil action, a person whose access to or exercise of competition is hampered by an unlawful restraint of competition can ask the civil courts to order removal or cessation of the obstacle, award damages and reparations and return any illicitly earned profits (Article 12). If the lawfulness of a restraint of competition is questioned in the course of a civil proceeding, the case is referred to Comco for an opinion (Article 15). A note describing the relationships between civil courts and Comco was circulated in 1997.<sup>84</sup> Recourse to the civil courts is rare in Switzerland, since firms apparently prefer to go directly to Comco, thus avoiding the cost of proceedings whose outcome is uncertain.

### *International aspects of competition policy and policy enforcement*

Comco and SECO, the State Secretariat for Economic Affairs, take part in the work of several international competition bodies, notably the OECD (Competition Committee), UNCTAD, WTO and ICN (International Competition Network).

The Cartel Act applies to restrictive practices whose effects are felt in Switzerland, even if they originate in another country (Article 2). This raises the issue of investigations into practices orchestrated by foreign enterprises and enforcement of the corresponding decisions. Switzerland has not concluded any co-operation agreements relating to competition. Co-operation between the Swiss competition authorities and foreign authorities is limited and carried out on a case-by-case basis. A distinction can be drawn between formal and informal co-operation.

Formal co-operation is based on:

- the free trade agreement of 22 July 1972 between the European Economic Community and Switzerland, Article 27.3 of which states that if an anticompetitive practice is incompatible with the proper functioning of the agreement within the meaning of Article 23.1, the contracting parties should supply the joint committee with all relevant information and give it all the assistance it requires in order to examine the case and, where appropriate, to eliminate the practice objected to.<sup>85</sup> However, to date it has not been possible to base any practical co-operation on the agreement;<sup>86</sup>
- the bilateral agreement between the European Community and the Swiss Confederation on air transport, especially Articles 8, 9, 10 and 11 thereof.<sup>87</sup> The agreement, which came into effect on 1 June 2002, provides that the entire Community *acquis* relating to air transport should apply to relations between Switzerland and the EU. Competition rules and merger control are applied by the EU institutions pursuant to the EU legislation set out in the annex to the agreement. Comco co-operates with the European Commission in enforcing decisions and taking procedural measures in Switzerland. Switzerland retains exclusive competence with regard to state aid and Comco is the independent authority which monitors compliance with Swiss rules on state aid. Regular contacts take place between the Swiss and EU authorities with a view to ensuring that the air transport agreement is properly implemented;
- two OECD recommendations:
  - the 1995 Recommendation of the Council concerning Co-operation between Member States on Anticompetitive Practices affecting International Trade<sup>88</sup>;
  - the 1998 Recommendation of the Council concerning Effective Action against Hard Core Cartels.<sup>89</sup>

Informal co-operation allows for certain contacts with foreign competition authorities without involving the exchange of confidential information.

Where merger procedures are involved Comco, with the agreement of the enterprises concerned, co-operates with the other competition authorities concerned by the same transaction.

As the PCA report notes: "And yet, in a context of globalisation, the exchange of information between Swiss and foreign competition authorities becomes a necessity".<sup>90</sup> The isolation of the Swiss competition authorities, in stark contrast with the 25 national competition authorities united in the European Competition Network, makes Comco's task much more difficult, since it can count only on its own resources and activities to discharge its duties.

Approaches with the aim of concluding competition agreements with its main foreign partners, especially the EU, would significantly strengthen the action of the Swiss competition authorities.

### ***Resources, actions and implicit priorities***

As the PCA report points out, the criteria and methods used by Comco and its Secretariat to assess whether competition on a market is effective have been criticised in the specialist literature.<sup>91</sup> The Secretariat's competences and deficiencies in the indicators on which Comco's decisions are based have come in for particular criticism.<sup>92</sup> Where the criticisms have been endorsed by independent experts they have been taken into account.<sup>93</sup> Yet representatives of the business community continue to regret the lack of close attention on the part of Comco's members, linked to the fact that theirs is only a part-time job.

Comco has issued a relatively small number of decisions relating to cartels and abuses of dominant position since the Cartel Act came into force in 1996. The snail's pace feared by the OECD in 1999 has not changed.<sup>94</sup> Two reasons could partly explain this situation. First, some anticompetitive practices have been halted during Comco's informal and formal investigations and are therefore not counted in the statistics. Under the 1995 Cartel Act (before direct sanctions) Comco could take decisions only against anticompetitive practices in force on the market. Consequently, if an anticompetitive practice was abandoned during an investigation, Comco was unable to take any further action and the procedure had to be closed. Second, contrary to expectations when the Cartel Act was passed, Comco has had to spend a lot of its time on merger control, which could also explain why it has allocated a substantial proportion of its resources to that activity rather than the fight against anticompetitive practices.

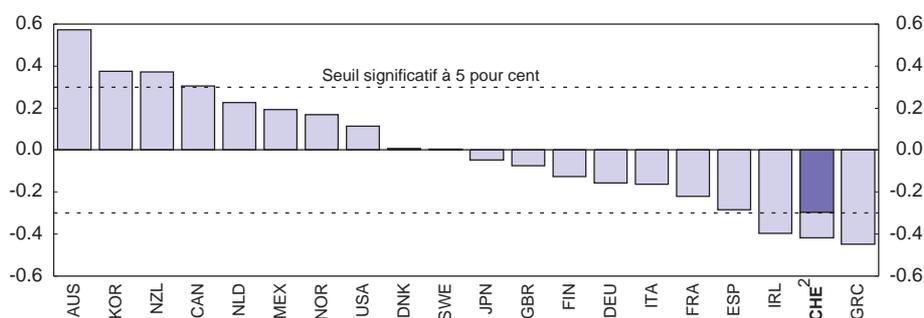
The Secretariat was greatly occupied in 2003 with implementing the Communication on Vertical Agreements (Section 3.5.1) and in 2004 with preparing to implement the 2003 Cartel Act, since enterprises had one year, from 1 April 2004 to 1 April 2005, to comply with the revised law (see Annex 2). During that period, enterprises could notify their practices to Comco in order to obtain an assurance that they were not in breach of the law. The Secretariat spent much of its time dealing with these notifications. Since the beginning of the transition period on 1 April 2004, the competition authorities have opened only one investigation (three in all in the calendar year). In contrast, they have dealt with 154 notifications under the transitional provisions and have advised enterprises in 56 cases on questions relating to the revised legislation.<sup>95</sup>

Comco was at pains, both before and after the new law came into effect, to tell enterprises about it and to explain the new provisions. Members of the Commission and the Secretariat described the key points of the reform in over 25 articles for academic or specialist journals and in over 120 oral presentations, as well as making time for discussions with enterprises and lawyers.<sup>96</sup> This wide-ranging information campaign helped to ensure that enterprises, representative bodies and lawyers were better acquainted with the rules for direct sanctions, the leniency programme and the new presumption concerning vertical agreements.

Since the end of the transitional period on 1 April 2005, all anticompetitive practices can be sanctioned retroactively (a decision will be issued and a sanction imposed even if the anticompetitive practice is abandoned during the procedure) and the activities introduced by Comco during the transition period from 1 April 2004 to 31 March 2005 have been halted. The pace of decisions should therefore accelerate, though Comco's lack of resources could compromise its effectiveness.

In international comparisons, the resources allocated to Comco's Secretariat are relatively meagre (see Figure 2). In its message concerning the 2003 reform of the Cartel Act, the Federal Council looked forward to the creation of a further 15 posts.<sup>97</sup> But even though that number seemed ungenerous in view of the new tasks attributed to Comco by the 2003 Cartel Act, not all the promised new posts were filled when the Act came into effect (Table 3). Furthermore, Comco was also subjected to the across-the-board cuts imposed on the entire federal administration as part of the programme to curb government spending. Internships, which used to be funded by the central administration, now have to be funded from Comco's own budget. At 1 January 2005, Comco's Secretariat had 40 staff of university graduate level (management included), 7 clerical staff and 10 interns. This situation greatly undermines the effectiveness of competition policy enforcement that the reform of the law was intended to promote.

**Figure 2: Staffing of competition authorities<sup>1</sup>**



1. The following equation was used to estimate the effect of the size of the economy on the staff/GDP ratio:

$$\log(\text{staff}/\text{GDP}) = 0.513173 - 0.38325 \cdot \log(\text{GDP})$$

(1.5)                      (-3.2)

(Student-t in brackets)                      S.E.: 0.30                      R<sup>2</sup>: 0.36

The figure shows residues after controlling the effects of the size of the economy.

2. The darker bar shows Switzerland's position if the competition authority had 60 staff instead of the present 45.

Source: OECD (2004), *Economic surveys: Switzerland 2003*, Paris.

**Table 3. Comco's human and financial resources**

	Number of staff	Budget
2005	Comco: 15 Secretariat*: 57	CHF 7,200,000
2004	Comco: 15 Secretariat*: 57	CHF 7,100,000
2003	Comco: 15 Secretariat*: 57	CHF 7,077,000

\* Full-time equivalent.

## Limits of competition policy: exemptions and special regulatory arrangements

### General exemptions and special treatment

The Cartel Act provides for the following exemptions:

- general exemptions set out in Article 3 with regard to other provisions of law;
- agreements significantly affecting competition that may be declared lawful if they are justified on grounds of economic efficiency (Article 5.2a). Comco may deem categories of agreements to be justified by way of ordinances or communications (Article 6);
- abuses of dominant position that may be deemed lawful if they are justified for legitimate business reasons;
- exceptional authorisations by the Federal Council on the grounds of compelling public interests.

### *Exemptions under Article 3 of the Cartel Act*

Provisions of law which do not allow competition in a market for certain goods or services take precedence over the provisions of the Cartel Act if they establish an official market or price system or entrust certain enterprises with the performance of public interest tasks, granting them special rights (Article 3.1). Sectors which at least partially escape competition law are agriculture, healthcare (including certain pharmaceutical products), and network industries governed by specific regulations (Box 7). A decision of the federal court in the EEF-WATT/Migros case has detailed more clearly the application of this provision.<sup>98</sup>

The Cartel Act does not apply to effects on competition that result exclusively from laws governing intellectual property (Article 3.2). The 2003 reform refined this provision, adding that the Act does apply to import restrictions based on intellectual property rights. This addition is intended to attenuate the general exemption covering intellectual property rights and originates in Parliament's wish to allow certain parallel imports of products protected by a patent. A barrier to (parallel) imports of products protected by trademark law or copyright based on the corresponding laws is not and was not possible. The Federal Court has posed the principle of the international exhaustion of trademark and patent law. And yet in 1999 it issued a contrary judgment in the field of trademark law by endorsing the principle of national exhaustion (Kodak judgment).<sup>99</sup> In the Kodak judgment, however, the Federal Court allowed Comco the possibility of intervening when there are significant price differences between the country of origin and Switzerland and when the conditions for putting the patented products onto the market in the country of origin are comparable to those in Switzerland. Parliament based the addition of the new phrase in Article 3.2 on this case law. According to the provision, Comco must assess whether the conditions for intervention under the Cartel Act are met on a case-by-case basis (abuse of dominant position or agreement affecting competition). In addition, Comco can only intervene to prohibit the practice if a barrier to importation is an abuse of dominant position. As a general rule, however, the holder of a patent property right rarely occupies a dominant position.<sup>100</sup> As far as patent law is concerned, the opening to parallel imports offered by the 2003 Cartel Act is still very patchy.<sup>101</sup> Introduction of the principle of international exhaustion in patent law, as recommended by Comco, or at least the principle of regional exhaustion in Europe, could more effectively counter restrictions on parallel imports.

With regard to the general scope of Article 3, in each case the competition authorities have to clarify whether the prevailing legal rules nonetheless allow for a certain degree of competition.<sup>102</sup> Only cases where the law explicitly rules out competition are deemed to be exempt. Comco has deliberately interpreted Article 3 narrowly so as to restrict its scope as much as possible. In the electricity sector, Comco has succeeded in imposing a precedent in the EEF case (see Section 4.2.1). In other cases (SMA, for example),<sup>103</sup> Comco decisions have been overturned on appeal on the basis of Article 3 in particular.

As already mentioned, the Cartel Act applies to both private and public enterprises. Public enterprises are therefore not excluded from the scope of the Act unless they have a specific exemption under Article 3. For example, a relatively recent Comco decision (December 2003) ordered Swisscom, an enterprise in which the state has a majority stake, to stop granting its Bluewin subsidiary discounts on the wholesale broadband services market.<sup>104</sup> This practice, which favoured its subsidiary over other ADSL service providers, was deemed to constitute an abuse of dominant position.

**Table 4. Main exclusive rights**

<b>Goods or services</b>	<b>Entities</b>	<b>Scope</b>
<b>Agriculture</b>		
Sugar	Monopoly granted by a federal law: exclusive agreement for a refinery (directly with the sugar manufacturer Aarberg/Frauenfeld)	Beet sugar refining
Distillation of alcohol and alcoholic beverages	Swiss Alcohol Board	Import rights granted to the private sector
<b>Manufacturing and infrastructure</b>		
Salt	Monopoly administered jointly by the cantons	Exclusive production and distribution rights
Electricity	Public establishments (cantonal or communal) or private enterprises	Exclusive rights to waterways (production) and access to public right of way (power lines); hence concessions (production) or public entities (supply)
Drinking water	Units of local governments	Exclusive rights to sources and access to public right of way (supply); hence concessions or public entities
Gas	Swissgas and public-sector regional suppliers	Exclusive access rights to public right of way (supply); hence concessions or public entities
<b>Services</b>		
Rail transport	Swiss railways (CFF) and regional companies	Federal licence. Network access prices regulated by the Federal Transport Office
Passenger transport by bus, tramway, cable car, boat, etc.	CFF, cantonal or local public enterprises.	Exclusive supply rights
Air transport	Swiss International Airlines	Privileges in its capacity as national carrier (pursuant to bilateral agreements)
Flight control	Swiss Control	Monopoly for certain services
Ports	Basle City and Basle Country ports	Exclusive rights to basic installations and management
Certain telecommunication services	Swisscom	Currently, no open third-party access to the local loop
Postal services	Swiss Post Office	Monopoly on certain domestic mail services and international letter services.
Healthcare services (basic health insurance)	Healthcare service providers	Prices for most treatment set by TARMED, based on an agreement between service

**Table 4. Main exclusive rights**

<b>Goods or services</b>	<b>Entities</b>	<b>Scope</b>
Certain insurance services	Cantonal and federal monopolies	providers and healthcare insurers Monopolies on fire and natural disaster insurance in some cantons. Industrial accident insurance
Some mortgage bonds	Two institutions for mortgage bonds	Issuance of "Schweizer Pfandbriefe" only through one institution of canton banks and one of other banks
Chimney-sweeping services	Official chimney-sweeps	Exclusive rights granted in certain cantons.

Sources: Information provided by SECO; WTO (2004), *Examen des politiques commerciales: Suisse et Lichtenstein*, Report from the Secretariat, Geneva.

#### *Justification of agreements affecting competition*

With regard to agreements affecting competition, as explained above, the Cartel Act provides that agreements that significantly affect competition may be deemed lawful if they are justified on grounds of economic efficiency. Under Article 5.2, an agreement is deemed to be justified on grounds of economic efficiency:

- when it is necessary in order to reduce production or distribution costs, improve products or production processes, promote research into or dissemination of technical or professional know-how or exploit resources more rationally; and
- when such agreement will not in any way whatsoever allow the enterprises concerned to eliminate effective competition.

Article 6 states that the conditions under which agreements affecting competition are as a general rule deemed to be justified on grounds of economic efficiency may be determined by way of ordinances or communications. It says that the following in particular will be taken into consideration: a) co-operation agreements relating to research and development; b) specialisation and rationalisation agreements, including agreements concerning the use of schemes for calculating costs; c) agreements granting exclusive rights to deal in certain goods or services; d) agreements granting exclusive licences for intellectual property rights; and e) agreements with the purpose of improving the competitiveness of small and medium-sized enterprises, insofar as they have only a limited effect on the market. Paragraph e) was introduced as part of the 2003 reform of the Cartel Act.

Article 6.2 states that ordinances and communications relating to agreements affecting competition may also recognise particular forms of co-operation specific to certain branches of the economy as being deemed to be justified, in particular agreements concerning the effective implementation of legal provisions for the protection of customer or creditors in the field of financial services.

Comco has issued four communications to date. The first, on 15 December 1997, concerned type-approval and sponsorship of sporting goods.<sup>105</sup> The second, on 4 May 1998, concerned grids for calculating costs and dealt with the conditions under which the use of such grids produced by associations was justified.<sup>106</sup> Comco issued two important communications in 2002 concerning vertical agreements (assessment of vertical agreements<sup>107</sup> and vertical agreements in the motor vehicle trade),<sup>108</sup> which were considered in Section 3.5.1.

#### *Justification of abuse of dominant position*

Although the Cartel Act does not contain any specific provision stating that an abuse of dominant position may be justified and deemed lawful, the Message from the Federal Council on the Cartel Act sets out the principle of legitimate business reasons, stating: "A practice affecting competition by an enterprise in a dominant position is in principle unlawful when, with no objective justification, it hampers access to or exercise of competition by other enterprises or disadvantages trading partners. Objective reasons that may justify a strategic practice (legitimate business reasons) exist when the enterprise concerned bases its practice on commercial principles".<sup>109</sup> To date, no abuse of dominant position examined in a detailed investigation (Article 27) has been deemed justified for legitimate business reasons.

#### *Exceptional authorisations by the Federal Council on the grounds of compelling public interests*

The Federal Council may give exceptional authorisations on the grounds of compelling public interests for cartels and abuses of dominant position (Article 8) and business concentrations (Article 11).

Article 8 of the Cartel Act states that agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests. Article 11 states that a concentration of enterprises prohibited by Comco may be authorised by the Federal Council at the request of the enterprises taking part if, in exceptional cases, it is necessary in order to safeguard compelling public interests.

These exceptional authorisations are of limited duration and may be granted conditionally. The Federal Council may, at the request of the interested parties, extend an exceptional authorisation when the conditions under which it was granted are still met. To date, requests have been made to the Federal Council on only two occasions: prohibition of the printed music cartel and prohibition of an abuse of dominant position in the electricity sector (EEF). The requests were rejected in both cases. In the first case, the Federal Council upheld Comco's decision and the cartel was prohibited. In the second, the parties withdrew their request before the Federal Council had given its decision.

#### *Sectoral exclusions, rules and exemptions*

##### *Electricity*

The electricity sector comprises six supra-cantonal, vertically integrated companies and a host of small enterprises, mostly public, belonging to communes or cantons. The distributors have a local or regional monopoly and set the prices for transporting electricity on their network. Their accounts are often incorporated into those of cantonal or local authorities and distribution is in some cases combined with the distribution of other utilities like water and gas. As a result, pricing structures lack transparency.<sup>110</sup> The structure of the market causes inefficiencies which result in electricity prices that are higher than the OECD average, and great price disparities between different user categories and regions. In December 2001 Parliament approved a reform, the Electricity Market Act,<sup>111</sup> inspired by the broad principles of EU reforms: separation between transport, generation and distribution at both accounting and operational level, and free access to the transport network (which should be managed by an independent company) on the basis of transparent pricing. However, the planned reform was rejected by a popular vote on 22 September 2002.

After rejection of the Electricity Market Act, a panel of experts was asked to define the basic principles for a new regulatory system for the supply of electricity. An electricity supply bill was drafted,<sup>112</sup> providing for the market to be opened up in stages. To begin with, access to the network would be assured for all end-users except households. After five years, households would also be allowed to choose their provider. Unlike the first measure rejected by the population, the switch to a completely open market would not be automatic but would take place by way of an order of the Federal Assembly subject to an optional referendum.

Until the new electricity supply law comes into effect, the Federal Council is proposing to amend the Electrical Installations Act<sup>113</sup> to allow for advance provisional regulation of cross-border electricity trading. This procedure permits a step-by-step opening of the market. Regulation of cross-border electricity trading has been given high priority because of developments within the EU, notably the entry into force of Regulation EC No 1228/2003 on 1 July 2004. The proposed new legislation is broadly consistent with the rules in force in the EU since that date. It would create an independent manager of the transport network and an electricity commission to act as the regulatory authority while providing for non-discriminatory access to the transport network and management of congestion problems.<sup>114</sup> Parliament is due to consider the two bills in 2005.

The electricity supply bill, designed to ensure greater competition on the electricity market, is to be welcomed, even though some aspects are liable to cause distortions of competition (mostly those to do with liberalisation in stages and the guaranteed electricity supply model). The step-by-step opening of the market as proposed in the initial draft submitted for consultation (initially free access to the network for end-users consuming more than 100 MWh a year) breaches the principle of competitive neutrality and causes distortions of competition.<sup>115</sup> A small business that consumes a lot of electricity is free to choose its supplier and negotiate favourable conditions of supply, whereas a rival business that consumes less electricity but targets the same customers remains tied to its supplier, which probably supplies power under less favourable conditions. In order to remedy this situation, the Federal Council amended its proposals so that all commercial customers can freely choose their supplier in the first phase. If Parliament does not adopt this amendment, there is a risk of a temporary or even permanent distortion of competition. Secondly, as the bill provides for a guaranteed electricity supply model, it breaches the principle of competitive neutrality between companies offering electricity on the market. They will be all the more tightly regulated in that quantities delivered to households tied to their networks will be substantial in relation to their total electricity sales.<sup>116</sup> Companies with a limited distribution network and few small customers are less subject to government prescriptions.

From a theoretical standpoint, the aim should be the total opening up of the market at a single stroke. It is only when all customers (end-users and distribution companies) are free to choose their supplier that market mechanisms can be fully effective, with free competition ensuring that the market operates more efficiently. Opening up the market completely and immediately would avoid the pitfall of arbitrary decisions about thresholds in the intermediate stages. However, two-stage liberalisation could be the price to pay for ensuring that the plan is accepted.

A private national company to manage the entire transport network, Swissgrid, has been created and is due to become operational in 2005. Swissgrid is a joint venture of seven power suppliers: Nordostschweizerische Kraftwerke AG (NOK), Centralsschweizerische Kraftwerke (CKW), Elektrizitäts-Gesellschaft Laufenburg AG (EGL), Aare Tessin AG für Elektrizität (Atel), BKW FMB Energie AG, Energie Ouest Suisse SA (EOS) and Elektrizitätswerk der Stadt Zürich (EWZ). By a decision of 7 March 2005, Comco authorised the creation of Swissgrid, subject to conditions.<sup>117</sup> Comco's in-depth examination found that Swissgrid would have a dominant position in the market for high-tension electricity transmission in certain areas of Switzerland. Nonetheless, under the Cartel Act Comco can authorise a concentration that creates a dominant position if the concentration leads to an improvement of competitive

conditions in another market that outweigh the harmful effects of the dominant position. Comco decided that this concentration would improve competition in the market for supplying electric power to ultimate consumers, because the new entity would facilitate transmission in the high-tension network. In order to ensure sufficient improvement in competitive conditions in the market for electricity supply, Comco imposed the following conditions: Swissgrid must guarantee open and non-discriminatory third-party access to its network; Swissgrid must publish its tariffs and conditions for using its network; Swissgrid and the companies participating in it must establish separate accounts for the high tension network; Swissgrid may not trade, sell or commercially produce electric power or have an interest in firms that do so; and members of the board and management of Swissgrid may not be members of similar bodies of other electricity firms. The first two conditions are intended to facilitate transmission of power. The third permits oversight of Swissgrid's tariffs. The last two conditions are intended to avoid possible conflicts of interest in management. The firms have filed a notice of appeal against some of the conditions. The appeal process is going to slow down the establishment of Swissgrid and thus put the brakes on setting up interconnections through the new entity, as Switzerland's commercial partners had hoped. Yet the condition that Comco has imposed, defining terms for third party access, are generally similar to those in the markets of other OECD countries, where third party access is open. The biggest difference is that there is not now a sectoral regulator in Switzerland to guarantee third party access *ex ante*.

Comco has played an important role in the slow and laborious process of opening up the electricity market by insisting that the Cartel Act applied to the electricity industry. Comco launched a number of investigations for abuse of dominant position against power companies that refused to open their networks to competitors. In the EEF/WATT case, on 5 March 2001, Comco found that EEF's refusal to allow Watt Suisse AG to use its network to provide power to a private customer, Migros, in a zone covered by EEF's distribution network constituted an abuse of dominant position. Comco came to the conclusion that no rule of law, federal or cantonal, contained provisions to prevent application of the law relating to cartels pursuant to Article 3 of the Cartel Act.<sup>118</sup>

The Appeals Commission for Competition Matters and the Federal Court dismissed EEF's appeals. The Federal Court upheld the arguments put forward by the competition authorities, especially that the Cartel Act applies to the electricity sector if there are no provisions to the contrary in federal or cantonal law.<sup>119</sup> The Federal Court's judgment in the EEF case opens up the electricity market through the Cartel Act, which can oblige an enterprise to carry electric current unless cantonal law gives it a monopoly right to distribute electricity on its territory. The canton of Fribourg granted EEF such a monopoly after the EEF case, thus putting the enterprise beyond the reach of the Cartel Act. The canton of Vaud introduced a similar monopoly in April 2005. The introduction of such cantonal monopolies has been made possible by the legal vacuum caused by the lack of a federal electricity law. Once the Federal Electricity Act has been passed, steps will have to be taken to ensure that these cantonal monopolies are abolished. Of course, it cannot be ruled out that the legality of these cantonal monopolies will be tested before the federal court in the course of an appeal about impairing trade.

### *Gas*

Gas accounted for approximately 12 per cent of total final energy consumption in Switzerland in 2004.<sup>120</sup> Switzerland does not produce any natural gas itself, so gas is imported from Germany, the Netherlands, Russia (via Germany), France and Italy. Swissgas, a private firm, is the main importer, accounting for about three-quarters of imports. The natural gas market is controlled by a *de facto* monopoly of cantons and municipalities, which own the majority of gas companies including the seven largest, which account for 50 per cent of the market.<sup>121</sup> The government maintains that supplying households and small consumers would be a relatively unattractive proposition for possible competitors. Supplies to large consumers and long-distance transport via the Swiss high-pressure network are guaranteed by the Pipeline Transport Installations Act of 4 October 1963.<sup>122</sup>

On its own initiative, the Swiss gas industry has set up a self-regulation system for access. The most important transit pipeline is owned and managed jointly by Swissgas and some foreign firms. In theory, access to major commercial users and long-distance transport networks is free. However, natural gas prices in Switzerland are significantly higher than the industrial-country average.<sup>123</sup> Comco has not initiated any investigation to identify possible abuses of dominant position. Plans for liberalising the gas sector were being drawn up before the referendum in September 2002 which rejected the Electricity Market Act. Reforms were therefore postponed, priority being given to the pursuit of reforms in the electricity sector. However, the government should continue with reforms like those of the electricity industry so as not to postpone the potential benefits of liberalising the gas industry any longer.

### *Telecommunications*

Telecommunications service providers must obtain a licence from the Federal Office of Communication (OFCOM). In fixed telecommunications, Swisscom has a monopoly on the "last mile" (see below) and must therefore not give third party access to the local loop. In mobile telecommunications, the Federal Communication Commission (ComCom) has granted GSM and UMTS licences to four operators.

Liberalisation of the telecommunications sector, begun in 1996, has run into a final obstacle: unbundling the local loop. This is significant not only for wireline telephony but also for competition in the high-speed data transport segment, which is particularly important for the development of inexpensive internet services.

The Federal Council sought to open the last mile to competition and introduce unbundling in February 2003. In order to do so, it amended the ordinance on telecommunications services so as to bring both forms of unbundling (shared line access and full access) under interconnection rules. The Federal Council considered that there was a sufficient legal basis for opening up the last mile through regulation rather than legislation, which would have taken much longer. ComCom, which supported the Federal Council's position on the legal basis for introducing shared line access and full access, had issued a decision to that effect in the context of an interconnection procedure brought by TDC Switzerland (Sunrise) against Swisscom in July 2003 concerning the unbundling of subscriber connection. However, the decision was appealed to the Federal Court, which upheld the appeal, finding that the amended ordinance on telecommunications services did not constitute a sufficient legal basis for unbundling the local loop. Unbundling should be introduced into Switzerland as part of the current revision of the Telecommunications Act.

### *Postal services*

The provision of postal services (like the provision of telecommunications services) was a state monopoly until the end of 1997. When the Telecommunications Act came into force on 1 January 1998,<sup>124</sup> the monopoly was split between the Swiss Post Office (for postal services) and Telecom PTT (for telecommunications services), renamed Swisscom in October 1998. The Post Office is wholly owned by the Confederation.

The Federal Post Office Act,<sup>125</sup> amended in 2003, divides the market for postal services into three segments:

- Reserved services, provided exclusively by the Swiss Post Office as a monopoly by virtue of its universal service obligations;

- Non-reserved services, also provided by the Swiss Post Office by virtue of its universal service obligations, but in competition with other suppliers;
- Liberalised services.

Reserved services concern the consignment of domestic and incoming international letters, defined as any piece of mail with a maximum size of 353x250 mm, maximum thickness of 2 cm and maximum weight of 1 kg. Parcel transport was liberalised on 1 January 2004, when the Swiss Post Office's monopoly on carrying parcels up to 2 kg was abolished. However, the sector reserved for the Post Office is much more extensive in Switzerland than in most other European countries and the pace of liberalisation has been slower. In 2006, the monopoly limit will be lowered to 100 g for letters, provided that financing of the universal service is guaranteed. The post office ordinance will be revised for this second phase.<sup>126</sup>

Non-reserved services, which can be offered by authorised private operators in competition with the Swiss Post Office, concern outgoing international letters and all domestic and international postal services for parcels up to 20 kg. Under the post office ordinance, concessions must be granted for all non-reserved services generating sales in excess of 100,000 Swiss francs with the exception of newspaper and magazine subscription services. All other services can be freely provided by private enterprises, including foreign firms, and are not subject to monopoly rights or concessions.

Under the post office ordinance, access to universal services, the quality of such services and customer satisfaction are monitored by a regulator, PostReg, which is separate from the Swiss Post Office. However, given that the Confederation is both the owner of the Post Office and responsible for PostReg, there is an obvious conflict of interests.

### *Railways*

The first phase of railway reform began in 1999. It contained four measures applicable to all railways: accounting and organisational separation of infrastructure and transport, network access, competitive tendering and liberalisation of goods traffic. CFF, the Swiss rail operator, was transformed into a joint-stock corporation and given enhanced management powers, though the Confederation is still the only shareholder. It no longer intervenes in management but defines the company's objectives and exercises strong influence over the sector, being responsible for transport policy.<sup>127</sup>

The bilateral agreement on terrestrial transport concluded with the EU has given EU rail operators greater access to the network since 1 June 2002. The agreement provides for total liberalisation of combined transport. For goods and passenger transport, it has resulted in partial liberalisation of international routes on a reciprocal basis, enabling foreign operators to provide links with Switzerland, though only in partnership with a local operator. Switzerland and the EU are currently negotiating introduction of the EU's first railway package (directives 2001/12, 2001/13 and 2001/14). Amongst other things, this implies complete liberalisation of goods transport, limited in a first phase to the Trans-European Rail Freight Network (50,000 km of railway lines on which 70 to 80 per cent of all transport takes place) and extended in a second phase to the entire network.

International comparisons show the first phase of rail transport reform in a relatively favourable light.<sup>128</sup> Competition in goods transport has increased, though some restrictions on access for passenger transport remain. CFF still has an exclusive right to provide long-distance passenger transport services, in exchange for which the Federal Council has given it certain basic tasks.<sup>129</sup> In addition, slots are currently allocated not by a totally independent body but by an entity comprising the enterprises operating in the sector (CFF/BLS/RM), creating clear conflicts of interest (ordinance on access to the rail network, RS 742.122). The European Commission considers that this structure is not compatible with EU directive

2001/14. Consequently the Federal Office of Transport (OFT) has included an amendment in the second phase of railway reform, currently before Parliament, providing for a separate body whose mission is to ensure compatibility with the requirements of directive 2001/14. The directive sets only minimum requirements, so the question of creating a legally independent authority remains. Under the current system, the OFT sets the price for using slots, which leads to a conflict of interest since the Confederation owns CFF.

Infrastructure financing mechanisms are due to be harmonised as part of the second phase of railway reform, the aim being to co-ordinate the framework conditions for all enterprises.<sup>130</sup> The reform also includes various measures to foster competition, especially a strengthening of the arbitration commission, which will be able to open enquiries on its own initiative and not only on a complaint, as was previously the case. Likewise, according to this proposal, competitive tendering for regional passenger transport services would be mandatory in certain cases where it is currently optional.

### *Financial services*

In the financial services sector, a plan to introduce integrated supervision of financial services is due to go before Parliament. The plan is based on the work of the Federal Commission on Financial Markets Supervision (known as the Zimmerli Panel of Experts after its chairman). The Federal Council has clearly stated its support for integrated supervision. As things stand at present, some financial services providers are supervised by different institutions (e.g., Federal Banking Commission for banks, Federal Social Insurance Office for health insurance companies, Federal Private Insurance office for private insurance companies) while others are not subject to any supervision at all. This generates distortions of competition since the same financial service may be supervised by a different body according to whether the provider is a bank or an insurance company, for example, or may not be supervised at all if the provider operates in a field that is subject to limited supervision (as is the case with independent asset managers and introducing brokers). Enterprises that are not subject to supervision or rules do not have to bear the same costs or restrictions as their regulated rivals. In addition, the lack of supervision of certain groups of service providers raises risks for the stability of the financial marketplace. According to the principle of "same business, same risks, same rules", the plan calls for the creation of an institution, called FINMA, formed by merging the Federal Banking Commission, the Federal Private Insurance Office and the money-laundering authority.<sup>131</sup> The Federal Council is expected to adopt a message to Parliament proposing the creation of FINMA and a new system of sanctions. The Federal Council's plan is a step towards tightening up financial markets supervision. To a considerable extent, it corresponds to the recommendations of the Zufferey Commission, a panel of experts asked to assess the regulation and supervision of financial markets in Switzerland.<sup>132</sup> Contrary to the commission's recommendations, some service providers will be excluded from all supervision, thus causing potential distortions of competition. Because of the question marks about the risks of excessive regulation affecting small service providers and the potential risks that such enterprises represent, the Federal Council decided not to include them in FINMA at this stage. As this would have taken a great deal of time, the Federal Council preferred to put forward a plan for partial integrated supervision, covering the biggest operators, which could be adopted quickly. However, analysis of the situation should continue with a view to covering parts of the industry currently excluded, in particular on the basis of the scale of the risks that the smaller operators could generate.<sup>133</sup>

In merger control, the most important case from the point of view of its effects on the structure of the banking market was the 1998 merger of Union de Banques Suisses (UBS) and Société de Banques Suisse (SBS), the two largest banks in Switzerland at that time. Comco authorised the merger subject to conditions.<sup>134</sup> At the time of the merger, the principal market affected was that for commercial loans to small and medium sized enterprises. Geographic markets were determined to be regional (generally representing cantonal markets for loans to SMEs).<sup>135</sup> In eight regional markets, Comco examined in depth the effect on competition resulting from strengthening the position of UBS in those markets.<sup>136</sup> In most cantons, the principal players are UBS, Credit Suisse and the cantonal bank, as well as many other smaller banks such as the *Caisses Raiffeisen*.

Since then, Comco has monitored the implementation of the conditions imposed on the new institution, UBS SA (selling branches and subsidiaries, remaining a shareholder in and paying user fees to shared banking sector enterprises, and maintaining commercial credit to SMEs under appropriate conditions). The conditions ended at the beginning of 2005. On two occasions, Comco applied sanctions to financial institutions (a bank and an insurance firm) for violating notification obligations.<sup>137</sup>

For several years, Comco has also been looking at payment systems markets, particularly the markets for payment cards such as credit and debit cards. In November 2002, Comco prohibited the non-discrimination clause in the contracts between merchants and Visa, MasterCard and American Express. The firms have appealed, and the appeals tribunal has not yet issued its decision.<sup>138</sup> Another inquiry, concerning the same issue for debit cards, has been suspended. At the end of 2003, Comco opened a new inquiry into credit card interchange fees, examining whether the firms are infringing Art. 5 of the Cartel Act prohibiting restrictive agreements and concerted actions.

Most of the cantonal banks in the twenty-four cantons that have them benefit from a state guarantee, a situation which is liable to generate distortions of competition when rival banks do not benefit from similar measures (Table 5). On two occasions, Comco has taken positions concerning the state guarantee for cantonal banks and the special provisions of federal law concerning banks and savings institutions. Among other things, the Commission has proposed to the federal and cantonal legislators to subject cantonal banks to supervision by the federal banking commission and to end the advantageous rules concerning reserves, discount rates for own funds and tax relief. Comco also proposed to review periodically the need for and cost of the state guarantee.<sup>139</sup> Most of the points raised by Comco were addressed in the 1999 revision of the law.<sup>140</sup> At that time, the provision of the law that determined the criteria of the state guarantee was removed. The anti-competitive effect of the state guarantee in the banking market is not clear.<sup>141</sup> Experience suggests that even cantonal banks that do not have an explicit guarantee (or have a limited guarantee) benefit from state support, so correction is necessary.<sup>142</sup>

**Table 5. Canton guarantees for cantonal banks**

	Aargauische	Appenzeller	BC	BC Genève	BC du Jura	BC	BC Vaudoise	Basellandsch	Basler KB	Berner KB	Glarner KB	Graubündner	Luzerner KB	Nidwaldner	Obwaldner	Schaffhauser	Schwyz	St. Galler KB	KB Tessin	Thurgauer	Urner KB	Walliser KB	Zuger KB	Zürcher KB	
Limited guarantee																									
Primary guarantee																									
Secondary guarantee																									
Secondary guarantee excluding subordinated loans																									
No state guarantee																									

Source: Hans Geiger and Beat Kräuchi (2003), *Umstrittene Staatsgarantie der Kantonalbanken*, NZZ, 11/12, October 2003, p. 29.

Fire insurance is a cantonal monopoly in 19 of Switzerland's 26 cantons. It is a free market in the cantons of Appenzell-Outer Rhodes, Geneva, Obwald, Schwyz, Tessin, Uri and Valais. In this group of seven cantons, there are 24 private firms on the fire insurance market.<sup>143</sup> A debate about abolishing cantonal monopolies has been in progress for many years, fuelled by contradictory expert reports.<sup>144</sup> The Comco Secretariat opened a preliminary investigation in 2003 to assess whether private insurers formed an agreement affecting competition. The investigation provided fuller knowledge of the markets and enabled a distinction to be made between monopoly and liberalised cantons. It transpired that the premiums of private insurers are about 13 per cent higher than those of monopolies. The private insurers justify this

situation on many grounds, arguing that they have to earn a return on their risk capital and that monopolies spend less on marketing and acquiring customers and enjoy tax breaks.<sup>145</sup> The investigation was unable to prove the existence of a price cartel between private insurers.

On the basis of the results of this preliminary investigation, Comco concluded that it was not justified in recommending the monopoly cantons to liberalise the fire insurance market. However, the issue does not seem to have been settled yet, especially in the context of international trade agreements such as the WTO General Agreement on Trade in Services or new bilateral agreements with the EU including services, which could oblige Switzerland to consider requests to open up these markets to foreign competitors. Decentralising cantonal markets, thus ensuring a single market for fire insurance in Switzerland, and opening them up to foreign competition could result in a new competitive situation that would completely change the playing-field.

### *Healthcare and pharmaceuticals*

The healthcare sector, which accounted for almost 11 per cent of GDP in 2001, is notable for very high prices in relation to other countries and extensive regulation, a feature shared with most other OECD countries.<sup>146</sup> Health insurance, along with medical care and treatment, is one of the main elements of Swiss health policy. This has been the subject of debate recently in Switzerland, from the perspective of competition policy. (A more extensive OECD analysis of these questions will be available soon.)

Health insurance comprises mandatory basic insurance and optional supplementary insurance, which may be taken out with private insurers. The basic insurance system is governed by the Federal Health Insurance Act of 18 March 1994 (“LAMal”), which came into force in 1996.<sup>147</sup> LAMal was a complete reform of the Swiss health insurance system. It introduced an element of competition in health insurance offered by private firms. The principal tools of basic insurance are as follows. Basic insurance is compulsory. Each insurance company must accept any insured. The law sets an extensive list of services that all insurers must reimburse. Beyond that list, each insurer determines what supplementary services it will offer in addition to the basic coverage. The corresponding costs must be covered by its income. It is thus those expenses that will determine, for each insurer, its premium level without, however, being authorised to earn profits. The system sets a single premium for each insurer and region. Insurers benefiting from the lowest costs to that extent can propose lower premiums than their competitors. Subscribers can change their insurer without penalty. To avoid competition over the selection of risks, the law provides a system for risk sharing. The aim of the Health Insurance Act is to guarantee access to high-quality healthcare for all (according to the solidarity principle).

In this context, control of spending depends on, among other factors, the capacity and incentives for insurers to negotiate advantageous terms and prices, the incentives for providers to become more efficient, and the incentives for patients to take more responsibility in their demand for healthcare.<sup>148</sup> This situation may be susceptible to high prices, as in other areas of the Swiss economy. In addition, economic factors (such as salary levels and interest rates) and demographic and geographic features of the market explain only 3 percentage points of the difference in prices compared to Germany, the United Kingdom, France or the Netherlands, which varies from 13 to 38 percent; the rest of the gap represents a rent to suppliers and distributors, at the expense of the insured, or is dissipated by inefficient structures.<sup>149</sup>

Effective competition between insurers is important to encourage them to negotiate advantageous terms and prices with healthcare providers. However, standard market mechanisms function with difficulty in the market for health care because of the many detailed regulations and issues about information in the health sector.

Price competition between healthcare providers is virtually non-existent, given on the one hand the insurers' obligation to contract with all providers, and on the other hand the TARMED single pricing system, based on a pay-per-service system.

A planned partial reform of the Health Insurance Act was rejected by Parliament in 2003. The Federal Council drew up a new revision in 2004, now being debated in Parliament, which could come into effect in 2006 or 2007. The package of measures was divided into several smaller reforms which can be accepted separately.

One of the main proposals in the Federal Council's plan involves partly abolishing the obligation to contract. According to this proposal, the freedom to contract would be applied to the conclusion of agreements between insurers and service providers in the ambulatory sector but would not be extended to the hospital sector.

Meanwhile, in 2004 Comco issued a preliminary notice that anticipated eliminating the obligation to contract in both the ambulatory and fixed services. Comco's position is that three elements will still be needed for freedom to contract<sup>150</sup>:

- Preventing umbrella organisations from negotiating pricing agreements. If prices are to be truly liberalised they must be set through contractual negotiations between service providers and insurers. The aim is to prevent homogeneous and concerted price-setting and hence the creation of price cartels, which would be the case if umbrella organisations were responsible for negotiations;
- Allowing free choice of the level of prices and the form of reimbursement. Insofar as free competition is guaranteed when service providers and insurers conclude an agreement, there is no reason why this procedure should not be extended to the method and amount of remuneration for services provided;
- Abolishing price approval by cantons or the Confederation. This would preclude complete application of the Cartel Act under Article 3, which states that provisions of law that do not allow competition in a market for certain goods or services take precedence over competition law.

The implementation of Comco's proposal, envisaging abolition of the obligation to contract in the ambulatory and hospital sectors, would imply that the Cartel Act would be applied to the basic insurance system, which would no longer be covered by the Article 3 exemption.<sup>151</sup> According to the Comco proposal, application of the Cartel Act would help to prevent agreements between insurers designed to exclude service providers and agreements between service providers designed to exclude an insurer. In addition, Comco advised that abolishing the obligation to contract should also be accompanied by a reform of other excessively restrictive aspects of the Health Insurance Act that limit the autonomy of healthcare providers, notably in determining remuneration mechanisms.

The production and marketing of drugs are governed by the Federal Drugs Act and the Therapeutic Products Act of 15 January 2000.<sup>152</sup> Swissmedic, the Swiss Agency for Therapeutic Products, a public body attached to the Federal Department of the Interior, must approve any new drug before it is put on the market. The provisions of the law are based on a compelling public interest, that of the protection of human and animal health.<sup>153</sup> The Price Inspector recently queried Swissmedic's monopoly, once again noting the high price of drugs in Switzerland in comparison with other countries.<sup>154</sup> Other options could be considered, such as co-ordination with the equivalent European authority.<sup>155</sup> This would avoid duplicating costly approval procedures in Switzerland (Swissmedic) and in the EU. On average, Swiss consumers pay

20.6 per cent more for their drugs than German consumers.<sup>156</sup> The Price Monitoring Office considered that the most recent official price reduction measures, following a two-year price review and competition with certain countries, including the Netherlands, Denmark and the UK, are not sufficient. Even for drugs subject to the new regulation, the price differential with Germany is still 14.7%. In its 2004 annual report, the Price Monitoring Office called for the liberalisation of parallel imports in order to put pressure on prices.<sup>157</sup> This call echoes Comco's recommendation to the Federal Council, encouraging the principle of international exhaustion of patent law to favour parallel imports and combat high prices in Switzerland.<sup>158</sup> This has been hotly debated in Switzerland<sup>1</sup> but in the end rejected by the Federal Council, which confirmed the principle of national exhaustion. A broadening of this concept, for example, with a principle of regional exhaustion in a European setting, would still be a progress as it would contribute to a price competition enhancement in this area in Switzerland, as a result of a limited lowering in price.

The question of drugs was not included as such in the current reform of the Health Insurance Act. Yet measures to stem the rise in drugs spending could be foreseen. The system for setting ex-factory prices and margins for distributors (wholesalers and retail pharmacists) and the system for reimbursing pharmacists who sell drugs reimbursed by basic insurance are defined in the Health Insurance Act and/or its implementing ordinances.

Comco prohibited the Sanphar drugs cartel in 2000.<sup>159</sup> The cartel made detailed provisions for the prices of drugs sold to wholesalers, then to retailers (pharmacists and practitioners), then to consumers. Following the dismantling of this private cartel, a new provision was introduced into the Health Insurance Act in 2000 to enable pharmacists to withhold a flat amount on all prescription drugs, which somewhat cushioned the effects of the dismantling of the Sanphar cartel.

### *Agriculture*

According to the constitutional mandate defined at Article 104 of the Federal Constitution, agriculture has a twin mission.<sup>160</sup> On the one hand, agricultural production must be market-oriented and respect the conditions of competition; on the other, non-market aspects such as the conservation of natural resources and protection of the landscape are classified as public goods. Conflicting objectives are bound to arise, as pointed out in the Federal Council message of 29 May 2002 on the development of agricultural policy (Agricultural Policy 2007).<sup>161</sup> The Federal Agriculture Act contains various provisions that prevent or restrict competition. However, some parts of the farming sector are not regulated and hence fall within the scope of the Cartel Act.

The agriculture sector can be divided into several segments; the thrust of regulation differs from one to another. In the sugar segment, for example, no competition is possible since a single enterprise has a monopoly. In other markets (for example, the market for milk), quotas or price rules (admittedly limited) restrict competition even though the Cartel Act applies in full to other parameters of competition.

Switzerland tops the OECD table for state support of agriculture, in terms of both gross revenue attributable to output and per capita.<sup>162</sup> In 2003, government subsidies represented the equivalent of 74 per cent of gross revenue attributable to agricultural output, almost two and a half times the average for OECD countries (31 per cent) and double the EU average.<sup>163</sup>

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1. OECD (2004). See Economic Surveys on Switzerland for the pro and cons of implementing the principle of international exhaustion of patent law.

The second package of bilateral agreements with the EU will lead to more open markets. The Agricultural Policy 2007 programme also introduces some reforms, especially the abolition of milk quotas by 2009 and the gradual introduction of more flexible measures relating to quotas on meat imports.<sup>164</sup> However, regulation still greatly hampers competition in the agriculture sector,<sup>165</sup> meaning that considerable potential for regulatory reform remains.

The next stage, called Agricultural Policy 2011, is still in its initial phase. It calls for further adaptation linked to reforms resulting from the WTO Doha round. According to the Swiss government, Agricultural Policy 2011 must be conceived with a view to the sustainable development of agriculture in economic, ecological and social terms.<sup>166</sup> In economic terms, the aim is to cut internal market support by half by abolishing all export subsidies and further reducing the price threshold for fodder cereals by 2009. The savings generated by reducing market support (including export subsidies) will be allocated to direct payments so that farmers can continue to provide the general interest services that go hand in hand with agricultural production.

## **Competition advocacy in regulatory reform**

### *Comco's role*

One of Comco's missions is to promote competition, which it does in three main ways. First, as part of its task of constantly monitoring the competition situation, Comco can address recommendations to communal, cantonal and federal authorities with the aim of promoting effective competition, especially with regard to the drafting and enforcement of laws relating to economic affairs (Article 45, Cartel Act). Second, in the framework of regular consultation procedures, the competition authorities can also issue opinions on draft Confederation legislation that limits or influences competition in any way whatsoever (Article 46). Third, Comco can provide expert advice to other authorities on questions of principle relating to competition (Article 47). Article 23.2 states that the Secretariat draws up opinions (in accordance with the provisions of Article 46.1) and advises officials and enterprises on matters relating to application of the law.

Comco has addressed a dozen or so recommendations under Article 45, mainly to the Federal Council (see Box 8), though most of them have not been taken up by the authorities concerned. Some Comco recommendations concern important issues like the liberalisation of non-life insurance, reimbursement by the basic health insurance system of prescribed drugs purchased abroad, and parallel imports and patent law. SantéSuisse, an umbrella organisation of health insurers, decided in 2004 to reimburse drugs purchased abroad when they are medically prescribed and covered by basic health insurance.

Comco has also issued a series of opinions under Article 46.2, mainly relating to telecommunications, energy and healthcare. As part of the revision of the Federal Telecommunications Act, for example, Comco issued an opinion to the Federal Department of Environment, Transport, Energy and Communications (DETEC) in favour of unbundling the local loop.<sup>167</sup> In the energy sector, it issued an opinion on the electricity bill.<sup>168</sup> In healthcare, it issued an opinion as part of the partial reform of the Health Insurance Act favouring greater competition in the healthcare sector and the introduction of more efficient regulation taking greater account of the quality/cost ratio.<sup>169</sup>

Comco could have made greater use of its powers to issue recommendations (Article 45.2), which have a wider scope than opinions, in the key issues that have marked economic and social policy debate in Switzerland in recent years and could have benefited from Comco's input, such as healthcare, air and rail transport and energy. When presenting its annual report in April 2005, Comco expressed its support for parliamentary initiatives in favour of unilateral adoption of the "Cassis de Dijon" principle, though without issuing a formal recommendation to that effect (see Section 5.4).

Comco's Secretariat is also involved in working groups on the reform of important laws relating to competition, as was the case for the revision of the Cartel Act and the current revision of the Internal Market Act, dealt with in the next section.

The State Secretariat for Economic Affairs (SECO) also has a unit for competition policy issues and is taking part in current regulatory reforms, albeit within guidelines imposed from above.

**Box 7. Main recommendations issued by Comco from July 1996 to January 2005  
(Article 45.2)**

**Bill on therapeutic products.** Comco advised the Federal Council to make the following amendments to the bill: a) with regard to authorisation for introduction onto the market, remove the requirement that any applicant wanting to sell products in Switzerland must be domiciled in Switzerland; b) introduce a simplified procedure for any imported drug that has been authorised in the country from which it is exported or in Switzerland; c) remove the ban on advertising prescription drugs.<sup>170</sup>

**Purchase of drugs abroad.** Comco advised the Federal Council to authorise health insurers to reimburse drugs and other pharmaceuticals acquired abroad at lower prices than in Switzerland. Opening up the market for drugs approved in Switzerland to other countries would increase competition and put pressure on prices, improving the price/service ratio for insurees.<sup>171</sup>

**Shipping of newspapers and magazines.** Comco advised the Federal Council to amend a regulation enabling the Post Office to give bigger reductions to publishers for the normal distribution of newspapers if they also contracted for morning distribution. Through such loyalty discounts, the Post Office has a competitive advantage over other enterprises for morning newspaper distribution.<sup>172</sup>

**Main recommendations issued by Comco from July 1996 to January 2005 (cont'd)**

**Advertising restrictions in the healthcare professions.** Comco advised the governments of five cantons to abolish advertising restrictions on the medical professions.<sup>173</sup>

**Life assurance.** Comco advised the Federal Council to open up the Swiss life assurance market to foreign competition in the context of the second cycle of bilateral negotiations with the European Union.<sup>174</sup>

**Lawyers' fees.** Comco advised cantons that still prescribe mandatory fees for lawyers to abolish them.<sup>175</sup>

**Financing of the intercantonal certification agency.** Comco advised the agency to stop certifying all farm and food products or, if it continued, advised member cantons to stop subsidising the activity.<sup>176</sup>

**Parallel imports and patent law:** In its recommendation to the Federal Council, Comco encouraged the principle of international exhaustion in patent law in order to favour parallel imports and combat high prices in Switzerland.<sup>177</sup>

***Reform of the Internal Market Act***

The Internal Market Act of 6 October 1995 seeks to eliminate restrictions on market access introduced by cantons and communes.<sup>178</sup> It aims to facilitate professional mobility and trade in Switzerland and hence to make the Swiss economy more competitive. Conceived as a framework law, it seeks not to harmonise regulations but rather to lay down the basic principles for a smoothly operating internal market.

First and foremost, the Internal Market Act defines the principles governing free access to the market. Any person having an establishment and any enterprise having its registered office in Switzerland is entitled to offer goods and services on Swiss territory. Access to the market is governed by the rules of the place of origin. At the same time, certificates of qualification issued or recognised at canton level, permitting the exercise of a lucrative activity, are valid anywhere in Switzerland. The law on freedom of access to the market also includes cantonal and communal public procurement.

For external suppliers, freedom of access may be restricted by the rules that apply to the place where the goods or services are delivered or provided, though these restraints are authorised only under certain conditions.

Comco is responsible for monitoring compliance with the Internal Market Act at an institutional level. In doing so, it can address recommendations to cantons and communes concerning draft or existing legislation and provide expert advice. In contrast to the Cartel Act, the Internal Market Act does not give Comco any powers to issue binding decisions. It is up to the individuals concerned to enforce the right of free access to the market. The Internal Market Act gives them a right of recourse against restrictions on access.

However, there is a considerable discrepancy between the objectives and the real effects of the Internal Market Act.<sup>179</sup> This transpires in particular from the report of the National Council Management Commission dated 27 June 2000 on the effects of the Federal Internal Market Act and the free movement of services and persons in Switzerland.<sup>180</sup> It was drawn up on the basis of an assessment by the PCA (working report of 11 February 2000 submitted to the National Council Management Commission entitled “How open is Switzerland's internal market?”).<sup>181</sup> The PCA's assessment concludes that the Internal Market Act has not had any notable effect in opening up Switzerland's domestic market, for three main reasons.<sup>182</sup>

First, the case law of the Federal Court gives the principle of federalism precedence over the internal market, justifying its position restricting access to the market on the provisions of the Internal Market Act itself. The Act should therefore be amended appropriately to remedy this problem.

Second, the Internal Market Act in its current state, especially Article 3 setting out the conditions under which cantons can restrict access to the market, gives the cantons significant scope to do so.

Third, the right of recourse has not driven enforcement of the Internal Market Act in the way it was supposed to. Few actions have been brought, since the length and cost of the procedure, combined with uncertainty as to the outcome, have a deterrent effect. The benefits of a successful suit are incommensurate with the resources invested, a finding that has been borne out with regard to small contracts in particular, such as taxi services and plumbing systems.

The reform of the Internal Market Act is based mainly on the three weaknesses identified above. Even though the macroeconomic costs of not fully achieving the Act's objectives are not thought to be great,<sup>183</sup> the current situation nonetheless hampers the dynamism of business on the Swiss market for goods and services. Substantial costs linked to the lack of a single market exist on certain markets, often attributable to differing codes of conduct across the cantons. The problems are particularly striking in the construction sector, owing to the variety of cantonal standards, making it difficult for construction plans drawn up in one canton to be used in another. Reform of the Internal Market Act is also motivated by the problem of recognition of cantonal certificates of qualification in the framework of the agreement between the EU and Switzerland on the free movement of persons, which came into effect on 1 June 2002. Under the agreement, cantons are obliged to treat European certificates of qualification, for professions regulated at canton level, according to the European recognition procedure. There is a risk that Swiss nationals may find themselves worse off than nationals of an EU Member State because of differences in cantonal rules on recognition.

The Federal Council therefore regards reform of the Internal Market Act as one measure among others designed to stimulate competition on the domestic market. The reform has the following main objectives.<sup>184</sup>

- To remove cantonal and communal barriers to market access. Consequently, the revision proposes a more restrictive formulation of the exceptions provided for at Article 3 and the extension of freedom of access to commercial establishments;
- To ensure that intercantonal recognition procedures for certificates of qualification for professions covered by the agreement with the EU on the free movement of persons comply with EU rules,<sup>185</sup> thus also ensuring that Swiss citizens are not treated less favourably than EU citizens;
- To strengthen Comco's supervisory role. As things stand at present, Comco can merely address non-binding recommendations to cantonal and communal authorities. Under the new draft legislation, it will have a right of recourse enabling it to challenge administrative decisions that it considers unlawful.

The reform is to be welcomed because it should help to lower cantonal and communal barriers to the creation of a proper internal market. Of course, some aspects of the reform could have been toughened up, especially those concerning Comco's role. Comco could have been given a right to intervene against restrictions on market access rather than a right of recourse that is not necessarily easy to assert. Given the opposition that emerged during the consultation procedure on the reform, however, the prospect that the proposed package will finally be passed already represents very real progress towards greater competition on the internal market. Most opposition to the planned reform concerned the need to embark on a reform at all, introduction of the principle of the freedom of establishment and Comco's new powers. In the end, how far the internal market is opened up will depend on how far the cantons are willing to go in according the general interest priority over particular interests.

### ***Public procurement***

Comco's Secretariat has played an active part in work to reform public procurement law. As Comco says in its 2004 annual report, "priority has been given to analysing current regulations from a competition standpoint and drawing up proposals on that basis so as to ensure that future public procurement law favours competition".<sup>186</sup>

In Switzerland, public contracts for supplies, services and construction work amounting to over 30 billion Swiss francs were awarded at all levels in 2000, representing approximately 25 per cent of all public spending and 8 per cent of GDP.<sup>187</sup> The Confederation accounted for 19 per cent of the total, the cantons for 38 per cent and the communes for 43 per cent.

Switzerland is a signatory to the WTO agreement on government procurement. The main exceptions to the undertakings given by Switzerland under the agreement concern Swiss railways, the Post Office and public arms firms.<sup>188</sup> Switzerland has formulated reserves concerning application of the agreement to other signatories who have not granted Swiss enterprises comparable and effective access to certain types of market.<sup>189</sup> An agreement between Switzerland and the EU on government procurement came into effect in June 2002.<sup>190</sup> The agreement extends the scope of the WTO agreement on a reciprocal basis for contracts worth more than certain amounts in various sub-sectors, particularly rail transport and telecommunications.

The main law governing federal procurement is the 1994 Federal Government Procurement Act,<sup>191</sup> supplemented by the 1995 ordinance on government procurement.<sup>192</sup> The Act lays down general rules for public procurement and provides for definitions and thresholds to be periodically adjusted. The ordinance contains more detailed rules for the government procurement covered by the Act and for all other public procurement, including contracts worth less than the threshold values and contracts awarded by entities not covered by Switzerland's undertakings under the WTO agreement. In particular, it rules out discrimination between qualified bidders and ensures that effective competition exists.

There are 42 offices at federal level responsible for government supply contracts. Each federal office is responsible for its own service contracts. The Confederation Government Procurement Commission co-ordinates public procurement for supplies and services but not for construction.

There are four types of procedure for awarding procurement contracts: open tenders, selective tenders (with pre-qualification), invitation tenders (at least three suppliers must be invited) and negotiated tenders. Contracts worth more than the threshold amounts stipulated in the WTO agreement are generally awarded on the basis of open or selective tenders. Negotiated tenders are permitted only in the cases identified at Article 13 of the ordinance, such as when there is only one qualified supplier. When contracts are worth less than the threshold amounts a choice may be made between the four types of procedure, but buyers generally opt for negotiated tenders. The contract must be awarded to the supplier making the best offer in economic terms provide that it complies with the criteria laid down in the invitation to tender. Neither the Act nor the ordinance institute preferential treatment for Swiss suppliers.

Under a 1994 intercantonal Concordat, the cantons transposed the Agreement on Government Procurement into their own public procurement laws for contracts awarded by cantons, communes and certain enterprises.<sup>193</sup> The Concordat applies to contracts worth more than 9.6 million Swiss francs for construction work,<sup>194</sup> 383,000 Swiss francs for supply and service contracts and 766,000 Swiss francs for supply and service contracts awarded by public water distribution, electricity and transport enterprises. The 1995 Federal Internal Market Act expressly rules out discrimination in cantonal and communal procurement by authorising suppliers from all cantons to tender anywhere in Switzerland.<sup>195</sup>

An independent body, the Confederation/Cantons Government Procurement Commission (CMCC) is responsible for ensuring that Switzerland complies with its international undertakings relating to government procurement. A Government Procurement Appeals Commission (CRM) has been created to deal with complaints relating to federal contracts, which cannot be challenged in the Federal Court. Complaints relating to government procurement at the cantonal level are dealt with by the administrative courts and their judgments can be appealed to the Federal Court. A parliamentary study published in 2002, commissioned as part of a recent government evaluation of public procurement policies and practices, drew attention to several structural problems with the appeal procedures.<sup>196</sup> These problems relate in particular to contradictory decisions by the Federal Court and the CRM, the high cost of procedures in relation to the possible benefit and the fact that some suppliers fear retaliation by buyers if they challenge the award of tenders. Swiss law does not allow appeals from supervisory bodies like Comco or the CMCC (unless international obligations have been violated).

In practice, the opening up of public procurement does not seem to have gone very far, especially at regional and local level. The new legislation on government procurement came into force in 1996, bringing Swiss law into line with the WTO agreement; five years later, more than 80 per cent of contracts in the cantons of Geneva, Vaud and Graubunden were still being awarded to local firms.<sup>197</sup> There are several reasons for this situation.<sup>198</sup> First, the value of most contracts is less than the threshold at which public calls for tender have to be issued. Second, there is no harmonisation of public procurement law between the Confederation and the cantons or between some of the cantons themselves.<sup>199</sup> despite the existence of intercantonal co-ordination, so it is highly complex and difficult to apply, for both bidders and buyers. The thresholds have been harmonised since the revision of the accord, except for a limited number of cantons that have not yet adhered to it. Interacting and overlapping rules governing such contracts increase the legal uncertainties, which hardly encourages bidders to appeal against an award procedure. And yet the practical effectiveness of the legislation is based largely on the right of recourse, use of which is also checked by the high cost of taking legal action. Third, when the international thresholds are not reached, the lower thresholds above which competitive tendering is mandatory at national level have hitherto differed very considerably from one canton to another. However, attempts to improve the situation have been made in recent years, especially with a view to harmonising threshold values and procedures for

contracts not governed by international treaties. Amongst other measures, a government procurement internet portal has been set up to centralise cantonal and federal calls for tender and unify the tendering system.<sup>200</sup>

### ***Technical barriers to trade***

The Federal Technical Barriers to Trade Act of 6 October 1995 was designed to eliminate technical barriers to trade. Although the situation has improved in recent years, administrative and technical regulations in areas such as production, packaging and labelling still present obstacles for importers into Switzerland. A business survey carried out by the Comco Secretariat showed that many rules regarded as technical barriers to trade still exist in the food and near-food (e.g., cosmetics) sectors. Their effect is to make products more expensive in Switzerland. As Comco pointed out in its 2004 annual report, "they are said to hamper imports of products and thus increase prices, or actually prevent products from entering Switzerland at all even though they comply with Community rules (which is why Switzerland is often referred to as an island of high prices)".<sup>201</sup> The abovementioned revision of the Internal Market Act will also have significant implications in terms of standards, particularly with regard to cantonal regulations.

Parliament has addressed the issue on two occasions,<sup>202</sup> considering that barriers to trade could be eliminated by transposing the Community's "Cassis de Dijon" principle. The principle stems from a 1979 decision by the Court of Justice of the European Communities in a case relating to the marketing in Germany of the French liqueur Cassis de Dijon. The "Cassis de Dijon" principle means that any goods produced and/or introduced onto the market in a Member State in compliance with national rules may be marketed without restriction in another Member State. The principle also holds good when the goods have been manufactured according to technical or quantitative rules other than those applied in the importing country. Thus, goods can be marketed in the country of import if they comply with the legal rules and production standards of the country of export.<sup>203</sup>

In its 2004 annual report, Comco supported Parliament's stance by calling on Switzerland to introduce the Cassis de Dijon principle unilaterally, stating that "any liberalisation measure, even unilateral, would increase social welfare. Switzerland should not therefore content itself merely with taking steps to harmonise laws but should also tread the parallel path of recognition. Such a move would also be consistent with the constitutional principle of economic freedom, which the Confederation is required to guarantee".<sup>204</sup> In May 2005, the Federal Council approved in principle the concept that the "Cassis de Dijon" rule will be applicable to imported goods. The Federal Council proposed to parliament that the Technical Barriers to Trade Act be amended so as to transpose the "Cassis" rule into Swiss law. This will concern products for which Swiss and EU rules are not harmonised, such as construction materials and food products. On the other hand, as for the EU, reservations are envisioned concerning measures to protect health, consumers and the environment. Pharmaceuticals, for example, would not be covered by the measures envisioned by the Federal Council. If the proposal is endorsed by Parliament, the introduction of these new measures should introduce a competitive dynamic that could reduce costs of products for businesses and consumers.

### **Conclusions and possible measures**

The Swiss economy has been under-performing for more than twenty years. More efficient markets for goods<sup>205</sup> and greater competition would generate the higher productivity gains that are essential to stimulate the economy's growth potential.

Competition issues do not affect all markets for products to the same extent. The main problems are concentrated in sectors that have little exposure to competition from other countries, or even other cantons, and in which public action plays a major role. The relative compartmentalisation of certain markets is

partly due to Switzerland's federal organisation and linguistic differences. Although competition policy is a federal government portfolio, the cantons have extensive powers to intervene in markets and often control supplies and prices for electricity, water, gas and regional transport, resulting in very considerable differences in prices for public services. Cantons also influence certain sectors like construction and professional services through various regulations that constitute de facto barriers to entry and through major procurement contracts that often favour local firms.

Network industries have been only partially liberalised, and to a greater or lesser extent depending on the sector. Reforms in the electricity, gas, telecommunications and postal services sectors have been both slower and less ambitious than those accomplished in the European Union. However, reform is under way in most of the network industries.

The Swiss government has embarked on a number of reforms to bolster its competition policy. An initial reform package was adopted in 1995 under the revitalization programme, namely the Act on Cartels and other Restraints of Competition (Cartel Act), the Internal Market Act and the Technical Barriers to Trade Act. The Federal Council has since undertaken further reforms, including amendments to all three Acts to strengthen their content. The revision of the Cartel Act was passed in 2003, but the other two are still being revised.

The 2003 reform of the Cartel Act gave the Swiss competition authorities important means, such as direct sanctions and the leniency programme, for combating restraints of competition. As a result Swiss competition law has become much closer to European competition law and that of many OECD countries. Although a "competition culture" still needs to be consolidated in Switzerland, the reform of the Cartel Act is welcome, since it illustrates the government's determination to introduce more competition in Switzerland. The role of Comco has changed with the 2003 revision of the Cartel Act, and it has become an agency, with quasi-judicial functions, for applying the law. In this setting, its institutional and political independence become crucial. In this regard, new rules should be adopted concerning Comco's composition, operation and procedures.

Ever since it was established, Comco has supported the process of regulatory reform through its decisions (on electricity) and its recommendations on major issues in important fields (including parallel imports, health, and life-assurance). In combating restraints of competition, Comco's action could have been more forceful, although the disincentives and penalties at its disposal to date have been weak. The revision of the Cartel Act in 2003 is expected to provide concrete solutions. However, several specific measures could further enhance the conditions under which Comco operates and acts, and it will increasingly play a quasi-judicial role.

The Federal Council launched a programme of measures to support growth in 2004. Many aspects of this programme, notably those calling for a revision of the Internal Market Act, provide for regulatory reforms that should lead to stronger competition.<sup>206</sup> The hostility aroused by the planned reform in various quarters during the consultation phase underlined the scale of the challenge. The Federal Council's recent proposal to adopt the "Cassis de Dijon" principle for goods imported from the EU goes a step further and seeks to improve competition with far-reaching regulatory reform, in particular of the Technical Barriers to Trade Act. However, these major important proposals are yet to be approved by Parliament and could be the subject of referenda.

## *Possible measures*

### **1. *Ensure that Competition Commission members are economically and politically independent.***

The financial and political independence of Comco is not now guaranteed, because of the potential for conflict inherent in the current system (in which members can include representatives of interest groups and corporate directors). Sanctions and the leniency programme have compounded the problem. Disqualification procedures and a register of members' interests are only partial solutions that cannot guarantee complete independence. The presence of interest group representatives may also undermine the cohesion of the Commission, in particular when they publicly contest Comco's collegiate decisions on the grounds that they are not in the interests of the groups they represent. The law states that representatives of interest groups must be in a minority. The Federal Council appoints a "substantial" minority of such members. Under the Cartel Act as it stands, the Federal Council could considerably reduce the number of interest group representatives and then propose an amendment to the law that would confine the Commission to independent members only. A drastic cut in the number of Comco members would also promote decision-making mechanisms. Hence the need to look at the extent to which membership activity should be increased to ensure that it operates on an optimal basis. In addition, a clearer separation between the activities of the Comco Secretariat and the Federal Department of Economic Affairs would also ensure greater clarity as to the competition authorities' powers and activities.

### **2. *Draw up rules of procedure specific to the law on cartels.***

Currently, cartel procedures are subject to the general provisions of administrative law. However, these rules are not geared to the specific features of competition law. To ensure that the law on cartels remains effective, it needs its own rules of procedure.

### **3. *Increase the competition authorities' resources.***

The competition authorities are given limited resources in relation to their statutory tasks, especially as they have to monitor also compliance with the Internal Market Act. A substantial increase in Secretariat resources would make it possible to intensify and extend investigations, while making procedures as short as possible. This kind of development would be crucial in enabling Comco to assume the powers given to it by Parliament.

### **4. *Develop international co-operation in competition matters.***

The Swiss competition authorities are relatively isolated, whereas many anticompetitive practices and many mergers have an international dimension. The relative isolation of the Swiss authorities has increased since the creation of the European Competition Network, bringing together the national competition authorities of the 25 Member States of the European Union. The effectiveness of Comco's activities should be strengthened through international competition agreements.

### **5. *Replace the principle of preventing abuse by that of prohibiting cartels.***

The principle of preventing abuse means that sanctions cannot be systematically imposed for any breach of the Cartel Act and tends to slow down Comco's investigation and decision-making processes.<sup>207</sup> The principle of prohibition, which exists in many other countries' competition law, should be firmly established in Swiss competition law. The introduction of a prohibition system would send a clear signal of a change of paradigm in Switzerland with regard to cartels.

**6. *Strengthen competition in a number of regulated markets via increased co-operation between Comco and sectoral regulatory authorities.***

Comco is now consulted in advance in certain cases concerning the determination whether a firm has a dominant position. It would seem desirable to bring together even more the work of Comco and of sectoral regulatory authorities, with systematic bilateral consultations in cases about competition in these sectors. Moreover, regular informal consultations could improve the overall coherence of the implementation of competition policy.

**7. *Reconsider the role of the price supervisor and consumer protection.***

In the context of ongoing regulatory reform, especially the liberalisation and privatisation of various activities, the issue of price monitoring should be addressed. If some of the Price Supervisor's activities are deemed necessary, consideration should be given to the appropriateness of the separation between that authority and Comco and the most effective solution in a context of limited resources. The organisation of consumer protection should also be strengthened and the implications of possible integration into Comco should be examined.

**8. *Ensure an ambitious reform of the Internal Market Act.***

The creation of a genuine single market in Switzerland would do much to stimulate actual and potential competition in many sectors protected by various cantonal barriers. This means getting the cantons to realise that it is in their medium- and long-term interest to create such a market even if it means risking short-term disaffection fuelled by the loss of situation rents.

**9. *Continue to increase competition in public procurement.***

The opening up of public procurement has not gone far enough, mostly because of differences in rules, thresholds, awards and appeals that affect the transparency required for competition to be truly effective. Efforts should continue to enforce existing regulations more effectively and to limit the possibilities for splitting up public procurement contracts so as to avoid competitive tendering. The legal protection available through appeals against non-competitive awards should also be improved.

**10. *Accelerate and strengthen regulatory reforms targeting sheltered sectors.***

Reforms could be more ambitious and could be accelerated in many areas, such as healthcare, agriculture and infrastructure (especially the gas, electricity and transport sectors). This could be done through consulting with Comco in advance when planning such reforms, as well as through closer collaboration with sectoral authorities.

**11. *Open up markets to more international competition.***

Although the average import penetration rate in the manufacturing sector is similar to that of comparable economies, the degree of openness for all goods and services is not particularly high given the size of the economy, price levels and transport costs.<sup>208</sup> Moreover, since the early 1980s, the Swiss economy has opened up to international trade more slowly than the smaller EU countries. Adoption by Parliament of the recent Federal Council proposal to introduce the principle of "Cassis de Dijon" for trade in goods between Switzerland and the EU would be a fundamental signal and means of strengthening competition in domestic markets. In addition, increased openness to parallel imports through a modification of the federal patent law, whether internationally (as recommended by Comco) or regionally by negotiating an agreement at the European level, could also significantly stimulate price competition in some sectors.

## Abbreviations

Atel	Aare Tessin AG für Elektrizität
ATF	Federal Court judgement ( <i>arrêt du Tribunal fédéral</i> )
CFE	Chemins de fer fédéraux – Swiss railways
CKW	Centralsschweizerische Kraftwerke
CMCC	Confederation/Cantons Government Procurement Commission
Comco	Federal Competition Commission
ComCom	Federal Communication Commission
CommVert	Communication on Vertical Agreements
CRM	Government Procurement Appeals Commission
DETEC	Federal Department of Environment, Transport, Energy and Communications
DFE	Federal Department of Economic Affairs
DPC	Law and policy on competition
EEA	European Economic Area
EEC	European Economic Community
EEF	Entreprises électriques fribourgeoises
EGL	Elektrizitäts-Gesellschaft Laufenburg AG
EOS	Energie Ouest Suisse SA
EU	European Union
EWZ	Elektrizitätswerk der Stadt Zürich
FF	Federal Gazette
GSM	Global System for Mobile Communications
ICN	International Competition Network
IEA	International Energy Agency

NOK	Nordostschweizerische Kraftwerke AG
OCCE	Merger Control Ordinance
OECD	Organisation for Economic Co-operation and Development
OFCOM	Federal Office of Communications
OFT	Federal Office of Transport
OIP	Price Indication Ordinance
WTO	World Trade Organisation
PCA	Parliamentary Control of the Administration
OPO	Post Office Ordinance
OST	Telecommunication Services Ordinance
GDP	Gross Domestic Product
SME	Small and medium-sized enterprises
PostReg	Postal services regulatory authority
RO	Official collection of Swiss federal law
RS	Systematic collection of Swiss federal law
SECO	State Secretariat for Economic Affairs
SMA	Schweizerische Meteorologische Anstalt
TarMed	Medical pricing system
TF	Federal Court
UBS	Union des Banques Suisses
UMTS	Universal Mobile Telecommunications System
UNCTAD	United Nations Conference on Trade and Development

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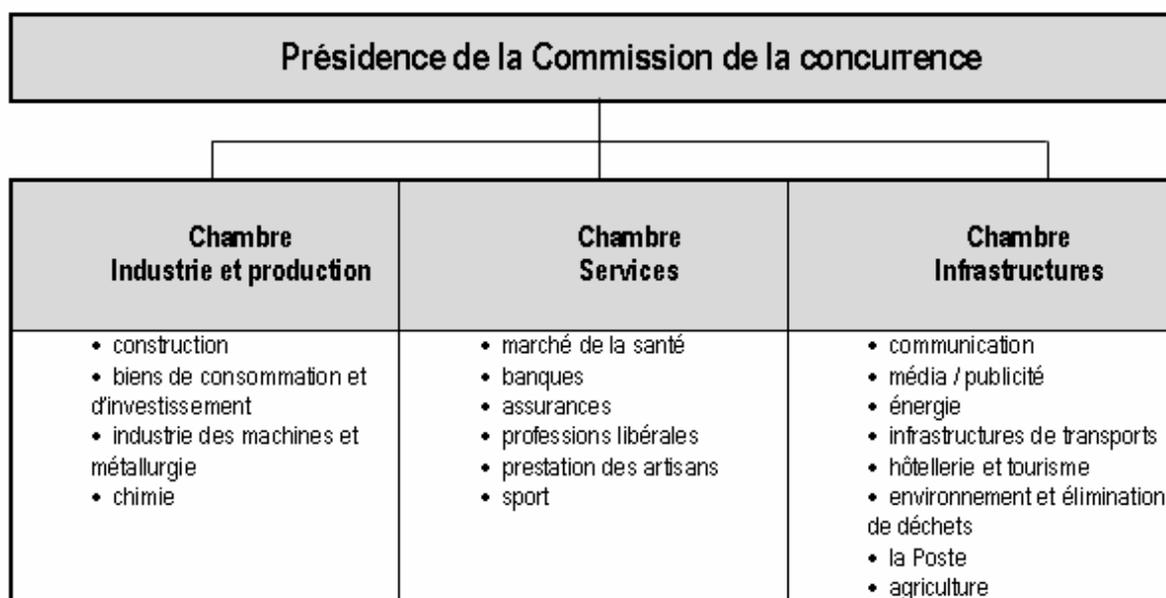
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## ANNEX 1

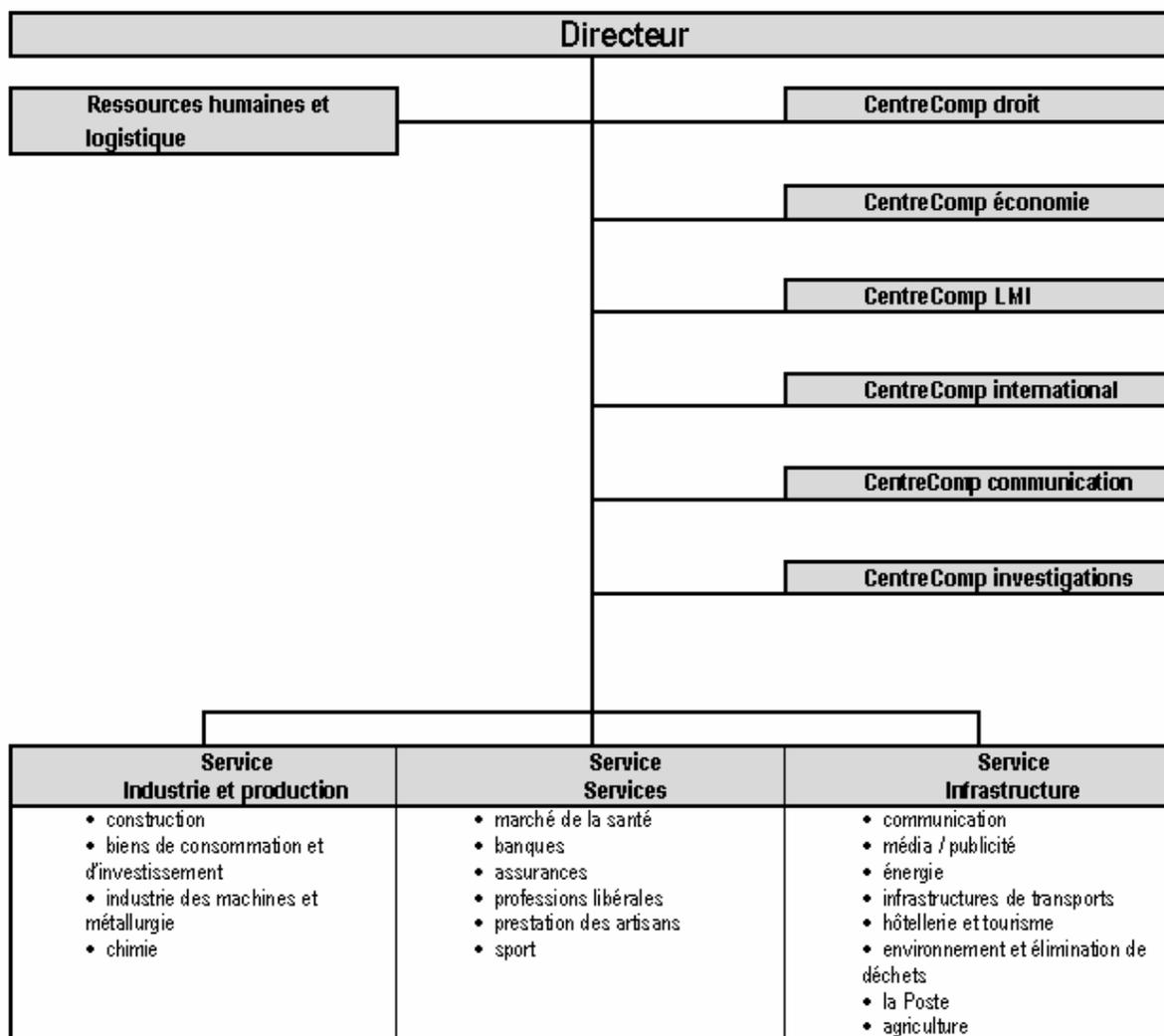
### ORGANISATIONAL CHART OF THE SWISS COMPETITION AUTHORITIES (in French only)

#### Organigramme des autorités de la concurrence



**ORGANISATIONAL CHART OF THE SWISS COMPETITION AUTHORITY  
(in French only)**

**Organigramme du Secrétariat de la Commission de la concurrence**



## ANNEX 2: COMCO'S ACTIVITIES IN 2003 AND 2004

<b>Investigations</b>	<b>2003</b>	<b>2004</b>
Carried out during the year	23	24
Carried over from the previous year	19	21
Opened	4	3
<b>Decisions</b>	<b>5</b>	<b>10</b>
with change of behaviour	2	1
with amicable settlement	1	2
with decision	2	3
Interim measures	2	1
Sanctions	1	0
<b>Preliminary investigations</b>	<b>2003</b>	<b>2004</b>
Carried out during the year	46	47
Carried over from the previous year	27	25
Opened	19	22
Closed	30	20
with opening of an investigation	4	3
with amicable settlement	7	2
with no further action	19	13
<b>Advice</b>	<b>2003</b>	<b>2004</b>
Under transitional measures of 20 June 2003	no data	154
Under Article 49.a.3 of the Cartel Act	no data	7
Relating to revised provisions	no data	56
<b>Market observation</b>	<b>2003</b>	<b>2004</b>
Carried out during the year	139	102
Completed	95	82
In progress	44	20
<b>Mergers</b>	<b>2003</b>	<b>2004</b>
Notifications	30	21
No intervention after preliminary review	25	16
Detailed review	5	6
Comco decisions	2	2
Provisional go-ahead	1	2
Sanctions	0	2
<b>Opinions, recommendations and positions</b>	<b>2003</b>	<b>2004</b>
Opinions (Article 15 of the Cartel Act)	0	3
Recommendations (Article 45 of the Cartel Act)	2	0
Opinions (Article 47 of the Cartel Act or Article 11 of the Passenger Transport Act)	2	7
Positions on applications for broadcasting licences	12	13
<b>Opinions, recommendations and positions (cont'd)</b>	<b>2003</b>	<b>2004</b>
Case monitoring	2	1
Communications (Article 6 of the Cartel Act)	0	1
<b>Internal Market Act</b>	<b>2003</b>	<b>2004</b>
Recommendations / Investigations	0	1
Opinions (Article 10.1 of the Internal Market Act)	1	0
Advice (Secretariat)	6	3

**ANNEX 3**

**COMCO'S ACTIVITIES RELATING TO RESTRAINTS OF COMPETITION  
(AGREEMENTS AND ABUSE OF DOMINANT POSITION)**

<b>Restraints of competition</b>		<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>	<b>2000</b>	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>
<b>Investigations opened</b>		<b>4</b>	<b>8</b>	<b>7</b>	<b>12</b>	<b>12</b>	<b>4</b>	<b>14</b>	<b>5</b>	<b>3</b>
	Agreements affecting competition		5	3	7	6	2	10	2	
	Abuse of dominant position	3	2	2	5	5	2		3	2
	Agreements and abuse of dominant position	1	1	2		1		4		1
<b>Final decisions</b>		<b>0</b>	<b>5</b>	<b>3</b>		<b>11</b>	<b>13</b>	<b>4</b>	<b>5</b>	<b>10</b>
	Change of behaviour before procedure completed						3	1	2	1
	Amicable settlement			1		2	2	2	1	2
	Prohibition decision		5	2	8	5	3	1	2	3
<b>Investigations opened on the basis of the Communication on Vertical Agreements</b>									12	

## ANNEX 4

### COMCO'S MERGER CONTROL ACTIVITIES

	1996	1997	1998	1999	2000	2001	2002	2003
<b>Notification</b>	1	22	26	33	54	35	42	30
<b>Permission granted after preliminary review</b>	1	19	22	31	52	33	38	25
<b>Permission granted after detailed review</b>	0	2	2	0	1	2	4	3
<b>Prohibition or conditional permission</b>	0	1	2	0	1	2	0	2

## NOTES

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10. Message concerning the Federal Act on cartels and other restraints of competition, 23 November 1994, p. 19, (RS 94.100).
11. Federal Act of 6 October 1995 on cartels and other restraints of competition, (RS 251).
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18. RS 251.5.
19. RS 241.
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21. RS 942.20.
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32. Comco (2004), 2003 Annual Report, Bern.
33. Comco (2004), *op. cit.*
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38. Any proposal of a new law or revision of existing law goes together with an explanation from the Federal Council, called Federal Council Message, which explains the proposal and comments on every new or revised provision of the law.
39. Rolf Dähler and Patrick Krauskopf (2003), *op. cit.*, p. 8.
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41. DPC 2001/2, p. 255 ss.
42. DPC 2001/1, p. 210 ss. In the SMA case, the Federal Court adopted a very restrictive interpretation of the notion of enterprise, concluding that it did not apply to SMA, and consequently overturned Comco's decision. The 2003 reform of the Cartel Act states that the term enterprise means any customer or supplier of goods or services in the commercial process regardless of legal or organisational form. This addition means that in a case similar to the SMA case, the Federal Court would no longer be able to overturn a Comco decision on the same grounds.
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60. RS 944.05
61. RS 943.02.
62. Article 10 of the Act (RS 172.021) states that persons called to render or prepare a decision (for which they are empowered) must disqualify themselves if they have a personal interest in the matter; if they are related to a party by blood or marriage in direct line or to the third degree in collateral line or if they are united by marriage, engagement or adoption; if they represent a party or have acted in the same case for a party; if, for other reasons, they could have a preconceived opinion in the matter.
63. <http://www.weko.admin.ch/kommission/00221/index.html?lang=fr>.
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66. Parliamentary Control of the Administration (2000), *La situation en droit des cartels*, report to the National Council Management Commission, 11 October 2000, Bern, p. 20.
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70. Parliamentary Control of the Administration, op.cit., pp. 20-21.
71. *NZZ*, 31.08.2002, page 15.
72. Federal Act of 20 December 1985 on price monitoring, RS 942.20.

73. Federal Ordinance on Post, 26.11.2003 RS 783.01.
74. Federal Act of 20 December 1968 on administrative procedure, RS 172.021.
75. Christian Bovet (2004), "Innovations procédurales et dawn raids: embuscades ou embûches?", in Walter Stoffel and Roger Zäch, eds., *Kartellgesetzrevision 2003: Neuerungen und Folgen*, Schulthess, Zurich, p.288.
76. Christian Bovet (2004), op. cit., p.288.
77. RS 313.0.
78. Christian Bovet (2004), op. cit., p.307.
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80. For insurance companies, banks and other financial companies, turnover is replaced respectively by the total amount of gross premiums and by gross income (by analogy with Article 9.3 of the Cartel Act).
81. RS 251.5.
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88. OECD (1995), Recommendation of the Council concerning co-operation between Member countries on anticompetitive practices affecting international trade, 27 July 1995, C(95)130/FINAL.
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104. DPC 2004/2, pp. 407-448.
105. DPC 1998/1, p. 158 ss. The Communication concerns the conditions under which type-approval and sponsorship agreements are justified, insofar as they govern or influence competition on the sporting goods market.
106. DPC 1998/2, p. 351 ss.
107. DPC 2002/2, p. 404 ss.
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123. International Energy Agency (IEA) (2003), *Energy Policies of IEA Countries: Switzerland 2003 Review*, Paris.
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125. Federal Act of 30 April 1997 on the Post Office, (RS 783).
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185. For some occupations, the cantons have already agreed to the automatic recognition of qualifications.
186. Comco (2005), op. cit., p. 14.
187. Commission des achats de la Confédération (2004), "Présentation et analyse des réponses au questionnaire relatif aux forces et faiblesses du droit des marchés publics", planned reform of government procurement law, 15 March 2004.  
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188. In 2002, purchases by Swiss railways amounted to 1.1 billion Swiss francs and purchases by the Post Office to about half that amount. *La Vie économique*, October 2003, page 49.
189. For more information, see the WTO website ([www.wto.org/english/tratop\\_e/gproc\\_e/chegen.doc](http://www.wto.org/english/tratop_e/gproc_e/chegen.doc)).
190. The text of the agreement can be consulted online at [www.europa.admin.ch/ba/off/abkommen/f/beschaffungswesen.pdf](http://www.europa.admin.ch/ba/off/abkommen/f/beschaffungswesen.pdf). It was notified to the WTO in document WT/REG94/R/B/3, 13 September 2004.
191. Federal Act of 16 December 1994 on government procurement, (RS 172.056.1).
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201. Comco (2005), op. cit., p. 6.
202. Question 04.3390 from Mrs. Doris Leuthard (National Council) and motion 04.3473 from Mr. Hans Hess (State Council).
203. Comco (2005), op. cit., p. 7.

204. Comco (2005), *op. cit.*, p. 8.
205. Goods means goods and services.
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- <sup>207</sup>. OECD (2004), *op. cit.*, p. 113 et p. 146.
- <sup>208</sup>. OECD (2004), *op. cit.*