

SWITZERLAND

(1st July 1997 - 30 June 1998)

I. Changes to competition laws and policies, adopted or envisaged**1. Summary of new provisions in competition law and related legislation**

1. The Federal Act of 6 October 1995 on cartels and other restraints of competition (LCart) has not been amended since it took effect on 1 July 1996.

2. On 25 February 1998 the Federal Council adopted an Ordinance on emoluments within the framework of LCart (Ordinance on LCart emoluments)¹. The Ordinance regulates the collection and calculation of emoluments by the Competition Commission and Secretariat in the context of administrative procedures and for opinions and other services provided in application of LCart.

2. Other measures taken in this area (including instructions and directives)

3. LCart Article 6 provides that the Competition Commission may prescribe by way of a Communication the conditions under which agreements relating to competition or particular forms of co-operation specific to certain branches of the economy are generally deemed to be justified for reasons of economic efficiency. In the period under review two communications were adopted on the basis of this provision.

4. On 15 December 1997 the Competition Commission adopted a communication relating to the endorsement and sponsoring of sports goods². This communication specified the conditions under which endorsement and sponsoring agreements are justified, inasmuch as these agreements govern or influence competition in the market for sports goods.

5. On 4 May 1998 the Competition Commission adopted a communication on pricing defining the conditions under which use of schedules issued by associations is justified³.

II. Enforcement of competition laws and policies**1. Action against anti-competitive practices, including cartels and abuse of dominant position****a.1) Summary of activities of the competition authorities**

6. During the period under review the Secretariat conducted a number of preliminary investigations in different areas, such as zero-address mailing (abuse of dominant position)⁴, the public telephone service's system of rebates for international calls (abuse of dominant position)⁵, school access to the Internet (abuse of dominant position)⁶, notaries' services in Lucerne (public law requirements)⁷, payments trafficking (abuse of dominant position)⁸, Zurich gas supply (agreements)⁹, emergency call number 140 (abuse of dominant position)¹⁰, medical product retailing (agreements)¹¹, code of collaboration between

SWITZERLAND

health insurance funds (agreements)¹², lake navigation service of the four cantons (abuse of dominant position)¹³, car breakdown service (agreements)¹⁴, chimney-sweeping service in Zoug Canton (agreements)¹⁵, charges of the Fiduciary Chamber of Geneva (agreements)¹⁶, fees of the association of doctors of Bern Canton (agreements)¹⁷, the Swiss certification market (unlawful agreements and abuse of dominant position)¹⁸, news-stands in railway stations (abuse of dominant position)¹⁹, CFF group traffic (abuse of dominant position)²⁰, participation in the “*Schweizer Spielmesse St-Gall*” (abuse of dominant position)²¹. In connection with the preliminary investigation concerning SWICA (agreements), the Competition Commission provisionally ordered an association of doctors not to recommend its members to have their names removed from the list of doctors participating in a new health insurance scheme (Nova Light)²².

7. The preliminary investigations which yielded no indication of unlawful restraint of competition were terminated. In the other cases, measures to remove or prevent restraints of competition were taken by mutual agreement with the undertakings concerned, or an investigation was opened.

8. The Competition Commission concluded three ordinary investigations during the period under review. These related to the following cases: “Sammelrevers für Musiknoten” (agreements)²³ concerning agreements between publishers and distributors of printed music, “Recymet SA” (agreements and abuse of dominant position)²⁴ concerning the market for used battery recycling, and “Telecom PTT-Fachhändlerverträge” (abuse of dominant position)²⁵ concerning special distribution contracts signed by the post and telecommunications service. A few words need to be said about each of the three decisions.

9. In the “**Sammelrevers für Musiknoten**” decision, the Competition Commission found that all the agreements between the publishers and distributors of printed music constituted horizontal restraints of competition and, because price fixing was involved, that they were unlawful within the meaning of LCart Article 5 § 3 a, the undertakings in question having failed to make a case for reversal of the presumption of unlawfulness. The parties concerned have appealed to the Federal Council to authorise these agreements as an exception, essentially for reasons of public interest. The Federal Council has not yet taken a position on the appeal.

10. In the “**Telecom PTT-Fachhändlerverträge**” decision, the Competition Commission ordered Swisscom to cease business practices constituting an abuse of dominant position prohibited by LCart Article 7. The Commission found that Swisscom favoured certain of its business partners by granting higher annual premiums to those of its distributors who obtained their supplies from it exclusively. This difference in treatment had no commercial justification, since distributors achieving identical sales figures with Swisscom products but also selling competitors’ products received lower premiums. Swisscom having appealed against the decision, the latter has not yet taken effect.

11. The “**Recymet**” decision concerns the Swiss market for used battery recycling, in which the Batrec SA and Recymet SA companies are the only two contractors. Pursuant to a complaint lodged by Recymet SA, the Competition Commission considered whether the exclusive contracts signed by Batrac SA with five battery collection firms were or were not unlawful agreements within the meaning of LCart Article 5 § 1, and whether certain practices by Batrec SA which were complained of constituted or did not constitute abuses of dominant position within the meaning of LCart Article 7. Although the Commission found no existence of unlawful agreements or practices, the operative part of its decision formally recognised that Batrec SA had a dominant position in its market. In the course of the proceedings the Commission denied two applications for interim injunctions lodged by the plaintiff.

a.2) *Price surveillance*

12. Switzerland's price surveillance authority is competent to act in cases of excessive pricing of goods and services where prices are set by cartels or firms with dominant positions. In the event of parallel procedures conducted by the Competition Commission and the Price Surveillance Authority, the procedures provided for by LCart take precedence over those provided for by the law on price surveillance, unless otherwise decided jointly by the two authorities.

13. Over the period from 1 January 1996 to 30 June 1997 the main price surveillance activities concerned cantonal premiums for real estate insurance, waste taxes, hospital taxes, prices of medicines and gas and water rates. In most cases the prices and rates concerned were steeply reduced in consequence²⁶.

a.3) *The Appellate Commission for matters of competition*

14. The Appellate Commission ruled on four cases during the period under review. In three cases the Competition Commission's decision was upheld. In the "Le Temps" case the Appellate Commission did not recognise the appellant's right to appeal²⁷. In the "Recymet" affair²⁸ the Appellate Commission upheld the Competition Commission's decision to refuse interim injunctions in this particular case. In the "Telecom PTT/Blue Window" decision the Appellate Commission did not give a judgement on the merits of the case, having established that the proceedings had become unnecessary²⁹. Finally, in the "Comtop AG" decision the Appellate Commission, on procedural grounds, overruled the Competition Commission's decision to impose a fine of SF 5 000 for non-compliance with the requirement to notify the concentration operation³⁰.

a.4) *The courts*

15. Over the period from 1 July 1997 to 30 June 1998 a number of suits for removal of an impediment to competition were brought before the civil courts. The purpose of these suits was to terminate, by way of interim injunctions, alleged breaches of competition law. The cases concerned were: "Teilnahme an einer Fachmesse" (Commercial Court of Aargau Canton)³¹, "Fluggesellschaften" (Commercial Court of Zurich Canton)³² and "Kiesaufbereitungsanlage" (High Court of Lucerne Canton)³³.

16. In a judgement on 3 November 1997 in the "Künstliche Besamung" case, the Federal Court upheld the decision of the Appellate Commission for matters of competition, which had overruled the decision of the Secretariat of the Competition Commission to issue interim injunctions³⁴. In line with the Appellate Commission, the Federal Court ruled that competence to issue interim injunctions did not lie with the Secretariat but with the Appellate Commission.

17. Finally, in its "Le Temps" decision of 23 March 1998 the Federal Court rejected the appeal under administrative law against the Appellate Commission's decision to withdraw the suspensive effect from the appeal before that same authority³⁵.

b) *Description of significant cases, notably those with international implications*

18. The Competition Commission instituted an ordinary investigation in October 1997 concerning the Volkswagen Group in Germany in the matter of restraint of direct and parallel imports of Volkswagen cars into Switzerland. This case is of particular significance for international co-operation between Switzerland and the EU. It has been referred to the Joint Switzerland/EU Committee for the 1972 Free

SWITZERLAND

Trade Agreement between Switzerland and the European Communities. Proceedings are taking their course.

2. *Mergers and acquisitions*

a) *Statistics on the number and types of mergers notified and/or monitored*

19. Thirty-one concentration operations were notified during the period under review: 16 in the second half of 1997 and 15 in the first half of 1998. Leaving aside two cases in which the notification was withdrawn by the parties, the Commission made a detailed examination in five cases. Of these five, three were authorised after examination and two were authorised subject to compliance with obligations and conditions. The notifications are detailed in the table that follows:

Names of enterprises and type	Result
2nd half of 1997	
Thyssen / Krupp / Hoesch ³⁶ (joint venture)	⊕
Rhône Poulenc / Merck / Merial ³⁷ (joint venture)	⊕
Rhône Poulenc / Merck / Merial ³⁸	◆
GE Capital Corporation / Bank Aufina ³⁹ (acquisition of control)	⊕
Migros / Globus ⁴⁰ (acquisition of control)	⊕
Siemens / Elektrowatt ⁴¹ (acquisition of control)	⊗
Nouveau Quotidien / Journal de Genève ⁴² (joint venture)	○
Valiant Holding / Bank in Langnau ⁴³ (merger)	⊕
Diax Mobile AG (joint venture)	⊕
Anzeiger von Uster / Druckerei Wetzikon AG ⁴⁴ (acquisition of control)	⊕
Anzeiger von Uster / Druckerei Wetzikon AG ⁴⁵	◆
CS Group / Winterthur Versicherungen ⁴⁶ (acquisition of control)	⊕
Adtranz CH / Schindler Waggon AG ⁴⁷ (acquisition of control)	⊕
Roche / Corange ⁴⁸ (acquisition of control)	⊕
Watt AG ⁴⁹ (joint venture)	⊕
CS / UBS / Fastbox Ticketservice AG ⁵⁰ (joint venture)	⊕
Zschokke / Locher ⁵¹ (acquisition of control)	⊕
Revisuisse Price Waterhouse / STG Coopers & Lybrand ⁵² (merger)	⊗
1st half of 1998	
GE Capital Corporation / Banque Procrédit ⁵³ (acquisition of control)	⊗
UBS / SBS ⁵⁴ (merger)	○
Alphacan Somo / Wavin AG (joint venture)	⊕
Comtop II ⁵⁵	*
ATAG/ Ernst & Young / KPMG (merger)	∇
Swisskey (Swisscom / Telekurs) (joint venture)	⊕
Berner Tagblatt Medien AG / Schaer Thun AG	∇
Post / Bevo (joint venture)	⊕
Compaq / Digital (merger)	⊕
Bell (Coop) / SEG Poulets AG (acquisition of control)	(∇)
Montres Rolex SA / Gay Frères SA (acquisition of control)	⊕
Curti & Co AG / SSG (acquisition of control)	⊕

Names of enterprises and type (cont'd)	Result
1st half of 1998	
Curti & Co AG / SSG	◆
Alcatel / Thomson (joint venture)	⊕
Thyssen / Krupp (merger)	(∇)
Batigroup / Stamm (acquisition of control)	⊕

Key:

⊕	=	No objection after preliminary examination (LCart Art. 23)
⊗	=	No objection after examination (LCart Art.33)
O	=	Authorisation subject to compliance with obligations and conditions
◆	=	Sanctions for non-compliance with prior notification requirement
∇	=	Notification withdrawn by parties
(∇)	=	Procedure in progress at 30 June 1998
*	=	Operation not subject to control of concentrations

b) *Description of some significant cases*

20. **“Le Temps”⁵⁶**: In the “Le Temps” case the Competition Commission delivered its first formal decision on control of concentrations (previous cases having led to position-taking only). The operation examined was for the creation of a joint venture by two press enterprises for the publication of a new daily newspaper in French-speaking Switzerland (“Le Temps”). Differentiating between readers’ markets and advertisers’ markets, the Commission did not find any particular problem concerning the latter. On the other hand, it found that the operation would lead to the creation or reinforcement of dominant positions liable to eliminate effective competition in different segments of the readers’ market in French-speaking Switzerland. The concentration was nevertheless authorised, subject to two obligations, in application of the failing company defence theory. The obligations imposed were the following: (i) any change in capital structure and voting power is subject to prior authorisation by the Competition Commission; (ii) the Chairman of the Board of the company publishing the newspaper “Le Temps” must be a person other than one of the principal shareholders.

21. **Rhône Poulenc/Merck⁵⁷** : The Competition Commission penalised the undertakings Merck & Co Inc and Rhône Poulenc S.A. for having conducted an operation of enterprise concentration during the period of provisional prohibition set by LCart Article 32 § 2. This was the first case in which the Commission had to take a position on the effect of foreign concentrations in Switzerland. It considered that such an effect was produced when the sales thresholds specified in LCart Article 9 § 1 b are reached (the specification being that at least two of the participating enterprises should have individually achieved a sales figure of at least SF 100 million). In setting the fine (SF 60 000 for each of the two participants) the Commission took account, *inter alia*, of the behaviour of the enterprises and gauged the amount of the fine in terms of effective preventive control of enterprise concentrations. This decision gave rise to an appeal which is still pending with the Appellate Commission for matters of competition.

22. **Revisuisse Price Waterhouse / STG-Coopers & Lybrand⁵⁸**: The Competition Commission reached the conclusion that competition will not be affected by the concentration in question. The Commission considered that the other auditing firms present in the market are sufficiently powerful to compete effectively with the new entity. Furthermore, the concentration will not give rise to a collective dominant position attributable to a situation conducive to parallelism by all the leading audit companies. Such parallelism is excluded by the heterogeneity of auditing services and the lack of transparency in the market. The fees earned by audit companies in this market largely derive from a limited number of assignments. The latent threat posed by clients to audit companies -- changing to another firm if the current auditor is not behaving competitively -- has a strong regulating effect, even more so if these big firms are also clients for other services.

SWITZERLAND

23. **UBS /SBS⁵⁹**: The merger of the Union de Banques Suisses and the Société de Banque Suisse caused the Competition Commission to undertake a close scrutiny of the trade credit and mortgage credit markets. Finding that the merger could lead to a collective dominant position in the market for business credit of up to SF 2 million, the Commission authorised the concentration subject to four obligations. First, UBS is required to sell approximately 25 banking outlets, if possible to a sole purchaser interested in Swiss retail banking. These outlets must be located in the three main speech regions and have a strong position in retail banking in Switzerland. Second, the new bank will have to sell two of its establishments (“SoBa Solothurner Bank” and “Banca della Svizzera Italiana”) and an enterprise specialising in bank computer systems (Bosslab). Third, UBS SA must continue to participate in the banks’ joint institutions and purchase their services. Fourth, it must maintain until 2004 the business credit for up to SF 4 million that accumulates because of the concentration.

III. Role of the competition authorities in the enforcement of other policies, including regulatory reform and trade and industrial policy measures

1. Activities of the competition authorities pursuant to LCart

24. An essential task of the competition authorities is their participation in the legislative process in the form of preliminary advice, at both the federal and cantonal levels (LCart Art. 46). Furthermore, the Competition Commission is required to monitor the competition situation and make recommendations to the authorities for the purpose of promoting effective competition (LCart Art. 45). It is appropriate here to report on the principal activities of the competition authorities pursuant to LCart Articles 45 and 46.

a) Professional services

25. As regards cantonal regulations, the Competition Commission has made it possible for notaries in Bern Canton to authenticate all title deeds in all district offices of the canton’s land registry, regardless of where their registered office is located. It also requested an amendment of the Lucerne Canton law that gave public notaries competitive advantages over private notaries⁶⁰. As regards attorneys, the Commission has requested several cantons to amend their laws on that profession so as to eliminate the provisions regulating attorneys’ fees⁶¹.

26. The Competition Commission also proposed that the federal lawmakers introduce into the Federal Act on free movement of attorneys a provision prohibiting the cantons from maintaining scales for attorneys’ fees in their legislation⁶². After approval by the Commission, the Swiss Attorneys Federation recommended the cantonal bars to amend their statutes and prescribed customs so as to bring them in line with the Cartels Act. Most of the cantonal benches followed the recommendations of their superior body.

b) Electricity

27. The position taken on 11 May 1998 on the bill of law concerning the electricity market (LME), which will not be deregulated before the year 2000, is one of the important instances of preliminary advice given by the Competition Commission during the period under review. The Commission welcomes the progressive liberalisation that will take place in parallel with that of the EU. However, it has certain criticisms to make about the bill, notably on three points: compensation for non-recoverable investments, the provisions for promotion of renewable energy sources, and the establishment of a special arbitration committee for questions of interconnection.

c) *Health care*

28. The Competition Commission took a position on the preliminary draft of a federal act on the medical professions by requiring compliance with the principles of non-discrimination and competitive neutrality in the selection of doctors for internships and postgraduate training⁶³.

d) *New Public Management*

29. New public management is an important area. Several instances of position-taking by the Competition Commission have concerned the regulation of economic activities of the Confederation which are in competition with private enterprises. In its position-taking on the draft amendment of the Federal Act on Meteorology and Climatology, the Commission stressed that the Swiss Institute of Meteorology (ISM) must observe the principles of competition law and that, as a public corporation, it must not disturb competition among private suppliers. Accordingly, the private and public tasks and activities of the ISM must be separated according to precise and transparent criteria. The Commission also gave a ruling on the relations between the Federal Office of Topography and a private map-printing firm.

2. *Activities of the competition authorities in connection with the LMI (Domestic Market Act)*

a) *Public procurement*

30. With reference to the article of legislation on public procurement (LMI Art. 5), the Competition Commission and its Secretariat gave preliminary advice on several occasions concerning amendments in progress. In the context of the amendment of procurement legislation in the cantons of Basel-Town and Basel-Country, the Commission specified that participation in a procurement contract could not depend upon participation in an industrial agreement⁶⁴. Furthermore, the Commission's recommendations of May 1998 concerning the draft amendment of the intercantonal agreement on procurement clarified several important points of Swiss law on procurement, such as the question of compliance with labour standards or the conditions of application of the selection procedure.

b) *Other*

31. Procurement aside, the Secretariat took a position on questions concerning the validity of professional credentials in Switzerland (attorney's certificate in Aargau Canton and inkeeping licences in Basel-Country Canton) and on general questions relating to the scope and effects of the Domestic Market Act.

IV. *Resources of the competition authorities*

1. *Annual budget*

32. The budget for 1997 amounted to SF 3 138 300 and the budget for 1998 is SF 4 921 300.

SWITZERLAND

2. *Establishment*

33. The Competition Commission has 15 members. The Secretariat comprises 42 persons: 21 jurists, 13 economists, 7 support staff and 1 other professional.

V. **Short list of new reports and studies on questions relating to competition policy (or bibliographical references)**

1. The competition authorities regularly publish their activities in the periodical “Droit et Politique de la Concurrence” (DPC).

BALDI Marino/BORER Jürg, “Das neue schweizerische Kartellgesetz – Bestimmungen über Wettbewerbsabreden und marktbeherrschende Unternehmen”, WuW 4/1998, pp. 343 et seq.

DÄHLER Rolf, “Konzentration – Die Fakten und das Recht” in: Gauch/Fleiner/Volken (Hrsg.), Die Schweiz im Umbruch, Freiburg, pp. 97 et seq.

DROHLSAMMER Jens, “Entwicklungen im Wettbewerbs- und Kartellrecht/Le point sur le droit de la concurrence”, Schweizerische Juristen Zeitung 94/1998, pp. 232 et seq.

DUCREY Patrik, “Vorsorgliche Massnahmen im Kartellverwaltungsrecht”, Sic 3/1998, pp. 281 et seq.

HOMBURGER Eric/SCHMIDHAUSER Bruno/HOFFET Franz/DUCREY Patrik, “Kommentar zum schweizerischem Kartellgesetz”, Zürich, Zweite Lieferung 1997.

SCHERRER Frank, “Fusionkontrolle nach revidiertem Kartellgesetz – erste Fälle und offene Fragen”, Aktuelle Juristische Praxis 11/1997, pp. 1391 et seq.

STOFFEL Walter A., “Le droit suisse de la concurrence 1997 : les premières expériences avec la nouvelle LCart”, SZW/RSDA, pp. 249 et seq.

TERCIER Pierre/VENTURI Silvio, “Le contrôle des concentrations dans le nouveau droit suisse de la concurrence”, Revue de droit des affaires internationales No. 2 1997, pp. 203 et seq.

TERCIER Pierre “Le matériel sportif officiel et le sponsoring ; aspects du droit de la concurrence”, Aktuelle Juristische Praxis 1/1998.

VON BÜREN Roland/COTTIER Thomas (eds.), “Die neue schweizerische Wettbewerbsordnung im internationalen Umfeld”, Bern, Stämpfli, 1997.

NOTES

1. RS 251.1; DPC 1998/1, pp. 150 et seq.
2. DPC 1998/1, pp. 158 et seq.
3. Not yet published in DPC.
4. DPC 1997/3, pp. 301 et seq.
5. DPC 1997/3, pp. 308 et seq.
6. DPC 1997/3, pp. 312 et seq.
7. DPC 1997/3, pp. 317 et seq.
8. DPC 1997/3, pp. 322 et seq.
9. DPC 1997/3, pp. 326 et seq.
10. DPC 1997/3, pp. 329 et seq.
11. DPC 1997/4, pp. 452 et seq.
12. DCP 1997/4, pp. 460 et seq.
13. DPC 1997/4, pp. 465 et seq.
14. DPC 1997/4, pp. 469 et seq.
15. DPC 1997/4, pp. 472 et seq.
16. DPC 1997/4, pp. 479 et seq.
17. DPC 1997/4, pp. 481 et seq.
18. DPC 1997/4, pp. 487 et seq.
19. DPC 1998/1, pp. 1 et seq.
20. DPC 1998/1, pp. 10 et seq.
21. DPC 1998/1, pp. 14 et seq.
22. DPC 1998/1, pp. 32 et seq.
23. DPC 1997/3, pp. 334 et seq.
24. DPC 1997/4, pp. 490 et seq.
25. DPC 1997/4, pp. 506 et seq.
26. DPC 1997/5, pp.655 et seq.

SWITZERLAND

27. Decision of the Appellate Commission of 23.3.1998, DPC 1998/1, pp. 114 et seq.
28. Decision of the Appellate Commission of 6.11.1997, DPC 1997/4, pp. 602 et seq.
29. Decision of the Appellate Commission of 5/14.5.1998, DPC 1997/4, pp. 598 et seq.
30. Decision of the Appellate Commission of 15.5.1998, not yet published in DPC.
31. DPC 1997/4, pp. 626 et seq.
32. DPC 1997/4, pp. 635 et seq.
33. DPC 1998/1, pp. 125 et seq.
34. Federal Court order of 3 November 1997, DPC 1997/4, pp. 618 et seq.
35. Federal Court decision of 23 March 1998, DPC 1998/1, pp. 123 et seq.
36. DPC 1997/3, pp. 344 et seq.
37. DPC 1997/3, pp. 350 et seq.
38. DPC 1998/1, pp. 98 et seq.
39. DPC 1997/3, pp. 358 et seq.
40. DPC 1997/3, pp. 364 et seq.
41. DPC 1997/3, pp. 385 et seq; DPC 1997/4, pp. 540 et seq.
42. DPC 1997/3, pp. 385 et seq.
43. DPC 1997/4, pp. 515 et seq.
44. DPC 1997/4, pp. 519 et seq.
45. DPC 1998/1, pp. 92 et seq.
46. DPC 1997/4, pp. 524 et seq.
47. DPC 1997/4, pp. 532 et seq.
48. DPC 1998/1, pp. 62 et seq.
49. DPC 1997/4, pp. 558 et seq.
50. DPC 1997/4, pp. 572 et seq.
51. DPC 1998/1, pp. 91 et seq.
52. FF 1997 IV 1352.
53. FF 1998 I 599.
54. FF 1998 I 600.

55. DPC 1998/1, pp. 89 et seq.
56. DPC 1998/1, pp. 40 et seq.
57. DPC 1998 1, pp. 98 et seq.
58. Commission decision of 20 April 1998, not yet published in DPC.
59. Commission decision of 20 April 1998, not yet published in DPC.
60. DPC 1997/4, pp. 576 et seq.
61. DCP 1997/4, pp. 582 et seq.
62. DPC 1997/4, pp. 579 et seq.
63. DPC 1998/1, pp. 109 et seq.
64. DPC 1997/4, pp. 591 et seq.