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(1 July 1998 - 30 June 1999)

I. Changes to competition laws and policies, proposed or adopted

1. Summary of new legal provisions of competition law and related legislation

1. The Federal Act of 6 October 1995 on Cartels and Other Restraints on Competition (“LCart”) has not been amended since it entered into force on 1 July 1996.

2. Other relevant measures, including new guidelines

2. On 7 September 1998, and pursuant to LCart Article 23, paragraph 2, the Secretariat of the Competition Commission published a **notification form for reporting business concentration transactions**¹ in the German, French, Italian and English languages. The form stipulates the information to be provided in compliance with Article 11 of the Ordinance of 17 June 1996 on the Control of the Concentration of Undertakings (“OCCE”), for the purpose of reporting business concentration transactions as defined by LCart Art. 4, par. 3 and Art. 9. It facilitates comprehensive reporting and enables the competition authorities to carry out preliminary reviews quickly and without hindrance (Art. 10, par. 1 and Art. 32, LCart). It also allows for simplified notification if, for example, the Competition Commission (“Comco”) is already familiar with the affected markets because of a previous ruling, or if a joint venture is being created in order to enter a new and developing market². In any event, the contents of the simplified notification form must be cleared with the Commission Secretariat.

3. LCart Art. 15, par. 1 stipulates that if the legality of a restraint on competition is called into question during a civil procedure, the civil judge is required to refer the matter to Comco for an opinion. On 12 October 1998, Comco handed down a **ruling on jurisdictional and procedural principles for the establishment of legal advisories**: 1) Comco would base its opinion solely on the facts as presented by the civil judge, i.e. it would not seek additional facts; and 2) if the facts presented by the civil judge were incomplete, Comco would include certain reservations in its opinion without first inviting the civil judge to supply additional information. To enable civil judges to ascertain the facts Comco would need to formulate an opinion, the competition authority has decided to publish a vade-mecum on the subject (currently under preparation).

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II. Enforcement of competition laws and policies

1. *Action against anticompetitive practices, including agreements and abuses of dominant positions*

a.1) *Summary of activities of the competition authorities*

4. During the period under review, the Secretariat announced that it had concluded ten preliminary investigations. Cases of alleged *unlawful agreements* (Art. 5, LCart) involved “doctors’ fees under health insurance plans”³ and “calcareous sandstone”⁴. *Abuse of dominant position* (Art. 7, LCart) cases dealt with “development and distribution of construction software”⁵, “approval and sponsorship of footballs”⁶ and “beer distribution”⁷. Lastly, the following cases were reviewed with regard to provisions on both *unlawful agreements* and *abuse of dominant position* (Arts. 5 and 7, LCart): “installation and repair of postage meters”⁸, “distribution of medicinal drugs”⁹, “surgical implants for osteosynthesis”¹⁰, “hospital charges for out-patient care”¹¹ and “production of ready-mix concrete”¹².

Seven of these ten preliminary investigations were dropped for lack of evidence of unlawful restraints on competition as defined by LCart. In the other three cases, measures to eliminate or preclude such restraints were taken with the consent of the companies in question.

5. Between 1 July 1998 and 30 June 1999, Comco also concluded six ordinary investigations. Cases of *unlawful agreements* (Art. 5, LCart) included: “Fuel-oil burners and gas burners”¹³, “Technical gases”¹⁴ and “Artificial insemination of cattle”¹⁵. Investigations of *abuses of dominant positions* (Art. 7, LCart) looked at “Swisscom – Centrex”¹⁶ et “Minolta”¹⁷, whereas “Lists of hospitals for semi-private insurance plans offering a limited choice of hospitals”¹⁸ was reviewed from the standpoint of provisions on both *unlawful agreements* and *abuse of dominant position* (Arts. 5 and 7, LCart). The issues explored in these ordinary investigations were as follows:

6. In respect of the market for central heating services and repairs, Comco held in its “**Fuel-oil burners and gas burners**” ruling that the annual price lists issued by the installers’ associations for time and materials, subscription prices and other after-sales services constituted unlawful price agreements under LCart Art. 5, par. 1 and Art. 3. The Commission prohibited application of the lists and directed the associations to so inform their members and the public.

7. The “**Technical gases**” ruling involved unlawful agreements between Switzerland’s four main gas suppliers. The agreements covered such areas as selling prices for gas and beams, mutual protection of customers and the installation of new gas storage facilities. It should be noted that these agreements were dissolved by the participating firms on 5 November 1996 following introduction of the new LCart on 1 July 1996. However, the agreements continued to produce anticompetitive effects even after they were abandoned because they included supply contracts for between five and ten years. As a result, Comco directed the four companies concerned to allow their customers to extend their existing contracts on fair market terms or to conclude new contracts with other suppliers.

8. In the “**Artificial insemination of cattle**” case, Comco found that the fact that the Swiss Association for Artificial Insemination (SVKB) supplied cattle semen only to veterinarians who belonged to the Association constituted an abuse of dominant position under LCart Art. 7, paragraph 2 e). The authority declared the exclusivity clauses unlawful and directed that remedial measures be taken.

9. In the “**Swisscom - Centrex**” case, the former monopoly supplier of telecommunications services (Swisscom) had refused to install “Centrex” communication systems unless users obtained their auto-

switches from Swisscom's own range. In an out-of-court settlement with Comco, Swisscom agreed to offer "Centrex" services on a non-discriminatory basis, irrespective of the origin of users' auto-switches.

10. In the last case, an independent repairer of photographic products lodged a complaint with the Price Surveillance Office over "**Minolta**"'s refusal to deliver spare parts. The case was referred to the competition authority, which opened an investigation on 7 June 1997. In this particular instance, and because of the interdependencies between the purchase of a camera and subsequent servicing thereof, Comco defined the product market as a *system market*. In such a market, the main product and subsequent servicing constituted a composite product; competition in the primary market therefore exerted a disciplinary effect on the downstream market. In terms of camera sales, Minolta, with a 24 percent market share in 1998, had a large number of competitors (between 15 and 20) and did not have a dominant position. Consequently, its actions did not fall within the scope of LCart Art. 7.

11. With regard to "**Lists of hospitals for semi-private insurance plans offering a limited choice of hospitals**", the Comco Secretariat received a request from the Private Hospital Association of the canton of Bern to prohibit use of a system that had been established unilaterally by two Swiss health insurers to classify the rates charged by private hospitals. In its ruling of 19 April 1999, Comco held that the insurers in question did not occupy a dominant position in the Swiss health insurance market, and that the co-operation agreement they had concluded would not significantly affect effective competition in the relevant market.

a.2) *Summary of activities of the Price Surveillance Office*

12. The main activity of the Price Surveillance Office involves state-regulated prices. In the event that parallel measures are taken by Comco and the Price Surveillance Office, procedures under LCart take precedence over those under the Price Surveillance Act, unless the two authorities decide otherwise by mutual consent. In practice, however, there is rarely any overlap in jurisdiction between the two bodies, since state-regulated market and price regimes, as well as the special rights conferred on businesses that perform public functions, are in many cases exempt from direct application of LCart¹⁹.

13. Between 1 July 1998 and 30 June 1999, the main activities of the Price Surveillance Office involved **hospital charges**—an area in which prices and costs are continuing to rise. Nevertheless, the action of the Price Surveillance Office, along with that of the Federal Council (as an appellate body in this respect), exerts a positive influence on rates. On 1 January 1999, the **prices of medicinal drugs** on the list of specialities for at least 15 years²⁰ were submitted for international comparison. As a result, a number of prices were cut, achieving about two-thirds of the potential savings in this area. Two decisions concerned **Swisscom SA**, which, in the first case, had raised the price of its telephone directories by over 400 percent in a single increase and, in the second case, had refused to hand over requested information and documents to a Price Surveillance officer. In **property insurance**—a field in which cantonal establishments enjoy monopolies in 19 cantons, premiums were adjusted in the wake of a study published three years earlier by the Price Surveillance Office. Because of the capital investment that is needed to renew reservoirs and pipes, **water rates** are expected to show hefty increases: water prices are in many cases high because of the depreciation rates and methods set forth in cantonal regulations. Getting those regulations amended is currently one of the Price Surveillance officer's main concerns. Lastly, with regard to **household refuse incineration plants**, the Price Surveillance officer opposed the construction of new such plants, which would lead to excess capacity at national level. In his view, better use of the capacities of existing plants would be good for waste-exporting and waste-importing cantons alike. It is now up to the cantons concerned, incinerator operators and the relevant federal authorities to take appropriate action.

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a.3) Summary of activities of the Federal Communications Commission

14. The Federal Communications Commission (“ComCom”) was created in September 1997 as an independent licensing authority in conjunction with the liberalisation of the telecommunications market. Under the Telecommunications Act of 30 April 1997 (“LTC”), the Commission’s powers are as follows: a) grant licences to provide telecommunications services (Art. 4, LTC), provide universal service (Art. 18, LTC) and use radiocommunications frequencies (Art. 22, LTC); b) set terms for interconnection, in the first instance, if service providers fail to reach agreement (Art. 11, LTC); c) approve the national plan for the allocation of frequencies (Art. 25, LTC) and approve national numbering plans and set rules for ensuring that numbers are portable and service providers have freedom of choice (Art. 28, LTC); and d) impose sanctions for infringements of the Act and, if warranted, revoke licences (Art. 58, LTC). Since its creation, ComCom has handed down a number of rulings in its areas of activity, with its decisions on mobile telephony and interconnection proving most important²¹.

15. Liberalisation of the telecommunications market on 1 January 1998 triggered a widespread drop in prices. While it is difficult to compare rates from one operator to another, it can be seen that price cuts were smallest for local telephone services (where Swisscom has only one competitor) but much more substantial for international calls (where competition is much keener). In mobile telephony, competition was also a factor: at the end of 1998, 26 companies signed interconnection contracts with Swisscom and six with other firms. This subject, already highly controversial within the industry, may keep ComCom busy for some time to come, since the Federal Council is introducing a new system of calculation for the year 2000; in the light of what has been done in Switzerland and abroad, this may include new measures moving in the direction of concepts similar to unbundling and local loops.

16. While some 170 providers of telecommunications services express great interest in the Swiss market, the market’s dimension and developments at global level are going to lead to a concentration of forces (in joint ventures based on convergence of services or market extension, acquisitions, mergers, withdrawals and failures). Even if this concentration is played out largely outside of Switzerland, it will have repercussions on the domestic market as well.

a.4) Summary of activities of the Appeals Board for competition matters

17. The most important decision that the Appeals Board (“REKO”) handed down during the period under review involved the “**Télécom PTT - specialised distributors’ contracts**” case²². Swisscom (formerly “Télécom PTT”) appealed Comco’s decision of 15 December 1997 that the undertaking had discriminated against some of its trading partners by granting higher annual bonuses to distributors who purchased from it on an exclusive basis²³. REKO granted the appeal and reversed Comco’s ruling, finding 1) that the competition authority had infringed Swisscom’s right to a hearing, and 2) that Comco had not sufficiently clarified the facts of the case and failed to gather enough proof of the alleged discrimination. In addition, REKO stressed that the complex circumstances that often prevailed in competition cases demanded due regard for the right of the undertakings involved to be heard, as well as thorough analysis of the facts of the case.

a.5) Summary of activities of cantonal courts

18. During the period from 1 July 1998 to 30 June 1999, the “**Kodak**” civil suit was heard by the Commercial Court for the canton of Zurich²⁴. In its ruling of 23 November 1998, the Court held that international patent rights had been extinguished in Switzerland and therefore authorised parallel imports of Kodak products. The case is currently pending before the Federal Court, which is to hand down its ruling in the autumn of 1999.

a.6) *Summary of activities of the Federal Court*

19. During the period under review, the Federal Court ruled on three cases involving competition law or closely related matters:

20. In the first case, “**Nintendo/Gameboy**”²⁵, the Court upheld the principle of international extinction in the area of copyright in Switzerland—a principle it had already established in respect of trademark rights—thus authorising parallel imports²⁶.

21. In the second case, “**X/Appeals Board for competition matters and the Competition Commission**”²⁷, the Federal Court ruled in favour of Comco and REKO, which had denied a third party’s right to appeal the authorisation of a concentration transaction on the grounds that the authorisation had not been notified thereto. According to the Court, the appellant’s status as shareholder and consumer vis-à-vis the undertakings in question did not establish a close enough relationship and did not constitute an interest such as to warrant protection in the form of a reversal of the concentration authorisation.

22. In the third case, **Pistorius/Prazak**²⁸, the Federal Court held that a ban on competition contained in an agreement between two individuals theoretically did not fall within the scope of LCart²⁹.

a.7) *Summary of activities of the Federal Council*

23. The Federal Council’s September 1998 decision in the “**Sheet music trade**” case³⁰ was especially significant. By refusing to authorise the agreement on sheet music that Comco had deemed unlawful³¹, the Federal Council gave a clear and unambiguous signal: an unlawful restraint on competition could be authorised only if it were *necessary* to preserve compelling public interests and only if there were no other remedy less detrimental to effective competition³².

24. In its ruling of 3 February 1999 on “**Charges for out-patient care**”³³, the Federal Council held that, in the areas of medical care and health insurance, the freedom of commerce and industry was restricted insofar as Parliament had explicitly regulated the system of charges for medical services. In addition, the Council did not address the question of the inapplicability of LCart by virtue of LCart Art. 3³⁴ and the Federal Health Insurance Act (“LAMal”), which imposes strict rules on pricing agreements between health care providers and health insurers.

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

25. Following the Federal Council’s decision not to authorise the sheet music agreement (see paragraph 23), Comco examined similar **agreements concerning German-language books**. Pricing agreements, in the form of joint guarantee letters, set final selling prices for Switzerland. On 28 September 1998, Comco began an investigation of domestic and foreign signatories of such letters having effects in Switzerland.

2. *Mergers and acquisitions*

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

26. During the period under review, 38 concentration transactions were reported: 11 in the second half of 1998 and 27 in the first half of 1999. Disregarding the “Viag/Algroup” case, in which notification was withdrawn by the parties³⁵, the Commission conducted an extensive investigation of only one case

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("Bell/SEG"). The proposed transaction was authorised subject to certain obligations and conditions and is described in greater detail below.

The following table shows Comco's activity with regard to corporate mergers.

Names of participating enterprises and Type	Result
2 nd half 1998	
<u>"Industry and production" market services</u>	
Krupp / Thyssen (M)	⊕
Daimler / Chrysler (M)	⊕
CHS / Vobis	⊕
Bell / SEG (AC)	○
Shell / Exxon (JV)	⊕
Usego / Lekkerland (JV)	⊕
<u>"Services" market services</u>	
Banque Nationale de Paris (BNP) / United European Bank in Geneva (UEB) (AC)	⊕
Generali / Banca della Svizzera italiana (AC)	⊕
<u>"Infrastructure" market services</u>	
ESTEL (JV)	⊕
Swisscom / UTA (JV)	⊕
PubliGroupe / Swisscom (JV)	⊕
1st half 1999	
<u>"Industry and production" market services</u>	
Tony / Sântis (M)	⊕
Daimler Chrysler / ABB Daimler-Benz (M)	⊕
Carrier / Toshiba (M)	⊕
Emmi / Coop (AC)	⊕
Viag / Algroup (M)	∇
BAT / Rothmans (AC)	⊕
Bon Appetit / Usego Hofer Curti AG (AC)	⊕
Renault / Nissan (AC)	⊕
ABB / Alstom (JV)	⊕
Ford Motor Company / Volvo Car Corporation	⊕
<u>"Services" market services</u>	
Société Générale / Banque Paribas (M)	⊕
Preussag / Carlson Wagon-lit / WestLB Girozentrale (AC)	⊕
Generali / Secura (AC)	⊕
Rentenanstalt / Gotthardbank (AC)	⊕
HSBC / Republic National Bank of New York (M)	(∇)
<u>"Infrastructure" market services</u>	
Post / Bertelsmann (JV)	⊕
Swisscom / Unisource Business Networks (Switzerland) AG (AC)	⊕
Deutsche Post / Danzas (AC)	⊕
Batrec / Recymet (M)	⊕
Express / Impartial (M)	⊕
Axel Springer / Handelszeitung (AC)	⊕
TA Media / Radio Zürichsee (AC)	⊕
Edipresse / SDAP (AC)	⊕
Panalpina / Jacky Maeder (AC)	⊕
Dow Jones / Reuter (JV)	⊕
Kiosk AG / Melisa	(∇)
TUI / ITV	(∇)

Legend:

- ⊕ = No objection after preliminary review (Art. 32, LCart)
 - ⊗ = No objection after review (Art. 33, LCart)
 - = Authorisation subject to obligations and conditions
 - ◆ = Sanctions for violation of the prior notification obligation
 - ∇ = Notification withdrawn by the parties
 - (∇) = Procedure in progress at 30 June 1998
 - * = Transaction not subject to control over concentrations
- M=Merger; AC=Acquisition of control; JV=Joint venture

b) *Summary of significant cases*

27. The acquisition of the **SEG Poulets** slaughterhouse by **Bell SA**, a subsidiary of Groupe Coop, is the only case that prompted an extensive investigation³⁶. The case revealed two particularly interesting aspects:

28. First, domestic poultry production is protected by state regulations (quotas) applicable to poultry imports. The Ordinance on Poultry of 7 December 1998 ties poultry imports to purchases of domestic production by requiring importers of foreign poultry to buy domestic poultry in a certain ratio (1:0.68). The result is higher import prices, especially insofar as the slaughter of domestic chickens abroad is precluded for legal reasons (involving health and customs) and marketing considerations (the transport of live animals over long distances would detract from the products' image). For these reasons, the market affected by the concentration transaction is that of the slaughter of domestic poultry in Switzerland—a market in which the slaughterhouses vertically integrated by Migros and Coop (Switzerland's two largest retailers) hold a combined market share of 80-90 percent. Moreover, wholesalers and importers are in a position of dependence vis-à-vis chicken slaughterhouses in Switzerland.

29. It therefore proved necessary to look into joint dominance by Migros (with its Optigal SA slaughterhouse) and Coop (Bell) of the market affected by the concentration transaction. In the analysis, nine of the following ten criteria showed the existence of *incentives to sustained* collusive behaviour by the two businesses. It turned out that: a) *respective market shares* were significant and had remained stable in recent years; b) the *market phase* showed saturation of demand, with a low rate of innovation; c) *price elasticity* was low, given the “one-stop shopping” behaviour of most consumers; d) *product homogeneity* and *symmetry of business structures and costs* were very high; e) *market transparency* was also high; f) there was no *competition of substitution* with regard to poultry slaughtering; g) *foreign competition* was non-existent for the legal and marketing reasons cited above; h) *market power* would not have exerted beneficial corrective effects either upstream (feeding, fragmented structure) or downstream (retail market, dominated by Migros and Coop); and i) there were substantial *barriers to entry* due to high sunk costs (major investment in slaughtering infrastructure) and existing excess capacity; j) the absence of interdependencies with regard to personnel or capital between Migros and Coop did not alter Comco's opinion that the transaction in question would have led to a situation of joint dominance by the two firms.

30. In the end, Bell SA (Coop) was allowed to acquire SEG Poulets only on one condition: that Bell sell its majority interest in Favorit SA, which was Switzerland's third-largest chicken slaughterer (with a roughly 7 percent share of the market). In this way it was possible to offer smaller players a viable alternative, letting them counterbalance the slaughterhouses owned by Migros and Coop. In addition, this case shows that the state's protectionist regulation (in favour of domestic poultry producers) indirectly contributed to strengthening the position of the large distributors in the market in question.

III. **The role of competition authorities in the formulation and implementation of other policies, e.g. regulatory reform, trade and industrial policies**

I. *Activities of the competition authorities with respect to LCart*

31. An essential task of the competition authorities is their participation in the legislative process by offering advisory opinions, on both the federal and cantonal levels (LCart Art. 46). In addition, Comco regularly monitors competitive conditions and can provide government with recommendations to promote effective competition (LCart Art. 45). Some of these prerogatives are illustrated below.

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a) *Advisory opinions*

32. In the course of a consultation procedure, Comco examined two bills dealing with the introduction of **taxes on non-renewable energy**. The first had been prepared by the National Council, and the second came from the Council of States³⁷. Comco welcomed the principle of an internalisation of external costs that would lessen distortions of competition in the realm of energy. In addition, the Commission endorsed the gradual introduction of a capped incentive tax, to be differentiated between energy products and with revenues going to the community and to the economy. Comco opposed subsidising domestic hydroelectric power, but it was in favour of promoting fundamental research into solar energy and energy from the biomass. Lastly, Comco deemed that, to preserve Switzerland's international competitiveness, energy-intensive industries should not be taxed unless similar taxes were introduced in other countries.

33. In the consultation procedure regarding the **draft Electricity Market Act ("LME")**, Comco hailed the efforts undertaken to liberalise the electricity market in Switzerland. It felt, however, that only a *clear separation between distribution and production* could ensure effective competition in the electricity market. It therefore stressed the need to create a private national company to operate the national power grid, independent of generating companies. However, Comco felt it unnecessary to create an *arbitration board* modelled after the Federal Communications Commission (see paragraphs 14ff)³⁸. In addition, it recommended dropping the bill's provisions for *compensation for non-depreciable capital investment and incentives for renewable energy sources*.

34. In connection with the **new Agriculture Act**, the Comco Secretariat took stands on several implementing orders³⁹. Overall, it criticised the detrimental impact of the combination of quotas for imports and domestic services and favoured creation of a quota system that was less anticompetitive. In many cases, quotas had to be auctioned off, enabling the state to recover at least a portion of the income from the quotas in question. More importantly, the distribution of quotas should not benefit importers or create an artificial barrier to the entry of new competitors⁴⁰.

35. In the area of insurance, Comco expressed its opinions on the amendment of two federal laws⁴¹ during the consultation procedure. With regard to the **Insurance Contract Act**, the Commission welcomed the establishment of the principle of the divisibility of premiums without exemptions. It did, however, criticise provisions governing transfer of ownership, pointing out that this ought to constitute exceptional grounds for cancelling an insurance contract. Comco endorsed the bill's proposed four-week waiting period for cancellation and demanded that the insurer inform the new owner of the insured object of his rights.

36. In connection with the **Monitoring of Insurers Act**, Comco reaffirmed the above proposals regarding transfer of ownership (see paragraph 35) and opposed mandatory single premiums. If such a requirement had to be preserved on social policy grounds, it should apply only to the net, and not gross, amount of premiums. Lastly, Comco rejected making the degree of insurance cover uniform, proposing a minimum degree of cover that would not preclude competition among insurers on the level of benefit quality.

37. With regard to the **partial revision of the Health Insurance Act in respect of hospital financing**, Comco deemed that the bill offered a number of improvements but would not result in a better ratio of cost to benefits in the area of public hospital and semi-hospital health care⁴². Comco therefore proposed that the partial revision be deferred pending review of the following issues: a) hospital planning by the cantons, and the related matter of hospital financing (particularly hospital subsidies and/or reduction of health insurance premiums); b) incentives to cut excess hospital capacities; c) cantonal approval of care product pricing.

b) *Recommendations*

38. The draft **Therapeutic Products Act** (“**pLPT**”) would regulate marketing authorisation for drugs and medical devices, along with any related advertising. With regard to drugs, Comco recommended that the Federal Council amend the bill as follows⁴³: a) in the marketing authorisation procedure, the Swiss residency requirement (headquarters or subsidiary) imposed on applicants wishing to sell their products in Switzerland should be rescinded; b) the procedure should be simplified in the case of an imported drug that has been authorised for sale in the country from which it is being exported or in Switzerland; and c) the ban on prescription drug advertising should be lifted.

2. *Activities of the competition authorities with respect to the Domestic Market Act (LMI)*

39. The Domestic Market Act has been fully in force since 1 July 1998. Article 1 ensures that all persons having their headquarters or an establishment in Switzerland shall have the free and non-discriminatory market access needed to do business throughout the Confederation. Among the aims of the Act are to facilitate professional mobility and economic trade in Switzerland, to support the cantons’ efforts to harmonise the conditions for market access authorisation, to expand competitiveness and enhance Switzerland’s economic cohesion. LMI Art. 8 makes Comco responsible for monitoring enforcement of the law by the Confederation, the cantons and the communes, empowering the Commission to carry out investigations and make recommendations to the relevant authorities on planned or existing legislation. LMI Art. 10 empowers Comco to make expert reports on the Act’s enforcement for submission to federal, cantonal and communal administrative authorities, as well as to judicial authorities.

40. During the period under review, Comco made recommendations concerning the award of cantonal and communal contracts, cantonal regulation of itinerant trade and mail-order drug sales, and rural leases for outdoor advertising. In addition, it established an expert report on the Intercommunal Agreement Against Abuses in Contractual Interest Charges. Lastly, the Secretariat provided cantons and communes with information about public procurement, the principle of non-discrimination and mutual recognition of certificates of aptitude (*certificats de capacités*).

a) *Recommendations*

41. Pursuant to LMI, Art. 8, par. 2, Comco sent the cantonal and communal authorities two recommendations regarding **public procurement by cantons and communes**. The first involved the draft revision of the Intercantonal Agreement on Public Procurement (“AIMP”) of 25 March 1998⁴⁴; the second involved the canton of Neuchâtel’s draft Public Procurement Act of 6 May 1998⁴⁵.

Comco reiterated LMI’s essential requirements with regard to public procurement: a) the principle of non-discrimination was applicable to all public purchases by cantons or communes, irrespective of the amounts involved (Art. 5, par. 1, in relation with Art. 3); b) the principle of transparency had to be adhered to: criteria for participation and selection had to be published (Art. 5, par. 2); c) any restriction of free access to the market had to be imposed by a decision subject to appeal (Art. 9, par. 1); d) cantonal law had to provide for at least one avenue of appeal to a cantonal body that was independent of the administration (Art. 9, par. 2).

In its recommendation concerning the *draft revision of the Intercantonal Agreement on Public Procurement*, Comco indicated that the reservation of the right of reciprocity within the Swiss market had become void with the entry into force of LMI. With regard to the *draft revision of the Neuchâtel cantonal Act*, Comco recommended repealing the provision to exclude certain orders from the law’s scope of

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application. It also stated that the open procedure should take precedence and recommended, as a result, that use of the selective procedure be restricted.

42. In Switzerland, itinerant trade is regulated solely at cantonal level in a detailed manner. In its recommendations of 7 September 1998⁴⁶, Comco took a position on **cantonal regulation of itinerant trade**. It urged the cantons to review their practices for authorising itinerant trade in the light of the public interest criteria of fair trading and consumer protection. In addition, Comco recommended that the evidence and guarantees already supplied at the point of origin be taken into consideration. To calculate the amount of administrative taxes, it was necessary to apply the principles of equivalence and cost coverage. Comco applauded the work undertaken with a view towards federal regulation.

43. **Mail-order drug sales** are not regulated by a federal law, but by highly diverse cantonal laws: some cantons authorise mail-order drug sales, while others prohibit them entirely. This threatens to impede domestic trade and violate the principle of free market access. Comco therefore recommended that all cantons authorise the principle of mail-order drug sales, bearing in mind public health and patient protection requirements. It also recommended that the cantons not apply cantonal provisions that were incompatible with LMI⁴⁷.

b) Expert reports

44. At the request of a cantonal authority, and pursuant to LMI Art. 10 and LCart Art. 47, Comco prepared an expert report on the **Intercantonal Agreement of 8 October 1957 Against Abuses in Contractual Interest Charges**⁴⁸, and more specifically two prohibitions contained in Articles 2⁴⁹ and 7⁵⁰ of the Agreement. Nine cantons have joined the Agreement. Persons domiciled or established in other cantons that do not recognise these prohibitions have had their market access restricted, whereas they had wished to operate in the cantons in which the agreement was in force. In the light of Federal Court case law, cantonal regulations and efforts to amend the Consumer Credit Act, Comco concluded that it was necessary to make a distinction between consumer credit and trade credit. In respect of consumer credit, the prohibitions were justified by social policy considerations. Such was not the case for trade credit, where such grounds were lacking. In a decision of 20 October 1998, the executive authority of the canton in question came round to Comco's opinion.

c) Other

45. For its part, the Comco Secretariat responded to a number of questions on public procurement from the authorities and private individuals. It commented on proposed public procurement legislation in several communes, and on such particular issues as channels of legal recourse and offers to undercut. In particular, the Secretariat briefed the communes on LMI's minimal requirements with regard to public procurement, and especially the principle of non-discrimination and legal recourse. In addition, competition authorities and intercantonal bodies continued to build on the co-operation they had established. Lastly, the Secretariat answered a number of questions involving other areas of the LMI, such as the principle of non-discrimination and recognition of certificates of aptitude.

IV. Resources of competition authorities

1. Resources overall

a) Annual budget

46. The total annual budget includes expenditure on personnel and supplies for Comco and its Secretariat. In 1998, this came to SF 4 921 300 (or US\$3 280 867 at an exchange rate of SF 1.50 per dollar in August 1999). The total annual budget for 1999 is SF 4 770 100 (or US\$3 180 067), down about 3 percent from the previous year.

b) Number of employees

47. Comco is a decision-making authority composed of 15 members who serve on an essentially voluntary basis. Case files are prepared by the permanent Secretariat, which employs a staff of 45: 20 jurists, 16 economists and 9 secretaries.

2. Human resources

48. Over the period from 1 July 1998 to 30 June 1999, the Secretariat's human resources were deployed as follows: a) 50 percent for enforcement against anticompetitive practises; b) 35 percent for merger review and enforcement; and c) 15 percent for advocacy efforts in the form of opinions and recommendations to the courts in respect of appellate procedures.

V. Summary of new reports and studies relevant to competition policy (or bibliographical references)

The competition authorities publish regular accounts of their activities in the journal *Droit et politique de la concurrence* (DPC).

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NOTES

1. DPC 1998/3, pp. 518ff (German, French and Italian versions) and DPC 1998/4, pp. 725ff (English version). Note that these versions are also available on **our web site** (<http://www.wettbewerbskommission.ch>).
2. See for example DiAx-SBCIS, DPC 1997/2, pp. 197ff, No. 35.
3. DPC 1998/4, pp. 555ff.
4. DPC 1999/2, pp. 203ff.
5. DPC 1998/3, pp. 369ff.
6. DPC 1998/4, pp. 567ff.
7. DPC 1999/1, pp. 57ff.
8. DPC 1998/4, pp. 545ff.
9. DPC 1998/4, pp. 550ff.
10. DPC 1998/4, pp. 555ff.
11. DPC 1998/4, pp. 562ff.
12. DPC 1999/1, pp. 64ff.
13. DPC 1998/3, pp. 382ff.
14. DPC 1999/1, pp. 67ff.
15. DPC 1999/1, pp. 75ff.
16. DPC 1998/3, pp. 377ff.
17. DPC 1999/2, pp. 247ff.
18. DPC 1999/2, pp. 220ff.
19. LCart Art. 3 exempts certain provisions from competition requirements in respect of market goods and services, including: a) those establishing government-regulated market and price regimes; b) those that commission certain businesses to perform public functions and grant them special privileges.
20. The list of specialities enumerates drugs for which Swiss health insurance funds are required to cover costs.
21. Federal Communications Commission (ComCom) - 1998 Annual Report.
22. DPC 1998/4, pp. 655ff.

23. DPC 1997/4, pp. 506ff. and *Rapport annuel sur les développements en matière de politique de la concurrence en Suisse (1er juillet – 30 juin 1998)*, OECD, October 1998, p. 3 [English translation not available].
24. DPC 1998/4, pp. 683ff.
25. DPC 1998/3, pp. 486ff.
26. With regard to patent rights, the matter of extinction has not yet been clarified, pending the Federal Court's ruling in the "Kodak" case, which is expected in the autumn of 1999 (see also paragraph 18).
27. DPC 1998/3, pp. 498ff.
28. DPC 1998/4, pp. 718ff.
29. However, the said decision does not establish that a ban on competition never presents any difficulty from the standpoint of LCart. For example, if a business with a dominant position in a given market requires a trading partner to refrain from competition in respect of a particular professional activity, it may constitute an unlawful practice under LCart Art. 7 (see Dallafior in Homburger et al., *Kommentar zum schweizerischen Kartellgesetz*, N. 122s ad article 7, LCart).
30. DPC 1998/3, pp. 478ff.
31. DPC 1997/3, pp. 334ff. and *Rapport annuel sur les développements en matière de politique de la concurrence en Suisse (1er juillet – 30 juin 1998)*, OECD, October 1998, p. 3 [English translation not available].
32. Note that LCart Articles 8 and 11 respectively stipulate that unlawful agreements and practices and prohibited concentrations of enterprises may be authorised by the Federal Council on an exceptional basis on grounds of compelling public interests.
33. DPC 1999/1, pp. 184ff.
34. Art. 3 (1) LCart (see note 19).
35. Notification was withdrawn because the Boards of Directors of the two participating undertakings failed to agree on terms for the exchange of shares.
36. DPC 1998/3, pp. 392ff.
37. DPC 1998/3, pp. 445ff.
38. LCart Art. 7 gives Comco the power to eliminate abuses of dominant positions. This instrument provides for effective intervention against any abuses that grid operators could commit in connection with the obligation to provide service. Not setting up an arbitration board, and thus refraining from industry regulation, ensures coherent interpretation of the general rules of competition law in the area of electricity. It would therefore seem unnecessary to institute an arbitration board.
39. DPC 1998/4, pp. 573ff.
40. As in the Bell/SEG case (see paragraphs 27ff).
41. DPC 1998/4, pp. 635ff.

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42. DPC 1999/2, pp. 297ff.
43. DPC 1999/2, pp. 281ff.
44. DPC 1998/2, pp. 329ff.
45. DPC 1998/2, pp. 336ff
46. DPC 1998/3, pp. 446ff.
47. DPC 1998/4, pp. 623ff.
48. DPC 1998/4, pp. 639ff.
49. Under Article 2 of the Intercantonal Agreement Against Abuses in Contractual Interest Charges of 8 October 1957, physical or legal persons who intermediate for the purpose of arranging loans or the extension of credit may claim no remuneration or reimbursement of expenses from borrowers or beneficiaries of the credit.
50. Under Article 7 of the Intercantonal Agreement Against Abuses in Contractual Interest Charges of 8 October 1957, it is prohibited to claim any consideration whatsoever if no action is taken on an application for a loan or credit.