



**COMPETITION COMMITTEE**

**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS  
IN SWITZERLAND**

**2003**

## **1. Changes to competition law and policies, proposed or adopted**

### **1.1 Summary of new provisions concerning competition law or related legislation**

1. In the competition policy area, 2003 saw the revision of the federal act on cartels (hereafter LCart). Amendments were approved by Parliament on 20 June 2003 and, with the introduction of direct sanctions for the most harmful types of restraint of competition and new substantive provisions, constitute a significant reinforcement of legislation on cartels. Following approval of the amendments, the new features of the Act were publicised in the course of an information campaign to reach the broadest possible audience.

### **1.2 Status of the revision**

2. It was the exposure of the vitamins cartel that triggered action by the Federal Council at the beginning of 2000 to appoint an internal governmental working group to prepare draft amendments to the LCart. The expert group submitted its draft during the summer of 2000. The Federal Council put it to public consultation from September to the end of 2000. The draft was reworked on the basis of those consultations, and on 7 November 2001 the Federal Council approved a message on revisions to the Cartels Act.

3. Parliament approved those revisions on 20 June 2003, by a vote of 104 to 42 in the National Council and 25 to 2 in the Council of States. The new text imposes direct sanctions against particularly harmful agreements in restraint of competition, whether horizontal or vertical, as well as on abuse of dominant position, and it introduces a leniency programme.

4. The *délai référendaire* (the waiting period during which a referendum may be called), which expired on 9 October 2003, was not invoked. Ultimately, the draft implementation ordinances were put to restricted consultation. After making the necessary amendments, the Federal Council at the beginning of 2004 will set the date (expected to be 1 April 2004) for the revised Act and its implementation ordinances to come into force.

### **1.3 Other relevant measures, including new guidelines**

5. On 18 February 2002, the Competition Commission (hereafter Comco) published a “Communication on assessing vertical agreements” (hereafter “CommVert”), which is based on Regulation (EC) No 2790/1999 on vertical agreements. The purpose of this communication was to clarify the conditions and rules under which the importance of vertical agreements would be assessed.

6. The main problems encountered with vertical agreements relate to those that seek to prohibit parallel imports or to impose resale prices. In order to measure the restraint-of-competition effect of vertical agreements, one must take account of competition between distributors (intra-brand competition), and, more importantly, competition between competing producers (inter-brand competition). The Comco considers that vertical contracts have a significant effect on competition, and are unlawful, if they cannot be justified on grounds of economic efficiency, 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, and (c) limit sale to the final consumer, when such limit is imposed on an authorised distributor under a selective distribution system.

**STATISTICS BY TYPES OF CASE**

<b>Total number of cases</b>	<b>120</b>	<b>100 (percentage)</b>
Cases closed because Lcart inapplicable	22	18
Cases closed or preliminary investigation	58	49
Cases currently proceeding	40	33

7. The above table summarises all the cases handled by the CommVert since February 2002. Overall, 128 cases are proceeding or have been closed. In 22 cases (18%), the issue was settled because the LCart did not apply. In nine cases, the exemptions (“reserved provisions”) of LCart article 3 applied. Ten cases did not meet the definition of LCart article 4(1), because they related essentially to situations where the firms were vertically integrated.

8. In 58 cases (49%), the CommVert was applicable, and market monitoring could be suspended for three principal reasons: (a) there was no restraint of competition (40 cases); (b) the market had already been opened (12 cases, 8 of which are already closed); and (c) an amicable settlement was reached with the firm (6 cases).

9. Finally, of the 40 cases (33%) now proceeding, the applicability of the LCart and of the CommVert has still to be verified. It is difficult to draw any conclusions from this series of cases, because the Secretariat does not as yet have sufficient information.

**Statistics on cases by sector**

<b>Total number of cases</b>	<b>120</b>	<b>100 (percentage)</b>
<b>Biens de consommation :</b>	<b>100</b>	<b>83</b>
of which: Recreation and culture	21	21
Consumer electronics	17	17
Foodstuffs	12	12
Internet sales	9	9
Others	41	41
<b>Capital goods</b>	<b>15</b>	<b>13</b>
<b>Construction</b>	<b>5</b>	<b>4</b>

10. Looking only at the 76 cases that were closed, it is apparent that the Secretariat was not able to demonstrate that there was an illegal vertical agreement. The reasons for closing the cases may be summarised as follows: in 22 cases (29%) the LCart was inapplicable; in 48 cases (63%) there was no restraint of competition; and in 6 cases (8%) amicable settlement was reached out-of-court. The preventive effect of introducing the CommVert, while it is difficult to measure, is surely not negligible. The CommVert sparked vigorous debates in the business and legal communities at the time of its publication.

Those debates, and the resulting publications, moved the sectors concerned to comply with the requirements of the CommVert, in particular as they relate to the conclusion of new vertical agreements.

11. The Secretariat has also been heavily occupied in implementing the communication in the field of automobile distribution. Particular attention has been devoted to its implementation, and the Secretariat has had to respond to hundreds of consultations and requests for information, and has handled at least 20 complaints. A preliminary investigation into the industry as a whole has also been opened.

## **2. Enforcement of competition law and policy**

### ***2.1 Action against anticompetitive practices, including agreements and abuses of dominant positions***

#### **2.1.1 Summary of the activity of the competition authorities**

12. During the period under review, the Comco Secretariat completed 20 preliminary investigations:

- 14 involved unlawful agreements (Art. 5, LCart);
- 4 involved abuses of dominant positions (Art. 7 LCart)
- 2 involved both unlawful agreements and abuses of dominant positions (Arts. 5 and 7, LCart) simultaneously.

13. Of these 20 preliminary investigations:

- 19 were closed with no action taken;
- in 2 cases, amicable settlements were reached whereby the firms agreed to discontinue or prevent acts in restraint of competition.

14. During the period under review, Comco completed 5 ordinary investigations:

- 2 involved unlawful agreements (Art. 5, LCart);
- 3 involved abuses of dominant positions (Art. 7, LCart).

15. At 31 December 2003, 15 preliminary investigations and 20 ordinary investigations were in progress.

Name of Case	art. 5 LCart (agreements)	art. 7 LCart (pos. dom.)	art. 5 and 7 LCart	Outcome (see Key)	Reference in DPC
Kiosk AG		X		1	
Swisscom Office Connex		X		1	
SRG - tpc		X		1	
Cablecom / Vertrieb STB	X			1	
BWS Pitch.List	X			1	
Autorecycling Schweiz	X			1	
Deodorant sticks			X	1	2004/1, p. 85
Tintenstrahldrucker und Tintenpatronen [Ink jet printers and cartridges]	X			1	2003/4, p. 732
Mars			X	1	2004/1, p. 93
Accessoires de caméra Manfrotto [camera accessories]	X			1	
Medisinalgasmarkt [medicinal gas market]	X			1	
FOCAL	X			1	
Johnson / Johnson	X			1	2003/2, p. 240
Post/UBS	X			1	2003/2, p. 255
Sunstore / Elsa / Tempur	X			1	
Gebäudeversicherung [building insurance]	X			1	2003/4, p. 741
Vereinigung prof. Sprecher [Newscasters' union]	X			1	2004/2, p. 345
Wettbewerbsreglement [Competition rules] CH Baumeisterverband SBV [Swiss Contractors' Association]	X			2	2003/4, p. 726
Schweiz. Eislauflehrer Verband [Swiss Ice-Skating Instructors Assoc.]	X			2	2003/4, p. 721
Swisscom Directories		X		3	
Distribution of automobiles	X			4	
Homologation et sponsoring dans le domaine du volleyball [Volleyball team recognition and sponsorship]	X			4	
Kodak		X		4	
Ventes de produits sanitaires [Sales of health products]	X			4	
Cablecom - Programmes gratuits [Free programmes]		X		4	
Swisscom DSLAM		X		4	
ASTAG - Prix du diesel [Price of diesel]	X			4	
Swisscom Directories II		X		4	
Swisscom Gros clients [Large		X		4	

Name of Case	art. 5 LCart (agreements)	art. 7 LCart (pos. dom.)	art. 5 and 7 LCart	Outcome (see Key)	Reference in DPC
customers]					
Swisscom Talk & Surf		X		4	
Rabattverzicht Pharmahersteller [Pharmaceutical Producers' no-discount agreement]	X			4	
Kaminfeger [Chimneysweeps] Zürich	X			4	
Architect clause – Canton de Genève			X	4	
Telekurs Dualangebot [dual offer] MC/VISA	X			4	
Kodak Photo Service			X	4	
Swisscom ADSL		X		5	
Fahrlerer [Driving instructors] Graubünden	X			5	2003/2, p. 271
TicketCorner SA		X		5	
BSE-Tests – Grossverteiler [Wholesalers]		X		5	2003/4, p. 753
CS / Bank Linth	X			5	2003/3, p. 514
Migros/Watt – EBL		X		6	
Feldschlösschen / Coca-Cola		X		6	
Marché de la viande [Meat marketing]			X	6	
Partenariats Axpo [Partnerships]			X	6	
SWICO / p.EN.S		X		6	
Teleclub / Cablecom		X		6	
Mobile telephone terminal charges		X		6	
Publigroupe		X		6	
Swisscom Directories		X		6	
German-language book prices	X			6	
CoopForte		X		6	
Swatch/ETA SA Manufacture Horlogère Suisse		X		6	
HP-Vertrag Kt. AG bei öffentlichen Spitälern [Contract with public hospitals]	X			6	
Vertrieb von Tierarzneimitteln [Veterinary medicines business]	X			6	
Debitkarten [Debit cards]	X			6	

Name of Case	art. 5 LCart (agreements)	art. 7 LCart (pos. dom.)	art. 5 and 7 LCart	Outcome (see Key)	Reference in DPC
EMR-RME	X			6	
ACPG Private Clinics Association of Geneva	X			6	
FASMED / Santésuisse	X			6	
Unique / Valet Parking		X		6	
Credit card Interchange Fee	X			6	

#### Key

DPC = *Droit et Politique de la Concurrence* (publication by the Swiss competition authorities, available on the Internet at : [www.weko.ch](http://www.weko.ch))

- 1 = preliminary investigation: case closed with no action taken (no evidence of unlawful restraint of competition)
- 2 = preliminary investigation: case closed with no action taken (agreement with the parties under Art. 26, para. 2, LCart)
- 3 = preliminary investigation: case closed with action taken (investigation opened)
- 4 = preliminary investigation: in progress at 31 December 2003
- 5 = investigation: case closed
- 6 = investigation: in progress at 31 December 2003

#### Summary of important cases

##### Swisscom Directories

16. The Competition Commission opened an investigation in November 2003 into the market for telephone directories and related services. Swisscom Directories is required to provide the databases that publishers need to produce their directories. At the same time, it offers its own electronic directory, ETV. The investigation will need to determine whether the conditions and the prices at which Swisscom Directories provides its database to its competitors are complicating or impeding the creation of new directories that would compete with ETV, and whether the company is attempting by this means to protect and reinforce its own ETV-based products.

##### Swisscom ADSL

17. On 15 Dec 2003 the Comco issued a ruling in the Swisscom ADSL case relating to the market for broadband Internet access. Internet service providers are obliged to go through the Swisscom network in order to connect their clients across Switzerland. The Comco found that Swisscom was abusing its dominant position by favouring its subsidiary Bluewin over competing ADSL service providers. It ordered Swisscom to abandon its system of volume discounts whereby Bluewin enjoyed lower prices than its competitors for using the system. The Comco concluded that Swisscom has a dominant position on the wholesale market for broadband Internet services. The Comco also ruled that the discounts were discriminatory and not justified on economic grounds. This decision confirms the provisional measures taken in May 2002. Swisscom has appealed this decision to the Competition Appeals Board (*Commission de recours pour les questions de concurrence*).

##### SSR - tpc

18. The Secretariat of the Competition Commission closed its preliminary investigation and took no further action in the SSR case relating to TV programme production. tpc is an independent production subsidiary of Société Suisse de Radiodiffusion (SSR). Other producers had complained to the Comco that SSR and tpc were abusing their dominant position, as buyer and supplier, respectively, of TV programming. The Commission concluded that SSR and tpc have a strong position in the German-Swiss market for independent programme production, but that there was no indication that this position was being abused.

#### Sanctions against Swisscom

19. On 6 October 2003, the Comco terminated the sanction proceedings it had initiated against Swisscom for breaching an out-of-court settlement reached in May 2002. In that settlement, Swisscom had undertaken to cease its practice of enclosing advertising materials with its fixed-line service bills, targeted specifically at preselected clients of a competing operator to induce them to sign up with Swisscom. Nevertheless, in June 2002 Swisscom had mailed out a promotional insert. The Comco found that this did not violate the settlement because it was not addressed specifically to the clients of other operators but was aimed more generally at persuading Swisscom's fixed-line clients not to select another operator.

#### Swatch/ETA SA Manufacture Horlogère Suisse

20. In a case involving the watchmaking industry, the Comco issued a provisional measure in November 2002 ordering ETA SA Fabrique d'Ebauches to continue delivering its movement blanks to its clients. On 17 February 2003, the Comco denied a request from Sellita Watch Co. to amend or supplement those measures in the wake of price increases announced by ETA SA. The Comco ruled that the likelihood of irreparable damage to competition had not been demonstrated. A challenge to the Appeals Board was turned down, and an appeal against that decision, in turn, was rejected by the Federal Court.

#### Coopforte

21. The Coopforte investigation, which was opened in December 2001 and had been suspended for a year because of concentration proceedings involving Coop/Epa and Coop/Waro, was reopened at midyear. The issue was to ascertain whether Coop held a dominant position and was abusing it by taking a "Coopforte" contribution in the form of a systematic deduction of 0.5% from its suppliers' invoices.

#### The construction market

22. The Secretariat has focused closely on reducing and eliminating the effects of systems for the declaration and exchange of information on the construction market, and the issue of price communication (rates, etc.). In the context of an amicable settlement, the Swiss Contractors' Association has amended its competition rules to remove any provision that would violate the Cartels Act. Initial investigations have been conducted as well into possible collusion in the gravel, cement and concrete industry.

#### Building insurance

23. According to information gathered by the competition authorities, private building insurance premiums were generally higher than those offered by cantonal (State-owned) insurance establishments during the decade 1990-2000. An investigation was opened in April 2003 to determine whether this difference in premiums reflected an unlawful agreement among private insurers. In the event, no evidence of such an agreement was found. For example, there were no uniform criteria for calculating premium, and the amount of premiums charged by private insurers varied greatly. Moreover, the average level of private insurers' premiums declined by 12% between 1993 and 2002. The differences in premiums between private

and cantonal insurers can be explained, among other things, by the marketing and acquisition costs that private insurers must bear.

#### TicketCorner SA

24. The competition authorities rendered a decision against the company TicketCorner SA, finding it in abuse of its dominant position in the market for distribution of tickets to entertainment events. Proceedings targeted the exclusivity clauses contained in the contracts negotiated by that firm with the organisers of sporting and cultural events, requiring them, generally for a period of three years, to distribute tickets to all their events solely through the TicketCorner network. In this way the company was able to restrict access by competing firms and to impose unfair commercial conditions on the organisers.

#### ACPG - Association of Private Clinics of the Canton of Geneva

25. A decision has been issued against the private clinics of Geneva, which had established an agreement on the reimbursement of hospitalisation expenses covered by supplementary insurance. That agreement set uniform fees for a number of services. The parties undertook not to renew the agreement as of 2004.

#### Driving instructors in the Canton of Grisons

26. The competition authorities reached an amicable settlement in proceedings against the driving-school instructors of the Canton of Grisons. Their professional association had stopped issuing fee recommendations to its members in 1998, yet the instructors continued to apply the former rates. This collusive practice was facilitated by the fact that the association published a calculation schedule that led to the de facto fixing of virtually uniform prices.

#### Crédit Suisse / Bank Linth

27. The Comco terminated its investigation into the effects of collaboration between these two banks. Their intent had been to develop a new form of cooperation in the Swiss retail banking market. It was initially planned that the Bank Linth would abandon the IT platform of the RBA group (Regional Banks Association) and connect to that of Credit Suisse. The larger bank was in future to do all the data processing on behalf of the smaller establishment. Cooperation in other areas was also envisaged. The two banks have abandoned the project.

#### 2.1.2 *Summary of the activity of the Price Monitoring Office*

28. In fulfilling its competition policy responsibilities the Price Monitoring Office currently focuses primarily on administered prices and on the prices set by firms wielding significant market power. During 2003, infrastructure and health again constituted the main focus of the Office's activity.

#### Electricity prices

29. For price comparison purposes, the Price Monitoring Office asked some 900 Swiss electricity companies to report their rates, and it calculated average prices per kWh for 14 categories of clients. Publication of the results of this investigation on the office's Internet site has brought much greater transparency to electricity prices. While it does not yet point to abusive pricing, this comparison has moved a number of companies to reduce their rates. The office will analyse rates charged by the companies with the highest prices, and will insist on reductions as appropriate.

#### Postal rates

30. The Price Monitoring Office has again considered a request to raise the price of letters, sparked by the deficit in the mail unit. The Office found that the losses resulted primarily from uncovered costs of the postal network, and asked for a political decision on the question of whether that network's deficit should be assumed solely by the mail service. The DETEC<sup>1</sup> answered this question in the affirmative, noting that politicians expected the Post Office to operate a network of branches covering the entire country, without subsidies, and consequently that uncovered infrastructure costs could only be financed by charging sufficiently high rates for monopoly products. The Department agreed with the recommendation of the Price Monitoring Office, which asked that, under the circumstances, price hikes should be limited to standard letters and that increases for other letter formats and for registered mail should be rejected.

#### Telecommunications

31. The Price Monitoring Office handled a number of complaints from the public. The terminal charges levied by mobile operators for calls over their networks constitute an important part of the price of communications. The office will examine whether the Comco investigation reveals that those charges result from collusion or from a dominant position. The high price of international roaming results primarily from the tolls that foreign operators charge for using their network. Liberalisation of the "last mile" should in future expand the offer of high-speed Internet service at lower cost. It may be difficult to challenge Swisscom's new "Teleguide" user charges<sup>2</sup> and late-payment surcharges on second billings, since these services generate costs, and the universal service license does not call for them to be provided free. In the case of value-added services offered via user-pay telephone numbers, the possibilities for abuse should be reduced by amendments to the regulations requiring the provider to announce the price before the toll kicks in, or to obtain the user's consent. The Price Monitoring Office supported the interconnection price reduction for Swisscom envisioned by the ComCom<sup>3</sup>, limiting its recommendations (which were accepted by the ComCom) to the interest rate on capital, the exchange rate used in international comparisons, and the expected price trends for the capital goods used in the calculations.

#### Cable TV charges

32. The Competition Appeals Board rejected the appeal brought by ACTV SA against a 2001 decision of the Price Monitoring Office reducing its monthly subscription charge from 23.70 francs to 17 francs (net of VAT and taxes), and upheld the authority of the Office and its pricing assessment. ACTV has filed an administrative appeal, which is pending before the Federal Court.

#### Water and sewage charges

33. The Price Monitoring Office received numerous complaints from residents of one canton relating to price increases for water and sewage services. These price hikes resulted from a new calculation model that took into account the value of replacement installations in calculating depreciation. To prevent this model from becoming a benchmark for the industry, discussions have been launched with the authorities of the Canton in question.

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<sup>1</sup> Federal Department of Environment, Transport, Energy and Communication.

<sup>2</sup> Swisscom now charges for using the electronic telephone directory at its public payphones.

<sup>3</sup> Communications Commission

## Drug prices

34. The cost of drugs paid for by the health insurance funds has risen sharply in recent years.<sup>4</sup> Since the official price index of drugs has declined slightly, it was tempting to blame higher costs on increased consumption. A survey by the Price Monitoring Office found however that increasing drug costs were related not to quantities but to prices. An analysis of prescriptions reimbursed by the insurance funds revealed an annual increase of 8.6% in retail prices and 10.8% in manufacturers' prices since 1992, as a result of the substitution of many relatively cheap drugs by more costly successors. According to the OFS<sup>5</sup>, this is a consequence of technological progress that cannot be reflected in the index. If the burden of medications on the basic insurance system is to be contained, attention will have to be paid to the pricing of new drugs, and international price comparisons could assist in this regard.

## TARMED

35. The new pricing schedule for health services, TARMED, which applies uniformly throughout Switzerland, came into effect in doctors' offices and in the ambulatory sector of hospitals on 1 January 2004. With the pricing partners having concluded a cost neutrality agreement, the Price Monitoring Office looked into the practical application of that agreement during 2003. Changes to the pricing structure should not in fact result in any overall change in the revenues of physicians or in health insurance premiums. Calculating the point values has not posed a problem for physicians and public hospitals, although the private hospitals appear to be having difficulties.

## Hospital charges

36. The Price Monitoring Office continued its examination of specific cases. Its method of calculating charges, approved by the Federal Council in the course of an appeal, is today being properly applied by the tariff partners and this has helped to reduce the number of disputes. Moreover, it has been found that the benchmarks, which supplement the Office's analysis, are increasingly being used in the tariff negotiations. With respect to residential care facilities or "medical-social establishments" (EMS), the Office found that a portion of medical care costs is charged to the resident patient, and this is contrary to article 44 of the Federal Health Insurance Act (LAMAL), which stipulates that service providers may not charge fees higher than the tariffs and prices fixed by agreement or by the competent authority, for services provided under the LAMAL.

### 2.1.3 *Summary of the activity of the Federal Communications Commission*

37. The Federal Communications Commission (ComCom) is the independent regulator of the telecommunications market. Its responsibilities consist, inter alia, of awarding concessions for telecommunication service operators and concessions for the use of radio frequencies, and drawing up interconnection conditions on an initial basis when the service providers cannot reach agreement. Some of ComCom's responsibilities have been delegated to the Federal Communications Office (Ofcom).

38. At the beginning of the year, the Federal Council amended the decree on telecommunications services, by applying interconnection conditions to leased lines, high-speed access, and the two forms of unbundling. Following that change, one company (TDC Switzerland SA) initiated two new interconnection procedures and filed a request for the issuance of provisional measures. That request was rejected on procedural grounds, and the matter is still pending.

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<sup>4</sup> They accounted for 21.6% of total payouts in 2002, compared to 18.3% in 1997.

<sup>5</sup> Federal Office of Statistics.

39. In the context of two procedures, ComCom has lowered the interconnection prices of Swisscom, the historic supplier, by 25 to 35% for the years 2000 to 2003. The reason for these procedures is the legal obligation of the market-dominant provider to offer interconnection services at cost-based prices. In calculating that price, the ComCom used the LRIC method ("Long-run Incremental Costs"), which is internationally recognised and is also used within the European Union in interconnection matters.

40. Finally, in a move to stimulate the Swiss market for mobile telephone services by encouraging innovative projects, the ComCom decided to grant a GSM concession to two companies. That decision was taken after a thorough evaluation by the Federal Communication Office. The expected market stimulation should benefit both private and commercial customers.

#### *2.1.4 Summary of the activity of the Competition Appeals Board*

Cablecom (DPC 2003/2, p. 406)

41. The case relates to Cablecom's showing Teleclub's digital television programmes on its cable network. Since March 2002, Teleclub has had a concession allowing it to broadcast its programmes digitally. For cable transmission, Teleclub has to go through the network of Calbecom, Switzerland's largest cable operator, which has also been running its own digital TV programming since September 2002. Digital programmes can only be received with the aid of a set-top box that decodes the signals. Cablecom made the showing of Teleclub's digital programmes on its network conditional on Teleclub's agreeing to use Cablecom's "Swiss-Fun" set-top box, rather the one that Teleclub had developed for itself. Suspecting that Cablecom was abusing its dominant position to favour its own products, Comco issued provisional measures requiring Cablecom to broadcast Teleclub's digital programmes with immediate effect and to authorise the use of the Teleclub set-top box, in order to prevent the structure of the subscription television market from being immobilised in an anti-competitive manner. The Appeals Board, in a decision on 20 March 2003, confirmed Comco's ruling and rejected Cablecom's challenge.

#### *Health insurance funds and private clinics in the Canton of Argovie*

42. The Appeals Board accepted in part an appeal filed by private clinics in the Canton of Argovie. The Comco had prohibited an agreement concluded among the private clinics, the health insurance funds, and the physicians working in the clinics, relating to semiprivate insurance. The Appeals Board ruled however that the Comco had not sufficiently analysed the case from an economic efficiency viewpoint. Moreover, the Comco should have taken the public hospitals into account in its analysis.

#### *2.1.5 Summary of the activity of the cantonal courts*

43. On 20 October 2003, the cantonal court of Valais decided, in considering a demand for provisional measures, that the Swiss Football Club should rejoin the Football Club Sion Association in the Challenge League championships. The Sion club had been denied a license at the beginning of the season, for financial reasons.

#### *2.1.6 Summary of the activity of the Federal Tribunal*

Cablecom (DPC 2003/4, p. 912)

44. In upholding a challenge brought by Cablecom against a ruling of the Competition Appeals Board (see above), the Federal Court annulled the provisional measures taken by the Competition Commission. It held that, because the provisional measures had been taken not to safeguard an existing situation but to create a new situation, the decision to impose them should have been subject to strict conditions that it did not in fact meet. It criticised the Appeals Board for having taken what amounted to a

decision on the substance of the case without having conducted an in-depth investigation, particularly into the existence of "legitimate business reasons", and for having thereby left Cablecom in a complex situation that it would be difficult to reverse. The court concluded that the measures taken by the Comco were disproportionate in the context of a provisional measures procedure.

EBL (DPC 2003/3, p. 695)

45. This case concerned the refusal of EBL to grant right of transit to Watt AG for supplying electricity to a private client (Migros) located within EBL's distribution zone. EBL had challenged the competence of the Competition Commission on the basis of the "reserved provisions" referred to in LCart article 3. The Comco had taken upon itself to conduct an investigation in the course of which it would have to determine whether the reserved provisions preventing applicability of the Cartels Act could be invoked, a matter that was not a question of admissibility but rather a question of law that should have been dealt with in a substantive decision. The Competition Appeals Board had upheld the decision of Comco. The Federal Court on the other hand accepted the EBL appeal in part, and sent the case back to the Comco. It ruled that where reserved provisions apply, the Comco is prohibited not only from taking a decision based on the LCart, but also from investigating the behaviour of the firm involved. Consequently, if the firm invokes reserved provisions, in time and in a manner that is not manifestly groundless, the authority is obliged to render a preliminary decision on this question. The Federal Court therefore sent the case back to the Comco to examine, on a preliminary basis and in the context of a preliminary decision, whether there were in fact reserved provisions that prevented application of the LCart.

EEF (DPC 2003/4, p. 925)

46. In a ruling of 5 March 2001, Comco pronounced as unlawful - being an abuse of a dominant position - the refusal by the EEFs to allow their network to be used to transport the electricity of a third-party electrical company (Watt AG) intended for a private consumer (Migros) located in an area covered by the EEF distribution network. Comco took the view that, in the absence of legislation specific to the electricity market, it was competent to handle this sort of dispute. It came to the conclusion that Fribourg legislation on EEFs contained no compelling reason ("reserved provision") to prevent the application of the law on cartels and that the EEFs' behaviour could not be justified by "legitimate business reasons". The Competition Appeals Board turned down an appeal brought by the EEFs, which then challenged this ruling before the Federal Court. The Federal Court confirmed Comco's decision. It accepted the argument of the competition authorities and pointed out moreover that for a Canton to adopt a rule instituting a legal monopoly for the distribution of electricity, as the Canton of Fribourg intended to do, would appear to constitute a disproportionate and hence unlawful restriction on economic freedom. It did not however decide the question, since it rendered its decision before this new cantonal provision came into effect.

Swatch/ETA SA Manufacture Horlogère Suisse

47. The Federal Court turned down the appeal against the decision of the Competition Appeals Board. The Court considered that the likelihood of irreparable damage to competition and to the appellant had not been demonstrated. The appellant should instead have turned to the civil courts to protect its interests.

#### 2.1.7 *Summary of the activity of the Federal Council*

EEF

48. In the wake of the Federal Court's decision (see above), the EEFs applied to the Federal Council for an exceptional authorisation, invoking various public interests that they argued should take precedence

over efficient competition (security of supply, respect for the popular vote against the Federal law on the electricity market, etc.). In a decision on 5 November 2003, the Federal Council held that the exceptional authorisation procedure has no suspensive effect in law, and it rejected a request for provisional measures that would suspend implementation of the Competition Commission's decision during proceedings before the Federal Council. It concluded, in effect, that there would be no irreparable harm to the EEFs if they were to comply with the Comco decision, specifically by negotiating transit arrangements with Migros and Watt. Subsequently, a new distribution agreement between Migros and the EEFs having rendered moot the demand for transit, the EEFs withdrew their request for exceptional authorisation, and the procedure was closed without action.

Description of important cases, particularly those with international implications

49. None

## 2.2 *Mergers and acquisitions*

### 2.2.1 *Statistics on the number and type of mergers reported or controlled*

50. During the period under review, 27 concentration transactions were reported. Comco conducted 2 extensive reviews.

51. The following table summarises Comco's activity in the area of corporate mergers.

Names of participating firms and transaction type	Outcome	Publication in DPC
AC: E.On/Ruhrigas	⊕	2003/1, p. 171
JV: Express (Tamedia)	⊕	
AC: Swisscom Fixnet / WLAN	⊕	2003/1, p. 204
AC: Swisscom Fixnet / Megabeam	⊕	
AC: Swisscom Fixnet / Aervik BV	⊕	
AC: Abattoirs St-Gall	⊕	2003/3, p. 552
JV: Condover / Cinven – BS	⊕	2003/3, p. 606
JV: GU Nestlé / Coca-Cola	⊕	
AC: Cablecom GmbH	⊕	
AC:Tamedia / Meier Druck	⊕	
AC: Ringier / Bolero	⊕	2003/4, p. 827
AC: Carnavi / Sutter	⊕	
JV: Total Holdings UK Ltd. / Samsung General	⊕	2003/3, p. 602
AC: Alcan / Pechiney	⊕	2003/4, p. 809
AC: EDF / EDFT	⊕	2003/4, p. 774
AC: Coop / Waro	⊗	2003/3, p. 559
JV: Edipresse / Ringier – Le Temps	○	2003/4, p. 794
AC: NLZ / Anzeiger Luzern	∇	
JV: BZ / Bund	(∇)	
AC: Hogg Robinson / Kuoni	(∇)	
JV: Tamedia / BZ – 20 Minuten	(∇)	
AC Accenture / Systor	(∇)	2003/2, p. 297
JV GAUM	(∇)	2003/2, p. 367

Names of participating firms and transaction type	Outcome	Publication in DPC
AC Crédit Agricole / Crédit Lyonnais	(∇)	2003/2, p. 376
AC DSM / Roche	(∇)	2003/2, p. 380
AC Zürich Invest Bank AG / AIG Privat Bank AG	(∇)	2003/3, p. 549
AC 3i / MIB	(∇)	2004/1, p. 141

Key:

- ⊕ = No objection after preliminary investigation (Art. 32, LCart)
- ⊗ = No objection after review (Art. 33, LCart)
- O = Authorisation subject to obligations and conditions
- ∇ = Sanctions for violating the prior notification requirement
- (∇) = Notification withdrawn by the parties
- F = Procedure in progress at 31 December 2003
- M = Merger; AC = Acquisition of a controlling interest; JV = Joint venture

## 2.2.2 Summary of significant cases

### Edipresse/Ringier -- Le Temps

52. In a decision of 20 October 2003, the Comco authorised Ringier SA to increase its shareholding interest in the company that publishes the daily newspaper Le Temps (SA Le Temps). Edipresse and Ringier hold equal (50%) interests in SA Le Nouveau Quotidien ERL, which owns more than 80% of the shares of SA Le Temps. In order to ensure that SA Le Temps would preserve its independence in the hands of its new principal shareholders, the Comco maintained and expanded the conditions it had imposed when Le Temps was founded in 1997. Thus, the chairmen of the boards of SA Le Temps and SA Le Nouveau Quotidien ERL will have to be independent of Edipresse and Ringier, and the Comco will have to approve any changes in their shareholding structure. Moreover, in order to guarantee current and potential competition between Edipresse and Ringier in markets not directly affected by the concentration, the Comco imposed on them the duty to report any agreement regarding French-language media distributed in Switzerland.

### Tamedia/BZ - 20 Minuten; BZ/Bund

53. The Comco examined two cases of concentration in the written press in German-speaking Switzerland. One case involved the joint takeover of 20 Minuten (Switzerland) by Berner Zeitung AG (BZ) and Tamedia, while the other related to the purchase by Groupe Espace Media of a shareholding interest in its direct competitor Bund Verlag AG. In-depth investigations were launched into these two cases, and the results were still pending at the end of 2003. In January 2004, the Comco authorised Groupe Espace Media to buy shares in Bund Verlag AG, subject to conditions, and prohibited BZ from acquiring an interest in 20 Minuten (Switzerland). If BZ were to have an equity interest in 20 Minuten, this would give the Groupe Espace Media a dominant position in the market both for newspaper readers and for advertisers in the Berne region, where 20 Minuten represents, after Groupe Espace Media's purchase of shares in Bund Verlag AG, the most important competitor to BZ in the reader and advertising markets. In order to take an interest in Bund Verlag AG, Groupe Espace Media had to arrange divestiture of the local radio station Radio BE1, a subsidiary of Bund Verlag AG. In effect, Groupe Espace Media's acquisition of an interest in Radio BE1 would create a dominant position for Groupe Espace Media in the local broadcast advertising market.

## Coop/Waro

54. This concentration was authorised without conditions. The in-depth examination did not confirm the indications revealed during the preliminary investigation to the effect that Coop would thereby be able to create or reinforce a dominant position, simple or collective, in both the distribution and the supply markets. The examination also dissipated the Comco's concerns about the introduction of new products in the Swiss market and about the dependence of some suppliers on certain supply markets.

## The cheese industry

55. In this industry, the Secretariat investigated Emmi AG's takeover of the Swiss Dairy Food AG (SDF) factory in Landquart, which had been placed in bankruptcy protection and was already undergoing restructuring. To maintain consistency between the LCart and the bankruptcy proceedings, the trustee was brought into the merger investigation procedure, and confirmed that there was no other offer on the table, apart from that submitted by Emmi, to take over the activities of the Landquart factory.

## UBS

56. In 1998, the Competition Commission had authorised the merger of UBS and SBS to form the new UBS SA, subject to various conditions. Under the second condition, UBS was to continue to participate in the banks' common institutions (currently Telekurs Holding SA, SIS Swiss Financial Service Group and SECB Swiss Euro Clearing Bank) and to acquire their services. This condition was intended to maintain the competitive capacity of the cantonal banks and other banks. It was supposed to strengthen competition, particularly in the retail banking field. The condition expired at the beginning of May 2003. The Comco in fact had the authority to extend it for up to five years, but it found that, in light of the current market situation, UBS had respected the duties imposed on it, that the second condition had achieved its purpose, and that therefore there would be no justification for extending it further. UBS has thus fulfilled two of the three conditions that were imposed on it. It must still implement condition III (maintaining credit to businesses), which will expire at the end of 2004.

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

#### ***3.1 LCart-related activities of the competition authorities***

57. One of the essential tasks of the competition authorities is to take part in the legislative process by formulating preliminary opinions, at both the federal and cantonal levels (Art. 46, LCart). In addition, Comco keeps close track of competitive conditions and can make recommendations intended to foster effective competition (Art. 45, LCart). Below is an illustration of those prerogatives. In 2003, the competition authorities issued two opinions and two recommendations.

#### ***3.2 Activities of the competition authorities concerning the Domestic Market Act (DMA)***

58. Revisions to the Domestic Market Act were a priority concern in 2003. As a member of the expert group responsible for the revision, under the direction of the General Secretariat of the Federal Department of Economy, the Secretariat played a key role in drafting the revisions and the explanatory report prepared for the consultations. The Secretariat also handled several requests for information from private parties and from the authorities concerning the scope of the various provisions of the Act.

59. The Secretariat was also actively involved in revising legislation on government procurement. As a member of the steering committee and the legal working group, it dealt with strategic and legal questions of importance from the competition viewpoint. The Secretariat also played a role in shaping the new

training course that is to be offered to purchasing officers of the Confederation, which had been prepared the year before at the request of the Confederation Purchasing Commission (CAC).

#### **4. Resources of the competition authorities**

##### **4.1 Overall resources**

###### **4.1.1 Annual budget**

60. The total annual budget encompasses expenditure on staff and supplies for Comco and its Secretariat. In 2003, this amounted to SF 4,884,000. The total annual budget for 2003 was identical to that of the previous year.

###### **4.1.2 Number of employees**

61. The Comco is a decision-making authority made up of 15 members. Case files are prepared by a permanent Secretariat that, as of end-2003, employed 58 people: 4 managers and 54 assistants, including 22 jurists, 22 economists and 10 secretaries.

##### **4.3 Human resource allocation**

62. Between 1 January 2003 and 31 December 2003, the Secretariat's staff resources were allocated as follows: a) 70% to combat anticompetitive practices; b) 20% for merger review and legislative enforcement; and c) 10% for advocacy efforts in the form of advisory opinions and recommendations to the courts in appellate procedures.

#### **5. Summaries or references to new reports and studies on competition policy issues**

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

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