

SWITZERLAND

(1 January 2002 – 31 December 2002)

I Changes to competition law and policy, proposed or adopted

1. Summary of new provisions concerning competition law or related legislation

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

2. However, in autumn 1999 the Federal Department of Economic Affairs set up a Commission of Experts mandated to revise LCart, *inter alia* with a view to introducing direct sanctions. The message concerning the revision of LCart was adopted by the Federal Council (government) on 7 November 2001 and then submitted to Parliament. The National Council's Preparatory Commission discussed the draft revision at three sessions in 2002. During the autumn 2002 session, the National Council broadly approved the revision (details about the aims of the revision under item 4). The Council of States will handle the draft revision in 2003.

2. Other relevant measures, including new guidelines

3. On 18 February 2002, the responsible authority with regard to competition law (the Competition Commission, or Comco) published a "Communication on assessing vertical agreements", which is based on Regulation (EC) No 2790/1999 on vertical agreements. During the year, Comco and its secretariat were able to work towards setting up an initial practice with respect to vertical agreements. Also, on 21 October 2002, Comco issued a Communication on vertical agreements in the area of motor vehicle distribution, which was also based on Regulation (EC) No 1400/2002 on motor vehicle distribution.

3. Main aims of the revision

4. What triggered the present revision of the law on cartels was the media coverage given to the updating by the American competition authorities of the world vitamin cartel, to which the Swiss multinational Hoffmann-La Roche belonged. The discovery prompted a number of Parliamentary actions which were aimed at strengthening the law on cartels. Similarly, the Parliamentary Administrative Control Service concluded, in a report to the National Council's Management Commission, that the law on cartels had to be revised, with the focus on making the penalties harsher. The Federal Council took these requests into account in its message of 7 November 2001 on the revision of the law on cartels.

5. The effectiveness of competition law depends completely on the preventive effect it has. A law that is effectively applied already has a strong preventive effect in advance, i.e. it prevents any breaches before they can occur. The effect in question has been greatly improved in the new law on cartels thanks to two new instruments.

6. The first of these is the threat of direct sanctions. The most harmful restraints of competition will no longer be lucrative. This is why the sanctions framework has to be as wide-ranging as possible, so as to

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ensure that it is no longer advantageous for a company to be in breach of the law on cartels. To this end, the law provides for fines of up to 10 per cent of total sales in Switzerland over the past three years.

7. Even high fines are ineffective, however, if banned behaviour cannot be detected, which is why the probability of uncovering unlawful cartels has to be increased by means of a leniency programme. With the introduction of direct penalties, firms involved in illegal restraints of competition are going to try to reduce the risk of being discovered, so it will be harder to detect illegal restraints of competition. Foreign authorities' experiences with competition show that the probability of uncovering illegal practices increases thanks mainly to the leniency programme and to effective investigative measures, such as searches for example. This is why the draft revision stipulates that Comco can completely or partially waive sanctions against companies that help to uncover and eliminate restraints of competition.

8. The reputation effect is reinforced by two instruments, especially the threat of direct sanctions. Experience in other countries shows that the attention of the media, and hence the public, is very much greater when companies can be directly penalised. In such cases, they suffer not only the sanction, but also a loss of reputation which adds to the preventive effect of the law. The effectiveness of the revision will depend essentially on the law on cartels being applied consistently and effectively. The threat of direct sanctions is only credible if the competition authorities are in a position to apply the law with the necessary determination. For this, Comco needs adequate resources if it is to take account of demands that are qualitatively and quantitatively high and that are going to increase still further after the revision.

II Enforcement of competition law and policy

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

a.1) Summary of the activity of the competition authorities

9. During the period under review, the Comco Secretariat completed 19 preliminary investigations:

- 10 involved unlawful agreements (Art. 5, LCart);
- 8 involved abuses of dominant positions (Art. 7 LCart)
- 1 involved both unlawful agreements and abuses of dominant positions (Arts. 5 and 7, LCart) simultaneously.

10. Of these 19 preliminary investigations:

- 15 were closed with no action taken;
- in 6 of the 15 cases, the firms agreed out of court on measures to discontinue or prevent restraints of competition.

11. During the period under review, Comco completed 3 ordinary investigations:

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

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12. At 31 December 2002, 17 preliminary investigations and 20 ordinary investigations were in progress

Key

DPC = *Droit et Politique de la Concurrence* (publication by the Swiss competition authorities, available on the Internet at : 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 2002
- 5 = investigation: case closed
- 6 = investigation: in progress at 31 December 2002

| Name of case | Art. 5, LCart (agreements) | Art. 7, LCart (dom.pos) | Arts. 5 and 7 LCart | Outcome (see key) | Reference in DPC |
|--|-------------------------------|-------------------------------|------------------------|----------------------|---------------------|
| Radio-TV contract in St. Gall | | X | | 1 | 2002/3, p.431 |
| Berner Zeitung/Publicitas | | X | | 1 | 2002/3, p. 435 |
| Espace Media Groupe/Berner Zeitung AG/Solothurner Zeitung | | X | | 1 | 2003/1, p. 62 |
| Bill posting in Lucerne | | X | | 1 | 2003/1, p. 75 |
| Radio 24/Radio Zürisee | X | | | 1 | |
| Generika: Spirig Glaxo | X | | | 1 | |
| Johnson & Johnson | | X | | 1 | 2003/2, p. 240 |
| Reference price for heating oil | X | | | 1 | 2002/2, P.239 |
| Interprofession Apenzell Sàrl | X | | | 1 | |
| Farm tractors | X | | | 2 | 2002/4, p. 558 |
| Piano tuners | X | | | 2 | |
| Competition regulations of the Swiss Association of Builders (SBV) | X | | | 2 | |
| Change in the market regulations of the intercantonal teaching aids exchange (ILZ) | X | | | 2 | |

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| Name of case | Art. 5, LCart (agreements) | Art. 7, LCart (dom.pos) | Arts. 5 and 7 LCart | Outcome (see key) | Reference in DPC |
|---|-------------------------------|-------------------------------|------------------------|----------------------|---------------------|
| Interprofession de l'Emmental | X | | | 2 | 2002/3, p. 430 |
| Post/UBS | X | | | 2 | |
| Swisscom ADSL (provisional measures) | | X | | 3 | 2002/3, p. 440 |
| Cablecom-Teleclub (provisional measures) | | X | | 3 | 2002/4, p. 567 |
| Publigruppe | | X | | 3 | 2003/1, p. 87 |
| Swisscom Directories | | X | | 4 | |
| Swisscom Office Connex | | X | | 4 | |
| Cablecom – free programmes | | X | | 4 | |
| Kiosk AG | | X | | 4 | |
| SRG-tpc | | X | | 4 | |
| Kodak | | | X | 4 | |
| Cablecom/Vertrieb STB | X | | | 4 | |
| Medical gases market | X | | | 4 | |
| Stick deodorants | | | X | 4 | |
| Mars | | | X | | |
| Printer cartridges | | | X | | |
| Sale of health products | X | | | 4 | |
| Credit cards | X | | | 4 | |
| Fasmed | X | | | 4 | |
| BSE test – Labors | X | | | 4 | |
| BSE test – slaughter-house tests | X | | | 4 | |
| Pharmaceuticals manufacturer reduction | X | | | 4 | |
| Tele 2 – Swisscom | | X | | 5 | |
| Citroen distribution system | X | | | 5 | 2002/3, p. 455 |
| Private doctors' fees in Geneva | X | | | 5 | 2003/2, p. 265 |
| Driving school teachers in Graubünden | X | | | 6 | 2003/2, p. 271 |
| Swisscom ADSL | | X | | 6 | |
| Mobile telephony – termination charges | | X | | 6 | |
| Cablecom – Teleclub | | X | | 6 | |
| Publigruppe | | X | | 6 | |

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| Name of case | Art. 5, LCart (agreements) | Art. 7, LCart (dom.pos) | Arts. 5 and 7 LCart | Outcome (see key) | Reference in DPC |
|---|-------------------------------|-------------------------------|------------------------|----------------------|---------------------|
| Swico-S.EN.S | | X | | 6 | |
| Axpo distribution parterships | | X | | 6 | |
| Feldschlösschen – Coca-Cola | | X | | 6 | |
| CoopForte – Bonus | | | X | 6 | |
| Pig slaughtering market | | | X | | |
| Swatch/ETA SA Manufacture Horlogère Suisse | | X | | 6 | |
| Book prices (Sammelrevers) | X | | | 6 | 2002/4, p. 731 |
| TicketCorner | | X | | 6 | |
| BSE-Tests wholesaler | | X | | 6 | |
| Credit cards | | X | | 6 | |
| HP-Vertrag Kt. AG with public hospitals | X | | | 6 | |
| Distribution of veterinary drugs | X | | | 6 | |
| Debit cards | | | X | 6 | |
| Complementary medicine “register of empirical medicine” (RME) | | X | | 6 | |
| CS/Bank Linth | X | | | 6 | |

Summary of important cases

13. **Swisscom ADSL** (provisional measures): The object of the procedure is to for Swisscom Fixnet AG to make broadband Internet services available to Internet providers. Back in March 2002, Swisscom Fixnet AG gave the providers ADSL volume reductions based on the number of their subscribers. The preliminary investigation showed that Swisscom’s subsidiary, Bluewin, was the only company able to obtain the maximum reduction offered by Swisscom, enabling Bluewin to give final consumers ADSL subscriptions at a lower price than that paid to Swisscom by its competitors for the Swisscom network user tax. Comco took the view that this was probably an abuse of dominant position and launched an investigation. It took provisional measures obliging Swisscom to stop its anticompetitive behaviour and immediately apply to all retailers of ADSL services the same reduction as it gave its subsidiary, Bluewin. This prevented the new and rapidly expanding market for broadband Internet services from being immobilized in an anticompetitive manner.

14. **Tele2/Swisscom**: Swisscom had been enclosing with its bills for connecting people to the basic telephone network - where it still has a monopoly (last mile) - advertising material for its own products aimed at customers who had been pre-selected amongst those of a competing fixed line operator. Comco was able to close the case by means of an out-of-court settlement in May 2002, Swisscom having undertaken not to repeat this practice in the future. There were, however, signs suggesting that Swisscom was in breach of the settlement reached, prompting the Comco Secretariat in August 2002 to start the procedure for taking sanctions against Swisscom.

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15. **Distribution of farm tractors:** The preliminary investigation concerned the contractual clauses - relating to sale price setting and the geographical breakdown of the sales area – linking the farm tractor dealer to the official importer. The Secretariat analysed the vertical relations between six companies (accounting for over 70 per cent of the market) and their dealers. To begin with, the Secretariat considered whether these vertical relations constituted an agreement within the meaning of Art.4 of LCart. If so, it would consider whether the agreement was significant from the standpoint of Art. 5 of LCart and figure 3 in the Communication on assessing vertical agreements. And if this were the case, it would look to see whether the agreement was justified for reasons of economic efficiency. If there was no justification, the agreement would be unlawful. The Secretariat did not have to arrive at a final verdict as to the unlawfulness of the contractual clauses because each company undertook to put a stop to the state of affairs which had led to them coming under attack. Two companies made it clear in their contracts that dealers were free to set the sale price. One company struck out the contentious clauses, while yet another signed a statement in which it undertook not to define either a particular area or a sale price. The result was that the Secretariat was able to close the preliminary investigation.

16. **Citroën's distribution system:** It was the investigation into the Citroën distribution system that marked Comco's first substantive decision with respect to vertical agreements. Its investigation had shown that two clauses in the dealer and agent contracts appreciably restricted competition, which meant that two clauses in the Citroën network's distribution contract were unlawful. The offending provision in fact restricted the geographical supply and outlet possibilities of Citroën dealers/agents where new vehicles were concerned. By virtue of a decision of 19 August 2002, Comco banned the clauses in question and approved the out-of-court settlement reached with Citroën. Under the said settlement, Citroën undertook to amend the two clauses so as not to limit parallel imports and exports, in other words so as not to limit, even indirectly, cross deliveries within a given distribution network.

17. **Swatch/ETA SA Manufacture Horlogère Suisse:** The business of ETA SA Manufacture Horlogère Suisse consists, in particular, of delivering sketches to numerous watch-making companies. In August 2002, ETA announced that it was going to cut these deliveries as of 1 January 2003 and stop them altogether as of 1 January 2006. The announcement prompted a number of companies to lodge complaints with Comco and ask for provisional measures to be taken. The preliminary investigation, which began on 3 October 2002, revealed evidence suggesting that ETA SA had a dominant position on the market for sketches of mechanical watch movements and could abuse that position. On 4 November 2002, Comco launched an investigation into ETA SA and on 18 November 2002 it ordered provisional measures based on an out-of-court settlement negotiated between the Comco Secretariat and ETA SA. In its decision, Comco obliged ETA SA to continue, for the duration of the procedure in question, making deliveries to its existing Swiss and foreign customers in the ratio of 85 per cent sketches and 15 per cent finished movements.

18. **Publigroupe:** The investigation launched in November 2002 as a result of evidence of an abuse of dominant position focussed, first, on the network of contracts linking Publigroupe to numerous newspapers, which enabled Publigroupe to have sole control over the sale of publicity and advertising and, second, on Publigroupe's minority holdings in newspaper publishing companies, which allowed it to exercise a certain degree of control over these companies. Also, Publigroupe was refusing to pay some of its competitors commission on the advertisements they were publishing in newspapers managed solely by Publigroupe. In this way, the company was discriminating against its partners on the market and artificially preventing the emergence of any new competitors.

19. **Sickness insurers/Weita Holding SA:** Santésuisse, the insurers belonging to the association, concluded an agreement with a supplier of health products for incontinence. Under the terms of the aforementioned agreement, only the products of the said company would in future be reimbursed at a specific rate. Other suppliers' products would be reimbursed only on the same conditions. For all sickness

insurers to reimburse a company's products at the same rate looks problematic from the standpoint of competition law, even if competitors' products can still be reimbursed under the terms of the agreement.

20. **Concentration operation between the Cantonal Bank of Zurich (ZKB) and BZ Visionen:** Comco was notified on 7 August 2002 of the ZKB/BZ Visionen concentration operation. Thanks to this operation ZKB, the biggest cantonal bank in Switzerland, was intending to purchase unlisted registered shares – and hence obtain a voting majority – in Pharma Vision, BK Vision, Spezialitäten Vision and Stillhalter Vision (BZ Visionen), firms belonging to the group BZ Gruppe Holding AG. The BZ Visionen firms are listed investment companies for private and institutional investors. The question was whether a market should be defined for investment companies. However, the question remained open inasmuch as, even narrowly defined, concentration operations were not a problem from the point of view of the legislation on cartels.

21. **Co-operation project between UBS SA/Postfinance – the Swiss Post Office:** The subject of the preliminary investigation was the co-operation project between the Post Office and UBS in the credit field. The co-operation scheme involved outsourcing some of the functions of the credit production line, which the Post Office could not do itself for legal reasons, particular examples being refinancing, Risk and Capital Management and Recovery Management. The preliminary investigation focussed on the question as to whether the co-operation project constituted a horizontal or a vertical agreement within the meaning of the law on cartels. The investigation was closed when UBS dropped the articles on non-co-operation included in the initial project.

22. **Credit card terms:** In 2002, consumer complaints about the lack of competition between credit card issuing companies increased. Once one particular company had sharply increased its prices in early 2002, annual charges for cards were virtually identical among all the issuing companies. Comco launched a preliminary investigation to determine whether there was any evidence of an agreement concerning competition. Following a market survey, the procedure was extended to interchange fees – the commission that the purchasing bank (i.e. the bank that joins shopkeepers together in accepting the credit card) has to pay the issuing bank (i.e. the bank that issues credit cards to consumers) in respect of each transaction involving the use of a credit card.

23. **Veterinary tests/Migros:** Since early 2001, various retailers have been asking their beef suppliers to carry out BSE tests (bovine spongiform encephalopathy) on cattle aged over 20 months which are for slaughter. Migros told its suppliers in what laboratories the tests should be carried out. To the extent that the meat going to Migros is not separated from the rest of the meat during the slaughtering process, Migros' demands therefore extend to all slaughtered cattle. The preliminary investigation launched in September 2001 produced evidence that Migros had a dominant position as an indirect applicant on the BSE test market. There was also evidence to suggest that competition between laboratories was undermined because of the conditions imposed by Migros. It would also appear that Migros had unilaterally set the price of BSE tests. Lastly, there was evidence that some laboratories' access to competition had been hindered. It was for these reasons that an investigation was opened in 2002.

24. **Credit cards – non-discrimination clause:** In 2002, Comco handed down a decision banning credit card companies from inserting the non-discrimination clause in their contracts with merchants. It found that these companies were abusing a collective dominant position by imposing the clause on merchants and thereby prohibiting them from passing on to credit card users alone the cost of the commission they have to pay, or from charging customers using other means of payment different prices.

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a.2) Summary of the activity of the Price Monitoring Office

25. The Price Monitoring Office is responsible for preventing parties to a cartel, or firms wielding great market power, from imposing unfair prices or excessive increases. Between 1 January and 31 December 2002, infrastructure and health again constituted the main focus of the Office's activity.

Summary of important cases

Telenetwork taxes: Shortly before bringing out a formal decision, the Price Monitoring Office was able to reach an out-of-court settlement with Cablecom, the biggest Swiss telenetwork operator. The Office having demonstrated that the single monthly tax of CHF 22 was not justified, the price had to be lowered to CHF 19.50 as of 1 January 2003.

Electricity market: Following the firm no to the law on the electricity market, the electricity companies kept their monopoly on distribution. With substantial monopoly rents being earned, it is up to the Price Monitoring Office to defend consumers against abusive prices. The Office therefore resumed its analyses of concrete cases and it was in this framework, and in order to compare prices, that a sweeping investigation covering all Swiss companies was undertaken.

Postal rates: the Price Monitoring Office refused to allow an increase in the price of letters with acknowledgement of receipt, given that the product was covering its costs, but did on the other hand agree to price changes for parcel post which was always in deficit. The object of seeking to change the price for letters with acknowledgement of receipt was to improve the financial situation of the mail unit which was burdened by the postal network's deficit. In the opinion of the Price Monitoring Office, it was important to get at the root of the network's financial problems instead of masking them by having another unit take responsibility.

Drugs: As part of the revision of the regulations on the admission of drugs payable by the health insurance funds, the basket of countries used for price comparisons with other countries was expanded. Also, the sharp fall in the reductions extended to hospitals, stemming from a restrictive interpretation of the anti-corruption provision in the new law on therapeutic products, obliged the Price Monitoring Office to intervene. In its opinion, reductions are a legitimate part of competition and should not be bracketed with attempted corruption. Lastly, the comparative analyses performed by the Office, showing prices to be too high in Switzerland and the need to take action, were confirmed by outside studies.

Health care rates: TARMED, the new price mechanism which is set to replace the 26 cantonal health care rates and the hospital services catalogue used to calculate ambulatory services, with effect from 1 January 2004, has been approved by the Federal Council. The Price Monitoring Office backed this approval, given that its recommendations had been broadly acted on and that price increases of approximately CHF 1 billion had thus been avoided. The Price Monitoring Office will be looking during the course of 2003 at the point values scheduled in the various cantons. Since a number of hospitals are not yet able to distinguish clearly, from the accounting point of view, between the ambulatory part and the hospital part and cannot therefore present the costs of ambulatory treatment in a transparent manner, the Price Monitoring Office has developed a simplified analytical method, pending the arrival of TARMED.

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

26. 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).

27. In February 2002, ComCom had to refuse the requested unbundling of the last kilometre because of the lack of a legal basis in the Federal Tribunal's ruling of 3 October 2001. As part of the consultation on the revision of the Telecommunications Act and the Order on telecommunications services, ComCom came down in favour of rapid decree-based unbundling. On 26 February 2003, the Federal Council decided to introduce unbundling of the last kilometre at decree level. However, it was also anxious to submit to Parliament the obligation to unbundle as part of the ongoing revision of the law on telecommunications.

28. In late 2002, a fixed-line provider lodged two new interconnection requests. The latter require ComCom to lower two operators' interconnection prices for fixed-line calls to mobile networks. The two requests were withdrawn at the start of 2003.

a.4) Summary of the activity of the Appeals Commission for Competition Matters

29. **Fribourg electric companies (EEF)**: In a ruling of 5 March 2001, Comco pronounced as unlawful - being an abuse of a dominant position - the refusal by the EEF to allow its network to be used to transport a third party electrical company's (Watt AG) electric current 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 to prevent the application of the law on cartels and that the EEFs' behaviour could not be justified by "legitimate business reasons". An appeal having been lodged by the EEF, the Appeals Commission for Competition Matters fully confirmed Comco's decision. In particular, it confirmed Comco's competence in the matter and clearly noted that cantonal law contained no provision creating a legal monopoly in favour of the EEF which outweighed the law on cartels. The EEF appealed to the Federal Tribunal against this decision, and the case is now pending.

30. **Cable/Teleclub** (provisional measures): The proceedings relate to Cablecom's showing Teleclub's digital television programmes on its cable network. Cablecom is Switzerland's biggest cable network operator. For years, it has been showing analogical TV programmes via Teleclub subscriptions. Since March 2002, Teleclub has had a concession allowing it to broadcast its programmes digitally. To receive the programmes, it is necessary to have a Set-Top-Box which decodes the signals. Cablecom made the showing of Teleclub's digital programmes on its network conditional on Teleclub agreeing to use not the Set-Top-Box which it had developed, but Cablecom's Swiss-Fun Set-Top-Box. Cablecom launched its own digital television programme in September 2002. Comco came to the conclusion that by making the showing of Teleclub's programmes dependent on using the Swiss-Fun Set-Top-Box, Cablecom was favouring its own products and in all probability abusing a dominant position. To prevent the structure of the subscription television market being immobilized in an anti-competitive manner, Comco ordered Cablecom to take provisional measures enabling it to broadcast Teleclub's digital programmes with immediate effect and to authorise the use of the Teleclub Set-Top-Box. The Appeals Commission for Competition Matters confirmed, on appeal, Comco's ruling on provisional measures.

a.5) Summary of the activity of the cantonal courts

31. **X/Y** (DPC 2002/4, p. 757): The plaintiff and the defendant are both construction companies. The plaintiff claimed damages on the basis of Article 12 § 1 lit. b LCart., arguing that the defendant had lodged a complaint solely in order to delay the plaintiff's project. The court dismissed the plaintiff's case because the defendant had not acted unlawfully. The terms of neither Article 5 (agreements) nor Article 7 (abuse of dominant position) were met.

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a.6) *Summary of the activity of the Federal Tribunal*

32. **Book prices** (DPC 2002/4, p. 731): The Federal Tribunal partially accepted the appeal by the Swiss book and publishing association and the German Association for the German book market, and referred the matter to Comco for further consideration. The Federal Tribunal noted that the agreement on book prices was a competition-related agreement that came under the heading of the presumption of unlawfulness in Article 5 §3 of LCart. That presumption can, however, be reversed. In this particular case, though, Comco and the Appeals Commission for Competition Matters found that it could not be. The Federal Tribunal found, on the contrary, that prices were just one of many competition criteria on the book market and that competition between bookshops in matters of quality was sufficient to rule out the presumption that effective competition had been eliminated. It did find, on the other hand, that these agreements, which concern 90 per cent of the market, do no doubt affect competition quite appreciably. It is therefore up to Comco to decide whether they can be justified on grounds of economic efficiency.

a.7) Summary of the activity of the Federal Council

33. None

Description of important cases, particularly those with international implications

34. Cf. Citroën's distribution system, para. 16 above and Swatch/ETA SA Manufacture Horlogère Suisse, para. 17 above.

2. *Mergers and acquisitions*

Statistics on the number, size and type of mergers notified and/or controlled

35. During the period under review, 35 concentration transactions were reported. Comco conducted 4 extensive reviews.

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

| Names of participating firms and transaction type | Result | Publication in DPC |
|---|--------|--------------------|
| Edipresse-Journal de Morges (AC) | ⊕ | 2002/1, P. 159 |
| Edipresse-journal de la broye (AC) | ⊕ | 2002/2. P. 290 |
| France Antilles-l'Express Communication Holding SA (AC) | ⊕ | 2002/2, p. 316 |
| CSG/Belgacom/T.Mobile (JV) | ⊕ | |
| NZZ-LZ Medien Holding (AC) | ⊕ | 2002/2, p. 339 |
| NOK-Watt (AC) | ⊕ | 2002/2, p. 348 |
| Tamedia AG-LH Holding AG/RadioBasilisk Betriebs AG (JV) | ○ | 2002/3, p. 486 |
| Deutsche Post AG-DHL International Ltd (AC) | ⊕ | 2002/3, p. 642 |
| Candover/Kluwer (AC) | ⊕ | |
| E.ON-Ruhrgas (AC) | (V) | 2003/1, p.171 |
| Edipresse-Corbaz (AC) | ⊗ | 2003/1, p. 177 |
| GU Laboratoires INNEOV (EC between Nestlé SA and L'Oréal) | ⊕ | 2002/3, p.500 |

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| Names of participating firms and transaction type | Result | Publication in DPC |
|--|--------|--------------------|
| Coop/EPA (AC) | ⊗ | 2002/3, p. 505 |
| Emmi/SDF (M) | ⊕ | |
| Tamoil/TotalFinaElf (AC) | ⊕ | 2003/1, p. 160 |
| Crema/SDF (M) | ⊕ | 2003/1, p. 212 |
| RWE Solar GmbH (M) | ⊕ | 2002/4, p. 614 |
| Hewlett-Packard/Compaq (AC) | ⊕ | 2002/2, p. 296 |
| Pick Pay/EPA (AC) | ⊕ | |
| Norsk Hydro ASA/VAW Aluminium AG (AC) | ⊕ | 2002/2, p. 322 |
| Usinor/Arbed/Aceralia (M) | ⊕ | 2002/2, p. 329 |
| Richner AG/Vicom Baubedarf | ⊕ | 2002/3, p. 491 |
| Kohlberg Kravis Roberts & Co. LP/Demag Holding Sarl (AC) | ⊕ | 2002/3, p. 523 |
| RWE Solutions AG and Schott Glaskontor GmbH (AC) | ⊕ | 2002/4, p. 614 |
| Migros/Scana (AC) | ⊕ | 2002/4, p. 625 |
| Cargill Inc/Alcorex SA (AC) | ⊕ | 2003/1, p. 164 |
| RAG/Degussa (M) | ⊕ | |
| BP/E.ON (M) | ⊕ | 2002/3, p. 466 |
| Fust/Rediffusion (AC) | ⊕ | |
| Coop Leben/National (AC) | ◆ | 2002/3, p. 524 |
| CS/Bank Linth (AC) | ∇ | 2002/3, p. 466 |
| Ernst & Young/Arthur Anderson (AC) | ⊕ | 2002/3, p. 469 |
| Valiant Holding/Interregio Bank/Luzerner Regiobank (M) | ⊕ | 2002/4, p. 606 |
| ZKB/BZ-Visionen (AC) | ⊕ | 2002/3, p. 496 |
| IBM/PWC Consulting (AC) | ⊕ | 2002/4, p. 628 |
| Pfizer/Pharmacia (AC) | ⊕ | 2003/2, p. 314 |
| CIE Management-Hirslanden AG (AC) | ⊕ | 2003/1, p. 168 |

Key:

- = No objection after preliminary investigation (Art. 32, LCart)
- = No objection after review (Art. 33, LCart)
- = Authorisation subject to obligations and conditions
- = Sanctions for violating the prior notification requirement
- = Notification withdrawn by the parties
- = Procedure in progress at 31 December 2002

M = Merger; AC = Acquisition of a controlling interest; JV = Joint venture

Summary of significant cases

37. **Edipresse-Corbaz:** In May 2002, Edipresse notified Comco of its purchase of the Vaudois press group Corbaz, which published two regional dailies. Since this operation showed signs of strengthening

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Edipresse's dominant position with regard to daily papers in the Vaud region, Comco began investigation procedures on 19 June 2002. These showed that the operation in question would not eliminate effective competition on the market, although Edipresse's position would be stronger. The fact was that the presence in French-speaking Switzerland of the French group Hersant and the new co-operation arrangements put in place by the independent French-speaking Swiss publishers (in particular between *La Liberté* and *Le Nouvelliste*) had a substantial and lasting competitive effect on Edipresse. To accentuate this effect, Edipresse also agreed to reduce its holding to less than 33 per cent and not to sit on the board of directors of the company publishing *Le Nouvelliste*. In addition, competition on the advertisements market was stepped up by the withdrawal of Publigruppe d'Edipresse Suisse (publisher of the group's Swiss dailies) in order to focus on Edipresse Holding, and the relinquishment of the exclusivity clause in favour of Edipresse contained in its leasing contract with Publicitas. In view of these structural changes, made during the course of the procedure, Comco unreservedly authorised the concentration. A competitor has lodged an appeal against this authorisation with the Appeals Commission for Competition Matters.

38. **Coop/Epa:** In a decision of 7 August 2002, Comco agreed to Coop's purchase of Epa. Coop and Epa are both companies active in retailing. The extensive investigation did not confirm the signs, revealed during the preliminary investigation, of Coop having created or reinforced a dominant position, either on the distribution or on the supply side. With regard to the foodstuffs distribution market, the review procedure showed that the existing competitors (particularly Migros) are strong enough to restrain the behaviour of Coop/Epa. Moreover, given Epa's small size, the present concentration transaction is not going to change the structure of the distribution market at all substantially. As to the supplies market, the extensive investigation did show that suppliers were to some extent dependent vis-à-vis Coop in certain markets. That said, the purchase of Epa is not going to create or strengthen a dominant Coop position on these markets.

39. **Emmi/SDF:** Emmi has taken over SDF's cheese-making activities. Various sectors are affected, in particular hard and semi-hard cheeses and also *fromage frais* and cheese spreads. The Emmi takeover comes at a particularly difficult time for SDF which is experiencing major financial problems and does not appear to be viable in its present form in the long term. The Swiss cheese industry in general, moreover, is going through a restructuring phase. The prospect of the market gradually opening up to the international market in the framework of bilateral agreements also influenced Comco's decision. The authorisation comes in the wake of Comco launching an extensive review of the concentration between Emmi and SDF on 26 July 2002, and then deciding to authorise the early completion of the transaction on 22 August 2002.

40. **Concentration operation between Ernst & Young AG and Arthur Andersen AG:** On 28 May 2002, Comco received information of a concentration operation between Ernst & Young SA and Arthur Andersen Suisse SA. Prior to the notification, the companies had asked to be allowed to carry out part of the operation on a provisional basis. The companies are active in the area of auditing and consultancy. With the disappearance of the international Arthur Andersen network, the number of big companies working in these markets has gone from five to four. The preliminary investigation produced no evidence to suggest that the intended operation would create or reinforce a dominant position, which is why Comco did not proceed with an extensive review.

41. **Crédit Suisse/Banque Linth:** It was in 2001 that Crédit Suisse and Banque Linth made public their intention to collaborate in various ways. The object in particular was for Banque Linth to be able to transfer its electronic data to the Crédit Suisse IT platform. Also, Crédit Suisse was to take a holding of some 5 per cent in the capital of Banque Linth, which could have been increased to 33 per cent. A representative of the bigger of the banks was also to be appointed to the board of Banque Linth.

42. Following action by Comco, notice of the intended collaboration was submitted, but the parties then withdrew their notification. Comco therefore launched an investigation to analyse the situation from

the standpoint of an agreement between competitors. In the end, the parties abandoned their project and the investigation was closed.

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

1. *LCart-related activities of the competition authorities*

43. 43. 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.

a) *Preliminary opinions*

44. On several occasions, the Secretariat took a position on proposed legislation, including the Act on lawyers in the cantons of Bâle-ville and Zurich, the revision of the Act on Telecommunications (LTC) and its implementing decrees, and also on the revision of the Order on the Post Office.

b) *Recommendations*

45. There are no particular recommendations to comment on.

2. *Activities of the competition authorities concerning the Domestic Market Act (DMA)*

46. The Domestic Market Act (DMA) guarantees persons with their headquarters or establishment in Switzerland free and non-discriminatory access to the market so that they can be in gainful employment anywhere in Switzerland. The Comco Secretariat carried out a nationwide investigation into the state of the market in the sanitary fittings sector, the aim being to gather information on the structure of the market and on any existing restrictions on access to the said market. The information collected was incorporated in the work of the *Société Suisse de l'Industrie du Gaz et des Eaux* so that a new directive could be drawn up on the award of concessions for work and checks on drinking water and natural gas installations. The new directive should result in standard regulations that are consistent with the Domestic Market Act (DMA).

47. The Secretariat also dealt with three cases submitted by private individuals complaining about restrictions on freedom of access to the market in their particular area of gainful activity, or else asking for information about the scope of the DMA. The Secretariat also drafted various documents for the Federal Department of Economic Affairs, which related to the revision of the DMA. With regard to public procurement, central to the Secretariat's activities were the ongoing dialogue with the *Conférence Suisse des Directeurs des Travaux Publics, de l'Aménagement du Territoire et de la Protection de l'Environnement* and collaboration in the *Commission des Achats de la Confédération* (CAC). In addition, the Secretariat worked with a working party headed by the *Office Fédéral des Constructions et de la Logistique* which had been requested by the CAC to design a new training schedule for Confederation buyers.

IV. Resources of the competition authorities

1. Overall resources

a) Annual budget

48. The total annual budget encompasses expenditure on staff and supplies for Comco and its Secretariat. In 2002, this amounted to SF 4 884 000. The total annual budget for 2002 was identical to that of the previous year.

b) Number of employees

49. Comco is a decision-making authority made up of 15 members. Case files are prepared by a permanent Secretariat that, as of end-2002, employed 53 people: 4 managers and 49 assistants, including 20 jurists, 19 economists and 10 secretaries.

2. Human resource allocation

50. Between 1 January 2002 and 31 December 2002, the Secretariat's staff resources were allocated as follows: a) 65% to combat anticompetitive practices; b) 25% for merger review and enforcement; and c) 10% for advocacy efforts in the form of advisory opinions and recommendations to the courts in appellate procedures.

V. Summaries or references to new reports and studies on competition policy issues

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

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