Introduction

Switzerland is a relatively small country, both in terms of population and area. It might be considered a relatively "large" economy, however, if measured by the size of its absolute GDP or GDP per capita. The size of an economy is sometimes also defined by economists as the number of competitors that can be sustained when supplying domestic demand only. According to this definition, with its population of 7.2 million, Switzerland is to be qualified as rather small an economy, which therefore has particular

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competition policy issues (for example: open markets for exports and imports as well as a well functioning legal system including trade and investment agreements are essential. That's why well functioning competition among competitors is crucial.

**Enforcement**

The Swiss Competition Commission (Comco) was set up in 1995 by the Federal Act on Cartels and Other Restraints of Competition (Act on Cartels, ACart). In contrast to the former Cartels Commission, which only had consultative powers, the COMCO possesses enforcing powers.

The year 2003 is a very important year in the history of Swiss Competition. Besides combating the abuse of dominant positions and investigating against possible vertical agreements, this year was dominated by the revision of our law, the Act on Cartels and other restraints on Competition (hereinafter: Acart). There were several reasons leading to this amendment, from which I will mention two:

- the former Acart turned out to be ineffective because only non-compliance with legally enforceable decisions of the Comco was sanctionable (in other words: the initial violation of competition rules was free from any penalty).
- the exposure of the vitamin cartel provided a real impetus behind the decision of the Federal Council at the beginning of 2000 to form an internal working group with the task of preparing a preliminary draft for the revision of Acart.

The main objective of the revision was to enhance the preventive effect of the Acart and reach international standards by making the country's notoriety as a "paradise for cartels" and the Comco's reputation for being a "paper tiger" no longer be justified.

Of particular import is the fact that since April 1, 2004, the Comco has the power to impose fines for those violations that cause the most significant damage to the economy. Further, in an effort to eliminate cartels, the Acart introduced a Leniency Program, pursuant to which cartel members are given the opportunity to escape or reduce a possible fine by coming forward to the Comco with information about a cartel in which they are involved.
The fundamentals of the revision include (besides the introduction of direct sanctions and a leniency programme):

- A new clause, in which a presumption of the elimination of effective competition will be made in the case of certain forms of price-fixing agreements and territorial protection.
- A more precise definition of the concept of market dominance (Art. 4 para. 2 Acart), according to which the “ability to act independently” may relate to conduct towards competitors, suppliers or consumers.
- The repeal of the special reduced turnover thresholds that applied to the notification of mergers between media organisations.
- The introduction of new investigation methods, in particular dawn raids.
- The extension of the reservation relating to the application of intellectual property law (contained in Art. 3 para. 2 Acart), according to which Acart will be applicable to restraints on parallel imports.
- The introduction of the "SME Article" (Art. 6 para. 1 lit. e Acart).
- An adaptation of the method of calculation of the turnover thresholds for banks and financial intermediaries (in order to bring it in line with EU law).
- A new statutory basis for the charging of fees.
- A statutory basis for a regular evaluation of the application of Acart.

**Awareness and Advocacy**

The revision of the Acart also included a transition period lasting from April 1, 2004 until March 31, 2005. During this period, according to the new Acart, companies were given the opportunity (or option) either to terminate or notify their infringements to the Comco.

The Competition authorities therefore started a huge campaign to inform the economy about the scope of the new law. The information campaign was designed to reach the major industries and sectors of the entire economy. It took a lot of time and human resources, but the result is very satisfactory since it contributed to increase and reinforce the preventive effect of the Comco in its fight against cartels.
Activities in 2004

A Introduction

The year 2004 was marked by the revision of the Act on Cartels. On 1 April 2004 the new provisions amended and approved by Parliament on 20 June 2003 came into force. The Ordinance regarding the Sanctions for Unlawful Restrictions of Competition (Acart-Sanctions Ordinance) came into force at the same time. This ordinance specifies in particular the application of the new instruments of direct sanctions, the leniency programme and the notificationing of restraints on competition for the purpose of avoiding a penalty. Although sanctions will not be imposed until April 2005, there was a great deal to be done in view of the revised provisions.

Up to 31 March 2005 the transitional phase of the new provisions is in force. This phase is designed make it possible for companies to adapt their conduct and their contracts to the new provisions of the Acart, without facing the risk or threat of an immediate sanction.

Since the beginning of the transitional phase on 1 April 2004, the competition authorities have opened only one new investigation (three in the whole calendar year), but have dealt with 154 notifications in the transitional phase, and have in 56 cases provided advice to companies on matters arising from the revised provisions.

B First Experiences with the Revised Provisions

1. Introduction

Since the coming into force of the revised provisions on 1 April 2004, the competition authorities have dealt with notifications of existing as well as of new restraints on competition. A substantial portion of the work here involved consultations by the Secretariat on questions arising from the possibility of direct sanctions being applied to existing or newly planned practices.

In respect of the new notification provision, the Competition Commission circulated a draft report form for consultation in April 2004. As a result of feedback received, the form was revised and approved in its final form by the Competition Commission at the end of 2004. It can be downloaded from the Competition Commission's website at www.weko.ch.
2. Consultations

In connection with the coming into force of the revised provisions there arose many questions from companies and their legal representatives with regard to potential sanctions on account of an agreement or practice. These questions were dealt with by the Secretariat on a fee basis in the form of consultations.

The aim of the consultations was to show the companies whether or not, on account of a certain agreement or practice, there existed a state of affairs potentially subject to sanctions under the Cartels Act. In the absence of such a presumption the companies are free to implement or continue to operate the agreement in question without being exposed to the threat of sanctions. If there exists a situation posing a potential risk of sanctions, the Secretariat’s advice is to the effect that a formal notification under Art. 49a para. 3 let. a Acart should be submitted.

The more than 50 consultations tied up a considerable portion of the Secretariat’s staff resources. But this extensive expenditure of effort devoted to consultation paid off inasmuch as it helped prevent formal notifications in terms of Art. 49a Acart, which would themselves have absorbed still more time and effort.

3. Selected Specific Cases

Post Office/ SIC – Tariffs in Payment Transactions
On 28 May 2004, the Competition Commission was informed of the introduction of new tariffs (lower tariffs) affecting payment transactions by the Post Office and the SIC. The new tariffs, levied on financial institutes for credit notes (known as the B-Tariff), were negotiated by both suppliers with their clients. Investigations revealed that at the present time the two methods of payment form different relevant markets and do not compete with each other for the same customers. The Competition Commission therefore refrained from opening a preliminary investigation.

Maestro Debit Cards: introduction of an interchange fee and of a new price model of the Telekurs Multipay AG
In July 2004 the Competition Commission received two notifications relating to Maestro Debit Cards. One notification referred to the introduction of a multilateral interchange fee in connection with the adoption of the Maestro system. The Interchange fee is a fee that Telekurs Multipay AG has to pay for transactions in Switzerland to the suppliers of Maestro debit cards. The second notification concerns the introduction of a new price model by Telekurs Multipay AG as a result of the new tariff. In order to ascertain whether there
were grounds indicating unlawful restraint of competition, the Secretariat of the Competition Commission opened a preliminary investigation in September 2004.

**Four Notifications in the Area of Supplementary Health Insurance.**

Several health assurance companies have collective or individual contracts with a group or with public or publicly subsidised hospitals or private clinics in a number of cantons. The contracts affect in-patient services in the area of supplementary insurance, and establish the fees for private and semi-private treatment. It is still unclear whether this constitutes an unlawful pricing agreement (Art. 5 para. 3 Acart), or whether it is a justified agreement for reasons of economic efficiency (Art. 5 para. 2 Acart) or whether it is governed by cantonal provisions (Art. 3 para. 1 Acart).

**Swiss Pool for Air Transport Insurance**

The Swiss Pool for Air Transport Insurance (SPL) is a group organised as a simple partnership that reinsures risks in air and space transport underwritten by its members as primary insurers. It maintains three sections covering accidents, third party and hull insurance. At present 18 primary insurers and 4 reinsurers are members of the Pool. The SPL standardises insurance companies' prices and terms and conditions of business, and this can accordingly be designated as an agreement restricting competition. Since the SPL also has a considerable share of the Swiss air transport insurance, there is a need to investigate whether the agreement restricts competition to a significant effect. It is also necessary to examine what reasons of economic efficiency there are for the existence of the SPL.

**Calculation aids for Veterinary Surgeons.**

This notification deals with the calculation aids used by veterinary surgeons for calculating prices and rates for their services. The aid consists of a catalogue of services and the tariffs to be charged for them. It must be ascertained whether these recommendations are in fact observed by the veterinary surgeons, and whether in the form they take they constitute an unlawful price agreement.

**SVV Net Premium Tariffs**

Since the coming into force of the Accident Insurance Act (AIA) in the year 1984, private insurance companies engaged in this social insurance have applied a standard group tariff in the areas of occupational accident insurance, non-occupational accident insurance and voluntary insurance. These tariffs are established by the Swiss Insurance Association (SVV). On 4 June 2004, the SVV submitted a report in order to have the permissibility of the tariffs revised on 1 January 2005 examined in terms of cartel
legislation. During this process the SVV decided with immediate effect on 20 September 2004 to establish no further net premium tariffs.

The most important problem is at the insurance company level. The premiums for the year 2005 are based on the recommended net premium tariffs of the SVV. The tariff is implemented in countless subsequent contracts made by the insurance companies with the employers. In addition the insurance companies do not yet have available to them the databases required for the setting up of company specific tariffs. The tariffs conforming to cartel legislation will still be put in force within the transitional period, but they will require for their implementation an adjustment period that will extend beyond the expiry of the transitional phase.

Eskamed AG
The notification of the Eskamed AG concerns the new regulations governing the Alternative Medicine Register (AMR) kept by Eskamed, which come into force as of 1 January 2005. These regulations cover the contractual relationship between the therapists and Eskamed AG. The notification was submitted as a result of a previous procedure (investigation 32-0137, published in RPW 2004/2, p. 449 ff.), which resulted in the Competition Commission recognising certain signs indicating that Eskamed AG occupied a dominant position in the market for quality assurance systems.

Swisspower
On 18 May 2004, the company Swisspower submitted a notification in accordance with the transitional requirement. Swisspower comprises several small suppliers active in the electricity supply market, and their aim is to use their collective strength as a means of competing in the major client sector with the established companies Axpo, BKW, EOS, etc. Although this conduct is covered in Art. 5 para. 3 Acart, the Competition Commission came to the conclusion there is sufficient external competition to reverse the presumption of the elimination of effective competition. Since competition in the relevant market tends in fact to be furthered by this collective approach, the Competition Commission came to the conclusion that no indications of significant affection of competition were present, and there was therefore no cause for the opening of proceedings.
4. Typical "small economies" cases:

**UBS/SBS (RPW 1998/2, 278 ff):**

The merger of the Union de Banques Suisses (UBS) and the Société de Banque Suisse (SBS) caused the Competition Commission to undertake a close scrutiny of the trade credit and mortgage credit markets. Finding that the merger could lead to a collective dominant position in the market for business credit of up to 2 million CHF, the Commission authorised the concentration subject to three obligations:

- First, UBS is required to sell approximately 25 banking outlets, if possible to a sole purchaser interested in Swiss retail banking. These outlets must be located in the three main speech regions and have a strong position in retail banking in Switzerland.
- Second, UBS SA must continue to participate in the banks’ joint institutions and purchase their services.
- Third, it must maintain until 2004 the business credit for up to SF 4 million that accumulates because of the concentration.

The merger proceedings relating to UBS/SBC required the monitoring of compliance with Obligation III relating to SME credits. This final obligation arising from the merger of the UBS and the SBC expired on 31.12.2004.

**Coop/Waro (RPW 2003/3, 559 ff)**

In the retail trade sector, the Secretariat conducted an in-depth investigation into the takeover of Waro by the Coop. The concentration was eventually authorised unconditionally. The Competition Commission ruled that in the retail trade there was more intense competition and the successful market entry of foreign players had given the sector new impetus. The Competition Commission paid special attention to the issue of whether the two large food distributors collectively held a dominant position. The investigations failed to indicate any parallel course between the price development of the wholesale distributors, which demonstrated that even major market players could not conduct their business as they wished irrespective of the conditions in the sales markets. In this environment, the insignificant increase in market share brought about by the acquisition of Waro would not lead to the establishment or intensification of a dominant position in the supply market.
Construction Markets sector

In 2004, the Competition Commission opened an investigation into the question of whether competition was being obstructed in the case of invitations to tender for the supply of cement and concrete systems (manufacture of concrete with tunnel excavation material) for the NRLA construction sites and in the subsequent award of contracts. The two Neat-Tunnels are being constructed by the Alpine transit companies Gotthard AG and BLS Lötschberg AG respectively.

"Sammelrevers": Publisher and Booksellers (RPW 1997/1, 35; RPW 1997/3, 334; RPW 1999/3, 441, RPW 2002/4, 731)

On 28 September 1998, the Competition Commission opened an investigation on price fixing for books published in German, involving the Swiss booksellers' and publishers' association and the German booksellers' association. In its decree of 6 September 1999, the Competition Commission found that the Collective Undertaking formed an illegal competition agreement in the sense of Art. 5 paras. 1 and 3 a) of the Cartel Act. The Competition Commission obliged the publishers and book traders to supply their customers without fixing prices under the Collective Undertaking and declared the booksellers not to be bound by it any more. This decree was upheld by the Appeal Commission for Competition Issues. The matter was then brought before the Federal Supreme Court, which only reviewed whether the decision, that the Collective Undertaking formed an illegal competition agreement in the sense of Art. 5 was against federal law. In deciding this, the Federal Supreme Court is basically bound by the facts as found by the Appeal Commission.

The Federal Supreme Court's decision rendered in this matter on 14 August 2002 has been added to the official collection of precedents. See BGE 129 II 18: Börsenverein des Deutschen Buchhandels (German booksellers' association) and Schweizerischer Buchhändler- und Verleger-Verband (Swiss booksellers' and publishers' association) vs. the Competition Commission and the Appeal Commission for Competition Issues regarding price fixing agreements for books.

In its decision, the Federal Supreme Court held that the so-called "Sammelrevers 1993 für den Verkauf preisgebundener Verlagserzeugnisse in der Schweiz" (collective undertaking of 1993 regarding the sale of price-controlled literary products in Switzerland, hereinafter the "Collective Undertaking") formed a horizontally coordinated vertical agreement at the level of the booksellers, restricting competition on the direct or indirect pricing of the products. Therefore, the court found that according to Art. 5 para. 3 a) of the Swiss Cartel Act the (rebuttable) presumption of the elimination of all competition was applicable. However, the court held that there continues to exist competition between the booksellers based on quality, albeit
competition based on price is eliminated, and that competition could only be considered as eliminated in the sense of the law if the autonomous determination of all relevant competition parameters were excluded. Consequently, the court found that the legal presumption in Article 5 para. 3 a) of the Cartel Act was rebutted.

However, the court held that it remained to be determined if the substantial restriction of competition according to Art. 5 para. 1 Cartel Act resulting from the Collective Undertaking could be justified with the argument of economic efficiency according to Article 5 para. 2 Cartel Act. The matter was therefore referred back to the Competition Commission for further enquiry. The Competition Commission continues in its investigation (since December 2002) by analysing if there are "legitimate business reasons" justifying this behaviour.