



Switzerland is located in Central Europe, east of France and north of Italy.

Switzerland is a multi-ethnic, multilingual and multi-confessional nation.

It has been a Federal State since 1848. Switzerland has a federal structure with three different political levels: the Confederation, the cantons (states) and the communes (districts).

#### Economy<sup>1</sup>

Switzerland has a successful market economy based on international trade and a high-value added service sector. Its standards of living, worker productivity, quality of education, and health care are high. Inflation is low, as is unemployment.

In recent years, Switzerland has brought its economic practices largely into conformity with the EU's, to enhance international competitiveness.

Reflecting the anaemic economic conditions of Europe, GDP growth dropped in 2001 to about 0.8 percent, to 0.2 percent in 2002, and to (-)0.3 percent in 2003, with a small rise to 1.8 percent in 2004. In spite of this low growth performance, unemployment has remained at less than half the EU average.

#### Competition Evolution and Environment

The Swiss cartel legislation is based on Article 31bis and 64 of the Swiss Constitution. These provisions were adopted by the people and the cantons in 1947, but it needed 15 years to concretise these articles by a law. It was indeed only in 1962, that the first Act on cartels (Acart 62) was adopted by Parliament. This Act codified the principles of private law emanating from the common right. It created the Cartel Commission, which had only monitoring power but no decision making power. The Cartel Commission had the ability:

PROFILE	
Population:	7.4 million***
GDP (Current US\$):	320.1 billion **
Per Capita Income: (Current US\$)	40,680 (Atlas Method) 3,210 (at PPP)**
Surface Area:	30,010 (at PPP)**
Life Expectancy:	80.5 years**
Literacy (%):	99 (of ages 15 and above)
HDI Rank:	11
<i>Sources:</i> - CIA Government Publications, Factbook (**) For the year 2003 (***) For the year 2004	

- to conduct investigations against cartels producing harmful economic or social effects; and
- to provide non-binding recommendations on enterprises and publish those recommendations.

Thus, as the effects of the law were very limited, the Federal Council was asked in 1971 to strengthen Swiss competition law, which led to the first revision of Acart 62, in 1985 (Acart 85).

The aim of the revision was to reinforce the power of the Cartel Commission. In addition to its former tasks, the Cartel Commission could ask the Chief of the Federal Department of Economic Affairs to enforce its recommendations in cases of non-compliance.

The Acart 85 was certainly a step forward, but it still did not provide effective protection for the competitive environment nor did it provide for adequate protection against the misuse of dominant positions. In addition, the Cartel Commission had no instrument to deal with merger control.

\* Original paper submitted in October 2004. Revised in September 2005 & April 2006

1 CIA World Fact Book

At the national level, the efficiency of the internal market and increased competition became decisive factors for the competitiveness of the Swiss economy. This became an urgent matter after the refusal of the Swiss to enter the European Economic Area (EEA) on December 06, 1992. Furthermore, various studies have revealed that Switzerland had lost most of its competitive edge due to lack of effective competition. A governmental programme to revive the Swiss internal market as well as promotion of competition became absolutely necessary.

It was in this context that the revision of the Acart 85 was adopted in 1995 (Acart 95), which brought real changes. The Cartel Commission became the Competition Commission (Comco) and was given the following powers:

- to decide and decree on proposals of the Secretariat, whenever competition is hindered in an unlawful way through concerted practice, abuse of a dominant position or a merger;
- to act directly against the initiator. Appeals against the decisions may be addressed to the Appeals Commission for competition matters. Appeals under administrative law against the decisions of the Appeals Commission have to be addressed to the Federal Supreme Court; and
- to address recommendations and opinions to the political authorities and give expertise on important matters concerning competition. This allows the Comco to focus on concerns of competition policy at an early stage in the law and policymaking processes.

### Competition Law and Policy

The Acart 95, which came into effect on July 01, 1996, provided Switzerland's legal basis to prohibit cartels and other restraints on competition. While the rules concerning the prohibition of the different anticompetitive behaviour were up to date, the effectiveness of the Acart 95 was weak because only non-compliance with legally enforceable decisions of the Comco was sanctioned. In other words, the initial violation of competition rules was free of any fine. Thus, if a company left a cartel after a legally enforceable prohibition had been taken by the Comco, it escaped a fine even if it had been acting unlawfully for many years! In the well-known vitamin cartel case for example, the Comco, unlike the US or EU counterparts, could not impose fines, even though the involved companies acted similarly in Switzerland.

The exposure of the above mentioned vitamin cartel provided the real impetus behind the decision of the Federal Council at the beginning of 2000 to prepare a revision of Acart 95. After a consultation process, a proposal was submitted for parliamentary debate. On June 20, 2003, the parliament took action by:

- introducing direct sanctions (fines) for companies, which act unlawfully and eliminate effective competition by

- creating hard-core cartels, by imposing damaging vertical restraints, or by abusing their dominant position; and
- improving the means of investigation by introducing a leniency programme and new mechanisms like dawn-raids.

The Swiss Government decided to enforce the amended Acart 95 on April 01, 2004. Under the new Acart, companies have to weigh the profits of an unlawful behaviour on one hand and the risks associated with the discovery of infringement by the Comco on the other – namely the level of the fine and also any potential indirect damages (e.g. harm to reputation, procedural costs).

With the introduction of the new Acart, any company found to be engaged in cartel activity will face a financial penalty. However, the legislator also introduced a leniency program, which offers companies that are involved in practices that infringe the Act an incentive to cooperate with the Comco via a reduction of the sanctions imposed. Additionally, the new Acart gives any company the opportunity to voluntarily report a restraint on competition before the restraint takes full effect and thereby avoid direct sanctions.

Given these two major modifications (the direct sanctions and the Leniency Programme), companies should be pressed to respect the law since it will be very difficult to escape fines once a cartel is discovered by the Comco in the future.

Other fundamental changes of the revision include:

- A new presumption of the elimination of effective competition clause for certain forms of vertical price-fixing agreements and territorial protection;
- A more precise definition of the concept of market dominance, according to which the 'ability to act independently' may relate to conduct towards competitors, suppliers or consumers; and
- The introduction of new investigation methods, in particular searches of houses or companies, to be carried out by the Secretariat where there is strong suspicion of an infringement.

In addition to the Acart that directly deals with competition, other significant laws have been introduced in order to promote a competitive market economy. For instance:

1) The Federal Act on Price-Monitoring as of December 20, 1985 applies to all kind of prices, goods and services including credit prices. It introduces the role of a price inspector that:

- observes price evolution;
- prevents the increase of prices and the maintenance of abusive prices; and
- periodically informs the public about its activities.

2) The Federal Act on Unfair Competition as of December 19, 1986

It aims to guarantee fair competition between competitors without regarding their market positions.

3) The Federal Act on the Internal Market as of October 6, 1995 which is currently under revision. This Act guarantees free and non-discriminatory market access in Swiss territory to any person having her office or establishment in Switzerland. It aims in particular:

- to facilitate professional mobility and economic exchanges in Switzerland;
- to support the efforts of the cantons aiming at harmonising the licensing requirements of market access;
- to increase the competitiveness of the Swiss economy;
- to reinforce the economic cohesion of Switzerland.

4) The Federal Act on Technical Barriers to Trade as of October 6, 1995

This law lays down applicable and uniform rules, aiming at preventing the creation of technical trade barriers, eliminating them or reducing them.

### **Institutions, its Competencies and Anticompetitive Business Practices**

The Comco, established by Acart 95, consists of 15 members who are elected by the Swiss government, the Federal Council. The Acart requires that the majority of the members of the Comco are independent experts – usually law and economics professors. Representatives of business associations and consumer organisations occupy the remaining seats.

The Comco is responsible for enforcing cartel legislation to ensure free competition. It is an independent body, (although administratively attached to the Federal Department of Economic Affairs) and concentrates its efforts on fighting cartel agreements, the isolation of the Swiss market through vertical agreements, abuses of dominant positions and state limitations on competition. Furthermore the Comco is also responsible for implementing domestic market regulations and ensuring that enterprises have unrestricted access to the market throughout the country.

The Comco is supported by a full-time Secretariat. It leads the investigations and prepares draft decisions for the Comco. The institutional separation in an investigating secretariat and a decision-making Commission ensures quick and broadly supported results.

According to the Acart, the Secretariat is also in charge of giving legal advice to enterprises and public administrations. Further, it has to examine a broad range of markets and keep track of the international developments in competition policy

2 Website of Federal Communications Commission

### **Box 97.1: Checking Abuse of Dominance**

**Ticketcorner case:** Ticket promoter, Ticketcorner's contracts included an exclusivity clause. This clause imposed an obligation on promoters to sell all the tickets for all their events via Ticketcorner over a period of several years. The events promoters concerned were therefore not permitted to sell any of their tickets through any competitors of Ticketcorner.

The Comco came to the conclusion in its investigation that Ticketcorner holds a dominant position in the market for ticket sales systems and that it is abusing this position through the imposition of the exclusivity clauses. This practice was prohibited.

**Swisscom case:** The Comco ordered Swisscom, the former public telecommunication enterprise, to dispense with its system of rebates, which allowed Bluewin, a provider, to pay lower charges for use of the network in comparison with its competitors. The Comco reached the conclusion that Swisscom held a dominant position in the wholesale market for broadband services.

In addition, the Comco held that the rebates caused discrimination and were not justified on economic grounds. The decision has the objective of safeguarding competition in the rapidly growing market for broadband services.

These examples show that under Acart 95, a company's unlawful behaviour could only be prohibited but not be financially sanctioned. The incentive to respect the law was low.

*Source: Annual Report 2003 of the Competition Commission*

### **Regulatory Framework**

#### ***Telecommunications Sector<sup>2</sup>***

In line with developments in EU member states, the new Law on Telecommunications (LTC) was introduced on April 30, 1997, which initiated competition in all the sections of the telecommunications sector in Switzerland from January 1, 1998. The Law establishes the Federal Communications Commission (ComCom), which is an independent regulatory authority responsible for enforcing LTC in the telecommunications market. The body is independent of the Government and has its own Secretariat.

It is the ComCom which guides the *Federal Office of Communications (OFCOM)* to prepare its cases and implement its decisions. The ComCom has moreover delegated some of its tasks to OFCOM.

Some of the main activities of the ComCom are listed below:

- Granting licences for telecommunications service providers and licences for the use of radio communication frequencies;
- Laying down the conditions for interconnection when service providers fail to reach an agreement;
- Award of universal service licences;
- Approval of the national frequency allocation plan and national numbering plans;
- Fixing the terms of application of number portability and free choice of supplier; and
- It also takes measures in the event of violation of the law in force and, where applicable, withdraws the licence.

### **Energy Sector**

Energy is dealt with in Chapter 7 of the Federal Constitution. The Federal Act on the Energy introduced on June 26, 1998 and its associated ordinance form the legal basis for the implementation of the Swiss Energy programme.

The Swiss energy sector is highly decentralised and comprises of three levels of organisation and decision-making: federal, cantonal and municipal. In addition, inhabitants can influence policy making at all levels through referendums and public initiatives.

The *Swiss Federal Office of Energy (SFOE)* is the office responsible for all questions relating to energy supplies and energy utilisation within the Federal Department of Environment, Transport, Energy and Communication (DETEC).

### **Consumer Protection<sup>3</sup>**

In Switzerland, there is no special law on consumer protection like in other countries. Different legal regulations (private and public Law) protect consumers against dangers to their health and against misrepresentation.

*Private law* governs the legal relationships between citizens. Contractual relationships between consumers and suppliers are governed by the Code of Obligations (*Federal Act, as of March 30, March 1911*). Switzerland's Federal Act against Unfair Competition applies to unfair marketing practices that affect relations between consumers and suppliers offering goods or services.

A judicial authority examines compliance with the provisions of private law only if action has been taken before a civil court.

Public law protects consumers by prescribing suppliers' conduct. Consumers do not take legal action on their own initiative to defend their rights. The appropriate federal authority acts on its own initiative by exercising controls or making decisions

The Swiss Government has created two central bodies to provide advice on consumer protection policy: the Federal Office of Consumer Affairs affiliated to the General Secretariat of the Federal Department of Economic Affairs a permanent administrative body, and the Federal Commission of Consumer Affairs, a non-permanent advisory body composed of scientific experts and representatives of consumer associations, economic apex organisations and unions.

In addition, there are four recognised consumer organisations in Switzerland. These organisations represent consumers' interests with the legislature and business. These bodies take action, conduct tests, provide information and practical tips and give advice in individual cases.

### **Concluding Observations and Future Scenario**

Activities in 2004-05 were dominated by the revision of the Act on Cartels. Comco, before and after the coming into force of the revised provisions, devoted considerable effort to the task of explaining the new regulations and of making companies aware of them. In many written contributions published in specialised and sector journals, as well as in oral presentations, members of the Commission and of the Secretariat set out the most important points of the revised provisions and engaged in discussions with the private sector and with the legal community.

This broad based information campaign ensured that companies and lawyers were well aware of the existence of direct sanctions and of the leniency programme, as well as of the new presumption in the case of vertical agreements. This helped establish such terms as 'antitrust compliance' and 'antitrust audit' in the legal vocabulary of Switzerland.

Experiences abroad indicate that businesses will make active use of the opportunity to report possible restraints of competition. The Secretariat will have the task of dealing with these reports quickly and purposefully. In addition, wherever possible, the competition authority will aim at concluding investigations where no particular competition issue arises and focus its efforts on cases where preliminary analysis has revealed indications of unlawful restraints on competition.

3 <http://www.konsum.admin.ch/index.html?lang=en&PHPSESSID=9df8067f37c6d8a3218b9bd5d2bd7736>

Finally, an important task of the Comco is international cooperation. Indeed, with market liberalisation and globalisation, the need for better international cooperation between authorities has become more and more crucial for enforcing agencies. Since there is no legal basis for international co-operation in competition matters between Switzerland and other countries<sup>4</sup>, the Comco takes advantage of other opportunities to share information and

to build new relationships with authorities in order to effectively enforce the competition law in Switzerland. One example is its extensive involvement in international organisations like the International Competition Network (ICN), which has so far been a very positive experience for Switzerland and which could potentially lead to enhanced cooperation with foreign authorities in the future.

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<sup>4</sup> Except the agreement with the European Community on Air transport.

<sup>†</sup> *Fanny Raess is a lawyer and is currently working for the Swiss Competition Commission as case handler. She has an extensive operational experience in the areas of retail trade and of merger cases. Before her current position, she obtained a masters degree in Business Law at the University of Geneva, Switzerland and has worked with cantonal tutelary authorities.*