

Unilateral Conduct Working Group Questionnaire

In case you have any questions on the questionnaire, please contact Elizabeth Kraus at the US FTC or Arno Rasek at the Bundeskartellamt. Please send the completed questionnaire by 31 October 2006 to ekraus@ftc.gov and arno.rasek@bundeskartellamt.bund.de, and provide a contact person who can answer possible questions on your response.

A. Objectives of unilateral conduct laws

1. With regard to your jurisdiction's unilateral conduct rules – *e.g.*, rules concerning the prohibition of abuse of dominance or monopolization - please state the objectives of these rules (*e.g.*, consumer welfare, efficiency, protecting the competitive process), and identify the source from the following, as applicable:

a. Constitution

The fundamental choices of Switzerland are expressed in its Constitution. In the same way, the bases of the economic organization are part of the Constitution¹. According to Art. 27 para. 1 of the Federal Constitution of the Swiss Confederation of April 18 1999: “Economic freedom is guaranteed”.

Art. 97 para. 2 mentions that: The Confederation “shall legislate on the remedies available to consumer organizations. In the field of federal legislation against unfair competition, these organizations shall have the same rights as professional and economic associations.”

Art. 122 stipulates that:

- “1. Legislation in the field of civil law and civil procedures is a federal matter.
2. The organization of the judiciary and civil justice are cantonal matters unless otherwise provided by statute.”

Art. 96 of the Federal Constitution of the Swiss Confederation mentions that “the Confederation shall legislate to fight against economically or socially damaging effects of cartels and other restrictions of competition. It shall take measures to prevent abuses in price fixing by enterprises and organizations of private and public law enjoying a dominant position on the market and against unfair competition.”

b. Statutes

The purpose of the Federal Act on Cartels and Other Restraints of Competition (Act on Cartels, ACart) of 6 October 1995 is to prevent harmful economic or social effects of cartels and other restraints of competition and, by doing so, to promote competition in the interest of a market economy based on liberal principles (art. 1 ACart).

¹ Tercier P, Bovet C. (Ed.), Commentaire romand, Droit de la concurrence, Geneva, Besel et al. 2002, p. 6.

Art. 4 ACart gives a definition of a dominant position: “The term “enterprises having a dominant position in the market” means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market.”

Art. 7 ACart refers to unlawful practices of enterprises having a dominant position. According to this Article:

1. Practices of enterprises having a dominant position are deemed unlawful when such enterprises, through the abuse of their position, prevent other enterprises from entering or competing in the market or when they injure trading partners.
2. The following in particular may constitute unlawful practices:
 - a) refusal to deal (e.g. refusal to supply or buy goods);
 - b) discrimination between trading partners with regard to prices or other conditions of trade;
 - c) the imposition of unfair prices or other unfair conditions of trade;
 - d) the under-cutting of prices or other conditions directed against a specific competitor;
 - e) restrictions on production, outlets or technical development;
 - f) the conclusion of contracts only on condition that partners agree to supply additional goods or services.

In addition, concerning concentrations, Art. 9 para. 4 ACart mentions that “Notwithstanding paragraphs 1 and 3 above, notification is mandatory when, on termination of a procedure initiated pursuant to the present law, a legally enforceable decision establishes that a participating enterprise occupies a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream.”

This Article illustrates the fact that not only the determination of an abuse of dominant position is important but also the determination of the dominant position itself.

c. Regulations

Ordinances of the Swiss Competition Commission (hereafter Comco) (Ordinance on the Control of Mergers of Enterprises, Ordinance regarding the sanctions for Unlawful Restrictions of Competition, Ordinance on the Fees Collection in the Federal Act on Cartels) do not contain any specific reference to a unilateral conduct.

d. Agency enforcement policy (e.g., guidelines, speeches)

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e. Case law

We have a large practise concerning art. 7 ACart, the following examples are recent cases, which have been quite important.

ETA SA²

In the watch industry, the investigation into ETA SA Manufacture Horlogère Suisse (hereinafter: ETA), a subsidiary of the Swatch Group, was concluded with the finding that ETA was abusing its dominant position. ETA has had the intention to discontinue its supply of ébauches (movement blanks) as from January 2006 and thereafter to supply only fully assembled watch movements (“phasing-out”). The investigations revealed that ETA held a dominant position in the market for Swiss made mechanical ébauches up to a unit price of CHF 300.-. The termination of supply has to be regarded as an unlawful refusal to do business and therefore as an abusive practice. For numerous competitors, the implementation of the phasing-out within such a short time meant in practical terms that they had been deprived of the basis for their business activity, as there was no alternative supplier. In an amicable settlement, ETA committed to supply the ébauches until the end of 2008 at the current volume and thereafter for two further years at a reduced volume. This will create a situation in which alternative production plants may be set up.

Coopforte³

In the retail sector, the Coopforte investigation specified criteria on the assessment of purchasing power puts into specific terms. The investigation was intended to indicate whether Coop by means of a general discount of 0.5% (the Coopforte Bonus) from the invoice total payable by its suppliers is abusing a dominant position. The investigation revealed that there was intense competition between retailers, but that it is conceivable that individual suppliers are dependant on the Coop. The criteria for this were in particular the importance of Coop in the sale of the products in question, the bargaining position of trading partners (manufacturers of branded goods), as well as individual dependencies of specific suppliers, in relation to which the emphasis was mainly placed on alternatives and the necessity of having specific assets. As part of an amicable settlement, Coop has undertaken to verify within the next 6 months whether the use of the Coopforte Bonus is justified. Coop is undertaking to repay the bonus with retrospective effect if a supplier can credibly show that it has not received an equivalent consideration from Coop in return. Suppliers that have regular dealings with Coop are exempted from the verification process (RPW 2005/1).

f. Other (please identify)

2. Are non-competition influences (such as promotion of industrial policy or distributive welfare) incorporated in these objectives? Please describe any such influences.

No, the only possibility, where other objectives can prime is Art. 8 ACart, which gives the right to the Federal Council (Swiss Government, Executive power) to exceptionally authorize practices of enterprises having a dominant position whose unlawful nature has been ascertained by the Comco on the grounds of compelling public interests.

² ETA SA Manufacture Horlogère Suisse, RPW 2005/1, 128 ff, available under: <http://www.weko.admin.ch/publikationen/00212/index.html?lang=de>.

³ Coopforte, RPW 2005/1, 146 ff, available under: <http://www.weko.admin.ch/publikationen/00212/index.html?lang=de>.

3. If there are multiple objectives, how are these balanced or reconciled?

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4. How has your jurisdiction balanced the risks associated with over-deterrence (detering efficient, pro-competitive conduct as a result of excessive intervention) with the risks associated with under-deterrence (permitting anti-competitive conduct as a result of too little enforcement) in choosing its objectives for unilateral conduct rules? Is this choice affected by the nature of your economy?

The Swiss jurisdiction does not consider a dominant position on a market to be illicit (“bigness isn’t badness”) as long as this position results from efficient practices. The ACart introduces a control of behaviour. Firms having a dominant position are only forbidden to misuse it.

Since 1st April 2004, the Comco has the possibility to impose fines against unlawful restrictions of competition. This revision of the law created a dissuasion effect preventing illicit behaviours.

The Comco balances the over/under-deterrence risk the following way:

- During the transition period (from April 1 2004 to March 31 2005), companies were given the option either to terminate or notify their infringements to the Comco. Every terminated or notified infringement was free of any fine within that period.
- According to Art. 49a para. 3 ACart, direct sanctions are also waived if:
 - “a) the enterprise notifies the restriction of competition before it takes effect. If the enterprise is informed of the opening of a procedure under Articles 26-30 within five months of notification and if it then continues with the restriction of competition, the charge is not waived;
 - b) the restriction of competition has not been practiced for a period of longer than five years prior to the opening of the investigation;
 - c) the Federal Council has authorized a restriction of competition under Article 8.”

Concerning Art. 49a para. 3 lit. a ACart, the following has to be stressed: Imagine a company notifies clearly unlawful behavior with the intention of pursuing and profiting from the such behavior without the threat of fines during the Comco’s investigation. To avoid such risks/problems, the new ACart has established a so-called “opposition procedure”, according to which the Comco may declare its opposition to granting relief from fines by opening an investigation within a period of five months from the date of notification. Art. 19 of the Ordinance regarding the Sanctions for Unlawful Restrictions of Competition (ACart Ordinance on Sanctions) as of 12 March 2004 regulates the opposition procedure.

5. With regard to exemptions or exceptions to your laws specific to unilateral conduct (for example, for regulated sectors, government entities, purchasers, or exercise of intellectual property rights), please identify the exemption or exception and explain whether and how its goals differ from the objectives of your general unilateral conduct law and how the jurisdiction balances or reconciles these factors.

Art. 2 para. 1 and 1bis ACart refers to the scope of the Act:

“1. The present Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises.

1bis. The term “enterprises” means all customers and suppliers of goods or services in the commercial process regardless of their legal or organisational form.”

Art. 2 para. 1 bis ACart was introduced with the revision of our law and extends the coverage of “enterprises” which are considered “[...] all goods and services offerees or offerors participating in the economy, regardless of their legal or organizational form”.⁴ Coverage is extended in the following ways:

- The State often appears, especially in bid proceedings, in the form of centralized or decentralized administrative units without legal personality. Situations like this were not caught by the old ACart, but with the introduction of Art. 2 para. 1bis ACart, such administrative units can now be treated analogously to private market.
- The revised law not only extends the term “enterprise” to all kinds of State actors, but also includes private enterprises that were not heretofore caught by ACart (e.g., a consortium).⁵

Moreover, Art. 3 ACart mentions that:

“1. To the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over the provisions of this Act, including in particular:

- a) provisions which establish an official market or price system;
- b) provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.

⁴ The legislature made this change in reaction to the decision of the Federal Supreme Court concerning the SMA (Swiss Meteorological Institute) case. Cf. RPW 1999/3, 415ff (Comco); 2000/3, 461ff (REKO). The Tribunal quashed the Commission’s decision on the grounds (among others) that SMA did not have its own legal personality and could not be construed as an enterprise. Furthermore, it is important to mention that the term “independently” used in the former Art. 2 ACart was removed during the revision process. Therefore, whether the Comco will be able to proceed against dependent enterprises in the future remains an open question.

⁵ Krauskopf P., Carron S., „The Swiss Competition Authorities Throw New Obstacles Into Cartels’ Paths”, International Antitrust Bulletin, Fall 2003-Winter 2004, p. 47.

2. The present Act does not apply to effects on competition that result exclusively from laws governing intellectual property. However, import restrictions based on intellectual property rights fall to be assessed under this Act.

3. The procedures set forth herein regarding assessment of restraints of competition shall take precedence over the procedures set forth in the law of 20 December 1985 on the monitoring of prices except in the event of a decision to the contrary taken by common consent by the Comco and the Price Inspector.”

Concerning the exercise of intellectual property rights, up to now, the Comco has never dealt with a case of a dominant position.⁶

6. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules are influenced by the nature of your economy (e.g., small, transition, or recently-liberalized), please explain.

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, Switzerland is to be qualified as rather small an economy. The question about the economic size of a country is highly depending on the appraisal factors and thus the possible answers can turn out very different.

The smallness of the Swiss market has several consequences. First, concentration is comparatively high in few domestic industries. Because of the limited demand within Switzerland, in several sectors only a few firms can be maintained at an efficient scale. As a result, in some domestic industries such as retail distribution, there are only a few very large firms in the Swiss market retaining a large market share. However, compared to European retail firms, they are still rather small.

High industry concentration may raise different antitrust issues. Large firms relative to domestic demand may result in market dominance, with the possibility of its abuse. Swiss merger control has therefore been designed to avoid concentrations eliminating effective competition by creating a dominant position in markets characterized by high entry barriers.

7. If the objectives of, or exemptions or exceptions to, your unilateral conduct rules have been substantially reviewed or revised, please describe any change and the reason.

Since April 1 2004, Art. 4 para. 2 ACart mentions that: The term “enterprise having a dominant position in the market“ means “one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market”.

⁶ Table ronde sur les techniques et les problèmes de preuves pour prouver la dominance/pouvoir monopolistique, Working Party no 3, 7 June 2006, p. 3.

The words put into parentheses were introduced with the revision of 2004. That means that the term “dominant undertaking” does not only cover single or joint dominance of companies with respect to their competitors but also encompasses situations in which companies depend on other companies by reason of the market structure (suppliers or customers). The aim is to provide improved protection to small and medium-sized enterprises as compared to larger companies capable of abusing their market power.

Also since April 1, 2004, the Comco can set fines for unlawful restrictions of competition: According to Art. 49a ACart “an enterprise that participate in an unlawful agreement in terms of Article 5 paragraphs 3&4 or that behaves unlawfully in terms of Article 7 will be required to pay a sanction of an amount equal to up to 10 per cent of its turnover in Switzerland in the previous three business years. Art. 9 para. 3 ACart is applicable by analogy. The amount of the sanction is dependant on the duration and severity of the unlawful behaviour. The a priori profit thereby achieved by the enterprise will also be taken into consideration.”

8. Are there institutional features (e.g., the possibility for a ministry to overrule competition agency decisions or the requirement the competition agency consult with other governmental agencies) that affect your agency’s ability to achieve the objectives of the unilateral conduct rules? If so, please explain.

According to Art. 8 ACart, the Federal Council has the right to grant an exceptional authorisation on the grounds of compelling public interests in some cases.

Art. 8 ACart: “Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.”

Moreover, according to Art. 44 ACart: “Appeals against decisions of the Commission or its Secretariat, as well as against measures of force pursuant to Article 42 para. 2, may be lodged with the Appeals Commission for Competition Matters.”

Finally according to Art. 97 of the Federal Act of Legal Organization, the Federal Court is the last instance for appeal under administrative law.

The Appeals Commission and the Federal Court are an independent judiciary bodies that shall rule based on the same principles as Comco and therefore should not affect Comco’s ability to achieve the objectives of the unilateral conduct rules.

9. Please describe any difficulties that your jurisdiction has experienced with its objectives for unilateral conduct rules. Based on your experience, what, if any, suggestions (including selection of other objectives) would you have for your or other jurisdictions, and why?

The Comco has especially experienced challenges in the market definition in the Ticketcorner case:

Ticket Corner⁷

Ticketcorner 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 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 held a dominant position in the market for ticket sales systems and that it was abusing this position through the imposition of the exclusivity clauses. In a ruling dated 1 December 2003, this practice was prohibited.

On 27 September 2005 the Appeals Commission for Competition Matters (ACC) annulled Comco's decision on various grounds.⁸ One of them was the method chosen to define the relevant market and another the method used to calculate the market volume and the market shares.

B. Assessment of Dominance/Substantial Market Power

1. Please provide a brief description of single-firm dominance/substantial market power as defined in the provisions of your jurisdiction's general competition law, relevant agency policy statements (e.g. guidelines, speeches) and/or case law that pertain to unilateral conduct. As appropriate, please also explain whether and how your agency categorizes different levels of dominance/substantial market power (e.g., "super dominance").

Art. 2 para. 1 ACart mentions the market power: The ACart "applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises."

Art. 4 para. 2 ACart defines a dominant position: "The term "enterprises having a dominant position in the market" means one or more enterprises being able, as regards supply or demand, to behave in a substantially independent manner with regard to the other participants (competitors, suppliers or customers) in the market."

With the introduction of the remark put into parentheses, situations in which companies depend on other companies by reason of the market structure are also covered (relative market power).

2. Under your general competition law governing unilateral conduct, at which stage(s) can your competition agency intervene against potentially abusive unilateral conduct?

⁷ Ticket Corner, RPW 2004/3, 778 ff, and RPW 2005/4, 672ff, available under : <http://www.weko.admin.ch/publikationen/00212/index.html?lang=de>.

⁸ Ticket Corner RPW 2005/4, 672 ff, available under : <http://www.weko.admin.ch/publikationen/00212/index.html?lang=de>.

- If dominance/substantial market power is present yes/no
- Acquisition or creation of dominance/substantial market power yes/no

According to Art.10 ACart:

- “1. Concentrations of enterprises subject to notification shall be investigated by the Competition Commission if a preliminary review (Art. 32 para. 1) reveals signs that they create or strengthen a dominant position.
- 2. The Competition Commission may prohibit the concentration or authorise it subject to conditions or obligations if it transpires from the investigation that the concentration:
 - a) creates or strengthens a dominant position liable to eliminate effective competition, and
 - b) does not lead to a strengthening of competition in another market which outweighs the harmful effects of the dominant position.”

- Attempt to acquire or create dominance/substantial market power yes/no

- Other (please identify)

Art. 9 para. 4 ACart mentions that “Notwithstanding paragraphs 1 and 3 above, notification is mandatory when, on termination of a procedure initiated pursuant to the present law, a legally enforceable decision establishes that a participating enterprise occupies a dominant position in a market in Switzerland, and when the concentration concerns either that market or an adjacent market or a market upstream or downstream.”

3. Does your law contain or do you use a market share threshold at which you presume single-firm dominance/substantial market power and/or as a “safe harbour”? yes/no

4. Does your competition law enable the competition agency to intervene against unilateral conduct at a level below the dominance/substantial market power threshold ? yes/no

Art. 2 para. 1 ACart, which refers to the scope of the Act, provides that:

- “1. The present Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises.”

Therefore the ACart applies to enterprises having market power (level below the dominance) and their behaviour may be scrutinized by the Comco.

Art. 7 ACart declares as unlawful the abuse of a dominant position. Therefore, Comco can forbid and fine unilateral conduct under this clause when an enterprise is found to be dominant.

5. Does your jurisdiction’s analysis of dominance/substantial market power first

require that a relevant product and geographic market be defined?

yes/no

6. Which of the following criteria do you use for the assessment of single-firm dominance/substantial market power?⁹

- | | |
|---|--------|
| - Market share of the firm and its competitors | yes/no |
| - Market position and market behaviour of competitors | yes/no |
| - Durability of market power | yes/no |
| - Barriers to entry or expansion | yes/no |
| - Economies of scale and scope/network effects | yes/no |
| - Buyer power | yes/no |
| - Access to upstream markets/vertical integration | yes/no |
| - Access to essential facilities | yes/no |
| - Market maturity/vitality | yes/no |
| - Financial resources of the firm and its competitors | yes/no |
| - Profits of the firm | yes/no |
| - High prices (at absolute or comparative level) | yes/no |

Please specify any other criteria that you use to assess single-firm dominance/substantial market power.

R&D Capacities.

7. Of the criteria that you use to assess single-firm dominance/substantial market power, which are the most important criteria?

The most important criteria are:

- Market shares of the firm and its competitors
- Market position and market behaviour of competitors
- Market maturity/vitality
- Barriers to entry or expansion
- Buyer power

8. Please explain how your authority evaluates each of the criteria that you use, and also how it weighs the different factors.

When the Comco makes an investigation about a dominant position, the position on the market of the enterprise which is concerned by the investigation is conducted in three steps:

- the current competition (market shares of the firm and its competitors, market position, market behaviour of competitors and market maturity/vitality)
- the potential competition (barrier to entry)
- the position of the exchange partners (buyer power).

⁹ The answer “yes” should be provided if you use this criterion (amongst other criteria) at least in some of your cases. Conversely, the answer “no” should be provided if in practice you have not ever used that criterion.

The different factors are all equally weighted.

9. How do you evaluate the competitive significance, if any, of intellectual property rights (patents, trademarks, copyrights, etc.) in assessing dominance/substantial market power?

Art 3 para. 2 ACart: “The present Act does not apply to effects on competition that result exclusively from laws governing intellectual property. However, import restrictions based on intellectual property rights fall to be assessed under this Act.”

Is intellectual property presumed to create dominance/substantial market power in your jurisdiction? yes/no

10. Does the assessment of dominance/substantial market power differ in a small or isolated economy from the assessment in a large or integrated economy? For example, might dominance in small markets be presumed at lower (or higher) levels of market share than in other jurisdictions? Do free trade agreements alter the assessment of dominance/substantial market power? If so, please explain why. [NB: Jurisdictions that do not consider themselves “small” economies are welcome to skip this question.]

There is no difference in the assessment of dominance/substantial market power even though Switzerland is a small economy.

11. Please explain briefly the link between the definition and assessment of dominance/substantial market power in your jurisdiction and the objectives of your unilateral conduct laws.

“Competition must be protected as an institution in itself, which aims at economic efficiency, what results in protecting the consumer automatically.”¹⁰

C. State-created Monopolies

Throughout this section of the questionnaire, the term “state-created monopolies” refers to firms that are dominant or that have substantial market power due to state-imposed restraints of competition. In most cases, these firms were (or are still) owned by the state and the state did not (or still does not) allow for any private competitor. In an effort to avoid duplication with the ICN’s previous work, this project does not address the interface with network access or price-cap regulation implemented by a sector-specific regulator. Accordingly, we request that you do not focus on sectors that are/were regarded as “natural monopolies” and that are now subject to such regulation. Therefore, please answer the questions excluding references to the telecoms, energy, water, and railways sectors.

¹⁰ Tercier P., Bovet C. (ed.), Commentaire romand, Droit de la concurrence, Geneva, Basel et al. 2002, p. 201.

I. State-created Monopolies

- 1. What are the main sectors of your country in which state-created monopolies exist? Please describe important sector examples, including whether these monopolies are state-owned¹¹, state-controlled¹², state-enabled or facilitated¹³, recently privatized and/or liberalized, regional monopolies,¹⁴ etc.**

In Switzerland, the postal service (mail service) is a sector where the State has a part of monopoly position. Since April 1, 2006, the monopoly of the postal service is applicable on letters which weigh less than 100 grams. This monopoly is explained with the universal service that must be ensured in accordance with Art. 96 para. 2 of the Federal Constitution.

- 2. Please discuss the objectives behind the creation and/or perpetuation of state-created monopolies by providing specific examples from your jurisdiction. If the rationale for retaining the state-created monopoly was challenged (for example as a condition of membership in an international organization or to join an economic alliance or regional trade agreement) or has changed over time, please explain.¹⁵**

In general these state-created monopolies are justified by social matters or safety standards. The state-created monopolies are often created in order to guarantee the financing of a universal service.

- 3. Are there any legal or practical restrictions or difficulties faced by your competition agency in antitrust enforcement against state-created monopolies? If yes, please provide details and/or sample cases, for example:**

- Legal restrictions/scope of application: Is there a "state action defence" (i.e. competition law does not apply to state entities or state acts) or any special exemptions/exceptions for the state-created monopolies from the general antitrust law in your jurisdiction?

Art. 2 para. 1 and 1bis ACart refers to the scope of the Act:

“1. The present Act applies to private or public enterprises that are party to cartels or to other agreements affecting competition, have market power or take part in concentrations of enterprises.

¹¹ Those undertakings that are 100% owned by the State.

¹² The control belongs to the State, without taking into consideration the amount of the % of the State share.

¹³ E.g. where a monopoly exists due to exclusive rights granted by the state or due to state-imposed restraints of competition.

¹⁴ Includes public/private undertakings that are granted exclusive rights within a certain region.

¹⁵ The relevant information for answering questions 2, 5 and 6 may not readily be available within your agency. In this case, it is not necessary for you to conduct a research effort.

1bis. The term “enterprises” means all customers and suppliers of goods or services in the commercial process regardless of their legal or organisational form.”

Art. 3 ACart mentions that:

“1.To the extent that provisions of law do not allow competition in a market for certain goods or services, such provisions take precedence over the provisions of this Act, including in particular:

provisions which establish an official market or price system;

provisions which entrust certain enterprises with the performance of public interest tasks, granting them special rights.

2. The present Act does not apply to effects on competition that result exclusively from laws governing intellectual property. However, import restrictions based on intellectual property rights fall to be assessed under this Act.”

According to Art. 8 ACart, the Federal Council has the right to grant an exceptional authorisation on the grounds of compelling public interests in some cases.

Art. 8 ACart: “Agreements affecting competition and practices of enterprises having a dominant position whose unlawful nature has been ascertained by the competent authority may be authorised by the Federal Council at the request of the enterprises concerned if, in exceptional cases, they are necessary in order to safeguard compelling public interests.”

- Practical restrictions/difficulties: Please describe any practical restrictions that you have faced or may face in antitrust enforcement against state-created monopolies, such as instructions that your agency may receive from the government, political pressure, or overcoming vested interests.

No. The Comco is an independent authority.

4. How does the assessment of dominance/substantial market power of state-created monopolies differ from other dominance/substantial market power cases?

There is no difference.

II. Privatization and Liberalization Process and the Advocacy Role of Competition Agencies

5. Please briefly describe the ongoing or past privatization and liberalization process in your country. Is there a specific legal framework for the privatization in your country (e.g. a specific privatization law) ?

There is no specific legal framework for the privatization and liberalization process in Switzerland.

6. What are the objectives of your government in the privatization and liberalization of state-created monopolies (for example, raising competition/consumer welfare, maximizing revenue from the sale, etc.)?

The main objective of our government in the privatization and liberalization of state-created monopolies is to introduce competition in the affected sectors. This leads to lower prices and stimulates innovation.

7. Is competition law applicable to privatization transactions (e.g. approval of interested bidders or the successful bidder under its merger control powers)?

Yes, within the limits of Art. 3 ACart.

8. Please summarize the advocacy role of your agency in the privatization and liberalization of state-created monopolies, including as applicable:

- What are the legal instruments used by your agency for that purpose? To what extent are other government entities obliged or encouraged to seek the competition agency's opinion on or approval of privatization and/or liberalization proposals?
- To what extent does the advocacy role of your agency have impact on privatization and liberalization? Please provide examples of successes or failures if available.

The Art. 45 para. 2 ACart stipulates that "The Commission may address recommendations to the authorities, the purpose of such recommendations being to promote effective competition, especially with regard to the drafting and enforcement of laws relating to economics affairs."

According to Art. 46 ACart:

1. The Secretariat shall review draft Confederation legislation, especially in economic matters, that is likely to influence competition. It shall determine whether the effect of such legislation is not to introduce distortions or excessive restraints of competition.
2. In the consultation procedure, the Commission shall adopt a position with regard to draft Confederation legislation that limits or influence competition in any whatsoever. It may issue opinions on draft cantonal legislation."

Art. 47 ACart mentions that:" The Commission shall provide expert advice to the other authorities on questions of principle relating to competition. In cases of minor importance, it may instruct the Secretariat to carry out this task."

The advocacy role is very important in that subject and the Comco has very often addressed recommendations and given expert advice.

D. General

1. From among the following, how would you characterize your jurisdiction:
developed / developing / transitioning?

2. Please provide English-language citations to or summaries or excerpts of legislative history, leading judicial or agency decisions, or Articles that explain your jurisdiction's choice of its unilateral conduct law objectives, its definition and assessment of dominance/substantial market power and/or its approach to state-created monopolies and privatization.

All the legislation, press releases, annual reports and RPW (case law, recommendations etc) are available on: www.weko.admin.ch.

- Krauskopf Patrick / Carron Sabrina, "The revised Swiss Act on Cartels and Switzerland's involvement in the ICN" in: Boletín Latinoamericano de Competencia N° 17, Julio 2003.

- Krauskopf Patrick / Carron Sabrina, "The Swiss Competition Authorities Throw New Obstacles into Cartel's Paths" in: ABA's International Antitrust Bulletin Fall 2003 / Winter 2004.