Synthesis Report in Brief

I. Purpose and Terms of the Evaluation

The 1995 Cartel Act and its partial revision in 2003 *have enabled Switzerland's competition authorities (Competition Commission (COMCO) and its Secretariat) to promote and maintain a healthy level of competition in Switzerland. The 2003 revision mainly aimed at the introduction of* ***direct sanctions*** *and the provision of new instruments (leniency program, opposition proceedings, and raids).*

Art. 59a of the revised Cartel Act requires the Federal Council to ***evaluate*** *the efficiency and conformity of any proposed measure under Cartel Act before submitting a report and recommendation to Parliament concerning said measure. The present* ***Synthesis Report*** *from the "****Task Force Cartel Act****" was based on 15 reports and studies. It evaluated the ongoing effects and functioning of the Cartel Act, mentioned required modifications, and concluded with a series of proposals intended for the consideration of Parliament and the executive authorities (Federal Council, FDEA, and Antitrust authorities).*

II. Findings

The studies on the ***effects-based analysis*** *have demonstrated the known limits of the methods of quantitative effects-based measurement. These studies confirm that a modern antitrust law and a dynamic and independent competition authority are very important for the economy of Switzerland. The legislators are on the right track. Antitrust law must be incisive, and the competition authority must have the means to apply the law. The competition authority must measure its intervention in order to prevent errors in the application of the regulations. Indeed, the State influences through additional regulations the competition, and the Cartel law may only correct in a marginal way the market distortions created by the entirety of the State's regulations.*

All in all, the ***new legal instruments*** *adopted by the 2003 revision (leniency program, opposition proceedings, and raids) have proven to be useful. They enable the competition authority to prevent and uncover practices diminishing competition. They also promote the preventive effect of the Cartel Act and its conformity with the competition regulations' standards.*

Analysis of the ***number****, the* ***duration****, and the* ***outcome*** *of the investigations undertaken by the competition authorities reveals a satisfactory level of competence. Indeed, both Swiss and European competition authorities deal with the same number of investigations, in relative terms. With regard to the duration of the investigations, it isn't necessary to intervene. A report indicates that 70% of decisions taken by COMCO were confirmed by the courts (80% with respect to decisions of a secondary nature).*

The purpose and the instruments of the antitrust law in Switzerland are similar to those found in ***other countries****. However, in certain specific areas, international best practices have not been achieved. These areas include the institutional organization of the competition authorities, international cooperation, merger control, the treatment of vertical restraints, civil actions against cartels, and sanctions applied to natural persons.*

Substantial modifications must be undertaken by the ***institution*** *(COMCO and its Secretariat). For example, there are issues related to the size of COMCO and its non professional ("militia") members, the allocation of power between COMCO (which takes the decisions) and its Secretariat (which investigates the underlying facts), and the independence of COMCO (some of its members represent lobbies). The current organization of the various authorities dealing with competition matters must be amended even though the actual organization enables the authorities to work efficiently. The competition authorities must be totally independent (one must exclude lobbyists); COMCO must become a professional institution; and only one level of authority should exist. It is*

nevertheless possible to concretely upgrade the current system, and certain steps have already taken place.

*The current **international cooperation** with other competition authorities is confined to informal exchanges of information. However, the growing importance of globalization and the increasing frequency of cross-border antitrust practices require the competition authorities to rethink the actual situation. Indeed, to fight against these new antitrust practices is much harder if competition authorities cannot exchange confidential information regarding specific cases. By the way, parallel but separate procedures in different countries result in needless additional expense both for the national authorities, as well as for the concerned economic entities. It is thus appropriate to conclude cooperation agreements with our main trading partners in order to make possible the exchange of confidential information. A formal legal basis must be created in Switzerland's legislation to legitimize such exchanges.*

*Compared to other countries, Switzerland's **merger control** shows certain deficiencies and provides a relatively weak arsenal to effectively enhance competition. A risk exists that mergers having a strong negative effect on competition, and consequently on the economy and consumer welfare in Switzerland, might be approved. The harmonization of the Swiss merger control system with the EU merger control system would eliminate these problems and reduce the administrative workload with respect to transnational mergers. At the same time, modern instruments should be put into place to control the criteria governing intervention in the case of the concentration of enterprises (SIEC-test, efficiency defense, and dynamic consumer welfare standard).*

*The Swiss Parliament chose not to follow either the international (and European) best practice, or the jurisprudence and the actual economic practice regarding **vertical agreements** in antitrust matters. Moreover, with its **Notice regarding Competition Law Treatment of Vertical Agreements**, COMCO toughened Parliament's stance. There is currently a risk of preventing efficient vertical agreements between enterprises from different levels of market. It is therefore necessary to amend the Cartel Act and its current application in order to examine each vertical agreement in the light of its effect on the competition (including the efficiency reasons behind the agreement). The evaluation must also take into account the competition between brands (inter-brand competition); a feature which should be included during the next re-examination of COMCO's **Notice regarding the Competition Law Treatment of Vertical Agreements in the Motor Vehicle Trade**.*

*The importance of **civil law procedure regarding antitrust matters** is minimal. Such procedure must be enhanced so as to enable economic players to more easily denounce anticompetitive behavior. In this respect, the main measures would consist in improving the administration of evidence, expanding locus standi, and increasing damages. Civil law does not impede on administrative law; and civil law constitutes a complement in enforcing antitrust regulations.*

*Regarding **administrative procedure in antitrust matters**, it is unnecessary to create a specific law on the rights of cartels, even with respect to the ECHR. One must however adapt the existing law to suppress uncertainties and judicial insecurities, and to improve the legal arsenal used for uncovering illegal restrictions to competition (for example, reversing of the burden of proof, default interest, or immediate applicability). It may be possible that such adaptations will be imposed by judicial precedent.*

*The view that protection of competition should also include sanctions against natural persons in addition to the fines imposed on the enterprises has recently gained some support at the international level. In the final analysis, it is natural persons who enter into cartel agreements. This is the reason why we should consider the possibility of introducing **administrative fines against natural person**s (included a leniency program in favor of natural persons). The application of fines against individuals does not mean that there will*

not be fines against the respective enterprises; fines against natural persons are a complement in enforcing antitrust regulations.

The Cartel Act also addresses issues relating to ***intellectual property****. However, the importance of the recent revisions to the Cartel Act in this regard is limited. If one desires to promote parallel imports and avoid the effects of partitioning markets which influence competition as a result of the exhaustion of national rights, such corrective measures should be included in the Patent Act currently under revision by Parliament.*

*The Notice Regarding Small and Medium Enterprises ("****SME-Notice****") and the* ***Notice Regarding the Use of Calculation Diagrams*** *based on the SME-Notice have shown themselves to be efficient and have contributed to a better compliance with the law. It is not justifiable to apply further dispensations to SME in the context of antitrust law.*

III. Conclusions

Taken as a whole, the Cartel Act ***has achieved its purposes****. The instruments provided in the revision of the Cartel Act in 2003 (leniency program, opposition proceedings, and raids) accomplish the goals of the legislator. However, some* ***improvements*** *are* ***feasible*** *and* ***necessary****. The Task Force Cartel Act has formulated 14 recommendations:*

The first of which is the ***main observation*** *of the evaluation:*

1. *One must maintain the* ***underlying concept of the Cartel Act*** *as introduced in 1995 and revised in 2003. Globally, it is not necessary to amend the instruments added in 2003 (direct sanctions, leniency program, and raids).*

The improvements which are mentioned in recommendations two to five are ***priorities****, and which justify a revision of the Cartel Act.*

2. ***Competition authorities*** *must be fully independent of political influences and business, and its decision making-members must be professionals. COMCO and its Secretariat must merge into a single entity.*
3. *Switzerland must conclude* ***cooperation agreements*** *with its main trading partners allowing for formal exchange of confidential information between competition authorities. Moreover, it is necessary to* ***amend Swiss formal law*** *in order to enable the competition authorities to cooperate under certain conditions with their counterparts as per such agreements.*
4. *Switzerland must harmonize its* ***merger control*** *regime with the corresponding EU regulations, including the SIEC-test, efficiency defense, and dynamic consumer welfare standards.*
5. *Regarding the restrictions on* ***vertical agreements****, Switzerland must abandon the legal presumption of illicit conduct. One should however keep direct sanctions available in case of minimum or fixed price setting and restrictions with respect to territorial agreements.*

Once this revision is completed, the ***civil aspects of antitrust law****, the* ***civil and administrative procedure****, and the* ***system of sanctions*** *should be improved, or further evaluated. It would also be worthwhile to enhance the implementation of the Cartel Act.*