

Swiss Competition Report

Reporting Period: January 05 – March 05

This section reviews developments concerning the Federal Act of October 6, 1995 on Cartels and Other Restraints of Competition (the “Competition Act”), which is enforced by the Federal Competition Commission (“FCC”). Appeals against decisions of the FCC are heard by the Appeal Commission for Competition Matters (the “Appeal Commission”).

ANTICOMPETITIVE PRACTICE

VERTICAL RESTRAINTS

- ***Books price-fixing.***

By a decision dated March 21 2005, the FCC prohibited a framework distribution agreement between booksellers and publishers, which imposed the resale price of books to final customers in Switzerland. In 1999 the FCC had already stated that the agreement amounted to an unlawful restriction of competition and the Swiss association of publishers and booksellers appealed the decision. By decision dated August 14 2002, the Supreme Court admitted the appeal in part and sent the case back to the FCC for it to examine whether the unlawful restriction could be justified on grounds of economic efficiency.

Although the resale price fixing agreement applied to 90% of the books in German language sold in Switzerland, the Supreme Court retained the existence of remaining competition based on competitive parameters others than price, such as service quality, advice, book selection and advertising. It concluded that the price fixing agreement did not eliminate competition and "only" *notably restricted competition* on the Swiss market of books trade so that it could possibly be justified on grounds of economic efficiency. The FCC examined whether the resale price fixing agreement enabled a better and larger selection of books, an improvement in the sales due to a larger density of sales points or a better service. It concluded that the positive effect of a major density of the book sales points was not economic but cultural, which could not be taken into consideration by the competition authority but by the government.

- ***The FCC closes an investigation on the elimination of electrical devices.***

Producers, importers and resellers of electrical devices have now the legal obligation to take back used material at no cost and to eliminate it. Many producers, importers and resellers asked Swico (the Swiss Association for telematics and informatics) and/or SENS (a foundation for the waste reclamation) to carry out this task. Swico and SENS agreed on two possible restrictions of competition: (a) They agreed to eliminate different categories of electrical devices (markets sharing). By decision of March 21 2005 the FCC admitted the restriction of competition was justified on grounds of economic efficiency because it reduced the transaction costs and enabled the undertakings active in the waste elimination sector to do economy of scale; (b) Their service agreements with the producers, importers and resellers provide for the latter to levy a "recycling tax" (TRA) on new electrical devices, which they shall transfer to Swico and SENS. However, the investigation showed that the producers, importers and resellers could freely decide whether to pass the tax on customers. In the same decision of March 21 2005, the FCC concluded that the agreement

dealt with the internalization of a cost factor - made compulsory by law – and therefore did not constitute an agreement on an element of price. In any case, an agreement on the passing on of a price element does not constitute an agreement on price provided it does not lead to price harmonization on the product's retail market.

MERGER CONTROL

- ***The FCC cleared the acquisition by the former telephony monopolist Swisscom of a majority participation in Cinetrade.***

Following an in-depth inquiry closed on March 7 2005, the FCC cleared the acquisition by Swisscom of a majority participation in Cinetrade without any further obligations or conditions. Cinetrade group is active on the markets of pay TV (Teleclub), movie theatres (KITAG), and home video (Plaza Vista). The concentration facilitates the entry of the former telephony monopolist, Swisscom, in the movie markets, enabling the latter to complete its traditional activities - telephony and Internet – with television (Triple Pay). The FCC focused its analysis on the possible advantages resulting from the vertical integration of the pay tv platform (Teleclub) in the Swisscom infrastructure. The analysis did not show that the concentration might create a dominant position able to eliminate competition on the pay tv market or on the movie and sport broadcasting rights (premium content) markets.

- ***The FCC cleared a concentrative joint venture in the high-tension electricity market subject to conditions.***

Seven Swiss electricity companies plan to concentrate the exploitation of their (high tension) electricity-carrying network under a common company "Swissgrid". Following an in-depth inquiry, the FCC found that the concentration created a dominant position in the market for transportation of high-tension electricity in certain regions of Switzerland. In accordance with the Competition Act, the FCC cleared the operation on the ground that it improved competition on a neighbouring market, the market for electricity supply. The new concentrative joint venture facilitates the transportation of high-tension electricity. The FCC imposed the following conditions to ensure the improvement of competition on the market of electricity supply: (i) Swissgrid is to guarantee a free and non-discriminatory access to its network; (ii) Swissgrid is to publish the fees and conditions of use of its network; (iii) Swissgrid group must provide a cost accounting in relation to their high tension networks; (iv) Swissgrid group cannot commercially produce or sell electricity; (v) Swissgrid directors cannot be members of the management of other electricity companies.

POLICY AND PROCEDURE

- ***Termination of the grace period for the imposition of fines.***

Since April 1 2004 the FCC has been entitled to impose fines on undertakings involved in hardcore cartels. However, the legislator provided for a one-year grace period for undertakings to communicate existing restrictive behaviours to the FCC. In a press conference held on April 5 2005, FCC president, Prof. Walter Stoffel, commented that the grace period expired on March 31 2005. He noted a growing awareness of the financial

exposure resulting from not respecting competition law in sectors in which competition law had never been taken into consideration (e.g. the electricity sector). He suggested that undertakings used the leniency program to facilitate investigations and reduce fines. The FCC issued a notification form to apply for the leniency program.

- ***The FCC pleads for an application of the "Cassis de Dijon" principle.***

The FCC president also reported the existence of too many legal and technical regulations that restrict importation in Switzerland, especially in the food and near food markets (such as specific requirements on the labelling). If the constraint results from a strict application of a regulation, the FCC is empowered to address recommendations to the competent authority accordingly. Where the competent authority does not have room for interpretation, the regulation needs to be amended. Together with some Parliament members, the FCC is fighting for a strengthening of the free circulation of goods by means of a unilateral application of the "Cassis de Dijon" principle to goods coming from EU Member States.

- ***Explanatory Note on Investigations.***

The FCC Secretary issued an explanatory note to clarify its position on some issues related to investigations, which it has been authorised to conduct since April 1 2004: (i) the undertakings have the right to be assisted by a lawyer. However, the FCC officials will not wait for the lawyer to start the investigation, but will leave the collected documents aside for the lawyer to check the possible privileged content of the documents; (ii) according to criminal case law only the correspondence between a lawyer and its client relating to current proceedings is privileged; (iii) in-house lawyers are not subject to lawyers' professional secrecy so that their documents are not privileged.

* * *

Tavernier Tschanz, April 25 2005