

## Reporting Period : January 02 – March 02

### ENFORCEMENT POLICY AND LEGISLATIVE DEVELOPMENTS

*Competition Act.* On November 7, 2001 the Swiss Federal Council submitted for parliamentary debate a draft amending the Competition Act as to the following aspects :

- **Direct Sanctions.** The FCC should be entitled to impose (administrative) fines on undertakings, which can reach up to 10 % of the turnover achieved in Switzerland during the last three financial years, in case of participation in "hardcore" cartels (price fixing, customer or market sharing) and abuse of dominant position (see also 2000/3 and 2001/1 reports). In its report on the draft law, the Swiss Federal Council reiterated the opinion according to which fault is not a condition for imposing sanctions; this is in contradiction with the arguments developed by the Appeal Commission in its latest decision in the *Merial* case (see *Administrative and judicial decisions* hereinafter). Further, a system of preliminary notification of possibly unlawful agreements and practices is provided for in order to permit undertakings to avoid fines in cases where the FCC holds, after investigation, that the agreement or practices are unlawful. In addition, the FCC should be entitled to reduce or not to impose fines when cooperation with a hardcore cartel member allows the cartel to be discovered or suppressed (leniency programme).
- **Notification Thresholds.** The thresholds for concentrations in the media sector would be removed (see also 2001/3 report). In order to protect the media diversity, Article 9 (2) of the current Competition Act provides that a concentration in the media sector must be notified if the turnovers of the undertakings concerned are as low as 1/20 of the thresholds applicable to other sectors. If the draft law is passed, concentrations in the media sector will be subject to the "normal" thresholds. As to banks and other financial intermediaries, the calculation of the thresholds would be based, not on turnover, but on gross income. For insurance companies, the calculation would be based on the total value of annual gross premiums.
- **Other Important Amendments.** Unlike the initial draft, the Swiss Federal Council has given up modifying the composition of the FCC. Therefore, the FCC should still comprise a majority of independent experts. It would, however, be entitled to appoint only one vice-president and thus consist of only two chambers. Further, the following areas would be subject to amendment: (1) Pursuant to an order of a member of the FCC's presiding body, the competition authorities would be entitled to order searches and seize documents. The Federal Act on Administrative Criminal Law would apply to such investigative measures in order to offer a better protection of the undertakings' rights. (2) In order to clarify uncertainties connected with the current legislation, the power of the FCC and the Secretariat to receive fees for their investigations, expert advices, and other services would be ruled on in a specific Ordinance of the Swiss Federal Council. (3) In conformity with Article 170 of the Swiss Federal Constitution, the efficiency of Competition Law – in particular its ability to prevent damaging restraints of competition – would be subject to (systematic and scientific) evaluation. (4) As a transitory rule, no direct fines could be imposed if undertakings notify or

suppress their unlawful restraints within a six month period as of the entry into effect of the concerned amendment.

It is to be noted that the Swiss Federal Council no longer deals with the issues raised by the interaction between intellectual property rights and competition concerns. It may be recalled that in a recent decision, the Swiss Supreme Court ruled that the holder of a patent right may block parallel imports, provided that it complies with the Competition Act (see 2000/2, 2000/3 reports). It is likely that the enactment by the two chambers of Parliament, expected at first during the course of 2002, will be delayed. Indeed, the proposed amendments are likely to face opposition, with the result that the timing of the legislative process remains unclear.

***Vertical Agreements - Communication of the FCC.*** In a communication of January 7, 2002, the FCC defined the principles of assessment of vertical agreements in relation to the Competition Act :

- In general, a vertical agreement will be deemed to have a notable effect on the market when it fixes prices, restricts the territory in which the buyer may sell or the circle of customers, restricts sales to the final consumer within a selective distribution system or crossed sales among members of the same selective distribution system, or contains a non-competition obligation for a duration exceeding five years or one year after expiry of the agreement. For other agreements, the FCC communication provides for a safe-harbour rule if the undertakings do not hold, together, a market share higher than 10 % (*de minimis* clause); the cumulative effect of parallel networks of similar vertical restraints implemented by competing suppliers or buyers is reserved.
- The regime applicable to components and spare parts is twofold : while restrictions pertaining to the sale of these products to third parties are considered as having a notable effect under the presumptions set forth by the communication, the prohibition on reselling components is not unlawful when (i) these components have been delivered to the buyer in order to be integrated into the latter's own products or (ii) the buyer uses these components in a competing product.
- The communication of the FCC also provides for a list of lawful restrictions (on grounds of economic efficiency), such as the restriction imposed on a whole seller on selling directly to the final consumer or the prohibition on an authorized dealer, member of a selective distribution system, to resell the products it purchased to a distributor outside that system.

These principles aim at simplifying the assessment of vertical agreements and improving predictability of future decisions of the FCC.

([www.wettbewerbskommission.ch](http://www.wettbewerbskommission.ch))

***Annual Report of the FCC.*** On February 19, 2002, the FCC held its annual press conference and published its annual report. The FCC clarified some specific aspects of its present and future practice. The FCC stressed that it always seeks to reach amicable arrangements with a view to eliminating unlawful restrictions. This allows the companies concerned to avoid bad publicity. The FCC further explained that it does not put the Competition Act into operation only vis-à-vis small and medium-sized businesses, as it is sometimes asserted. As a matter of fact, as regards abuses of a dominant position as well as merger control, small and medium-sized businesses are very rarely concerned. In case of hardcore cartels, agreements entered

into by small and medium-sized businesses are just as damaging for consumers as competition restrictions implemented by large companies and are, therefore, combated severely by the FCC. In the year 2001, the FCC closed 13 investigations, of which only two ended with an amicable settlement.

(FCC press release, February 19, 2002, [www.wettbewerbskommission.ch](http://www.wettbewerbskommission.ch))

***Life insurance - Recommendation of the FCC.*** In its recommendation of October 1, 2001 to the Swiss Federal Council on the liberalization of the life insurance market (see 2001/4 report), the FCC recommended transposing the principles of the relevant EU regulations in the life insurance sector (i.e. the Directive 79/267/EEC of March 5, 1979, the Directive 90/619/EEC of November 8, 1990 and the Directive 92/96/EEC of November 10, 1992).

***Annual Report of the Price Supervisor ("Surveillant des prix").*** In February 2002, the Price Supervisor published its annual report for the year 2001. During the course of 2001, the Price Supervisor focused on network infrastructures (telecommunication, electricity market, TV networks) and the health sector (drug market, hospital taxes, dentist tariffs). The Price Supervisor reached seven settlements with undertakings imposing abusive prices and issued forty-nine recommendations to various authorities.

## **ADMINISTRATIVE AND JUDICIAL DECISIONS**

### ***Merger Control***

- **Airlines**

The FCC cleared the acquisition by UBS AG and Credit Suisse Group of Swissair's interest in Crossair.

- **Animal Health and Poultry Genetics**

Following a decision of the Swiss Supreme Court of April 24, 2001 (see 2001/2 report), the Appeal Commission partly confirmed, on March 7, 2002, a decision of the FCC in relation to the fines imposed on Merck & Co and Rhône-Poulenc for carrying out *Merial*, a concentrative joint venture, prior to FCC's approval (see 1998/1 report). The Appeal Commission held that if the thresholds are reached, a concentration must be deemed to have the potential of producing effects on the Swiss market. The concentration must therefore be notified and may not be carried out prior to FCC's authorization, irrespective of whether the concentration effectively creates or strengthens a dominant position. Pursuant to Article 51 of the Competition Act, administrative fines can be imposed on undertakings which do not refrain from carrying out the concentration during a period of one month following the notification. Unlike the FCC, the Appeal Commission held that fines are only possible if the undertakings are at fault. The Appeal Commission further defined a few criteria that allow the determination of the amount of fines. The intensity of the infringement and of the fault, the size, economic power and effect of the undertakings on the relevant market must be taken into consideration. The FCC is even entitled to increase the level of fines in order to strengthen their dissuasive effect.

- **Electricity**

- The FCC cleared the creation by the City of Zurich and Enron Power B.V. of a company intended to be active on the electricity market (transport, supply and trade) and in portfolio and risk management in the electricity sector.
- The FCC cleared the acquisition by the Nordostschweizerischen Kraftwerke AG ("NOK") of the shareholding held by Energie Baden-Württemberg in Watt AG, a company that was under the control of NOK, Energie Baden-Württemberg and E.ON Energie AG before the acquisition. The FCC considered that the shift from joint control exercised by three undertakings to joint control exercised by two undertakings amounted to a concentration within the meaning of the Competition Act.
- **Food**
  - The FCC cleared the merger between Unilever N.V./PLC and Bestfoods USA. The FCC found that the merger would neither create significant overlaps on the retail and catering markets nor produce a portfolio effect.
  - The FCC cleared the reorganization of Coca-Cola Nestlé Refreshments Company SA, a joint venture company controlled by The Coca-Cola Company and Nestlé SA.
- **Newspapers**

On March 18, 2002, the FCC cleared the acquisition by the France-Antilles group of Philippe Hersant of two local newspapers ("L'Express" and "L'Impartial").
- **Telecommunications**
  - The FCC cleared the creation of a joint venture by Ericsson SA and Sony SA, which aims at developing, designing, selling and marketing multi-media products for mobiles.
  - The FCC cleared the acquisition by Swisscom SA of the data processing business of AGI Holding SA.
- **TV sport rights**

The FCC cleared the acquisition by Canal+ SA and the RTL Group SA of joint control over the Group Jean-Claude Darmon SA.

### *Anti-Competitive Practices*

- **Debit cards**

On January 29, 2002, the FCC opened an investigation against Europay (Switzerland) SA, Swiss Post, UBS Card Center AG and Corner Banca SA. The investigation is to show whether these undertakings are breaching the Competition Act by prohibiting retailers from differentiating their prices according to the method of payment. The preliminary investigation showed signs that Europay (Switzerland) SA, on its own or collectively with other undertakings, has a dominant position on the concerned market and that there may be abuse thereof. A similar investigation is pending regarding the credit card market.  
(FCC press release, January 31, 2002, [www.wettbewerbskommission.ch](http://www.wettbewerbskommission.ch))

- **Electrical tools**

On October 3, 2001, the Secretariat of the FCC closed the preliminary investigation it was conducting with respect to the group of importers of electrical tools and equipment after the latter had confirmed that each of its members would in the future use its own order forms and propose its own estimates.

- **Electricity**

On March 27, 2002, the FCC opened four investigations against companies of the group Axpo AG, active in the electricity business. The investigations are to show whether these undertakings are in breach of the Competition Act, in that they have entered into partnership agreements on distribution with the final distributors (often local industrial services). Final distributors commit themselves, *inter alia*, to obtaining electricity supplies exclusively from the company concerned, for a long time-period, thus getting discounts on the habitual tariffs. According to the FCC, the conditions for the electricity purchase might be inequitable. Further, in view of the future liberalization, these long-term exclusivity agreements are likely to hinder future competitors.

*(FCC press release, March 28, 2002, www.wettbewerbskommission.ch)*

- **Food**

On February 1, 2002, the FCC opened an investigation against the meat transformation undertakings of two leading Swiss supermarkets, Micarna (Migros) and Bell (Coop), as well as against undertakings active on the pork trade market. The preliminary investigation has revealed signs of an abuse of a collective dominant position in that those undertakings impose overrated prices.

*(FCC press release, February 5, 2002, www.wettbewerbskommission.ch)*

- **Gasoline**

On December 3, 2001, the FCC closed its investigation into the gasoline market, which it had opened in May 2000. Signs of an unlawful agreement between oil companies as regards the price of gasoline at gas stations have not been confirmed. However, because of the economic weight of this business, the FCC will follow closely the future evolution of this market.

*(FCC press release, January 5, 2002, www.wettbewerbskommission.ch)*

- **Health**

On October 1, 2001, the FCC held that the agreement on invoicing patients of private clinics, entered into by the association of the physicians of the Canton of Aargau, four clinics and (at least) four health insurance companies, was unlawful.

- **Woodwork**

On October 23, 2001, the Secretariat of the FCC closed its preliminary investigation as regards HWS, the association of the Swiss wood dealers, after HWS confirmed that it would give up, *inter alia*, editing price recommendations and would amend those of its by-laws which aim at controlling and reorganizing the plywood market.