

# **Swiss Competition Report**

## **Reporting Period: July 04 – September 04**

*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”).*

### ***Vertical Restraints – Communication on Motor Vehicle Distribution***

On July 27, the FCC published an explanatory note on its Communication on Vertical Agreements in Motor Vehicle Distribution of October 21, 2002 (See 2002 /4 Report). The FCC takes into consideration the main developments in the application of the European Regulation (CE) 1400/2002 and the practice of the European Commission. In particular, the FCC states that: (1) vehicle suppliers have the choice between an exclusive or a selective distribution system; the mixing of both is no longer allowed; (2) notwithstanding the place of purchase of a vehicle within the European Economic Area and Switzerland and irrespective of whether the seller was an authorized distributor or an independent reseller, authorized repairers have the obligation to honor the warranties, perform free servicing and carry out repair work in respect of vehicles of the relevant brand; (3) vehicle suppliers have the obligation to organize their network of authorized repairers within a selective distribution system on the basis of qualitative criteria; (4) the same principle applies to the distribution of spare parts; (5) vehicle suppliers are prohibited from imposing fixed or minimum resale prices on their distributors; (6) in an exclusive distribution network, the distributor may be prevented from actively promoting vehicles outside the allocated territory or circle of persons (prohibition of active sales). General advertising on the internet which also reaches potential customers outside the allocated territory or circle must be allowed; (7) dissociation of sale, after-sale service and distribution of spare parts must be allowed; (8) vehicle suppliers must not limit access to spare parts. Any authorized or independent repairer must be able to obtain directly original spare parts or spare parts of equivalent quality anywhere in the EEA and in Switzerland; (9) a distributor shall have the right to be the authorized distributor for vehicles of different brands.

### ***Capacity to appeal the clearance of a concentration***

On October 20, 2003, the FCC cleared, with conditions, an increase in the indirect shareholding of the publishing company Ringier SA in the newspaper publishing company Le Temps SA. In order to ensure the independence of Le Temps SA from its two major shareholders, Edipresse and Ringier, the FCC maintained and extended the conditions imposed at the time of the creation of Le Temps in December 1997 (see 2003/4 Report). Agefi, a competitor of Ringier and Edipresse in the newspaper market, appealed the decision of the FCC claiming for the prohibition of the concentration. The Appeal Commission had to

examine the very controversial question as to whether a competitor has the capacity to appeal a decision of the FCC within the ambit of its control of a concentration. Based on a teleological construction of the Competition Act, the Appeal Commission denied, on July 15, 2004, the right of a competitor to appeal a decision on concentration.

On July 15, 2004, this holding was also confirmed by the Appeal Commission in the context of the acquisition by the Edipresse group of two daily papers distributed in the Canton of Vaud. The acquisition was cleared on December 16, 2002 (see 2002/4 Report). Etablissements Chérix, an entity of the Hersant Group and a competitor of Edipresse, appealed the clearance to the Appeal Commission. The Appeal Commission denied the right of Etablissements Chérix and of a competitor generally to appeal the clearance of a concentration. On September 16, 2004, Etablissements Chérix appealed this decision to the Federal Supreme Court.