Swiss Competition Report
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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").

HORIZONTAL AGREEMENTS

Supreme Court Confirms FCC's Right to Investigate "Past" Restrictive Practices.

In October 1999, four building firms participated in a public tender for the restoration of state buildings. Their respective offers contained similar prices to each others and were far above the price proposed in the invitation for tender. The Federal Office for Construction awarded the works to a fifth undertaking (who had not participated in the tender) and informed the FCC of the possible existence of a price agreement between the initial four participants. In December 2001, the FCC confirmed the existence of an unlawful agreement between the building companies and prohibited them from agreeing with each other on pricing for future tenders.

On December 22, 2004, the Appeal Commission annulled the FCC prohibition on the grounds that the Competition Act then in force did not empower the FCC to open an investigation in relation to past restrictive practices because of the lack of public interest in such an investigation. Upon appeal by the Federal Department for Economy, the Supreme Court disagreed with the Appeal Commission by holding that there was a public interest in having the FCC investigate past competition restraints to the extent that administrative sanctions can be imposed on the undertakings involved.

The amended Competition Act currently in force clearly states that sanctions may be imposed in relation to past restrictive agreements provided that such agreements were still in force at least five years prior to the opening of an investigation.

POLICY AND PROCEDURE

Draft Notice on De Minimis Exemptions to Restrictive Agreements.

On July 4, the FCC issued a draft notice on *de minimis* exemptions to restrictive agreements which takes into account the latest amendments to the Competition Act. The purpose of the draft notice is to identify agreements that have a limited impact on competition and should therefore be excluded from the prohibition on restrictive agreements. The draft notice was subject to public comments until September 30. A final notice has not yet been issued by the FCC.

Restrictive agreements would generally fall within the *de minimis* notice provided that three conditions are met: (i) the restrictive agreement aims to improve competitiveness by realizing

scale economies, by contributing to innovation, or by creating sales incentive (such as agreements on research and development, production, distribution, and marketing); (ii) the restrictive agreement only has a limited impact on the market (which is presumed when the aggregate market shares are below 10% for horizontal agreements and when each participant's market share is below 15% for vertical agreements); and (iii) the restrictive agreement does not contain hardcore clauses (namely clause relating to price-fixing or market allocation).

Restrictive agreements between small-sized undertakings would generally fall within the *de minimis* exception, provided that the agreement does not amount to a hardcore cartel. A small undertaking is defined as having annual worldwide turnover not exceeding CHF 2 million (€ 1.3 million) and less than 10 employees.

Appeal Commission Annuls FCC Decision for Violation of the Right to be Heard.

On December 1, 2003, the FCC found that Ticketcorner held a dominant position in the Swiss market for ticket distribution systems and prohibited Ticketcorner from entering into agreements containing direct or indirect exclusivity clauses. On September 27, 2005, the Appeal Commission annulled the FCC's decision for violating Ticketcorner's right to be heard, and remanded the case back to the FCC for further investigation.

The Appeal Commission found that the FCC, after submitting a draft decision to the parties to the investigation, rendered a materially different decision without providing Ticketcorner with an opportunity to respond on the basis of the FCC's amended decision, and that the FCC did not ascertain all the relevant facts of, and circumstances surrounding, the case. In particular, the FCC only interviewed organizers active in the pop/rock festivals segment in the Canton of *Vaud* and did not extend its survey to sport, theatre, fairs and cinema organizers in all Switzerland.

Furthermore, the FCC did not take into account all actual competitors of Ticketcorner. The Appeal Commission noted that new market conditions (from the time after the investigation begun until the time up to and including the appeal proceedings) should be taken into consideration. Although, as regards sanctions, the Appeal Commission would only have limited authority to take new market conditions into consideration as fines should be imposed on the basis of current or past competition law infringements and not based on prevailing market conditions at the time of the final decision.

Tavernier Tschanz – November 2005