

# Swiss Competition Report

## Reporting Period: October 04 – December 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”).*

### ADMINISTRATIVE AND JUDICIAL DECISIONS

#### *Administrative consultation proceedings*

- ***The Federal Competition Commission (the "FCC") issues a draft for a de minimis Notice.***

On November 22 2004, the FCC issued a draft *de minimis* notice, which is subject to a consultation period until January 31 2005. The purpose of the proposed notice is to identify the agreements between small and/or medium-sized undertakings which have a limited impact on competition and consequently do not fall within the prohibition on restrictive agreements. The draft notice distinguishes between small and medium-sized undertakings. Agreements between small undertakings are justified except if they amount to hardcore cartels and if they are entered into by a majority of competitors. Agreements between medium-sized undertakings are justified under the following circumstances: (i) the agreement aims at improving competitiveness by rationalizing the economic process; (ii) the agreement does not amount to a hardcore cartel; (iii) the agreement does not restrict competition, which is presumed when the aggregated market shares are below 10% in relation to horizontal agreements and below 15% in relation to vertical agreements.

#### *Merger Control*

- ***The FCC initiates an in-depth investigation of a concentrative joint venture in the high-tension electricity market.***

Seven Swiss electricity companies intend to concentrate the exploitation of their electricity-carrying network under a common company “Swissgrid”. The in-depth investigation launched in December 2004 must clarify whether the concentration creates or strengthens a dominant position on the market of transportation of high-tension electricity in certain regions of Switzerland.

## *Anti-Competitive Practices*

- ***The FCC closes an investigation against Coca-Cola and Feldschlösschen in the market of distribution of beverages to restaurants.***

By decision of December 6 2004, the FCC concluded that the exclusive distribution agreements between Feldschlösschen and restaurant owners with a term longer than 5 years are not unlawful under competition law provided that: (i) they are linked to a loan, to a leasing or to any other financial commitment of Feldschlösschen; (ii) after five years restaurant owners are entitled to terminate the agreement at any time against payment of the outstanding debt.

In the same proceedings, the FCC concluded that the agreement between Feldschlösschen and Coca-Cola Beverages AG - in which Feldschlösschen encourages sales of Coca-Cola products -, does not violate competition law. There remain other beer distribution channels available to Coca-Cola competitors aside from Feldschlösschen. Furthermore, as the agreement does not contain an exclusivity provision, the effects of the agreement within Feldschlösschen distribution channel are low.

- ***Supreme Court confirms a ruling of the Appeal Commission on the right to appeal.***

Corner Banca requested that the FCC pronounce interim measures against Telekurs Multipay SA to prevent an abuse of dominant position, which was refused. Corner Banca appealed to the Appeal Commission. The Appeal Commission denied the right of Corner Banca to appeal on the ground that the refusal of the FCC did not constitute a formal decision which was subject to appeal. Only a decision of the FCC taken within an investigation is subject to appeal, not a communication issued informally before the possible launch of an investigation. Furthermore, in case of the refusal of the FCC to launch an investigation, the claimant can only file a complaint against the FCC to the supervisory authority. By a decision of July 13 2004, recently published by the FCC<sup>1</sup>, the Supreme Court confirmed the ruling of the Appeal Commission.

---

<sup>1</sup> RPW/DPC 2004/4, p. 1193.