

# Swiss Competition Report

## Reporting Period: October 05 – December 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”).*

### POLICY AND PROCEDURE

#### ***Notice on De Minimis Exemptions***

On December 21 2005, the FCC issued a final Notice on *de minimis* exemptions to restrictive agreements. The FCC only made formal amendments to the draft notice that had been submitted to public comments on July 2004. Considering that the Notice is based on recent amendments to the Competition Act, the FCC will assess the effects of the Notice after a two-year periods.

The purpose of the Notice is to identify agreements that have a limited impact on competition and should therefore be excluded from the prohibition on restrictive agreements. It contains specific provisions for small-sized undertakings.

As already described in the preceding Report, 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 incentives (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 clauses 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.

### RESTRICTIVE AGREEMENTS

#### ***Amicable Settlement in relation to credit card Domestic Multilateral Interchange Fees***

On December 15 2003, the FCC initiated an investigation on the Domestic Multilateral Interchange Fees (DMIF) applicable to the four-party credit card payment systems (i.e. Visa and Mastercard credit card payment systems). The DMIF is an interchange fee fixed by companies issuing credit cards (the so-called "Issuers") and the companies that affiliate

retailers to the credit card payment systems (the so-called “Acquirers”). Mastercard and Visa are organized according to such a four-party credit card payment system: the credit card holders negotiate with the Issuers, whereas the retailers negotiate with the Acquirers. Corner Banca SA, Credit Suisse AG, UBS AG and Visa Card Services are active in the Swiss market for the issuing of Visa and Mastercard credit cards and Telekurs Multipay AG and Aduno SA are active in the Swiss market for the related acquiring services. Foreign Acquirers like B&S Card Service GmbH and Concardis GmbH offer acquiring services in Switzerland as well.

The FCC found out that the DMIF for the Visa and Mastercard credit card systems were negotiated multilaterally by the Issuers and the Acquirers in Switzerland, which amounts to an agreement on prices prohibited under the Competition Act. Instead of prohibiting the multilateral agreements, the FCC preferred to consider that the agreements on DMIF were justified on the grounds of economic efficiency subject to the following commitments by the the Swiss Issuers and Acquirers:

- 1) the DMIF shall not exceed the effective costs of the credit card networks. For example, the DMIF shall not include the cost of other services provided exclusively to the credit card holders (e.g. costs relating to the period of loan without interests until the invoicing to the credit card holder). The Issuers undertook to reduce the DMIF of 15% upon the entry into force of the amicable settlement;
- 2) the non-discrimination clause, which prohibits the retailers from passing the costs resulting from the use of a credit card on the customers, shall be abrogated;
- 3) upon request to the Acquirers, the retailers shall be informed of the DMIF applicable to a particular economic sector.

The FCC expects the reduction of the DMIF to have an effect on the commissions to be paid by the retailers, which shall be reflected in the final prices to the customers. The abrogation of the non-discrimination clause and the transparency rules should strengthen competition between the different payment means and improve the position of the retailers in their negotiations with the credit cards companies. The FCC’s approval of the amicable settlement is limited to four years so that the FCC will be able to reassess its effects on the market for the issuing and acquiring of credit card systems.

As the parties to the investigations accepted the amicable settlement prior to the term of the transitory period for the application of sanctions (March 31 2004), they could not be fined.

## ABUSE OF MARKET POWER

### *Off airport Parking services*

On December 2 2003, the FCC opened an investigation against Zurich airport (Unique) for an alleged abuse of a dominant position. Within the reorganization of the airport area, Unique terminated the agreements with two providers of valet parking services (Sprenger Autobahn AG and Alternative Parking AG), which took delivery of the passengers' vehicles and parked them outside of the airport area for a better price. As a result, they were impeded from offering their services on the Zurich airport parking area.

The FCC held that Unique's behaviour might amount to an abuse of its dominant position on the market of airport facilities for *off airport* parking services in the area of the check-in desks of Zurich airport. On December 2 2003, the FCC ordered provisional measures to maintain the current situation during the investigation. Unique had the obligation to continue to offer the necessary airport facilities to Sprenger and Alternative Parking under conditions similar to the existing ones to enable the latter to continue to provide valet parking services.

Unique's offer, made to Sprenger and Alternative Parking in December 2004, infringed the provisional measures ordered by the FCC. By a decision dated December 5 2005, the FCC imposed an administrative fine of CHF 248,000 on Unique for having infringed FCC's decision of December 1 2003. The FCC carries out the investigation on the merits.

TavernierTschanz – January 31 2005