Delivering expert knowledge to global counsel

International Law Office

Competition - Switzerland

Competition Developments in the First Quarter of 2008

Authors

Silvio Venturi

Pascal G Favre

May 08 2008

Introduction

The Federal Competition Commission (FCC) has published its 2007 Annual Report online. Forty-five concentrations were notified, out of which 39 were cleared during the first-stage investigation.

The FCC has imposed direct administrative fines for the first time since it received the power to punish competition law violations directly, which came into effect on April 1 2004 (with a one-year grace period in some cases). On February 5 2007 the FCC issued a decision assessing the fine against Swisscom Mobile for abuse of a dominant position in the call termination charges market at Sfr333 million. The FCC fined PubliGroupe Sfr2.5 million, having determined that PubliGroupe held a dominant position in the market for the selling and placement of advertisements in the printed media. These decisions are the subject of an appeal to the Federal Administrative Court.

The FCC prohibited a cartel in the market for road asphalting in the Canton of Ticino. The subjects of this enquiry were asphalt producers and undertakings active in road surfacing in the Canton of Ticino. No administrative fines were imposed as the infringement had taken place prior to April 1 2005, the expiry date for the grace period following amendments to the Competition Act which allowed direct fines. However, the FCC has announced that tender cartels will be subject to further scrutiny in the future.

Investigations

FCC initiates investigation into distribution of French books
On March 31 2008 the FCC initiated an investigation into the manner in which French books are imported into Switzerland. Switzerland's distribution system for books is dominated by a few major wholesalers. These intermediate book traders act as logistic centres between publishers and bookshops. For books published by French publishing firms, each wholesaler acts for a specific publisher as an exclusive dealer for the whole Swiss market.

Under the French Lang Law, publishers set the prices of books and booksellers cannot sell those books for more than a certain percentage below the set price. When importing books into the Swiss market, the wholesalers increase the price on the basis of a conversion table. The table allows the wholesalers to set a price for Switzerland that is higher than that in France.

The purpose of the investigation is to determine whether the distributors acting as exclusive dealers for French publishers have a dominant position and, if so, whether the pricing policy applied amounts to an abuse of that dominant position.

Merger Control

Maxit/Saint-Gobain merger approved subject to commitments
The FCC cleared the acquisition of Maxit Holding AB of Sweden by Compagnie de Saint-Gobain of France. On March 4 2008 the proposed acquisition was cleared by the European Commission under the EU Merger Regulation, subject to commitments to divest subsidiaries of Maxit active in the production and sale of gypsum-related products. Considering that the Swiss market was also affected by these commitments,

the FCC found that the proposed acquisition was not capable of creating a dominant position in the market of gypsum-related products for the ceramic industry

Coop/Carrefour merger approved subject to commitments
On March 17 2008 the FCC approved the acquisition by Coop of Carrefour's stores in Switzerland (12 existing and two planned hypermarkets).

In Switzerland, Carrefour's stores are run by Distributis SA, a company jointly held by Carrefour and Maus Frères. Maus Frères runs stores that are also active in the discount sector of the food retail market.

On November 26 2007 the FCC referred the case to a second-stage assessment. The principal concern in this proposed acquisition was the increased concentration in the food retail market which would result. Moreover, as was the case with Migros's recent acquisition of Denner, the FCC was concerned about the effect of this concentration on suppliers, which might be forced into a situation of dependence. As Carrefour stores are all large, the FCC also feared that the acquisition would strengthen Coop's position in the hypermarket sector.

On September 4 2007 the FCC also approved the merger of Migros and Denner subject to commitments. Although it declared that Coop's takeover of Carrefour's stores would create a stronger joint dominance between Migros and Coop in the national food retail market, the FCC was of the view that in the long term the effect of this takeover on the discount sector of this market would be weakened. The FCC particularly considered the pressure that is expected from new market entrants (eg, the German supermarket chains Aldi and Lidl). The FCC also considered the market share of Carrefour in the relevant market (less than 4%) to be relatively insignificant. Therefore, the FCC cleared the acquisition with the following commitments:

- Coop shall be permanently obliged not to impose exclusivity on any of its product suppliers (this type of commitment was also imposed on Migros upon clearance of the Migros/Denner merger).
- If Coop delists a product from its range even though the supplier is prepared to offer a product of similar quality in the market at a competitive price, Coop/Carrefour shall agree to find an individual solution for the supplier concerned.
- Coop shall not acquire any other food retail company in Switzerland (Migros/Denner, Manor, Aldi, Lidl, Spar, Maxi, Volg, Landi, Valrhône/Pam or Magro/Casino) for a period of six years.
- Coop/Carrefour shall sell a certain number of stores (representing a total area of 20,000 square metres) in regions (eg, Geneva and the Canton of Ticino) where the intended takeover would create a particularly concentrated market. This sale will be performed through an independent auditor.

Pursuant to Article 10(2) of the Act on Cartels, the FCC may prohibit a merger only if the investigation reveals that the merger establishes or strengthens a dominant position which may lead to the elimination of effective competition. The FCC held that this takeover would not eliminate effective competition.

fenaco/Steffen-Ris AG merger approved
On March 13 2008 the FCC approved the proposed concentration between fenaco and Steffen-Ris AG after a second-stage assessment.

Both fenaco and the companies controlled by Steffen-Ris AG are active in the market for agriculture products. fenaco is an important presence in the marketing of products derived from agriculture and is linked to the Landi cooperatives, which have a powerful position in the market. Steffen-Ris's warehouses prepare and distribute agricultural products.

The investigation showed that a dominant position would be created or strengthened as a result of this merger as relates to the wholesale market for consumer potatoes and industry potatoes, as well as to the wholesale market for seed potatoes. Therefore, the FCC cleared the merger subject to the commitment of fenaco/Steffen-Ris AG not to impose (through either purchase or supply) exclusivity on any undertaking active in the agriculture sector in Switzerland.

The merger of these two undertakings will create Switzerland's largest player in the Swiss agricultural sector.

CSS/INTRAS merger approved
In February 2008 the FCC cleared the merger of INTRAS Insurance and CSS, one of Switzerland's largest health insurance providers. The FCC found that the merger was not capable of strengthening a dominant position which could potentially lead to the elimination of effective competition. Although the merger was approved without commitments, the FCC implied that a merger involving insurers active in the

compulsory health insurance sector may be cleared subject to conditions. The completion of the contemplated merger is still subject to approval by the Swiss public health supervisory bodies.

For further information on this topic please contact Silvio Venturi or Pascal Favre at Tavernier Tschanz by telephone (+41 22 704 3700) or by fax (+41 22 704 3777) or by email (venturi@taverniertschanz.com or favre@taverniertschanz.com).