

Reporting Period : April 02 – June 02

ADMINISTRATIVE AND JUDICIAL DECISIONS

Merger Control

- ***Life insurance***

On June 24, 2002, the FCC fined the Compagnie d'Assurances Nationale Suisse ("Nationale") for the late notification of the take-over of Coop Vie, a cooperative society active in the field of life insurance. Nationale acquired a majority of Coop Vie's capital stock prior to notifying the operation to the FCC. As the FCC considered that Nationale had acted in good faith, the fine issued was relatively lenient.

(FCC press release, June 28, 2002, www.wettbewerbskommission.ch)

- ***Banking***

On May 16, 2002, the FCC announced that Crédit Suisse and Banque Linth have withdrawn their notification, submitted to the FCC in February 2002, regarding their cooperation project. Among other things, the project foresaw Crédit Suisse's participation in Banque Linth's stock capital, that Banque Linth would stop using its current IT platform for the benefit of that of Crédit Suisse, as well as the distribution of Crédit Suisse products through the sale channels of Banque Linth. The withdrawal of the notification in itself made the control procedure before the FCC purposeless. However, the FCC considered that closing the control procedure did not remove the concern that the measures spelled out in the cooperation project could result in behavior violating the Competition Act. Therefore, the FCC opened an investigation against Crédit Suisse and Banque Linth to determine whether the implementation of the above mentioned project constitutes an unlawful agreement or an abuse of a dominant position, or whether it could lead to such abuse.

(FCC press release, May 16, 2002, www.wettbewerbskommission.ch)

Anti-Competitive Practices

- ***Public procurements***

On December 17, 2001, the FCC held that the offers of four building companies, invited (selectively) to make offers for a procurement contract (the renovation of the concrete façade of the Swiss national library), containing virtually identical price terms, constituted a price fixing agreement leading to the elimination of effective competition. The agreement was therefore presumed unlawful according to Article 5(3) (a) of the Competition Act. Having pointed out that the bidding market is a provisional market, beginning with the invitation of tenders and formally ending with the conclusion of a contract with the successful tenderer, the FCC considered that the presumption of unlawfulness could not be reversed in the present case. On the one hand, external competition could no longer exist as the selective manner of awarding the contract naturally precluded any third party from accessing the bidding market. On the other hand, the FCC considered that there was no internal competition, holding in particular that the existence of factors other than

the price (such as the quality of the service offered) never justifies reversing the presumption of unlawfulness provided for in Article 5(3) (a) of the Competition Act.

- ***Gas distribution***

On December 3, 2001, the FCC suspended its investigation, opened on May 3, 2000, against gas distributors, which together supply more than 90 per cent of the gas stations selling branded gas on Swiss territory. In particular, the FCC considered that the distributors' practice of announcing price changes applicable to the whole sector in advance, and of enforcing these changes on the announced date, did not constitute concerted practice within Art. 4 (1) of the Competition Act. Instead, such practice was held to be merely the result of parallel behavior, which does not fall under the Competition Act. According to the FCC, a concerted practice exists only if, following reciprocal contacts between a number of companies, some companies anticipate the behavior of the other companies, and consciously and intentionally adapt their own behavior to that of the other companies. On the other hand, parallel behavior is said to exist, when a number of companies adopt an identical or uniform behavior on any given market, (exclusively) because of factors outside the influence of the companies concerned. Such factors include, in particular, price changes in an upstream market, as well as costs resulting from a change in state legislation (particularly taxes). The degree of market transparency and the homogeneity of the products offered are equally to be taken into account. In the case concerned here, the FCC considered that the uniform behavior of the gas distributors was due solely to the high transparency of the market and the presence of practically identical outside factors (taxes, price of crude oil, exchange rates and transport costs).

- ***Telephone network***

- On May 6, 2002, the FCC approved an amicable settlement with Swisscom SA ("Swisscom"), obliging Swisscom to stop sending advertisements for its own services together with its invoices for the connection fee to customers who have "preselected" another carrier. This settlement ends the investigation opened on December 5, 2001, regarding Swisscom's practice of sending advertisements for its own services in the liberalized telecommunications market together with its monthly connection fee invoices. Customers who had changed carrier and had opted for Carrier-Preselection received targeted advertising, aimed at getting them to again subscribe to Swisscom. While such large-scale advertising entails important costs for Swisscom's competitors, it entails only a small supplemental cost for Swisscom, as the latter is in any case bound to mail its invoices for the connection fee.

(FCC, press release, May 7, 2002, www.wettbewerbskommission.ch)

- On May 6, 2002, the FCC compelled Swisscom SA ("Swisscom"), by means of interim measures, to immediately grant to all ADSL service providers the same quantity discount (a discount based on the number of customers) as it granted to Bluewin SA ("Bluewin"), a Swisscom subsidiary. Bluewin is presently the only provider which, on the basis of the number of customers, benefits from the maximum discount. Bluewin can therefore offer its ADSL services to its end consumers at a price which is lower than the network user fee invoiced by Swisscom to competing providers. According to the FCC, Bluewin's competitive

advantage risks having important consequences on the future structure of the broad band services market (in particular ADSL), because of the dynamics of this market. There was therefore urgency in ordering the interim measures against Swisscom before rendering the main decision.

(FCC press release, May 7, 2002, www.wettbewerbskommission.ch)