

Swiss Competition Report

Reporting Period: April 05 – June 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

- ***Supreme Court Blocks Third-Party Appeals against Concentrations***

Facts. On December 16 2002 the Federal Competition Commission ("FCC") had cleared the acquisition by the Edipresse group of two daily newspapers distributed in the Canton of Vaud. Etablissement Cherix (an entity of the Hersant group, and a competitor of Edipresse) had appealed the FCC clearance. The Appeal Commission denied Etablissement Cherix, and third parties generally, the right to appeal an FCC clearance decision regarding concentrations. Further to the Etablissements Cherix' appeal, the Federal Supreme Court confirmed the Appeal Commission ruling in a decision dated June 14 2005.

Held. Since the entry into force of the Swiss Competition Act in 1996, the question of third parties' right to appeal decisions regarding concentrations has been controversial by reason of the lack of clarity of the Competition Act. On the one hand the Competition Act clearly states that only the undertakings involved in the contemplated merger are parties to the merger control investigations. On the other hand the administrative procedure rules provide any person with a legitimate interest with the right to appeal administrative decisions.

Based on legislative working documents, the Supreme Court held that the intention of the legislator was to exclude third parties (generally) from the merger control proceedings. It based its decision on the following main considerations: (i) the clear intention of the legislator was to have fast merger control proceedings in the interests of the Swiss economy in general; (ii) to admit the right to appeal for third parties who are not entitled to take part in the investigation proceedings would result in the transfer of the debate in the appeal proceedings; (iii) to admit the right for third parties to appeal would substantially impact merger processes in Switzerland considering that appeals suspend the implementation of the contemplated merger.

This decision by the Supreme Court constitutes a landmark decision to the extent it eventually states that third parties have no right to appeal decision regarding concentrations irrespective of any legitimate interest they may have. The Swiss solution differs from European Competition law, where third parties that are directly and individually concerned may appeal a clearance decision.

- *New market conditions to be taken into consideration in the appeal proceedings.*

In a decision dated November 18 2002, the FCC found the existence of an abuse of collective dominance in the Swiss market for access to the credit card payment system and prohibited it. The credit card payment system is a service provided either by banks or by credit card institutions (so-called "credit card acquirers") to retailers, to allow them to have access or to be connected to a predetermined credit card network as a means of payment by their respective customers. Four credit card acquirers, which held together a 98% market share, were involved in the collective dominance. The FCC held that they abused their dominant position by imposing a non-discrimination rule on the retailers. The retailers were prohibited from applying different retail prices depending on the method of payment used by their customers – in order to pass the commission fee due to the credit card acquirer on to the customer using a credit card.

Further to an appeal by one of the credit card acquirers, the Appeal Commission had to determine whether new facts – which occurred between the first instance decision and the appeal proceedings - have to be taken into consideration in accordance with administrative procedure. In the present case, the entry of cross border credit card acquirers in the Swiss market were likely to influence the geographical market definition and the existence of a collective dominance retained by the FCC.

The FCC stated that it based its argument on the fact that the parties would then always be able to influence the outcome of the final decision by changing their behaviors in the course of the proceedings.

The Appeal Commission considered that the scope of the Competition Act was to ensure the existence of efficient competition by appropriate measures. If the prohibition of a determined behaviour (in this case, the prohibition of the non-discrimination rule) appears not to be appropriate any more in the light of new market conditions, it is correct to assess the appealed decision on the basis of such new market conditions occurring in the meantime. This principle does not apply in relation to the imposition of a punitive measure (fine), where the situation must be assessed at the time the FCC pronounced such sanction. In a decision dated June 9 2005 the Appeal Commission annulled the FCC decision accordingly and sent it back for the FCC to render a new decision based on the new market conditions.