

Swiss Competition Report

Reporting Period: April 06–June 06

MERGERS AND ACQUISITIONS

No effective competition in the market for electricity transportation – the Appeal Commission clears the Swissgrid merger

Seven Swiss electricity companies intend to concentrate the exploitation of their (high tension) electricity-carrying network under a common company "Swissgrid". In a decision dated 7 March 2005 (Decision of the FCC of 7 March, *Swissgrid*, in RPW 2005/2, 347), the FCC cleared the operation subject to the following conditions; (i) Swissgrid is to guarantee non-discriminatory access to its network; (ii) Swissgrid is to publish the fees and conditions of use of its network; (iii) Swissgrid group must provide cost accounting in relation to their high tension network; (iv) Swissgrid group shall not commercially produce, distribute or sell electricity; (v) Swissgrid board members and directors are prohibited from being members of the management of other electricity companies active in the production, distribution and sale of electricity.

Further to the appeal of Swissgrid, the Appeal Commission annulled the decision of the FCC and cleared the operation without conditions or commitments (decision of the Appeal Commission of 1 Mai 2006 in *Atel, BKW FMB Energie AG, Centralschweizerische Kraftwerke AG, Elektrizitats-Gesellschaft Laufenburg AG, EWZ, EOS, Nordostschweizerische Kraftwerke AG/FCC*). It based its decision on the following considerations:

- (a) the FCC omitted to submit to the appellants a draft decision including the conditions so that they did not have the opportunity to respond on the proposed conditions. It amounts to a violation of the right of the appellants to be heard, which has the effect of annulling the decision of the FCC.
- (b) the Appeal Commission considered that competition in the relevant market for the transportation of high tension electricity was non-existent so that the planned merger could not have the effect of eliminating competition (existence of a factual monopoly). The existence of potential competitors could not be admitted due to the high costs and regulatory barriers linked to the setting up of an electricity transportation network. Accordingly, the operation had to be cleared without conditions. The Appeal Commission followed the FCC in distinguishing the following markets: (i) the market for the transportation of electricity; (ii) the market for the distribution of electricity, and (iii) the market for the supply of electricity. However, according to the Appeal Commission, the FCC mistakenly considered the demand side in the market for the distribution of electricity when assessing the competition in the market for transportation of electricity.
- (c) Even if the operation had the effect of eliminating competition, the conditions imposed by the FCC would not be appropriate to counterbalance the negative effects on competition. In particular, the Appeal Commission considered that the prohibition on

the members of the management of Swissgrid to be appointed as board directors in a company active in the electricity market would infringe Swiss commercial law.

The FCC appealed the decision of the Appeal Commission to the Supreme Court, specifying that its decision of clearance subject to conditions was still in force pending the final decision of the Supreme Court.

The Appeal Commission annuls the FCC's decision to prohibit the acquisition of a free daily by Espace Media Group

Tamedia AG and Espace Media Groupe SA (EMG) are active in the edition of newspapers, in the electronic media and in local radios and internet platforms. Tamedia and EMG's subsidiary Berner Zeitung AG intend to purchase (through a subsidiary of Tamedia) the company 20 Minuten (Schweiz) AG, which edits the free daily "*20 Minuten*" in some regions of Switzerland.

In a decision dated 19 January 2004 (Decision of the FCC, *20 Minuten*, in RPW 2004/2, 529), the FCC cleared the acquisition of 20 Minuten by Tamedia's subsidiary but prohibited Berner Zeitung to acquire common control of the editor of "*20 Minuten*" (by entering into Tamedia's subsidiary's share capital). The FCC held that the acquisition of 20 Minuten by Berner Zeitung would create a dominant position of EMG in the market of readers and in the market of advertisers in the Bern region liable to eliminate competition.

Berner Zeitung appealed the FCC's decision and requested the Appeal Commission to clear the acquisition of 20 Minuten or, subsidiarily, to clear the acquisition subject to EMG's commitments not to apply for a license to edit and distribute the daily free advertising paper "*Anzeiger Region Bern*".

In a decision dated 4 May 2006 (decision of the Appeal Commission of 4 May 2006, *Berner Zeitung AG, Tamedia AG/FCC*), the Appeal Commission annulled the FCC's decision and cleared the acquisition of common control by Tamedia and Berner Zeitung on 20 Minuten subject to EMG's commitment not to apply for a license for the daily advertising paper "*Anzeiger Region Bern*". Pursuant to the competition authorities' case law in the press media markets, the Appeal Commission defined the relevant markets from the readers' side and from the advertisers' side.

Relevant market from the readers' side. As opposed to the FCC, the Appeal Commission held that daily newspapers (payable) were not substitutes of the free daily "*20 Minuten*" because of their different content and use. Indeed, the Appeal Commission observed that readers of "*20 Minuten*" are pendular readers, who will not stop reading other daily newspapers if they read "*20 Minuten*". Consequently, the product market from the readers' side shall be limited to the market of free dailies for pendular readers in the region of Bern (where "*20 Minuten*" is distributed), in which 20 Minuten already benefits from a factual monopoly position. Because of the absence of actual and potential competition in this market, the Appeal Commission retained that the acquisition would not create a dominant position liable to eliminate competition.

Relevant market from the advertisers' side. The Appeal Commission defined and examined the following segments of the market for advertising :

- (i) the local market for the advertising of product names: according to advertisers advertisements in pendular free dailies reach a different category of readers than advertising in other media (mainly young readers who would not read other daily newspapers). The relevant market for advertising of product names includes the pendular dailies and other local advertising papers. Considering the high market share held by the advertising free paper "*Anzeiger Region Bern*" in the local market for advertising of product names (approximately 97%), the Appeal Commission retained that the acquisition shall not eliminate competition in this market provided EMG undertakes not to apply for a license to edit and distribute the "*Anzeiger Region Bern*".
- (ii) the regional market for individuals' advertising (real estate, jobs and other individuals' advertising), which includes besides the pendular free paper, daily newspapers, local advertising papers and internet portals: considering the dynamic and numerous substitutes to the free pendular paper, the Appeal Commission retained that the merger would not create a dominant position in the regional market for individuals' advertising.
- (iii) the regional or local market, as the case may be, for the advertising of events (theatres, concerts), which also include, besides the pendular free paper, daily newspapers and internet portals: the Appeal Commission considered that this market was dynamic as well and retained that the merger would not create a dominant position liable to eliminate competition.

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