Swiss Competition Report
Reporting Period: April 07–June 07

MERGER CONTROL

ComCo sends Migros/Denner Merger to Second Stage Assessment

On 7 May 2007, the Competition Commission (ComCo) decided to refer the proposed merger of retail giant Migros with cost-cutter Denner to a second stage assessment.

Under Swiss competition law qualifying concentrations must be notified to the ComCo, which then has one month in which to decide whether to initiate an investigation into them. During this initial stage, the concentration is suspended, unless, upon application, the ComCo decides otherwise. The ComCo's decision to investigate a concentration leads to a "second stage assessment" of four months' duration. At the outset of this assessment the ComCo decides whether or not the concentration can be consummated, pending the ComCo's determination on it.

In the decision to refer the Migros/Denner concentration the ComCo indicated its concern that the concentration might create or strengthen a dominant position in the Swiss retail market and in certain markets for the supply of the Swiss retail market. A further matter the ComCo declared that it will investigate in the second stage is whether the concentration will increase barriers to new entry into the Swiss retail market.

One of the main lines of enquiry will be whether this concentration has the effect of removing Denner as "a third competitive force" alongside the market heavyweights Migros and Coop, who together control 30% of the market and 70% of the food and drinks segment. The arrival in Switzerland of German discounters Aldi and Lidl will certainly play a significant role in the ComCo's analysis. With the distribution networks and financial capabilities of these two German chains they may be expected, even individually, but certainly together, to constitute a "third competitive force" constraining the behaviour of Migros and Coop in the retail market and in downstream supply.

ABUSE OF DOMINANT POSITION

Swisscom agreement to apply uniform conditions for ADSL suppliers

On 7 May 2007, Swisscom agreed with the ComCo to offer the same rebate package to all internet service providers (ISPs) supplying ADSL services. In so doing, Swisscom has brought itself into compliance with interim measures ordered by the ComCo on 6 May 2002, which Swisscom had formerly contested.

It had been Swisscom's practice to offer its subsidiary Bluewin, an ISP, access to its wide-band network upon a system of rebates more favourable than it was willing to grant to other ISPs. With the ComCo's provisional order of 6 May 2002, Swisscom initially began treating all ISPs identically with Bluewin. On 15 December 2003, the ComCo confirmed that Swisscom had committed an abuse of dominant position in favouring its subsidiary over other

ISPs. But the Appeal Commission annulled this decision on 30 June 2005, sending the matter back to the ComCo for redecision.

With Swisscom's decision now to comply with the ComCo's initial decision, and to abandon its claim for restitution from the ISPs, the ComCo has discontinued proceedings.

Nonetheless, a second investigation concerning Swisscom's activities in the ASDL market continues to run. This investigation seeks to determine whether Swisscom has abused its dominant position for wide-band internet network capacity by means of a price squeeze. The allegation is that the prices its subsidiary Bluewin charges final consumers are set at such a low level, and the prices which Swisscom charges to ISPs for access to the network are at such a high level, that it is not possible for ISPs to remain in the market in competition with Bluewin.

INVESTIGATIONS

ComCo terminates investigation into Conditions imposed by Cablecom on Teleclub

On 4 June 2007, the Competition Commission (ComCo) adopted a decision discontinuing its proceedings against Cablecom. This investigation related to Teleclub's complaint that Cablecom subjected its agreement to broadcast Teleclub's programming over its cable network to the condition that Teleclub use Cablecom's platform and client service.

Cablecom is Switzerland's principal cable operator, offering a "triple play" of high speed internet, television, and telephony. In particular, it offers digital television content to the retail market. Teleclub is a digital television content provider without the means of supply to consumers. It approached Cablecom for access to Cablecom's network. The latter agreed to such access only with a tie to other Cablecom services with the result that the Teleclub offering would appear as a programme package within the broader Cablecom offering.

On 23 September 2002, the ComCo imposed provisional measures obligating Cablecom to broadcast the Teleclub programming free of Cablecom's conditions. In so deciding the ComCo was particularly concerned to ensure the existence of competition in what was then the initial stage of the rapidly expanding pay-TV market.

A year later, in September 2003, Cablecom succeeded in having these provisional measures partly annulled on appeal. Nonetheless, it decided not to disturb the broadcasting of Teleclub's programming, which therefore continued uninterrupted. On the other hand, armed with this partial nullification, Cablecom initiated negotiations with Teleclub concerning the conditions upon which the former would offer the latter the use of its network.

In October 2006, the parties finally reached agreement on this matter, upon which Teleclub retracted its complaint. It was in response to this retraction that the ComCo has discontinued the investigation.

ComCo discontinues Investigation into Consumer Credit Lenders

The ComCo has come to the conclusion that there are no indications of collusion in the market for the provision of consumer credit and on 14 June 2007 therefore closed its preliminary investigation into the sector. The ComCo announced, however, that it will remain vigilant as regards this market.

It is undeniable that interest rates for consumer credit are higher in Switzerland than in comparator countries abroad. The particularly worrisome aspect of this is that, despite lower Swiss franc inflation than the inflation related to the currency of the comparator countries, notably the Euro, Swiss consumer credit headline rates often still outpace those abroad.
The ComCo's preliminary investigation viewed this market from a dynamic point a view, and not as a simple legacy snapshot. It is true that there have traditionally been only a few market heavyweights, but there have recently been new market entrants. The presence of two prominent suppliers of data to consumer credit lenders raised the spector of information sharing between lenders. However, the ComCo's preliminary investigation disclosed no co-ordination among lenders resulting from such information. Indeed, the ComCo recognized that the activities of these consumer credit data suppliers would in all probability favour competition in evening the playing field for new market entrants, providing of course that they were offered data supply terms equal to those offered to established lenders in Switzerland. Importantly, the ComCo's preliminary investigation ascertained that, over the last several years, the average rate of interest for consumer credit had dropped in Switzerland, and that the market leader had lost market share.

The ComCo has declared that it will continue to monitor this market and is prepared to initiate a full blown investigation if the observed trend towards increased competition in the market does not continue to prevail, or if new entrants report particular difficulties in gaining a foothold in this market. The ComCo will also be watching how these problems are being addressed in the European Union, in particular in regard to the integration of financial markets across Member States.

PARALLEL TRADE

The ComCo has issued Recommendations on Patent Right Exhaustion

On 26 June 2007, the ComCo published its recommendation that the current Swiss legal regime on patent right exhaustion be altered with a view to facilitating parallel imports. In this recommendation, the ComCo again argues for the pro-competitive position it first enunciated in 2003. The ComCo recommends that Swiss patent law be amended to provide for international exhaustion, or at least regional exhaustion. By regional exhaustion, the ComCo means that the placing of a patented product on a market in the EU would exhaust the patent right vis-à-vis sale of that product in Switzerland. The ComCo explained that exceptions should be made to the international solution, or that the regional solution should even be preferred, if necessary to ensure that the patent holder receives a return on its patent sufficient to stimulate research and development. Within the EU all countries respect intellectual property rights in the sense of providing sufficient incentives for innovation and development. The placing of a product on a market in some countries elsewhere where there is no sufficient protection of intellectual property should not deprive the patent holder of a return on its investment in Switzerland too.

The present position under Swiss law is that, subject to express reservation, patent rights in Switzerland are only exhausted with the placing of the patented product on the market in Switzerland. The placing of a patented product on a market in an EU country, for example, would not exhaust a Swiss patent. In the result, by the European Union law principle of Community-wide exhaustion, that product can be freely imported into any other EU Member State and sold there, but the assertion of Swiss patent law rights will prevent its entry into and sale in Switzerland.

The ComCo is very much aware that the result of this is to insulate Swiss distribution channels from competition from parallel trade. The ComCo is equally aware that removing this barrier to competition in Switzerland even via the regional solution would have potent effect, given the weight of the EU market of 500 million consumers.

The ComCo's recommendation was made as part of a consultation procedure relating to the revision of Swiss patent law. The purposes of such consultation procedures are to identify the various options for amendment to the relevant Swiss statute and to obtain the views of interested parties on these various options.

The consultation procedure was initiated by a 3 November 2006 motion of the Legal Affairs Commission of the Swiss executive, the Federal Council. This motion commissioned the Swiss Intellectual Property Institute to identify and describe, in as neutral a manner as possible, the various options for amendment in an explanatory report.

In the ComCo's view, the explanatory report issued by the Swiss Intellectual Property Institute on 18 April 2007 failed to maintain neutrality as to the various options, and failed to include all elements of the variants relevant to the analysis. This latest recommendation of the ComCo seeks to refute the explanatory report. The last word on whether to amend Swiss patent legislation to favour parallel trade lies with the Federal Council. If the latter does decide to proceed with amendments, the last word on them is with the Swiss legislator, or, in the event of a referendum on any statutory amendment, with the Swiss people.

Tavernier Tschanz – July 2007
For more information, please contact Silvio Venturi (venturi@taverniertschanz.com) or Phillip Landolt (landolt@taverniertschanz.com), tel. +41 (0) 22 704 3700.