

NATIONAL COMPETITION LAW REPORT – Q2 2008 - SWITZERLAND

INVESTIGATIONS - RECOMMENDATIONS

FCC recommends better protection for bidders of military goods

On June 26, 2008, the FCC made a recommendation to the Swiss Federal Government (Swiss Federal Council) to enhance the protection for bidders of military goods in Switzerland.

In Switzerland, public procurement law has undergone substantial changes in recent years and now allows foreign contractors to participate in public tenders. However, bidders of military goods cannot appeal against the procurement decisions when they feel that the contract was awarded in breach of the provisions and principles of Swiss law on public procurement contracts. The FCC proposed improving the protection for the bidders of such goods, by conferring on them a right of appeal against the awarding decision. Indeed, the FCC continuously monitors the competition environment. It may make proposals to official authorities for the promotion of effective competition, particularly with regard to the enactment of laws relating to the economy.

On August 7, 2007, the Secretariat of the FCC decided to terminate its preliminary investigation into armasuisse's purchase of 20 training and light transport helicopters. armasuisse is the federal competence center for the procurement of technologically complex systems and equipment, security relevant technologies and quality management of Switzerland. The Swiss Federal Department of Defence, Civil Protection and Sport funnels the procurement of all equipment and buildings required by the Swiss army through armasuisse.

In early 2006, following a bidding process, armasuisse purchased 20 helicopters from Eurocopter at an aggregate price of CHF 310,000,000. The Italian helicopter manufacturer Agusta S.p.A. complained to the FCC that in awarding this contract to Eurocopter and not to itself, armasuisse had discriminated against it and that this was an abuse of a dominant position.

The FCC confirmed that Swiss competition law does indeed apply to publicly owned entities. This was in fact the first case since the recent amendments of Swiss competition law involving allegations against a public entity. The FCC further determined that the geographical dimension of the market for the purchase of the helicopters in question was worldwide. It therefore concluded that armasuisse did not have a dominant position in this market. It concluded moreover that there existed no indication of abuse in this case.

MERGER CONTROL

FCC approves Swisscom/The Phone House merger

On June 3, 2008, the FCC approved the proposed acquisition by Swisscom AG of The Phone House's mobile-phone shops in Switzerland. Swisscom AG is Switzerland's largest phone company. The Phone House Switzerland is owned by the London-based Carphone Warehouse Group, Europe's largest mobile-phone retailer.

The FCC held that there would still be sufficient competition for mobile phone services after the takeover. There remain sufficient alternative supply channels, as consumers remain free to subscribe to telephone services or buy mobile phones either directly with the providers or with retailers. The first-stage investigation also revealed that there are no significant barriers to the entry of new competitors into the market of mobile phone service sales.

The envisaged takeover was announced by Swisscom the first time on March 28, 2008. The Secretariat of the FCC first held, within the context of informal consultation which was based on information submitted by Swisscom, that the contemplated merger was not subject to compulsory notification. However, the FCC then learned that The Phone House shops are also providing services related to the fixed network, such as DSL and phone subscriptions. As a result, it appeared that The Phone House was also active in a downstream market in relation to fixed network services, i.e. in a market where Swisscom had in the past been determined to hold a dominant position through a legally enforceable decision of the FCC. This triggers the obligation on Swisscom to file the contemplated merger.

In Switzerland, notification is mandatory when the jurisdictional thresholds set by the Competition Act are reached. The test applied to mergers is based on turnovers. That being said, notification is also mandatory when, on termination of a procedure initiated pursuant to the Competition Act, a legally enforceable decision establishes that an undertaking involved in the merger holds a dominant position in a market in Switzerland, and when the merger concerns either that market or a neighboring market or a market upstream or downstream. Once the merger is filed, the FCC is required to notify the undertakings within one month after it has received the complete notification as to whether it intends to initiate an investigation (Phase I of the procedure). If within this period no notification is made by the FCC, the merger may be completed. By contrast, the FCC's decision to investigate a concentration will lead to a "second stage assessment" of four months' duration (Phase II of the procedure).

FCC initiates a second-stage investigation into the Heineken/Eichhof merger

On April 29, 2008, Heineken announced its plans to buy the drinks business of Eichhof Holding, the last independent brewery in Switzerland.

Preliminary investigations indicated that the merger could lead to the market being dominated by two groups: Heineken-Eichhof and the biggest Swiss brewery, Carlsberg/Feldschlösschen. The FCC thus decided to refer the case to a second stage assessment. The principal concern in this proposed acquisition is the increased concentration in the catering trade (including both alcoholic and non-alcoholic beers) in which it would result. The examination of the merger will seek deeper clarification of questions about stability and the sustainability of a possible collective market-dominant position.

Under Swiss law, the FCC applied for the first time the concept of collective dominance under the Merger Regulation in the decision *Bell/SEG Poulets* in 1998. The FCC held, inter

alia, that there must be an expectation that the tacit co-ordination will last, in other words that there is sufficient incentive to coordinate behavior to deter the members of the oligopoly from deviating from the coordinated behavior.

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