

NATIONAL COMPETITION LAW REPORT – Q2 2009 – SWITZERLAND

ANNUAL REPORT

FCC publishes its 2008 annual report

The Competition Commission (FCC) has published its 2008 annual report¹. According to the FCC, 2008 was a year of activities designed to prevent distortions of competition. This update summarizes the activities undertaken by the FCC during 2008.

The FCC has established contacts with procurement agencies and major bodies in the field of public procurement. In a further measure, the Secretariat of the FCC conducted external training sessions for employees of federal procurement agencies in order to raise their awareness of the issue of bid rigging.

In the course of advisory procedures, the FCC was able to clarify and refine practices relating to recommended prices. It may happen that trade associations and industry organizations induce or encourage direct or indirect price-fixing agreements between their members by issuing tariffs, recommended prices or price lists. Descriptions of services or cataloguing services with tariffs or prices are normally treated as price-fixing agreements. The FCC held that at least two alternative instruments which comply with the requirements of the Competition Act (ACart) are available to the associations to this end. Services which are described without details of tariffs or quantities do not fix prices and thus do not restrict freedom to determine prices. The second permissible practice is the publication of historical, survey-based and aggregated figures. Such data must be accessible to consumers and the tariffs must be non-binding. This data must be compiled and published by independent third parties.

According to the FCC, 2008 was also notable for decisions in individual cases that will have generally applicable practical implications. From the groundbreaking Supreme Court decisions on the Internal Market Act made in response to appeals by the FCC relating to authorization procedures for practising a profession², it was possible to establish a precedent with signalling effect for the whole of Switzerland. These decisions also confirmed the importance of the power that allows the FCC itself to appeal against cantonal decisions on market access restrictions. The FCC has announced that it will make use of this option in the future in order to resolve fundamental issues.

¹ A summary in English of the annual report is available at the following address:
<http://www.google.ch/search?hl=fr&q=%22annual+report+2008+of+the+competition+commission%22&meta=&aq=o&oq=>

² Decisions of the Swiss Supreme Court of September 24 2008 (2C_85/2008) and October 13 2008 (2C_15/2008).

With regard to direct penalties, the FCC imposed a fine on a subsidiary of Galenica AG for its abuse of a dominant position in connection with the publication of the medicinal products compendium. In addition, the Secretariat requested that penalties be imposed on Swisscom for its pricing policy in the field of ADSL broadband internet. The Secretariat also conducted house searches in several cases of possible hard price-fixing agreements. The Secretariat continued ongoing investigations in 2008, and there were disputes before the appeal courts over procedural issues in several cases. According to the FCC, this regularly led to proceedings being prolonged and additional resources being tied up. The Federal Criminal Court and the Swiss Supreme Court have issued clarifying decisions in relation to competition authority procedures for house searches and have authorised the competition authority to remove the seals from evidence that has been seized and sealed³.

Although vertical agreements were a major issue in 2008, decisions related to this matter are expected in the course of 2009 only. Nonetheless, according to the FCC, the ongoing investigations in this regard had been completed.

The competition authorities concluded two significant merger cases, *Coop/Carrefour* and *fenaco/Steffen-Ris*, imposing requirements to ensure that competition is maintained. In particular, the *Coop/Carrefour* operation was a crucial contribution to the concentration process characterizing the retail distribution sector in Switzerland. Swiss law allows this trend, in line with its relatively favourable view of concentrations compared with EU law. The FCC concluded that the *Coop/Carrefour* concentration strengthened the collective dominant position of Coop and Migros in the downstream distribution market to the extent that effective competition is at risk of being eliminated. However, the merger was cleared because of Coop's commitment, among other things, to turn over some existing sites to third parties, notably the German discount retail stores Lidl and Aldi. As to the upstream supply market, Coop committed to maintain commercial relationships with suppliers having achieved more than 30% of their turnover with Carrefour from 2005 to 2007, provided that their products were offered at competitive price.

Also of major importance in 2008 was the work done on the evaluation of the ACart with a view to submitting a report to Parliament.

The FCC also reported that its Secretariat did a considerable amount of preparatory work for the annual conference of the International Competition Network, which took place in Zurich from June 3 to 5 2009.

INVESTIGATIONS

Secretariat opens preliminary investigation in relation to Maestro interchange fee

On March 25 2009, the Secretariat of the FCC opened a preliminary investigation against Maestro in connection with the introduction of an interchange fee for the use of the debit card Maestro. The opening of this investigation followed a preliminary notification that Maestro filed with the FCC before implementing its project.

³ See, e.g. decision of the Swiss Supreme Court of October 28 2008 (1B_101/2008).

The ACart provides for a system of non-mandatory preliminary notification of potentially unlawful agreements and practices. Undertakings have the possibility to formally submit a potential restraint of competition to the FCC before it produces effects (Article 49a para. 3 ACart). Once the filing is made, the undertaking is allowed to perform the notified agreement or behaviour without the risk of sanctions as long as the FCC does not inform the undertaking about the opening of a (preliminary or in-depth) investigation. The FCC has five months to decide upon the opening of such investigation.

In this case, a preliminary investigation was opened because the Secretariat considered that the introduction of an interchange fee might raise competition concerns. The question is whether the ACart authorizes a multilateral agreement on interchange fee, in particular given the strong position of the Maestro debit card on the market.

Regarding the procedure recently completed on the introduction of a multilateral interchange fee for “V-Pay”(which is a Visa debit card not yet present on the Swiss market), the Secretariat concluded that there is no reason to intervene until the market share of V-Pay remains below 15%, at most during a phase of market entry of three years.

FCC fines Felco and Landi for retail price-fixing

On May 25 2009, the FCC fined Felco SA and Landi Schweiz AG, two companies active in the professional cutting tools sector, for retail price-fixing. This is the first case where sanctions are imposed as part of a vertical agreement setting a price for resale, considered by Article 5 ACart as particularly harmful to competition.

Felco, a family-owned business from the Swiss canton of Neuchâtel, is the market leader in shears and clippers for professional use. Landi is a retailer active in the agricultural and non-food sectors. In September 2006, Felco and Landi entered into an agreement setting a price for resale of certain tools manufactured by Felco. After finding that the agreement could violate the ACart, Felco spontaneously decided on August 15 2007 to disclose the agreement to the FCC under the leniency program provided for by the ACart. Later on, the two companies reached an amicable settlement with the Secretariat of the FCC, which was approved on May 25 2009 by the FCC. The FCC nevertheless imposed a sanction on the two undertakings for their illegal agreement.

Under Article 5(4) ACart, vertical agreements are deemed to eliminate competition if they include retail price-fixing or minimum retail price imposition. An undertaking that participates in such a vertical agreement may be fined up to 10% of its turnover in Switzerland in the previous three business years. However, the fine may be fully or partially exempted if the undertaking co-operates with the FCC (leniency programme).

FCC conducts dawn-raids and opens investigation into the road works sector of the Cantons Zurich and Aargau

On June 8 2009, the FCC initiated an investigation into the market for road works in the Cantons of Zurich and Aargau. The subjects of this investigation are undertakings active in the road works and civil engineer sectors. Following a complaint, the FCC has detected signs

of market sharing in the way tenders (including tender prices) for road works were submitted, as well as in a sort of “rotation” of awards for road works. Dawn raids have been conducted by the FCC as part of the evidence-gathering.

The power of the FCC to order searches of premises and seizures of documents and data, together with the introduction of direct sanctions for hard-core restrictions of competition, are some of the substantial amendments of the ACart of 2003. The FCC’s investigatory powers are limited to searches of premises, seizure of documents and data and examination of parties and witnesses. Since the 2003 amendment to the ACart, the FCC is expected to conduct dawn-raids in respect of infringements that are subject to first-time infringements fines. This case is also significant in that it recalls the principle, already well established, that private law restrictions of competition in relation to public procurement, such as these agreements between tenderers, are within the FCC’s jurisdiction.

MERGER CONTROL

FCC announces in-depth investigation into Swiss Post/NZZ Group/Tamedia merger

On May 27 2009, the FCC sent the proposed concentration between Swiss Post, NZZ Group and Tamedia to a second-stage assessment.

Swiss Post and the media companies NZZ Group and Tamedia are planning to pool their activities in the early delivery of newspapers and magazines. Once completed, the concentration will result in a system of early distribution under the management of Swiss Post that covers most of the German-speaking Switzerland and parts of Romandie. A factor which will be significant in the FCC’s final appraisal of this concentration is whether and to what extent there is a potential competition to Swiss Post, NZZ Group and Tamedia in the market for early delivery. According to the FCC, there is indeed little or no other early delivery organization in the geographical area of activities of the new distribution entity

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