

Swiss Competition Report

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MERGER CONTROL

Failing Company Defence

In a decision dated March 6 2006, the FCC cleared the acquisition of AZM Aargauer Zentralmolkerei AG (AZM) by Emmi AG (Emmi). The FCC concluded that the merger created a dominant position of Emmi on the Swiss markets for milk, alimentary cream and butter, but cleared the acquisition on the basis of the Failing Company Defence. Without the acquisition, AZM would have disappeared and Emmi would have gained AZM's market shares. Indeed, the relevant markets are still regulated by the Swiss state and therefore they are closed to foreign competitors. The FCC concluded that only the opening of the Swiss market to European companies would allow the restoration of effective competition.

Following its decision the FCC addressed a recommendation to the Swiss Federal Council to accelerate the opening of the Swiss markets for the products concerned.

RESTRICTIVE AGREEMENTS

Preliminary investigation on price agreements in the air freight

On the basis of information received from third parties, the Secretariat of the FCC opened a preliminary investigation against several air companies. The investigation covers the existence of agreements on surcharges on air freight. The agreements deal with surcharges relating to fuel, security, war risk and customs clearance. The FCC will need to prove the existence of such agreements on surcharges and their anti-competitive effects in Switzerland.

On the basis of the bilateral agreements in place between the European Union and Switzerland on air transport, the FCC will carry out the investigation in cooperation with the European Commission and will focus on air traffic between Switzerland and non-EU member states.

ABUSE OF MARKET POWER

Electricity supply by Cantonal electricity companies

In March 2002 the FCC opened investigation proceedings for abuse of a dominant position against five Swiss electricity companies, AEW Energie AG (AEW), Elektrizitätswerk des Kantons Thurgau AG (EKT), Elektrizitätswerk des Kantons Zurich (EKZ), die St-Gallisch-Appenzellischen Kraftwerke AG (SAK), each owned by a Swiss Canton, and their commonly controlled electricity supplier Axpo Vertrieb AG (Axpo). The four Canton-owned electricity companies are active in the supply of electricity to end suppliers and consumers in their respective Cantons. They purchase electricity mainly from Axpo Group and own their own electricity networks. The FCC examined whether the partnership agreements between Axpo,

the Cantonal electricity companies and end suppliers amounted to an abuse of a dominant position. The contractual clauses under examination were namely: (i) the obligation for the end suppliers to procure electricity exclusively from the relevant Cantonal electricity company (for a five-year term); and (ii) the application of discounts towards end suppliers that were not party to these partnership agreements.

The FCC defined the relevant markets as the local markets for the supply of middle tension electricity to end suppliers. It found that the electricity companies held dominant positions on the relevant markets on the basis of the following elements: (i) the electricity companies still benefit from a factual monopoly on the network infrastructure; (ii) alternative third party networks are almost inexistent; (iii) the building of new network infrastructure is subject to very strict regulatory requirements; (iv) the obligation for the network owners to grant access to third electricity transporters is only based on case law of the Supreme Court and is too recent to have an impact on competition in the relevant markets.

Concerning the five-year exclusivity clause, the FCC considered that it did not amount to an abuse of dominant position on the following grounds:

- (i) competitors in the markets for the supply of middle tension electricity are granted access to the networks pursuant to the case law of the Supreme Court;
- (ii) exclusivity for five years is justified by the high sunk costs linked to the activity of electricity production and distribution;
- (iii) the exclusivity obligation is linked to an obligation for the electricity companies to satisfy the entire demand for electricity of the end suppliers;
- (iv) the end suppliers have the possibility to enter supply agreements for a one-year term.

As the electricity companies reduced the rates and abandoned the discounts in favour of the end suppliers that were not party to the partnership agreements during the proceedings, the FCC did not retain the existence of an abuse of dominant position and closed the proceedings by a decision dated December 19 2005.