

Swiss Competition Report

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INVESTIGATIONS

Enquiry into Practices of Telekurs in the Payment Terminals Market

Telekurs Multipay provides services permitting the payment of goods and services by credit and debit card. A feature of such services is “Dynamic Currency Conversion” or “DCC”. This permits the immediate conversion of payment amounts into another currency (i.e. a currency that is more familiar or convenient to the customer, such as that of his or her credit card statement). Unlike with ordinary credit card payments in a currency other than that of the holder’s monthly credit card statement, DCC allows the card holder to know the proposed exchange rate and the converted final amount as it will appear on his or her monthly statement.

On 17 January 2007 the ComCo launched an enquiry into Telekurs Multipay’s refusal to provide interface information to support the DCC function on payment terminals equipment furnished to merchants by competitors of its sister-company, Telekurs Card Solutions.

The ComCo had proposed to adopt provisional measures directing Telekurs to provide the necessary interface information to competitors of Telekurs Card Solutions to support the DCC function. But Telekurs took the initiative provisionally to provide such access. In view of this, the ComCo will refrain from adopting the proposed provisional measures, but the enquiry will continue.

Ferraro

The ComCo has terminated its enquiry into the prices the Italian chocolate manufacturer Ferrero charged the Swiss supermarket chain Migros for Kinder brand milk chocolate bars produced by Ferrero. The ComCo took this termination decision on 9 February 2007 upon receiving confirmation that Ferrero had come to an agreement with Migros, with the help of the ComCo, to lower the prices it charged Migros for this chocolate product by 22%.

In 2005, when Ferraro refused to lower the price for Kinder milk chocolate bars to that which it applied to sales of this product to Migros’ German outlets, Migros Switzerland began ordering the product from Ferraro’s German distributor. Ferraro Germany rapidly began declaring that it was out of stock, and could not fill Migros Switzerland’s orders. The latter then launched a copy of the Ferraro product, at a substantially lower price. It also complained to the ComCo that the real reason why Ferraro Germany was not filling Migros Switzerland’s orders was that Ferraro’s distributors were practising absolute territorial protection, prohibiting even passive sales, and that this was contrary to Swiss competition law.

Cement supply for the New Rail Line through the Alps

On 6 February 2007 the ComCo delivered its proposals to the Surveillance Delegation of the New Rail Line through the Alps (in its French acronym, “NLFA”) concerning means to

improve the conditions of competition in public tenders for the supply of cement in the NLFA project.

The NLFA came to life on 4 October 1991 by decision of the Swiss Parliament. This project seeks to improve transit through the Swiss Alps, and thereby favour an environmentally-friendly shift from road to rail transport of goods. New tunnels are being constructed, including one which, running 57 km from Erstfeld in Canton Uri to Bodio in Canton Ticino, will be the world's longest. The NLFA is currently Europe's largest construction project.

Parliament's decision of 4 October 1991 commissions the Surveillance Delegation of the NLFA among other things to supervise financial aspects of the NLFA. In November 2004 the NLFA made a complaint to the ComCo concerning what it considered to be excessively high prices for cement and concrete supplied for the NLFA. The ComCo initiated an enquiry which is still pending and its final results are expected in early autumn 2007.

The ComCo's proposals represent an intermediate stage of the enquiry and are in the nature of initial conclusions. The ComCo has formed the view that two factors which contributed to the relatively high cost of cement were its transport to areas of limited access and the high quality cement required. Consequently, the ComCo recommended that calls for tenders seek variants separating out the transport element and proposing different qualities of cement.

FINES

ComCo fines Swisscom Mobile CHF 333 million

On 5 February 2007 the ComCo issued a decision assessing the fine against Swisscom Mobile for abuse of dominant position in the call termination charges market at CHF 333,365,685.

The ComCo defines the relevant market for call termination charges as being limited to the operator making the charge. So by definition, Swisscom Mobile has a dominant position in respect to termination charges to all its users. Swisscom Mobile had fixed these charges, billed to other telephone operators (who pass them on in one form or another to their own subscribers), at CHF 0.335 per minute.

In the Autumn of 2002, the ComCo opened its investigation into the termination charges practices of all three Swiss mobile telecommunications services providers. The fine appealed against is for the period 1 April 2004 to 31 May 2005. On 1 June 2005, Swisscom reduced its call termination charges to CHF 0.20 per minute.

The ComCo has power to fine undertakings up to 10% of their group turnover in Switzerland for the past three years. CHF 333 million represents about 3-4% of the Swisscom group's most recent yearly turnover. This fine is therefore about 1/10th of what the ComCo could have imposed. It was also less than the amount of CHF 489 million announced earlier in the ComCo's draft decision. This is the second fine that the ComCo has imposed since it received powers to punish competition law violations directly, in effect since 1 April 2004 (with a one-year grace period in some cases). It is by far the largest of the two.

This decision is notable in that, of the three mobile phone operators in Switzerland, only Swisscom has been found to have abused its dominant position, and was fined in

consequence. In the EU, by contrast, it has always been the case that either all mobile telecoms operators active on a market were fined for abuse in relation to termination charges, or none was.

The ComCo had of course found that all three mobile telecommunications operators had abused its own dominant position in relation to termination charges – this is a necessary consequence of the ComCo’s relevant market definition, as indicated above. According to Swisscom, it applied the lowest call termination charges of the three operators. But Swisscom is by far the largest operator in terms of both subscribers (4.3 million) and revenue (CHF 4.1 billion in 2005). Termination charges are justified in part by reference to costs, and clearly Swisscom enjoys significant economies of scale advantages over its competitors. Moreover, Swisscom’s network advantages in relation to termination services may also have been a factor relevant to singling it out as having abused its dominant position. On average, a lower proportion of calls made by Swisscom mobile subscribers will be subject to termination charges (since most Swisscom Mobile customers’ calls will start and finish within Swisscom). To maintain competitiveness with Swisscom, other operators may have been able to justify high termination charges, in effect as cross-subsidies for other aspects of the service package.

Swisscom Mobile has declared that it will appeal against this decision to the Administrative Tribunal, which, since 1 January 2007, hears appeals against ComCo decisions.

ComCo fines PubliGroupe CHF 2.5 million for abuse of dominant position

On 5 March 2007, the ComCo issued a decision finding that PubliGroupe had abused its dominant position on the market for advertisements in the print media and assessing a substantial fine against it.

PubliGroupe is the principal conduit in Switzerland through which advertisements are placed for publication in the print media. It established a set of conditions which intermediaries seeking to deal with PubliGroupe on behalf of advertisers must meet in order to receive a commission from PubliGroupe. A group of independent intermediaries wished to sell advertising orders to PubliGroupe without meeting PubliGroupe’s qualification criteria. PubliGroupe refused to pay commissions to these independent intermediaries.

At the issue of this investigation launched in November 2002, the ComCo determined that PubliGroupe held a dominant position in the market for the selling and placement of advertisements in the printed media. The ComCo based this assessment on PubliGroupe’s large market share, the disproportion of its market share vis-à-vis that of its competitors, as well as on certain structural advantages enjoyed by PubliGroupe.

The ComCo fined PubliGroupe CHF2.5 million. It fixed this fine in reference to the type and gravity of the infraction. The fact that PubliGroupe had altered its behaviour to discontinue the abuse during the course of the ComCo’s investigation operated in mitigation. Indeed, an agreement between the ComCo and PubliGroupe abating this abuse had come into effect on 1 January 2006. In accordance with this agreement, PubliGroupe has lowered the turnover required of intermediaries to benefit from commissions. Furthermore, intermediaries are no longer required to sell all types of adverts appearing in newspapers, but may specialise in one or more categories alone.

On the other hand, the ComCo found that PubliGroupe's failure to put an end to this abuse, at the end of the one year grace period allotted on 1 April 2004 with the wide-ranging amendment of Swiss competition law, was an exacerbating factor.

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