NATIONAL COMPETITION LAW REPORT – Q1 2008 - SWITZERLAND

ANNUAL REPORT

The FCC published its 2007 annual report on the Internet. Fourty-five concentrations were notified, out of which thirty-nine were cleared during the first stage investigation.

The FCC has imposed direct administrative fines for the first time since it received the authority to punish competition law violations directly, in effect since 1 April 2004 (with a one-year grace period in some cases). On 5 February 2007, the FCC issued a decision assessing the fine against Swisscom Mobile for abuse of dominant position in the call termination charges market at CHF 333 million. The FCC fined PubliGroupe CHF 2.5 million, having determined that PubliGroupe held a dominant position in the market for the selling and placement of advertisements in the printed media. These decisions are currently the subject of an appeal to the Federal Administrative Court.

The FCC prohibited a cartel in the market for road asphalting in the Canton of Ticino. The subjects of this enquiry were all asphalt producers and all undertakings active in road surfacing in the Canton of Ticino. There were no administrative fines imposed, since the infringement had taken place prior to 1 April 2005, the expiry date for the grace period following amendments to the Swiss Competition Act, opening the way for direct fines. That being said, the FCC has announced that tender cartels will be subject to further scrutiny in the future.

INVESTIGATIONS

FCC initiates investigation into the distribution of French books

On 31 March 2008, the FCC initiated an investigation into the way French books are imported into Switzerland. Switzerland's distribution system for books is dominated by a few major wholesalers. These intermediate book traders act as logistic centers between the publishers and the bookshops. As regards books published by French publishing firms, each wholesaler acts for a specific publisher as an exclusive dealer for the whole Swiss market.

Under France's Lang Law, publishers set the prices of books, and booksellers cannot sell those books for more than a certain percentage below the selected price. When importing the books into the Swiss market, the wholesalers increase such price on the basis of a “conversion table”. This table allows the wholesalers to set a price for Switzerland that is higher than in France.

The purpose of the investigation is to determine whether the distributors acting as exclusive dealers for the French publishers have a dominant position and, if so, whether the price policy applied amounts to an abuse of a dominant position.

MERGER CONTROL

FCC approves **Maxit/Saint-Gobain** *merger subject to commitments*

The FCC cleared the acquisition of Maxit Holding AB of Sweden by Compagnie de Saint-Gobain of France. On 4 March 2008, the proposed acquisition was cleared by the European Commission under the EU Merger Regulation, subject to commitments to divest subsidiaries of Maxit active in the production and sale of gypsum-related products. Considering that the Swiss market was also affected by these commitments, the FCC found that the proposed acquisition was not capable of creating a dominant position in the market of gypsum-related products for the ceramic industry

Competition Commission approves **Coop/Carrefour** *Merger subject to commitments*

On 17 March 2008 the FCC approved the acquisition by Coop of Carrefour's stores in Switzerland (12 existing and 2 envisaged hypermarkets).

In Switzerland, Carrefour's stores are run by Distributis SA, a company jointly held by Carrefour and Maus Frères. Maus Frères runs stores that are also active on the discount segment of the food retail market.

On 26 November 2007, the FCC referred the case to a second stage assessment. The principal concern in this proposed acquisition was the increased concentration in the food retail market in which it would result. Moreover, as was the case with Migros' recent acquisition of Denner, the FCC was concerned about the effects of this concentration on suppliers, which might be forced into a situation of dependence. As Carrefour stores are all of large surface, the FCC also feared that the acquisition would strengthen Coop's position in the "hypermarket" segment.

On 4 September 2007, the FCC also approved the merger of Migros and Denner subject to commitments. Although it declared that Coop's takeover of Carrefour's stores creates a stronger joint dominance between Migros and Coop in the national food retail market, the FCC was of the view that in the long term the effect of this takeover on the discount segment of this market would be weakened. The FCC particularly took into consideration the pressure that is expected from new market entrants (such as the German supermarket chains Aldi and Lidle). The FCC also considered the market share of Carrefour in the relevant market (less than 4 %) relatively insignificant. Therefore, the FCC cleared the acquisition with commitments, which were as follows:

1. Coop shall be permanently obliged not to impose exclusivity on any of its product suppliers (this kind of obligation had also been imposed on Migros at the time of the clearance of the Migros/Denner merger).

2. If Coop delists a product from its assortment although the supplier is prepared to offer a product of common quality in the market at a competitive price, Coop/Carrefour bind themselves to find an individual solution for the supplier concerned.

3. Coop shall not acquire any other food retail company in Switzerland (Migros/Denner, Manor, Aldi, Lidl, Spar, Maxi, Volg, Landi, Valrhône/Pam and Magro/Casino) during six years.

4. Coop/Carrefour shall sell a certain number of stores (representing a total area of 20'000 m^2) in regions (such as Geneva and the Canton of Ticino) where the intended takeover would create a particularly concentrated market. This sale will be performed through the intermediary of an independent auditor.

Pursuant to Article 10 (2) of the Swiss Act on Cartels, the FCC may only prohibit a merger if the examinations reveal that the merger establishes or strengthens a dominant position which may lead to the elimination of effective competition. The FCC held that the Coop's takeover would not eliminate effective competition.

Competition Commission approves* fenaco/Steffen-Ris AG *merger

On 13 March 2008 the FCC approved the proposed concentration between fenaco and Steffen-Ris AG after a second-stage assessment.

Both fenaco and companies controlled by Steffen-Ris AG are active in the market of agriculture products. Fenaco is an important presence in the marketing of products derived from agriculture and it is linked to the Landi cooperatives, which themselves have a powerful position in this area. Steffen-Ris warehouses prepares and distributes agricultural products.

The investigation showed that a dominant position would be created or strengthened as a result of this merger as relates to the wholesale market for consumer potatoes and industry potatoes, as well as to the wholesale market for seed potatoes. Therefore, the FCC cleared the merger subject to the commitment of fenaco/Steffen-Ris AG not to impose (purchase or supply) exclusivity on any undertaking active in the agriculture sector in Switzerland.

The merger of these two undertakings will create Switzerland's largest player in the Swiss agricultural sector.

Competition Commission approves* CSS/Intras *merger

In February 2008, the FCC cleared the merger of INTRAS Insurance into CSS, one of Switzerland's largest health insurance providers. The FCC found that the contemplated merger was not capable of strengthening a dominant position which could potentially lead to the elimination of effective competition. Although the merger was approved without commitments, the FCC implied that a merger involving insurers active in the segment of compulsory health insurance may be cleared subject to conditions. The completion of the contemplated merger is still subject to the approval of Switzerland's public health supervisory bodies.

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