

NATIONAL COMPETITION LAW REPORT – Q 1 2010 – SWITZERLAND

INVESTIGATIONS

The FCC launches an investigation against Hallenstadion and TicketCorner

On 2 February 2010, the competition commission (FCC) opened an investigation against Aktiengesellschaft Hallenstadion Zürich (AGH) and TicketCorner SA (TicketCorner). AGH runs the Hallenstadion, a multifunctional sports arena, musical and music hall, auditorium and site of expositions in Zurich. TicketCorner is a leading Swiss company which, as a subsidiary of CTS Eventim AG, provides ticketing services for events of all types. The investigation's aim is to determine, on the one hand, whether the cooperation agreement between AGH and TicketCorner and, on the other hand, whether AGH's behaviour towards event organisers, constitute violations of the Swiss Cartel Act.

At the beginning of 2009, AGH and TicketCorner concluded a "cooperation agreement" for a duration of 5 years. According to this agreement, the companies wishing to organise an event in the Hallenstadion must distribute at least 50% of their tickets through TicketCorner.

The Secretariat of the FCC received two complaints from competitors of TicketCorner. The preliminary investigation opened thereafter has given indications that the cooperation agreement could breach competition law, in the sense that it excludes competitors from the market. Moreover, according to the FCC's press release, there are also indications that AGH could abuse its dominant position by compelling event organisers to distribute at least 50% of their tickets through TicketCorner.

This is not the first time that the FCC launches an investigation against TicketCorner. By decision of 1 December 2003, the FCC found that TicketCorner's practice of imposing exclusivity clauses in contracts with organisers of cultural and sporting events constituted an abuse of dominant position in the market for ticket distribution systems. TicketCorner challenged this decision before the Appeal Commission, which in 2005 sent the file to the FCC for a determination on whether, in view of market developments since the decision, there were grounds to revisit the finding against TicketCorner. The FCC renewed its enquiry, and concluded that, since the December 2003 decision, TicketCorner had altered its conduct by discontinuing its imposition of exclusivity clauses. Moreover, the FCC's analysis demonstrated that the market had evolved significantly (role of the Internet, development of new ticket sales systems, etc.). By a new decision of 18 December 2006 therefore, the FCC closed its enquiry into TicketCorner's practices.

The FCC issues interim measures in the credit card sector

The FCC has approved an amicable settlement by way of interim measures, pursuant to which the current system for the determination of Swiss Domestic Multilateral Interchange Fees

(DMIF) can be pursued, but under an improved form¹. Interchange fees are the commissions paid to the companies issuing credit cards (issuers) by the companies that affiliate retailers to credit card payment systems (acquirers). Such interim measures have been taken against Credit Suisse, Cornèr Banca, UBS AG, Visa Card Services AG (as issuers) and Aduno SA and SIX Multipay AG (as acquirers) in the context of an investigation launched on 15 July 2009 into the interchange fees applicable to four-party credit card payment systems (such as Visa and Mastercard credit card payment systems). The investigation is aimed at examining again the process for the determination of interchange fees, in the light of European changes².

These interim measures have replaced on 1 February 2010 the current system for the determination of the interchange fees, dating back to an FCC decision of 2005 having approved an amicable settlement with the undertakings concerned³. In that decision, the FCC found that the interchange fees for the Visa and Mastercard credit card systems were negotiated multilaterally by the issuers and the acquirers in Switzerland, which amounted to an illegal agreement on prices prohibited under the Swiss Cartel Act. However, instead of prohibiting the multilateral agreements, the FCC considered that the interchange fees agreements were justified on the grounds of economic efficiency subject to a certain number of commitments by the Swiss issuers and acquirers (namely, reduction of the interchange fees by 15%, abrogation of a clause prohibiting the retailers from passing credit cards usage costs onto the customers, information of the retailers on the interchange fees applicable to particular economic sectors). The FCC's approval of the amicable settlement on 5 December 2005 was limited to four years.

The interim measures have imposed a reduction of the interchange fees from 1.282% to 1.058% for 2010 (which corresponds to approx. SFr 20-30 million), thus adjusting to the average European rate. The FCC has also set the methods to calculate the interchange fees for the remainder of the interim period. According to the FCC, the dynamic towards cost control should be strengthened in the medium term.

The interim measures will be applicable for a duration of 3 years (or even longer if the investigation is not completed upon expiration of that period), unless the investigation is concluded earlier by a formal decision of the FCC.

The investigation aims at examining the lawfulness of the collective determination of interchange fees and the control mechanisms in place. The FCC believes that, in the meantime, a shift from a system based on cost to another system is not advisable.

ABUSE OF A DOMINANT POSITION

The Federal Administrative Court overrules the FCC's mobile termination fine of SFr. 333 million against Swisscom Mobile for an alleged abuse of its dominant position

¹ A German version of the decision is available at <http://www.weko.admin.ch/aktuell/00162/index.html?lang=fr>.

² See, in particular, MasterCard commitments towards the European Commission regarding Crossborder-Interchange Fees, Press release of 1 April 2009, IP/09/515 and MEMO/09/143. See also decision of the European Commission of 19 December 2007, MasterCard (COMP/34.579).

³ See DPC 2006/1, p. 65 *et seq.*

On 24 February 2010, the Federal Administrative Court (FAC) annulled an FCC ruling imposing a fine of SFr. 333 million to Swisscom Mobile for an alleged abuse of its dominant position in the market for mobile termination⁴.

In October 2002, the FCC had launched an investigation into the mobile termination fees charged by the three mobile phone operators in Switzerland. Termination fees are the fees charged by mobile network providers to other providers for routing calls through their network. The FCC found in February 2007 that Swisscom was market dominant and had violated its position by charging unreasonably high fees to other providers. Under Article 7(2)(c) of the Swiss Cartel Act, an undertaking is deemed to have abused its dominant position whenever it has “enforced” (that is, imposed on the other party) excessive prices or other inadequate trade conditions.

The FAC first confirmed the competence of the FCC for imposing fines during an administrative procedure, thus dismissing Swisscom Mobile’s elements of appeal on those grounds. According to the FAC, the procedure for setting fines set in the Swiss Cartel Act is compatible with the European Convention on Human Rights (ECHR) and there was no violation to the right of Swisscom Mobile to be heard in this case.

On substance, the FAC confirmed that Swisscom Mobile held a dominant position in the market for mobile termination.

However, on the question whether Swisscom Mobile’s mobile termination fees constituted abusive prices, the FAC did not follow the FCC. Although it acknowledges that the termination fees were high, the FAC argues that Swisscom’s practices with respect to the setting of interconnection prices in the telecommunication sector does not fall within the scope of the dominance control under the Swiss Cartel Act. The reasoning followed by the FAC is that network providers (Swisscom Mobile, Orange and Sunrise) negotiate termination fees among themselves. If they are unhappy with the result of the negotiation, they may file a complaint with the Federal Communication Commission (ComCom) for excessive prices. Since neither Orange nor Sunrise decided to do so, Swisscom’s termination fees cannot be deemed to have been “enforced” against contract partners within the meaning of Article 7(2)(c) of the Swiss Cartel Act. According to the FAC, such practices cannot be assessed under the remit of Article 7(2)(c) ACart, even if the control of prices is insufficient in the Telecommunications Act, as ComCom cannot investigate without a complaint from an operator.

On 28 August 2008, the FCC, the Price Supervisor and the ComCom had jointly called for the Swiss Government (Federal Council) to introduce an efficient instrument for faster determination of the network access prices charged by Swiss telecom companies. The Telecommunications Act should be amended so as to allow the ComCom to act not only on the basis of a complaint from a telecommunications service provider but also on its own initiative, if there are reasons for assuming that access conditions are discriminatory or not

⁴ A German version of the FAC’s decision is available at <http://www.bundesverwaltungsgericht.ch/index/entscheide/jurisdiction-datenbank/jurisdiction-recht-urteile-aza.htm>.

cost-based. This specific legislative proposal relates exclusively to determination of the access or interconnection prices paid between providers (i.e., wholesale level); it only concerns providers who are in a market-dominant position as a result of their network and who are thus able to obstruct competition even in downstream end user markets. The Swiss Government and the Parliament have not given effect to that proposal so far.

On 22 March 2010, the FCC announced its intention to appeal the FAC ruling to the Swiss Supreme Court. The main ground for appeal is that the FCC believes that the Swiss Cartel Act should also be applicable to regulated sectors. This issue is of high importance for the FCC since if it is decided that the Swiss Cartel Act (among which the prosecution of abuses of dominant positions) is not applicable to regulated sectors in general (i.e. telecommunications, energy, etc.), then the power and competence of the FCC would be significantly reduced.

In any event, it is interesting to note that Swisscom Mobile's termination fees have significantly decreased since the opening of the investigation in October 2002 (from 33.5 cents to 14 cents).

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