

Swiss Competition Report

Reporting Period: July 06–September 06

MERGERS AND ACQUISITIONS

Swissgrid.

On November 29, 2004, seven Swiss electricity companies notified to the FCC their intent to concentrate the exploitation of their (high tension) electricity-carrying network under a common company "Swissgrid". On March 7, 2005, the FCC cleared the operation subject to the following conditions: (i) Swissgrid must guarantee non-discriminatory access to its network; (ii) Swissgrid must publish fees and conditions of use of its network; (iii) Swissgrid must establish cost accounting for its network; (iv) Swissgrid shall not commercially produce, distribute or sell electricity; (v) Swissgrid board members and directors are prohibited from being members of the management of other electricity companies active in the production, distribution and sale of electricity. (Decision of the FCC of 7 March, 2005, *Swissgrid*, in RPW 2005/2, 347). Swissgrid appealed the FCC decision.

On May 1, 2006, the Appeal Commission annulled the FCC decision and cleared the operation without conditions or commitments (Decision of the Appeal Commission of 1 May, 2006 in *Atel, BKW FMB Energie AG, Centralschweizerische Kraftwerke AG, Elektrizitäts-Gesellschaft Laufenburg AG, EWZ, EOS, Nordostschweizerische Kraftwerke AG/FCC*). The Appeal Commission based its decision on the following considerations:

(i) The FCC omitted to submit to the appellants a draft decision including the conditions so that they did not have the opportunity to respond on the proposed conditions. The Appeal Commission found that this omission amounted to a violation of the right of the appellants to be heard, which had the effect of annulling the FCC decision;

(ii) Competition in the relevant market for the transportation of high tension electricity was non-existent so that the proposed operation could not have had the effect of eliminating competition. (Each electricity company owned a non-overlapping section of the high tension electricity-carrying network, and the sections were linked together to form the network.) The existence of potential competitors could not be admitted due to the high costs and regulatory barriers associated with the introduction of an electricity transportation network. Accordingly, the operation had to be cleared without conditions;

(iii) While the Appeal Commission agreed with the FCC in distinguishing three relevant markets—the market for the transportation of electricity, the market for the distribution of electricity, and the market for the supply of electricity—it found that the FCC mistakenly considered the demand side in the market for the distribution of electricity when assessing competition in the market for transportation of electricity; and

(iv) Even if the operation had the effect of eliminating competition, the conditions imposed by the FCC were inappropriate to counterbalance the negative effects on competition. In particular, the Appeal Commission considered that the prohibition on the members of the management of Swissgrid to be appointed as board directors in a company active in the electricity market would infringe Swiss commercial law.

The FCC appealed the decision to the Supreme Court, specifying that its clearance decision with conditions should remain in force pending the final decision of the Supreme Court.

Tamedia/20 Minuten (Schweiz) AG/ Espace Media Groupe SA.

Tamedia AG and Espace Media Groupe SA (EMG) are active in the newspaper publishing, electronic media, local radio stations, and internet platforms. Tamedia and EMG's subsidiary Berner Zeitung AG intended to purchase (through a subsidiary of Tamedia) 20 Minuten (Schweiz) AG that edits and distributes the free daily "20 Minuten" newspaper in some regions of Switzerland.

On January 19, 2004, the FCC cleared the acquisition of 20 Minuten (Schweiz) by Tamedia's subsidiary but prohibited Berner Zeitung from acquiring joint control of the editor of 20 Minuten (by purchasing Tamedia's subsidiary's share capital) (Decision of the FCC, 20 Minuten, in RPW 2004/2, 529). The FCC held that the acquisition of 20 Minuten (Schweiz) by Berner Zeitung would create a dominant position of EMG in the market for readers and in the market for advertising in the Bern region that could eliminate competition in these markets.

Berner Zeitung appealed the FCC's decision and requested the Appeal Commission to clear the acquisition of 20 Minuten or, alternatively, to clear the acquisition subject to a commitment by EMG not to apply for a license to edit and distribute the daily free advertising paper "Anzeiger Region Bern". EMG (through Berner Zeitung) holds a licence from the Canton of Bern to edit and distribute the (official) daily free advertising paper *Anzeiger Region Bern*.

On May 4, 2006, the Appeal Commission annulled the FCC decision and cleared the acquisition of joint control by Tamedia and Berner Zeitung of 20 Minuten (Schweiz) subject to EMG's commitment not to apply for a license to edit and distribute *Anzeiger Region Bern* (Decision of the Appeal Commission of 4 May 2006, *Berner Zeitung AG, Tamedia AG/FCC*).

Pursuant to the competition authorities' case law in the press media markets, the Appeal Commission defined the relevant markets from the readers' side and from the advertisers' side.

Relevant market from the readers' side. Disagreeing with the FCC, the Appeal Commission found that daily newspapers (payable) were not substitutes of the free daily 20 Minuten because of their different content and uses. The Appeal Commission observed that readers of 20 Minuten are pendular readers who will not cease reading other daily newspapers if they read 20 Minuten. Consequently, the product market from the readers' side was limited to the market of free dailies for pendular readers in the region of Bern (where 20 Minuten is distributed), in which 20 Minuten (Schweiz) had a monopoly position. Because of the absence of actual and potential competition in this market, the Appeal Commission found that the acquisition would not create a dominant position liable to eliminate competition.

Relevant market from the advertisers' side. The Appeal Commission defined and examined the following market segments for advertising:

(i) the local market for the advertising of product names. Based on responses from advertisers during its market test, the Commission found that advertising in pendular free dailies reach a different category of readers than advertising in other media (mainly young readers who would not read other daily newspapers). The relevant market for advertising of product names includes the pendular dailies and other local advertising papers. Considering the high market share held by the advertising free paper *Anzeiger Region Bern* in the local market for advertising of product names (approximately 97%), the Commission found that the acquisition would not eliminate competition in this market provided EMG undertook not to apply for a license to edit and distribute the *Anzeiger Region Bern*.

(ii) the regional market for advertising by individuals (real estate, jobs and other individual advertising), which includes the pendular free dailies, other daily newspapers, local advertising papers and internet portals. Considering the numerous substitutes to the free pendular paper and the dynamic nature of the market, the Appeal Commission found that the acquisition would not create a dominant position in the regional market for individuals' advertising; and

(iii) the regional or local market, as the case may be, for event advertising (such as theatres and concerts), which include the pendular free paper, other daily newspapers and internet portals. The Appeal Commission considered that this market was also dynamic and found that the acquisition would not create a dominant position liable to eliminate competition.