

Swiss Competition Report

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MERGER CONTROL

Competition Commission approves Migros/Denner Merger subject to commitments

On 4 September 2007 the Competition Commission approved the merger of Migros and Denner subject to extensive commitments.

In January 2007, Migros announced that, subject to merger control approval from the Competition Commission, it would acquire 70% of food retailer Denner. On 7 May 2007, Competition Commission referred the case to a second stage assessment. Second stage assessments are a maximum of four months.

The principal concern in this merger was the increased concentration in the food retail market it would result in. It is undeniable that Swiss national markets are at issue here. Migros defined the relevant product market very broadly, to include such channels as restaurants and cafés. Under such a market definition, Migros calculates its own market share at 16.6% and that of Denner at 2.3%.

When in 2006 Denner acquired another discount seller in the market, Pick-Pay, the Competition Commission rejected such a market definition and accepted a much narrower definition, that is, a market excluding restaurants, and determined the market shares of the three leading participants as follows:

35% Migros
32% Coop
0-10% Denner

Although it declared that this merger creates joint dominance between Migros and Coop in the food retail market, the Competition Commission was of the view that in the long term the effect of this merger on the discount segment of this market would be weakened. The Competition Commission held that it would be a disproportionate incursion into the merging parties' economic freedom to prohibit this merger. On 3 September 2007, therefore, the Competition Commission cleared the merger, with the most extensive commitments ever, which were as follows:

1. Migros is obligated to keep Denner independent from a legal, organisational, and operational point of view.
2. Operationally, this independence means:
 - a. Denner must determine its own price and discounting policy.
 - b. Denner must determine its own policy on product selection.
 - c. Denner must determine on its own the opening and closing of its shops:
 - i. Denner shops must not be transformed into Migros shops;

- ii. Denner must continue to perform its contracts with its affiliates except where there is just cause (for example a breach of a partnership agreement),
 - d. Denner must not participate in the Migros client loyalty programme and Migros must not participate in any such programme introduced by Denner.
 - e. The Denner brand must remain present in the market and will be exploited in an independent manner. Denner shall manage any internet services it introduces.
 - f. The majority of the Denner Board of Directors including its Chairman shall be independent of Migros. In this sense “independent” shall mean persons who are neither in an employment relation with a Migros company nor hold an institutional role in such a company.
3. Migros shall not acquire any other food retail company in Switzerland.
 4. Migros is required to announce any acquisitions as if it had been declared to have a dominant position in respect of the seller’s market for food retail or any upstream or downstream markets.
 5. Migros shall not open any M-Budget shops.
 6. Migros shall be permanently obliged not to impose exclusivity on any of its product suppliers.
 7. Migros and Denner shall be permanently required separately to source goods intended for resale.
 8. Suppliers which in 2004 – 2006 achieved on average more than 30% of their turnover with Denner may continue to supply Denner the same volume (with a tolerance of 10% of the preceding year’s amount) provided that the supplier can offer products of a quality that is usual in the market and a competitive price (competitive prices are the average price of two competing suppliers). If Denner delists a product from its assortment although the supplier is prepared to offer a product of a quality usual in the market at a competitive price, Denner/Migros obligate themselves to find an individual solution for the 30%-supplier concerned, insofar as it would lose its economic existence as a direct consequence of the concentration.
 9. Denner may only replace suppliers of its own-brand goods by Migros suppliers if the latter are able to supply the product in question at a better price. This is subject to item 8. Savings here are to be transferred to consumers.

These commitments are to remain in effect for seven years as of 4 September 2007, except where otherwise provided.

The commitments provide that they can be revisited after 1 January 2010 if market conditions should change. Expressly indicated as a marker of such change is the opening of at least 250 shops by Aldi and Lidl.

The Competition Commission has very little experience monitoring behavioural commitments, and it will be interesting to see how effective it performs this role in this case, through the intermediary of an auditor who is to be selected in the Competition Commission’s reasonable discretion.

Competition Commission authorises concentration between SWX, SIS and Telekurs with commitments

On 9 October 2007 the Competition Commission approved the concentration between SWX, SIS and Telekurs, subject to commitments intended to prevent a foreclosure of this market.

SWX operates the Swiss stock market and the virt-x stock market. SIS is involved in the execution of financial transactions. Telekurs offers various financial services.

The Competition Commission's concern was that this concentration would permit certain well established Swiss banks to exclude other banks from electronic trading of Swiss stocks contrary to the Code of Conduct for Clearing and Settlement. The Code provides that there must be non-discriminatory access and interoperability as between competitors, freedom of choice between banks and traders in regard to stock exchange transactions, the creation of price transparency and differentiation of products and services.

The Competition Commission imposed commitments which would ensure compliance with these aspects of the Code. Moreover, the commitments seek to guarantee for the future an open architecture for financial markets infrastructure as well as free access for stock exchange trading and the execution of transactions both for clearing and settlement.

Banking surveillance issues relating to this merger must now be examined by the Federal Banking Commission.

Competition Commission clears Nestle/Henniez merger

On 10 October 2007, the Competition Commission cleared Nestle's acquisition of the Swiss mineral waters producer Sources Minérales Henniez SA, which had been controlled by the Rouge family.

The relevant product market was held to be mineral waters and carbonated acid-based drinks (including iced tea, and fruit juice). Although both Nestle and Henniez are active on this market the Competition Commission held that there was sufficient competition. It was helped to this conclusion notably by the fact that:

Large groups are present which are able to sell their products on the hotels, restaurants, cafés, canteens etc. distribution channel, where consumption is principally on site;

As far as the retail distribution is concerned, that is, the domestic consumption segment, the large distributors possess a large number of their own mineral water brands; and

Foreign mineral water brands, such as from France, Germany, and Italy, may well establish themselves in Switzerland.

Upon its preliminary investigation the Competition Commission concluded that there was no indication that this concentration would create or strengthen a dominant position.

INVESTIGATIONS

Competition Commission closes investigation into the Swisscom bundled offer "Talk & Surf"

On 1 October 2007 the Competition Commission decided to discontinue its investigation into "Talk & Surf" on the basis principally that a change in Swiss telecoms law made it possible for competitors to offer the same bundle of services.

Swisscom is the incumbent Swiss telecoms provider. Until 1 April 2007 it was the only company which could provide fixed-line telephone connections. Its Talk & Surf product, introduced in early 2004, combined a fixed-line telephone connection, with wide-band internet, and the possibility of telephoning at the weekend without extra charge for the entirety of the fixed network.

Swisscom refused to resell its connections services to its competitors so they could not offer a comparable product. On 16 February 2004, the Competition Commission opened an investigation upon a complaint from these competitors.

Swisscom reacted by discontinuing marketing the product and ultimately by withdrawing it.

As of 1 April 2007, Swisscom's competitors can themselves bill for fixed-line connections services so they can now offer products which would compete with Talk & Surf.

In view of these developments, the Competition Commission determined that, in view of other demands on it, there is lack of public interest in continuing this investigation, and has therefore closed it.

Competition Commission initiates investigation in the transport industry

On 10 October 2007 the Competition Commission carried out investigations on certain participants in the transport industry, notably the association Spedlogswiss and the Panalpina, and Kühne+Nagel groups. These investigations took place not only in Switzerland but also in the US, and the UK.

The Competition Commission acted upon a complaint. It suspects that there is an agreement between a number of actors in this industry in relation to the fixing of various fee categories.

Both Panalpina and Kühne+Nagel have denied any wrongdoing.

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