NATIONAL COMPETITION LAW REPORT – Q3 2008 – SWITZERLAND

ABUSE OF DOMINANT POSITION

Competition Commission fines Documed

On July 17, 2008, the Competition Commission (FCC) announced that it has closed its investigation of Documed's practice in relation to information on pharmaceutical products. Documed is a subsidiary of Galenica, which is active in publishing information about pharmaceuticals in Switzerland. It publishes, in particular, the "*Swiss Compendium of Pharmaceuticals*". This contains comprehensive information on pharmaceuticals intended for medical staff and patients.

Documed has been subject to an investigation by the FCC since June 21, 2005. Documed was suspected of abusing its dominant position by forcing unreasonable prices from pharmaceutical companies and refusing to enter into contract negotiations on the provision of raw data regarding the pharmaceutical product information to third parties.

The investigation has shown that Documed's practice was discriminating against the information providers. In particular, tariffs applied by Documed favored without objective reason undertakings which provide an important quantity of information (more than 90 products per year). By contrast, Documed has not been found to have imposed unfair prices within the meaning of the Competition Act.

With Documed's decision now to remove any form of discriminatory treatment in its billing practice, the FCC has discontinued proceedings, whilst imposing a reduced fine on Documed (CHF 50,000).

Under Swiss competition law, an undertaking that abuses its dominant position may be fined up to 10% of its turnover in Switzerland in the previous three business years. The assessment criteria for imposing fines are set out in the Ordinance on Sanctions. The fine may be fully or partially exempted if the undertaking co-operates with the FCC.

MERGER CONTROL

Competition Commission approves the **Heineken/Eichhof** *merger*

On August 21, 2008, the FCC approved the proposed acquisition by Heineken of the drinks business of Eichhof Holding.

The FCC held that they were no indications that the concentration might create or strengthen a dominant position of the Heineken/Eichhof group. It further held that the merger could not lead to the market being collectively dominated by Heineken/Eichhof and the biggest Swiss brewery, Carlsberg/Feldschlösschen. The investigation revealed that there would still be

sufficient competition in the local and regional beer markets after the takeover. It also revealed that there are no significant barriers to the entry of new competitors into the relevant markets. Furthermore, undertakings active in the food retail sector appear to be strong enough to counterbalance the respective market power of Heineken/Eichhof and Carlsberg/Feldschlösschen.

In April 2008, Heineken announced its plans to buy the drink business of the Eichhof Holding. Preliminary investigations indicated that the merger could lead to the market being dominated by Heineken-Eichhof and Carlsberg/Feldschlösschen. The FCC thus decided to refer the case to a second stage assessment. The principal concern in this proposed acquisition was the increased concentration in the catering trade (including both alcoholic and non-alcoholic beers) in which it would result.

Under Swiss law, the FCC applied for the first time the concept of collective dominance under the Merger Regulation in the decision *Bell/SEG Poulets* in 1998. The FCC held, *inter alia*, that there must be an expectation that the tacit co-ordination will last, in other words that there is sufficient incentive to coordinate behavior to deter the members of the oligopoly from deviating from the coordinated behavior.

DOMESTIC MARKET ACT

Swiss Supreme Court upholds right to free market access

On September 24, 2008, the Swiss Supreme Court upheld for the first time the right to free market access under the Swiss Domestic Market Act (LMI). In the case referred to, an attorney-at-law had settled in the canton of Vaud after a number of years of practice in the canton of Geneva. The hiring of a trainee was refused on the grounds that the legislation of the canton of Vaud required a practice of at least 5 years in such canton. The cantonal courts had rejected an appeal of the attorney against the refusal. On appeal the Swiss Supreme Court finally decided that such a refusal violated the right to free access to the market granted by the Domestic Market Act. The Supreme Court argued that the attorney fulfilled the criteria set by the legislation of Geneva for the appointment of a trainee and that the legislation of the canton of Vaud had violated the principle of proportionality.

In its revised version, which came into force on July 1, 2006, the Domestic Market Act ensures that all persons having their headquarters or an establishment in Switzerland shall have free and non-discriminatory market access needed to do business throughout Switzerland. The Domestic Market Act ensures, in particular, that a person with his head office or facility in a canton (canton of origin) has the right to settle in another canton (canton of destination) to pursue its economic activity. This person can validly rely on the market access conditions in force in his home canton (principle of the place of origin), notably with respect to diplomas or permits issued by that canton. People affected by a restriction on market access, as well as the FCC, are entitled to file an appeal against the restriction. Furthermore, the Domestic Market Act makes the FCC responsible for monitoring enforcement of the law by the Confederation, the cantons and the communes, empowering the FCC to carry out investigations and make recommendations to the relevant authorities on planned or existing legislation.

By this ruling, the Swiss Supreme Court gives a broad scope to the Domestic Market Act. The ruling also shows that the FCC – through its right of appeal – contributes significantly to the respect for free market access.

LEGISLATIVE PROPOSAL

Competition Commission calls for simpler checking of network access prices in the telecom market

On August 28, 2008, the FCC, the Price Supervisor and the Federal Communications Commission (ComCom) jointly called for the 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 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

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