

NATIONAL COMPETITION LAW REPORT – Q 3 2009 – SWITZERLAND

INVESTIGATIONS

FCC imposes fines for collusive tendering in electrical equipment sector

On July 6, 2009 the Competition Commission (FCC) fined eight undertakings Sfr1.24 million for collusive tendering in relation to private and public tenders for electrical equipment in construction projects.

Following a complaint, the FCC found signs of market sharing in the Bern region in the way that tenders (including tender prices) for electrical equipment in private and public construction projects were being submitted. It also found that the award of tenders for electrical equipment works was based on a rotation process. On January 31, 2008 the FCC launched an enquiry into these practices.

As part of the enquiry, the FCC conducted dawn raids on the offices of principal market participants. The enquiry found that the undertakings concerned had participated in hardcore competition restrictions and, thus, were liable to a fine. The FCC fixed these fines after considering the type, duration and gravity of the respective infraction. The fact that all of undertakings concerned discontinued their practice immediately after the enquiry's launch and applied for lenient treatment operated in mitigation. The FCC also took into account the fact that the undertakings had agreed to reach an amicable settlement.

The FCC has the power to fine undertakings up to 10% of their turnover in Switzerland for the past three years. However, pursuant to Article 49a(2) of the Competition Act (ACart), the FCC operates a leniency programme, which applies to restrictive agreements that are subject to fines because they contain hardcore clauses that eliminate competition. Full immunity from fines is available for the first undertaking that reports its involvement in a qualified hardcore cartel and delivers information enabling the Secretariat of the FCC to start a regular investigation, provided that, among other things, the undertaking has not instigated the cartel activity. At any time during the procedure a fine reduction of up to 50% is available to an undertaking that does not qualify for full immunity, if and to the extent that it cooperates with the investigation and ends its involvement in the prohibited agreement at the time that evidence is provided.

This decision marks the first time that the FCC has imposed fines for collusive tendering. The FCC also confirmed the principle, already developed in a 2007 case¹, that the reaching of an amicable settlement does not rule out fines in respect of infringements that took place before the conclusion of that settlement.

¹ DPC/RPW 2007/2, 234, *Richtlinien VSW über die Kommissionierung von Berufsvermittlern*.

FCC opens investigation in relation to credit card Domestic Multilateral Interchange Fees

On July 16, 2009, the FCC initiated an investigation into the Domestic Multilateral Interchange Fees (DMIF) applicable to the four-party credit card payment systems (Visa and Mastercard systems). The DMIF are interchange fees fixed by companies issuing credit cards (issuers) and companies that affiliate retailers to the credit card payment systems (acquirers). In a four-party system, the interchange fee is paid by the acquirer to the issuer on each transaction paid by credit cards.

This is the second time that the FCC launches an enquiry into the DMIF interchange fee. At the end of a first investigation initiated in late 2003², the FCC found that the DMIF 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 ACart. However, instead of prohibiting the multilateral agreements, the FCC considered that the DMIF 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 DMIF by 15%, abrogation of a clause prohibiting the retailers from passing credit cards usage costs onto the customers, information of the retailers of the DMIF applicable to particular economic sectors). The FCC's approval of the amicable settlement on December 5, 2005 was limited to four years. The FCC has thus now to re-assess the effects of the settlement on the market for the issuing and acquiring of credit card systems.

FCC opens investigation against the Swatch group in the market for movement blanks

On September 14, 2009, the FCC opened an investigation against ETA Manufacture Horlogère Suisse SA, a company of the Swatch group specialized in the production of movement blanks. In late 2008, ETA had notified its customers of price increases and changes in payment terms for movement blanks for 2009. Following this notification, several complaints were filed with the Secretariat of the FCC. The FCC's investigation has to show whether ETA's actions might constitute an abuse of a dominant position in the market for movement blanks, and in particular whether ETA is discriminating without objective reasons against third party watch manufacturers in relation to prices for movement blanks.

MERGER CONTROL

FCC approves Tamedia/Edipresse merger

On September 17, 2009 the FCC approved the proposed concentration between Tamedia and Edipresse after a second-stage assessment. The concentration was cleared without conditions and commitments under the failing firm doctrine.

Tamedia is Switzerland's fourth-largest media firm and publishes more than 20 regional and local newspapers, including Zurich's *Tages-Anzeiger* and the free daily newspaper *20 Minutes*. It also runs radio and television stations and online services. Edipresse Switzerland

² DPC/RPW 2006/1, 65, *Kreditkarten - Interchange Fee*.

is based in Lausanne. It publishes the newspapers *Le Temps* and *Le Matin Bleu*, a scaled-down version of the daily *Le Matin*.

On June 2, 2009 Edipresse and Tamedia announced that they were planning to merge their Swiss business by 2013. In early 2010 Tamedia will acquire a 49.9% shareholding in PPSR, which represents most of Edipresse's activities in Switzerland. During a second stage, Tamedia will acquire an additional 0.2% of PPSR at the beginning of 2011, followed by the remaining 49.9% in early 2013. The price for acquiring the first two shareholdings is Sfr226 million, whereas the balance for the third transaction will depend on the development of Edipresse's Swiss business. Part of the price for the final tranche will be paid in shares, thereby making Edipresse one of Tamedia's major shareholders. In French-speaking Switzerland, the two companies also envisage merging the free daily newspapers *20 Minutes* and *Le Matin Bleu* as soon as possible. Edipresse's international operations, its magazine *Bilan* and its luxury marketing division will not be affected by the deal.

Under Swiss competition law, qualifying concentrations must be notified to the FCC, which then has one month in which to decide whether to initiate an investigation. During this initial stage the concentration is suspended unless, upon receipt of the application, the FCC decides otherwise. If the FCC decides to investigate a concentration, it initiates a four-month second-stage assessment at the end of which it decides whether or not the concentration can be consummated. The substantive test for clearance is the test of market dominance.

In the decision to refer the *Tamedia/Edipresse* concentration to a second-stage assessment, the FCC indicated its concern that the concentration might create or strengthen a dominant position in the free newspaper market in French-speaking Switzerland, considering the intent of the parties to merge the free French-language dailies *Le Matin Bleu* and *20 Minutes*. The FCC was also concerned that the merged entity could dominate the market for early newspaper distribution in French-speaking Switzerland.

The FCC found, in substance, that the merger did not pose a threat to the relevant markets. It held in particular that there was no room in the long term for two free daily newspapers to operate in the market for advertising in French-speaking Switzerland. Tamedia and Edipresse had both incurred significant losses since the launch of their free French-language dailies. The investigation showed that in the absence of the merger, *Le Matin Bleu* would inevitably have left the market and, as a result, Edipresse's market share would have accrued to Tamedia in any case. The investigation also showed that there was no alternative, less anti-competitive transaction that could be undertaken. This position was supported by the fact that no other publisher had expressed interest in acquiring *Le Matin Bleu*.

Under Swiss merger regulations, the concept of a concentration is defined in such a manner as to cover operations only if they bring about a lasting change in the control of the undertakings concerned. Therefore, one line of enquiry is to ascertain whether a transaction which leads to joint control of an entity by shareholders for an initial period but, according to legally binding agreements, is intended to be converted to give one shareholder sole control subsequently, may be considered to be an acquisition of sole control only. In the past, based on EU decisional practice, the FCC has accepted that such a start-up period could last up to three years³. In its decision to refer the *Tamedia/Edipresse* concentration to a second-stage

³ DPC/RPW 2005/2, 312 *et seq.*, *Tamedia/Edipresse/Homegate*.

assessment, the Secretariat of the FCC indicated that such a period seemed to be too long to exclude the possibility that the joint control might have an impact on the structure of the market. According to the Secretariat, such a period should not exceed one year.

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