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INVESTIGATIONS

Competition Commission fines Swisscom Sfr220 million for abusive margin squeeze

On November 5, 2009, the Swiss competition commission (FCC) fined Swisscom AG Sfr219.9 million for abusive margin squeeze in relation to broadband internet services provided until the end of 2007. Swisscom, which is Switzerland's largest phone company, was found to have charged competitors (e.g., TDC A/S's Sunrise, VTX Services SA and Green.ch AG) excessive prices for broadband connectivity services, compared with the prices charged to end users. According to the FCC, such high prices prevented Swisscom's competitors from trading profitably in the fast internet access business.

On October 20, 2005, the FCC launched an investigation regarding a possible margin squeeze through the implementation of an unfair price system by Swisscom in the market for asymmetric digital subscriber line (ADSL). According to the FCC, there were indications that Swisscom might dominate the market for ADSL services. Swisscom argued, in substance, that there was competition from cable, mobile and optic-fibre networks.

On November 12, 2008, the secretariat – the FCC's investigation body – issued a draft decision against Swisscom, alleging abuse of a dominant position in the area of ADSL services. The draft envisaged penalties in the amount of approximately Sfr237 million as a result of allegedly overpriced ADSL set-up services. According to the secretariat, the investigation revealed that Swisscom had abused its dominant position for broadband internet network capacity by means of a price or margin squeeze. The allegation was that the prices which Swisscom charged to internet service providers (ISPs) for access to the network were so high that it was not possible for ISPs to remain in the market in competition with Swisscom.

The FCC's findings confirmed the secretariat's view that Swisscom charged its competitors so high prices in the upstream market (i.e. wholesale market for ADSL connection to the internet) that the competitors could not compete profitably with Swisscom in the downstream market (i.e. retail market for ADSL services). The FCC decided that Swisscom's price system amounted to an abuse of a dominant position within the meaning of Article 7 of the Competition Act. The FCC fixed the fines after considering the type, duration and gravity of the infringement. The fact that Swisscom had continued its practice over many years in a high-growth market constituted an aggravating circumstance.

Swiss competition law recognizes the concept of a margin squeeze. Traditionally, the FCC defines a "margin squeeze" as the situation in which a dominant undertaking sets retail prices in relation to the wholesale prices so low that it is impossible for a comparably efficient competitor to compete profitably in the downstream or retail market. This definition of the

FCC was elaborated essentially in reliance on cases from the United States (the *Alcoa-case*), European Union (*Napier-Brown/British Sugar*; *Deutsche Telecom AG (DT)*) and rulings from the European Court of First Instance. According to the above definition, margin squeeze behavior is a violation of Article 7 of the Competition Act if a comparably efficient competitor cannot compete in the downstream market profitably due to the high prices imposed by the dominant undertaking in an upstream market.

Swisscom disagrees with the FCC's findings. It has declared that it will appeal against the decision to the Administrative Federal Tribunal, which, since January 1, 2007, hears appeals against FCC's decisions.

In February 2007, the FCC fined Sfr333 million for abuse of a dominant position in the call termination charges market[1]. Swisscom challenged the FCC's power to impose fines in connection with proceedings on mobile termination rates. The case is still pending with the Administrative Federal Tribunal.

Competition Commission fines Pfizer, Eli Lilly and Bayer for resale price maintenance

On December 8, 2009, the FCC found that resale price fixing agreements between manufacturers and distributors of three medical drugs (not reimbursed by the compulsory health insurance scheme) were unlawful. It inflicted to the pharmaceutical companies concerned, Pfizer AG, Eli Lilly (Suisse) and Bayer (Schweiz), a fine of Sfr5.7 million.

According to the FCC's press release[2], the three producers fixed resale prices by establishing recommended public prices for their products against erectile dysfunction (Viagra, Cialis and Levitra). These prices are integrated into the computer systems of the industry branch or are directly transmitted by wholesalers to the drugstores and to physicians who, in turn and in the large majority of cases, use them to charge their patients. The FCC decided that these practices constituted unlawful resale price maintenance agreements, within the meaning of Article 5(4) of the Competition Act.

This system of resale price fixing stems from the Sanphar cartel, sanctioned in 2000. Sanphar was an industry agreement aimed, in particular, at setting resale prices according to certain margin lists. The FCC found that the founding idea of this agreement survived for these three prescription drugs not reimbursed by the compulsory health insurance scheme. Covering the whole of the relevant market, this system stabilizes producers' prices and distributors' margins. The FCC has therefore prohibited the future publishing of resale prices and sanctioned the pharmaceutical companies concerned to a fine amounting to Sfr5.7 million.

The inquiry concerned the three drugs Viagra, Cialis and Levitra. They are subscription drugs only, but, as they are not reimbursed by the compulsory health insurance scheme, their price is not set by the public authorities but by the sellers. Consequently, the market concerned is subject to the general rules of competition law.

[1] DPC/RPW 2007/2, 241, *Terminierung Mobilfunk*.
[2] Available in French or German at : http://www.news-service.admin.ch/NSBSubscriber/message/fr/30454.

Competition Commission fines GABA for bans on parallel import regarding the Elmex toothpaste

The FCC inflicted to the manufacturer of Elmex toothpaste (Gaba International SA) a fine of Sfr4.8 million because of the export prohibition Gaba imposed on its Austrian license holder (Gebro Pharma GmbH). This clause, valid until September 2006, constituted an unlawful ban on parallel imports in Switzerland. Consequently, it caused a foreclosure of the Swiss market.

The agreement of 1982 between Gaba (CH) and Gebro (A) included, until September 2006, an export prohibition for Elmex products manufactured under license by Gebro. Consequently, Swiss retail companies could not buy Elmex products at lower prices in neighboring markets. According to the FCC's press release[3], this represents an unlawful ban on parallel imports through a vertical agreement. A lawful exception to bans on parallel import exists where it temporarily facilitates the launch of a new product in the Swiss market. However, according to the FCC's investigation, this exception was not applicable in this case. The FCC fined Gaba for Sfr4.8 million for the ban on parallel import. Gebro was fined for a symbolic amount of Sfr10'000 because they did not benefit from the ban.

Gaba and Gebro changed their agreement in September 2006 and repealed the export prohibition. The new agreement forces Gebro to inform Gaba for each export. Depending on the circumstances, this clause could have the same effect as an export prohibition. However, Gaba and Gebro have stated that they would not prohibit parallel imports within the framework of this agreement.

At the time, the FCC opened the investigation after a complaint from Denner – a discount supermarket chain (presently) owned by Migros – which could not import Elmex products from the Austrian market. After having received product deliveries from Switzerland, Denner has distanced itself from the proceedings. However, the FCC decided to continue the investigation, as it raised questions of principle. Moreover, the FCC announced that it will give priority in the future to the pursuit of contractual barriers to parallel imports, in particular to ensure that the revision of the patent law and the imminent introduction of the "Cassis de Dijon" principle in Switzerland will be complied with.

MERGER CONTROL

Competition Commission examines the concentration between Orange and Sunrise

The FCC is going to proceed to an in-depth investigation in the envisaged concentration between Orange (France Telecom group) and Sunrise (Tele Danmark Communications group). On several markets in the mobile telephony sector, various indicators could give reason to believe that a dominant position could be created or strengthened.

The network operators Swisscom (Schweiz) AG (Swisscom), Sunrise and Orange are the main actors in the Swiss market for mobile telephony. The concentration decreases the number of network operators in the Swiss market from 3 to 2. The merged entity would reach

[3] Available in French or German at : http://www.news-service.admin.ch/NSBSubscriber/message/fr/30591.

a market share of approx. 40%, whereas Swisscom's market share is of approx. 60%. Therefore, the FCC has decided to further examine the effects of the concentration on the mobile telephony market. The investigation will also analyse whether a collective dominant position between the merged entity and Swisscom could arise.

The maximum legal duration to conduct the in-depth investigation is 4 months.

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