



## Telecommunications Newsletter Switzerland

# Swisscom not Exempt from Sanctions Pursuant to the Swiss Cartel Act Despite Notification

On April 1, 2004, the Swiss Cartel Act ("SCA") was amended by a new Article 49a. Article 49a para. 1 SCA provides that enterprises which are parties to an unlawful agreement eliminating competition by fixing prices, by restricting the quantities of goods or services to be produced, bought or supplied or by market sharing agreements (Article 5 para. 3 SCA) or by agreements between enterprises of different market levels regarding minimum or fixed prices or territorial protection preventing parallel sales (Article 5 para. 4 SCA) will be required to pay a sanction of an amount equal to up to 10 per cent of its turnover in Switzerland in the previous three business years. This also applies to enterprises that behave unlawfully in terms of Article 7 SCA (dominant enterprises which abuse their position in the market).

The sanctions can be reduced in whole or in part if the enterprise concerned assists in the discovery and removal of the unlawful behaviour (Article 49a para. 2 SCA).

No sanctions are imposed, if an enterprise notifies the restriction of competition to the Competition Commission before it takes effect. If the enterprise is then informed by the Competition Commission of the commencement of an investigation under Articles 26-30 Cartel Act within a period of five months and if it then continues with the restriction of competition, the sanctions are not waived (Article 49 para. 3 lit. a SCA).

Furthermore, the final provision introduced in connection with the aforementioned amendment of the Swiss Cartel Act stipulates that no sanctions can be imposed, if an enterprise involved in an existing restriction of competition notifies the Competition Commission of a such restraint on competition or terminates such unlawful restraint within a year from the entering into force of the revised Article 49a SCA.

In its decision 2A.287/2005 of August 19, 2005, the Federal Supreme Court clarified that that an enterprise can only be exempted from the sanctions set out in the revised Article 49a SCA, if the enterprise notifies the Competition Commission of its anticompetitive behaviour prior to the commencement of an investigation by the Competition Commission and prior to a notification by the Competition Commission about the commencement of the investigation.

In the cases decided by the Federal Supreme Court on June 8, 2006, the Competition Commission's Secretariat had already commenced investigations against (1) Swisscom Mobile AG and other mobile operators regarding termination fees, (2) against Swisscom Fixnet AG regarding their installation practice for so called digital subscriber line access multiplexers ("DSLAM"), and (3) against Swisscom Fixnet AG and Swisscom AG regarding their product "Talk and Surf" which included telephone access and broadband access and additional services at discounted prices. In all of these cases, the Competition Commission's Secretariat had commenced the investigation and had notified the parties concerned of the investigation prior to the entering into force of the revised Article 49a SCA and prior to the Competition Commission having received a notice from the enterprises involved.

The Federal Supreme Court confirmed in its decision that the notification procedure set out in the final provision with respect to new Article 49a SCA can only then lead to an exemption from the sanctions if the enterprise involved has notified the Competition Commission prior to the commencement of an investigation and before the concerned enterprise has been notified by the Competition Commission of an investigation.



As in all three cases decided by the Federal Supreme Court on June 8, 2006, the Competition Commission's Secretariat had already commenced an investigation and had notified the commencement of the investigation to the enterprises involved before these enterprises sent a notice to the Competition Commission, the court concluded that the notices of the involved enterprises could not be qualified as a notices in accordance with the final provision to the revision of the Swiss Cartel Act of April 1, 2004, and remanded the case to the Appellate Commission in Competition Law Matters.

The decision makes it clear that, should it be finally determined that the behaviour of the enterprises involved is caught by Article 49a para. 1 SCA, the enterprises involved will not be able to escape the sanctions set out in this Article.

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