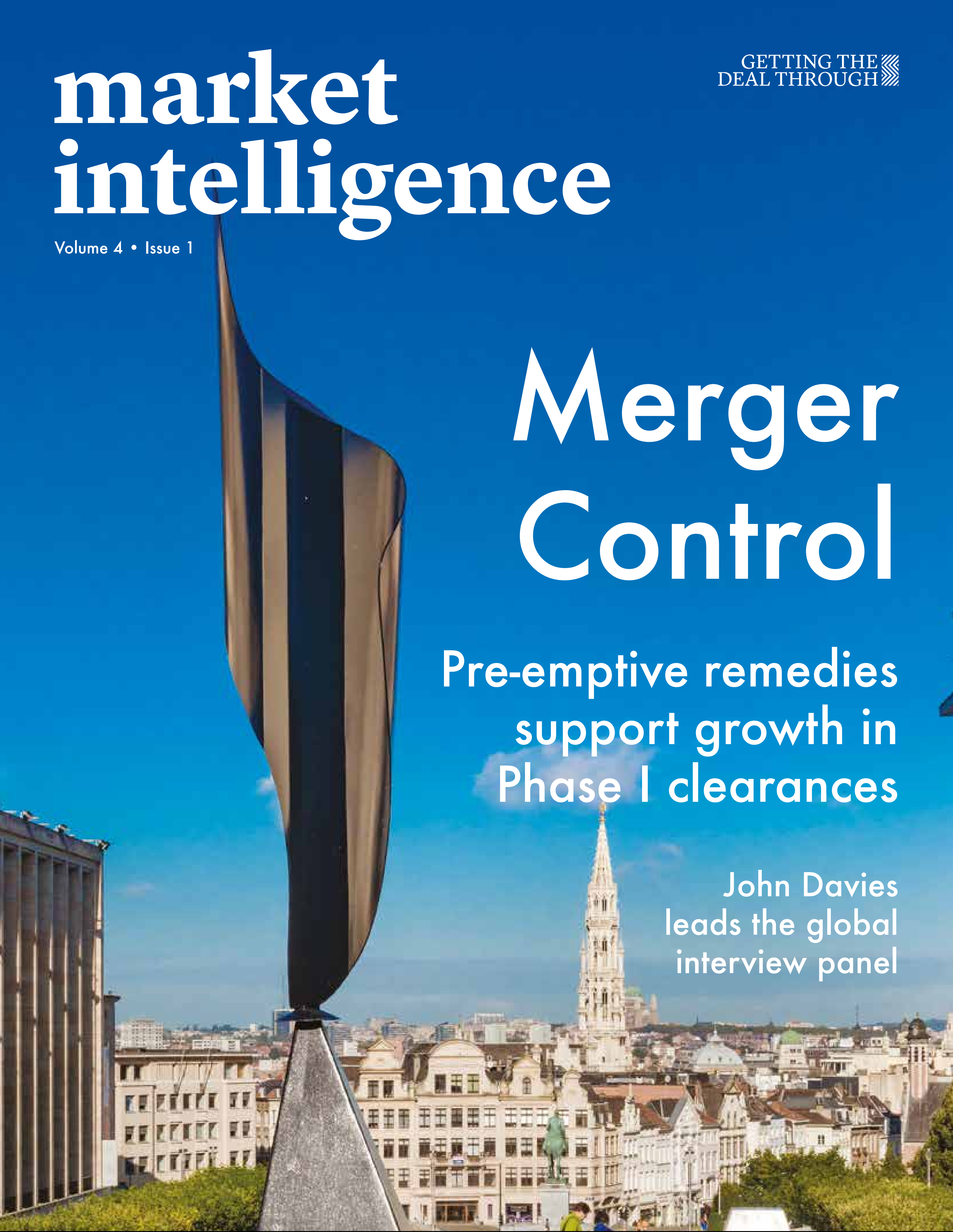

GETTING THE DEAL THROUGH

market intelligence

Volume 4 • Issue 1

Merger Control

Pre-emptive remedies support growth in Phase I clearances

John Davies leads the global interview panel

Activity levels • Enforcement priorities • Keynote deals • 2017 outlook
Europe • North America • Asia-Pacific • Latin America

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market intelligence

A note from John Davies, Panel Leader

The past year has been one of the busiest for competition authorities around the world. The very active M&A market saw many large, cross-border transactions such as *AB Inbev/SABMiller*, *Halliburton/Baker Hughes*, *Staples/Office Depot*, *ChemChina/Syngenta*, *LSE/Deutsche Borse*, *Bayer/Monsanto* and *Dow/Dupont* reviewed by multiple agencies. In addition to managing a high merger control case load, competition authorities have also been active in protecting their mandates by investigating companies for gun-jumping and procedural failures within the merger control processes. For example, MOFCOM has shown an increased willingness to sanction companies for failure to file, as exemplified by its recent decision to fine Canon for failure to notify its acquisition of Toshiba Medical Systems Corporation. In another example, the European Commission sent Facebook a statement of objections in December 2016 alleging it provided misleading information in its acquisition of WhatsApp.

While recent political shifts have not yet seemed to chill global M&A, it is clear that merger control is sensitive to such developments. While changing economic dynamics may drive foreign investment, populist movements may bring about, for example, increased protectionism in the form of foreign investment controls and increased intervention in strategically important areas. In the US, a number of recent foreign investment transactions, in particular involving Chinese investors, were blocked on national security grounds or faced extensive reviews. Chinese investments in German technology companies have similarly led to calls for tighter foreign investment controls in key sectors. The French government changed its foreign investment regime following the *GE/Alstom* transaction and the UK government is expected to amend its regime in the near future.

This changing landscape will require stakeholders to keep a close eye on both competition and foreign investment developments. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* provide a good introduction to these developments locally. We hope that this will be helpful for readers operating in this active and dynamic environment.

We are grateful to the interview panel for assisting with this project and providing their insights into major market, regulatory and enforcement trends, and the impact these are having on this complex field of practice.

Freshfields Bruckhaus Deringer LLP
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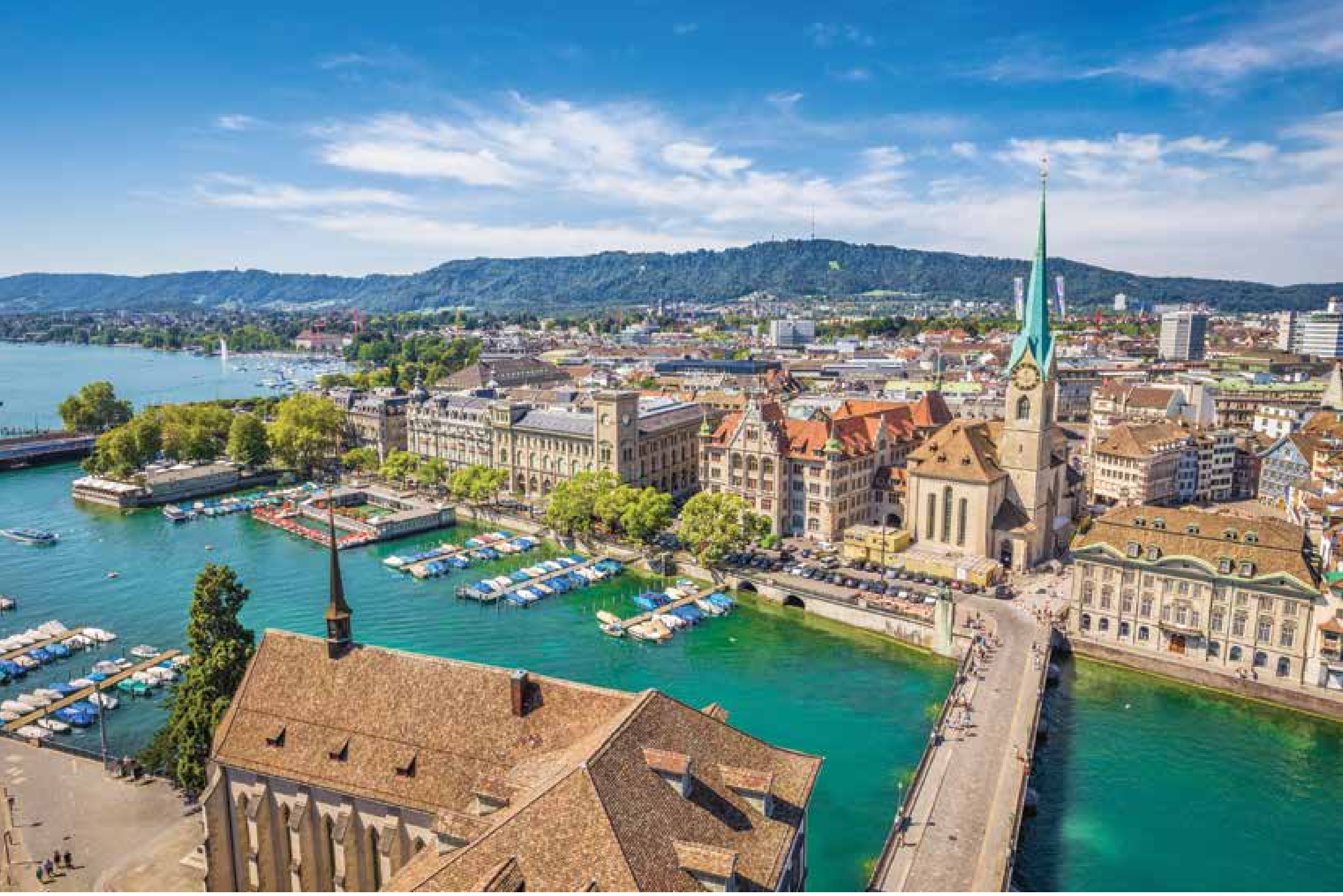

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MERGER CONTROL IN

SWITZERLAND

Philipp Zurkinden is partner and head of competition at Prager Dreifuss. Philipp joined the firm in 1999 and quickly established himself a valuable supplier of competition advice.

Bernhard C Lauterburg is counsel at Prager Dreifuss. Bernhard joined the firm's competition team in 2008.

Marino Baldi is senior counsel at Prager Dreifuss. Marino, a former Swiss diplomat, former member of the Competition Commission and spiritus rector of the currently effective Law on Cartels joined the team in 2011.

Together, the team has acted on many high profile cases – merger and cartel proceedings – and represented both domestic and international companies, from small local enterprises to Fortune 100 companies before the Competition Commission and the Federal courts. The team is currently very active in the financial markets, construction, technology and pharma sectors.

What have been the key developments in the past year or so in merger control in your jurisdiction?

Philipp Zurkinden, Bernhard C Lauterburg and Marino Baldi: Although we've seen a large number of concentrations with connections also to Switzerland in the past year, many of them were not subject to merger control as the undertakings' concerned turnover fell short of the threshold values. Thus, for the Swiss Competition Commission, 2016 was – again – not a particularly busy year in merger control (unlike in cartel enforcement). Recently, it has been rare for cases to go into Phase II: in 2014, there was only one Phase II procedure, in 2015 there were three Phase II procedures and in 2016 once again only one. In one case, which was notified in 2015, however, was only made public in 2016 (the *GE/Alstom* merger), the concessions offered in the EU merger proceeding with respect to certain products were also offered in Switzerland in order to ensure that the concerns the EU Commission voiced would also be addressed and resolved in Switzerland. Generally, we can observe that, in the context of cross-border mergers to the widest extent possible, Switzerland also relies on analyses made by the Directorate-General for Competition (DG Comp), as the merger parties regularly submit a waiver along with their merger notification allowing the Swiss competition authority to contact DG Comp and exchange information.

What lessons can be learned from recent cases to help merger parties manage the review process and allay authority concerns at an early stage?

PZ, BCL & MB: The staff of the Secretariat of the Swiss Competition Commission (the Secretariat) is the authority responsible for conducting cartel and merger investigations – is generally very accessible and shows a tendency to respond quickly to informal enquiries. Nevertheless, merger control is a formal and formalised process that both the authorities and the notifying party need to follow. Generally, in a transnational merger involving Switzerland and the EU it is still advisable, at least for complex cases, to reconcile the filing schedules at an early stage as the time frame for a Phase I analysis is not identical in Switzerland and in the EU. While Switzerland has a one-month period, the EU uses a 25-working days period. As a matter of practice, in cases that are supposed to be settled in Phase I, we normally set the one-month period to end some working days after the 25-working days period in the EU ends. Particularly in the past, the Swiss authorities had a tendency to 'wait and see' what the decision of the EU Commission in the same transaction will be. Nowadays, this tendency has relaxed and the Swiss authorities may, in some cases, even issue a statement of non-objection within two

Philipp Zurkinden

Bernhard C Lauterburg

Marino Baldi

weeks of the notification, without waiting for the Commission to issue its decision. In more complex cases, in other words, in cases where a Phase II decision or remedies must be expected, the alignment of two procedures is much more complicated as the periods for Phase II in Switzerland and the EU are again significantly different with the Competition Commission also not having a possibility to extend this period for negotiations on remedies. As a matter of practice, asking for a waiver has become standard and the offer of a waiver is expected as otherwise the Secretariat might consider a merger notification to be incomplete, resulting in a delay of the Phase I review period.

Merger control is, in most cases, quite predictable – although surprises can always occur. These may be alleviated, however, with an early inclusion of the Secretariat. Although not required by law, parties usually file a draft notification three weeks prior to the intended filing date; in this respect there is no difference to merger proceedings in the EU. Within this pre-notification period, informal talks may be held with the case team, although such informal talks rarely give you any clear indication of how the Swiss authorities will eventually decide. At least they can – and do – tell you from the outset whether they see any competition concerns. In addition, a pre-notification-filing is very useful and gives the Secretariat a possibility to inform the parties at an early stage of the completeness of the file. This lowers the risk that a notification that has been formally filed is incomplete, and thus delays the Phase I review – and the clearance timeline.

It is always possible to seek the Secretariat's advice on a no-name basis. This is particularly helpful where, for example, in connection with joint-ventures it is not clear at some time whether a notification may be necessary and the parties do not wish to notify for whatever reasons but want some sort of 'comfort letter'. We have sometimes sought such informal advice from the Secretariat, which is without prejudice but helps to lay the ground to determine possible next steps.

Normally, we submit the official form for standard merger notifications (Form CO) to DG Competition along with a Swiss merger filing. In such cases, the Swiss notification can be quite short with references to the Form CO plus the relevant Swiss specificities. Giving the Swiss authorities the Form CO and a waiver can really simplify things. In this context, we again note that some units of the Secretariat even began formally requiring a waiver and considering the merger notification incomplete without a waiver.

What do recent cases tell us about the enforcement priorities of the authorities in your jurisdiction?

PZ, BCL & MB: Since the introduction of the preventive merger control in 1995, only in two cases has the Competition Commission actually blocked a merger – in most cases where competition concerns arose, these could be remedied with (structural) commitments. Due to the high turnover thresholds, many concentrations are not subject to merger control in Switzerland. However, there is an exception according to which a transaction is subject to clearance by the Swiss competition authority even if the thresholds are not met, if one of the undertakings concerned has, in proceedings under the Swiss Cartel Act, in a final decision, been held to be dominant in a market in Switzerland, and if the concentration concerns either that market or an adjacent market or a market upstream or downstream thereof.

Media, telecoms and retail are sectors that are of great public interest and frequently come up in political debate, such as in connection with roaming fees or an alleged 'Switzerland-surcharge' in retail, or opinion plurality in the media sector. However, political considerations are not a substantive element of merger control in Switzerland. The Competition Commission solely examines whether the proposed merger creates or strengthens a dominant position leading to eliminate competition and if so, whether it does or does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed. Only if the second prong must be answered in the negative may the Competition Commission prohibit the merger or impose conditions. Hence, a proposed merger may not be prohibited for political considerations; however, the Federal Council may authorise a merger that the Competition Commission has prohibited if, in exceptional cases, it is necessary for compelling public interest reasons. Such a decision has never been issued to date.

Have there been any developments in the kinds of evidence that the authorities in your jurisdiction review in assessing mergers?

PZ, BCL & MB: The Merger Control Ordinance describes in detail which documents shall be submitted along with a merger notification. Apart from annual reports and the relevant agreements, these are copies of the reports, analyses and business plans made with regard to the concentration, etc, insofar as they contain relevant information that has not been provided in the general description of the proposed merger. The authorities can request any further information they may need either from the parties or third parties. It is not common to submit expert reports along with a notification, except in complex cases.

For such party expert opinions, the Secretariat has issued guidelines that follow international standards and are based on similar guidelines issued by the German Federal Cartel Office, the former UK Competition Commission and the European Commission.

THE INSIDE TRACK

What are the most important skills and qualities needed by an adviser in this area?

Merger control is a lot about understanding the parties' products. Perhaps it is best to leave the law aside for a moment and get your hands dirty to see what the merging parties are doing. Be extremely flexible, as in most cases the competition lawyer appears on the field at a relatively advanced phase of the project and has to create a sophisticated piece in a relatively short time in order to ensure that some important conditions precedent in an sale and purchase agreement occur sooner rather than later.

What are the key things for the parties and their advisers to get right for the review process to go smoothly?

Be simple and concise when explaining the merging parties' business and the rationale for the transaction.

What were the most interesting or challenging cases you have dealt with in the past year?

Apart from our role as lead counsel and coordinating the merger filings in an international transaction, most notable was a transaction in the communication technology sector, as well as a transaction in the pharma sector.

Philipp Zurkinden, Bernhard C Lauterburg and Marino Baldi
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Bern
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There have been cases in the past where significant economic research was undertaken to assess whether a proposed merger should be cleared, and such expert reports were obtained directly from the Competition Commission, after having notified the notifying party of the experts the Competition Commission intended to hear and the questions it intended to ask. In 2015, such expert reports were produced in the *SRG/Swisscom/Ringier* case. We are unaware if expert reports have been submitted in the Phase II case in 2016.

Talk us through any notable deals that have been prohibited, cleared subject to conditions or referred for in-depth review in the past year.

PZ, BCL & MB: There were no particularly notable deals in 2016. As mentioned, in one case, the Competition Commission ensured that concerns the EU Commission voiced would also be taken into account and resolved in Switzerland. In the only Phase II case, a vertically integrated pharmaceutical company with strong market power on almost all levels of the value chain acquired a pharmaceutical wholesaler supplying pharmaceutical products to doctors. Although it further strengthened the market position of the acquirer, the Swiss competition authority cleared the acquisition without conditions.

Still, the most widely discussed case concerns a joint venture between the national telecom company SRG, Swisscom and Ringier aiming at jointly marketing advertisement content. The joint venture partners aim to bundle their marketing capabilities and benefit from economies of scale in order to create a counterbalance against global companies such as Google and Facebook, which, according to the joint venture parties, have a market share of about 50 per cent in the digital advertising market in Switzerland. Although cleared by the competition authorities, the joint venture still faces fierce opposition by certain media companies for regulatory reasons. This case, as well as the previously mentioned pharma case, show, that the Swiss competition authority sets high thresholds for qualified market dominance in particular when assessing the potential developments in the foreseeable future.

Due to the high thresholds, some larger deals were, unlike in the EU, not subject to merger control in Switzerland or did not raise concerns. In this context, it should be borne in mind that mergers need be notified only if at least two undertakings concerned achieve a turnover of at least 100 million Swiss francs in Switzerland and the undertakings concerned achieve a cumulative turnover of at least 2 billion Swiss francs worldwide or 500 million Swiss francs in Switzerland. Furthermore, Switzerland applies a dominance test while other jurisdictions, namely the EU, apply the SIEC test. Thus, the hurdles for the competition authorities in Switzerland to intervene are rather high.

Do you expect enforcement policy or the merger control rules to change in the near future? If so, what do you predict will be the impact on business?

PZ, BCL & MB: In autumn 2014, the Swiss Parliament abandoned the idea of an amendment of the Swiss Cartel Act. This reform project included, among other proposed amendments, the simplification of the notification proceedings when a transaction was subject to merger clearance in both the European Union and Switzerland, provided that the markets affected by the transaction were at least EEA-wide in scope. It would have also included the adoption of the SIEC test into the Swiss merger control assessment.

After the election of the new parliament, which has not brought relevant political shifts, the parliament (ie, the competent legislative commission) is again discussing a new attempt to reform the Swiss Cartel Act with regard to merger control and, aside from procedural amendments, the introduction of the SIEC test. It is, however, not yet known if a formal reform of the Law on Cartels including the merger control section, will actually take place.

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