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Merger Control

Switzerland: Trends & Developments

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Trends and Developments

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Description of the current Swiss merger control system

With the total reform of 1995 a preventive merger control system has been introduced in the Federal Act on Cartels and other Restraints of Competition (CartA). A proposed merger must be notified to the Swiss Competition Commission (ComCo) if in the audited annual reports of the business year before the notification the turnover figures of the undertakings concerned exceeded CHF2 billion worldwide or CHF500 million in Switzerland and if at least two of the undertakings concerned each had a turnover of more than CHF100 million in Switzerland.

A proposed concentration is always subject to clearance by the ComCo even if the turnover thresholds are not met, if one of the undertakings concerned has, in proceedings under the CartA in a final and formally binding 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. This was the case in many transactions involving the media and telecoms sector, where the two largest companies active in these sectors were found to be dominant.

A substantive assessment criteria, the dominance test was introduced. Accordingly, a proposed merger may only be prohibited by the ComCo if the newly merged entity would create or strengthen a dominant position that results in an elimination of effective competition (qualified dominance). Practice shows that this qualified dominance-test makes it very difficult to prohibit mergers. The threshold as described before is very high.

Furthermore, as a matter of law, unilateral effects below the market dominance threshold are not within the scope of the ComCo's review powers.

The preventive character of the merger control system is secured in that notified concentrations within the meaning of the CartA may in principle only be closed after their approval by the ComCo. The merger control procedure is divided into two phases. Following the submission of a complete merger notification, the ComCo and respectively its Secretariat examine within a period of one month whether there are indications that the proposed concentration would create or strengthen a dominant position. Absent such indications, the ComCo is barred from further examining the proposed concentration and it may be implemented without reservations.

Although a formal notice that no in-depth investigation will be conducted is not foreseen in the CartA, the ComCo regularly informs the undertakings concerned of this fact. Conversely, if the preliminary examination shows indications that the concentration would create or strengthen a dominant position, the ComCo and respectively its Secretariat conduct an in-depth investigation which can take up to four months. The ComCo may either approve, prohibit or approve subject to conditions notified concentrations.

From the rough description above it results that the current Swiss merger control system was mainly inspired by the first EU merger control regulation.

Recent practice under the Swiss merger control

The current substantive dominance test (qualified dominance) makes it difficult for the competition authorities to prohibit merger projects. This is proved by the fact that since the introduction of the preventive merger system in 1995 only three merger projects were prohibited; only one prohibition decision became final and binding.

The first case was a merger in the media sector which was approved on appeal. The second case was the merger between France Telecom Switzerland (Orange) and Sunrise. ComCo stated the creation of a collective dominance between the newly merged entity and the Swiss incumbent Swisscom. The decision was not appealed.

The third case concerned a merger between Ticketcorner and Starticket, the two only significant ticketing enterprises active in Switzerland. The ComCo determined that the proposed merger between Ticketcorner and Starticket would have strengthened Ticketcorner's dominance and eliminated effective competition in the market of the distribution of tickets by third parties. In its competition assessment, the ComCo examined the position of the current providers of ticketing services active in Switzerland as well as potential market entries. It examined the market development as well as the role technology could play, such as Spotify, Facebook or Google. Despite advances in technology, the ComCo concluded that current and potential competitors would not be able to exert sufficient competitive pressure on the merged entity. This decision is currently under appeal before the Federal Supreme Court after the first appeals instance, the Federal Administrative Court, dismissed the appeal.

Apart from these three merger cases prohibited by ComCo, there are other mergers that were highly discussed within ComCo and its Secretariat. In 2015, the ComCo was called upon to make an in-depth examination of a planned joint venture between Swisscom, the national broadcaster SRG and Ringier, one of the leading Swiss media groups. By combining forces, the three companies aimed to strengthen their position in the marketing of online, TV, print and radio advertising, and planned broadcast target-ed television advertising through Swisscom TV.

The joint venture was eventually cleared in view of a sufficient level of competition remaining in the TV, online, radio and print sectors and uncertainties in the development of targeted TV advertisement.

Mergers in 2018

In 2018, the ComCo threw an eye on various mergers in the media sector.

Proposed acquisition of Goldbach Group

In May 2018, the ComCo announced to conduct an in-depth examination of the proposed acquisition of Goldbach Group, a leader in the marketing of electronic media by the Tamedia Group, one of the leading Swiss media groups with a portfolio of more than 50 media and digital platforms reaching a large part of the Swiss population in all language regions. On the basis of a preliminary examination, the ComCo had concerns that the proposed acquisition could lead to economies of scope across the individual advertising channels (TV, radio, print, online, poster or outdoor advertising) which could create a dominant position or strengthen an already existing one. This case was apparently seen very critical also in view of the existing joint venture of Swisscom, SRG and Ringier and concerns were raised that a duopoly situation could emerge.

Proposed joint venture of AZ Medien and Neue Zürcher Zeitung AG (NZZ)

In June 2018, the ComCo announced to conduct an in-depth examination of the proposed joint venture of AZ Medien and Neue Zürcher Zeitung AG (NZZ). AZ Medien was predominantly active in the north western part of Switzerland whereas NZZ was active on the whole of Switzerland. Both companies publish various newspapers and magazines and operate online platforms, television and radio stations.

Concerns arose that the merger could create or strengthen a dominant position in the reader markets for daily newspapers in the cantons of Solothurn and Aargau and in the magazine advertising market in the building services engineering sector. Furthermore, there were indications that collective dominance could be created or strengthened in the reader market for daily newspapers in the Basel area (with the Basler Zeitung) and in

the reader market for Sunday newspapers (with the Ringier Group).

Proposed acquisition of Basler Zeitung

In August 2018, the ComCo announced to conduct an in-depth examination of the proposed acquisition of Basler Zeitung, the leading newspaper in Basel, by the Tamedia Group. There were concerns that that the acquisition could create or strengthen a dominant position in the markets for advertisers of (print/online) job classifieds in German-speaking Switzerland and the Basel area. Furthermore, there were indications for the creation or strengthening of a collective dominant position in the reader market for daily newspapers in the same geographic area, in the market for the provision of national print company advertising (daily, Sunday, weekly and commuter newspapers) in German-speaking Switzerland and in the markets for advertisers in (print/online) real estate classified ads in German-speaking Switzerland and in the Basel area.

Conclusions

The ComCo eventually cleared all three merger cases after it concluded that none of them would result in an elimination of effective competition, a threshold that must be passed in order for any measures to be taken by the ComCo.

Mergers in 2019

A number of noteworthy merger decisions were seen in 2019. The first case concerned a joint venture between SBB, the Swiss national (state-owned) railway group, Hupac, a rail company active mainly in the north-south corridor and Rethmann, the parent company of Rhenus Logistics. The joint venture partners aimed at creating the Gateway Basel Nord hub (GBN) for import and export movements and the trans-Alpine transit traffic of goods.

Once completed, GBN shall provide both landside (road and track) and ship-borne goods handling services. Although the ComCo considered that GBN could eliminate effective competition in the transshipment of containers, swap bodies and semi-trailers in import and export traffic, it took into account, when clearing the joint venture, legal requirements for non-discriminatory access to GBN and that GBN would likely lead to substantial cost and time savings in combined transport. Furthermore, the ComCo assumed that competition in import and export transport by rail will improve to some extent.

In sum, the ComCo took the view that these advantages would outweigh the disadvantages of GBN's dominant position in the market for transshipment services. The merger decision was not appealed, however, the project has been blocked by complaints of a competitor, for instance against the federal government's

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decision on funding for the GBN or a complaint based on procurement laws.

The second case concerned the merger between Sunrise and Liberty Global Switzerland. In its preliminary opinion after the one-month assessment period, ComCo stated serious concerns, in particular about the creation of collective dominance of the newly merged entity with the Swiss incumbent Swisscom. Prager Dreifuss Ltd was, together with a team of economist experts of Polynomics, after the launch of the in-depth period, mandated by Sunrise to draft a legal and economic opinion to mainly show that the merger project would, contrary to the abovementioned prohibited merger in the Telecom sector (France Telecom Switzerland/Sunrise) not create a collective dominant position. The merger project was finally approved by ComCo without any conditions.

Reform of the Swiss Cartels Act

Merger control

After the total reform of the CartA in 1995, a partial revision in 2003 and a failed re-form attempt in 2012, the Swiss Federal Council has mandated on 12 February 2020 the Federal Department for Economy, Education and Research (EER) to draft amendment proposals. The main focus of this new reform lies on the reform of the merger control. Apart from some procedural adaptations to EU law the change from the current substantive dominance test to the “Significant Impediment to Effective Competition test (SIEC test) will be the main element of the amendment proposals of the EER.

Before mandating the EER with the drafting of amendment proposals the Swiss government and the Swiss Federal office for Economy asked Prager Dreifuss Ltd and a specialised team of experts of Polynomics (www.polynomics.ch) for an opinion on the consequences of a change to the SIEC test. In this legal and economic opinion, merger decisions of the ComCo concerning wholesalers and retailers, telecommunication companies and media were analysed and compared them with transactions examined by competition authorities applying the SIEC test. It was concluded that the SIEC test is suitable for preventing harmful merger below the qualified dominance threshold whereas the current Swiss substantive test allows a prohibition or approval subject to conditions only in such cases where the concentration would result in qualified dominance.

Cartel civil tools and the opposition proceeding

Two further points to which the EER shall draft amendment proposals are the strengthening of the cartel civil tools and the opposition proceeding. In civil antitrust law which is part of the CartA, only undertakings could proceed against undertakings participating in an unlawful agreement, or in an abuse of dominance. The amendment shall introduce such entitlement also for natural persons.

The current opposition proceeding is similar to the “comfort letter” system in the EU before the introduction of the EU procedural regulation 1/2003 but now appears to be too long in time and too complicated. In this context it is interesting to see that with the COVID-19 pandemic situation the European Commission is apparently offering this “comfort” guidance policy again, even if in a much more informal way.

After the EER will have issued its amendment proposals the Swiss Parliament will discuss the proposals.

Future amendments

Apart from the official reform process another important amendment could be introduced in the CartA in the near future. A popular initiative demands to enlarge the abuse of dominance provision (Article 7 CartA), which corresponds to Article 102 TFEU, in that not only dominant undertakings shall be addressed by the abuse prohibition but also undertakings with market power. A second demand of the same popular initiative is the introduction of a Geoblocking clause into the CartA.

The popular vote on these rather revolutionary amendments will take place not before autumn of this year. The Swiss Federal Council has issued an alternative proposal to be submitted to the Swiss parliament. The alternative differs from the original popular initiative text in that they delete the Geoblocking clause and that international undertakings with market power shall just be obliged to offer their products in Switzerland to the same price they offer them outside Switzerland without undertakings with market power in general being covered by the abuse provision in Article 107 CartA.

The latter alternative would correspond best with the original popular initiative as its purpose was to adapt Swiss consumer prices to those abroad. It is however not to be expected that an eventual introduction of market power into the CartA will in any manner affect current merger control reform as described above.

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Prager Dreifuss Ltd is one of Switzerland's leading law firms for business law with its headquarters in Zurich, a branch in Berne and a representative office in Brussels. The firm offers advice in all areas of commercial law. The Berne branch deals with competition and international trade law. The competition team is headed by Philipp Zurkinden and focuses on cartels and dominance abuse cases as well as on merger control. Due

to expansive knowledge of EU competition law, the team is regularly involved in multijurisdictional proceedings in Switzerland and the EU, and works with foreign international law firms. The team also deals with state aids and public procurement and Foreign Direct Investment. The firm's clients include private undertakings of all sizes and sectors as well as public institutions and governmental bodies.

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Bernhard Lauterburg is an experienced counsel in Prager Dreifuss' competition law team. He specialises in Swiss and EU competition law and regularly advises and represents domestic and international clients in antitrust and merger proceedings before the Swiss Competition Commission

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Marino Baldi has extensive experience in economic legal matters. He acted as a Swiss Ambassador for foreign economic relations and led, on behalf of the Federal Council, numerous bilateral and multilateral negotiations. He also presided over important fora of international

organizations, in particular in the areas of trade and investment law, as well as competition law. Marino Baldi is the author of the current Cartel Act and the Internal Market Act. He was a member of the Swiss Competition Commission for 12 years, and lectures on European and International Economic Law at the University of Zurich.

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