GETTING THE DEAL THROUGH

market intelligence

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Merger Control

John Davies leads the global interview panel

'Market transformational' deals on the rise

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A note from John Davies, Panel Leader

A global trend towards consolidation of markets is visible in the increased volume of transactions, as well as in the proliferation of 'market transformational' deals – four to three or three to two mergers, where the transaction could be the last major consolidation possible in the relevant sector. The contributions in this issue of *GTDT: Market Intelligence – Merger Control* show that such mergers are likely to face more intense scrutiny by competition authorities, not least because of the heightened attention they may draw from third parties and from political spheres. Consequently, competition authorities are also likely to take a closer look at the kind of remedies they find acceptable.

In particular, mergers in fields as diverse as healthcare, food retail as well as media and telecoms have faced challenges in several jurisdictions. For example, in Germany, the Bundeskartellamt blocked a merger between two of the country's largest food retail chains, Edeka and Kaiser's Tengelmann (later cleared by governmental intervention). In the US, the FTC required the divestment of 330 Family Dollar stores as a condition of closing its investigation into *Dollar Tree/Family Dollar Store*. In China, MOFCOM cleared the acquisition of Alcatel Lucent by Nokia subject to conditions related to the licensing of standard-essential patents – notably after the transaction had already received unconditional clearance in the US and the EU.

In this environment, it is more essential than ever to have up-to-date advice on current trends from local experts who also understand the international landscape. This issue of *GTDT: Market Intelligence – Merger Control* presents views and observations from leading competition practitioners around the world, offering valuable insight into the evolving legal and regulatory landscapes in their respective jurisdictions.

We would like to express our gratitude 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.

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March 2016

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Philipp Zurkinden

MERGER CONTROL IN SWITZERLAND

Prof Dr Philipp Zurkinden is a partner and head of competition at Prager Dreifuss, and Bernhard C Lauterburg is counsel of the competition team. Philipp joined the firm in 1999 and quickly established himself as a prime contact for competition advice. Bernhard joined the firm's competition team in 2008.

Together, they have acted on many high-profile cases – merger and cartel proceedings – and represented and represent 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 Competition Commission's various investigations in the financial sector and in the gravel and concrete, leasing and galvanising cases as well as advising in merger control in the technology, energy and pharma sectors.

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

Philipp Zurkinden & Bernhard C Lauterburg: For the Swiss Competition Commission, 2015 was not a particularly busy year in merger control. The number of cases notified to the Commission was almost the same as in 2014: about 30. While there had only been one Phase II procedure in 2014, there were three in 2015. All four procedures concerned the media and advertisement sector (*search.ch*, *Job Cloud/JobScout24*, *ricardo.ch* and *SRG/Swisscom/Ringier*) and all were cleared in 2015. We will briefly discuss these cases.

GTDT: 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: The staff of the Secretariat of the Swiss Competition Commission – the Secretariat is the authority responsible for conducting the 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 we would observe the following.

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 with Phase I, we normally set the one-month period to end some working days after the 25-working-days period in the EU ends. In the past, the Swiss authorities had a tendency to 'wait and see' what the decision of the EU Commission in the same transaction was; recently, this tendency has relaxed and the Swiss authorities may in some cases even issue a statement of non-objection within two 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 are expected, the alignment of the 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 it is expected that a waiver will be offered 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 may 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 about 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 on 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 for 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 Form CO (for standard merger notifications) to the Directorate General 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.

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

PZ & BCL: Only in two cases has the Competition Commission actually blocked a merger since the introduction of the preventive merger control in 1995. In most cases where competition concerns arose, these could be remedied with (structural) commitments. Media, telecommunications and retail are sectors which 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 alone examines whether the proposed merger creates or strengthens a dominant position leading to the elimination of 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 latter is answered in the negative may the Competition Commission prohibit the merger

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THE INSIDE TRACK

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

Merger control is mainly about understanding the parties' products. As a lawyer, perhaps 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 to have some important conditions precedent in an SPA 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.

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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 not been issued to date.

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

PZ & BCL: The Merger Control Ordinance describes in detail which documents shall by 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 issued guidelines that follow international standards and are based on similar guidelines issued by the German Bundeskartellamt, the former UK Competition Commission and the European Commission.

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 *[see below]*.

GTDT: 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: As mentioned in our introductory remarks, several transactions in the media and advertisement sector were referred to in-depth review. Every transaction that is found during Phase I to create or strengthen a dominant position must be investigated in a Phase II by the Competition Commission. The Competition Commission may prohibit the transaction or impose remedies if the combined undertaking will have the possibility to foreclose competitors on a lasting basis and thereby create or strengthen a dominant position. This occurs rarely, and the hurdles have been set high by the Federal Supreme Court.

The first case concerned the acquisition of the internet search engine search.ch by the national telecom company Swisscom. Among other things, search.ch provides an online telephone directory and so does Swisscom, through its subsidiary Swisscom Directories AG. Although the Competition Commission concluded that the transaction results in creating a dominant position, it did not find indications that effective

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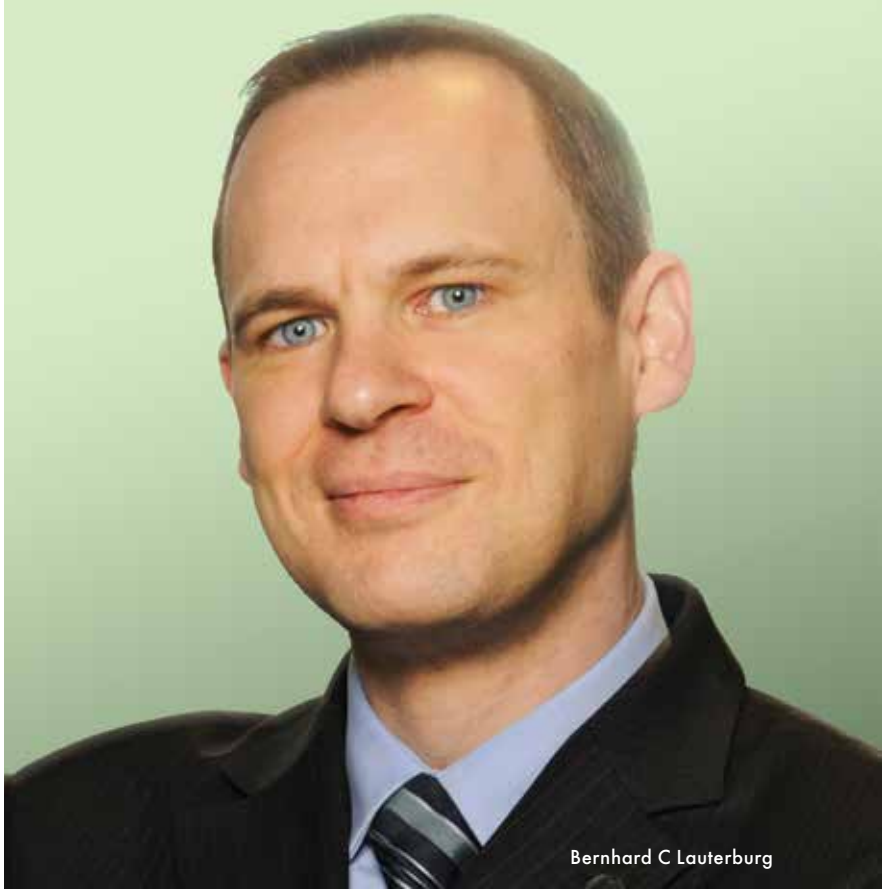
competition would be eliminated on a lasting basis and therefore cleared it.

In another transaction concerning the job advertisement market, JobScout24 was acquired by JobCloud, the latter being a joint venture owned by media giants Tamedia and Ringier. Despite the notification thresholds not being reached, the transaction had to be notified because in an earlier decision Tamedia had been found dominant in certain regional and supra-regional markets for daily newspapers, and the Competition Commission considered that these markets would also comprise online and print advertisement. According to the Law on Cartels, concentrations must be notified, despite the thresholds not being achieved, if one of the undertakings concerned has been found dominant in a particular market in previous procedures under the Law on Cartels, and the concentration concerns either this market or a market adjacent, upstream or downstream thereof. The Phase I assessment apparently showed that the acquirer already had a strong market position with a lead of 20–30 per cent on the next competitor, and that indications existed that a dominant market position could be strengthened. Moreover, at around the same time Tamedia also acquired Ricardo, which was also active through olx.ch in the job advertisement sector. The competitive analysis showed similar tendencies regarding the market positions as those determined in the *JobCloud/JobScout24* case; in other words, it had a strong market position with a lead of 20–30 per cent on the next competitor. Despite the dominant position of Tamedia and JobCloud respectively, the Competition Commission cleared both transactions and noted that the high market dynamics and the relatively low entry barriers would speak against eliminating effective competition.

Finally, the most widely discussed case was a joint venture between the national television and radio company SRG, the national telecom company Swisscom and the privately held media company 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. While the Competition Commission cleared the transaction at the end of the last year, the Federal Office of Communications initially blocked the transaction for regulatory reasons and only cleared it at the end of February 2016. Although the Swiss Competition Commission found a very strong market position in the market for personalised advertisements, it concluded that the international competitive situation and the international pressure this market is exposed to was not sufficient to block the deal or impose


Bernhard C Lauterburg

remedies. The Federal Office of Communications examined whether the transaction is in compliance with SRGs broadcasting concession. The decision of the Competition Commission has not yet been published. As a side note, the association of print media – of which Ringier was also a member – strongly opposed the deal as it feared its members would lose ground in the advertising market against the joint venture.

GTDT: 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: As already mentioned in the interview last year, in autumn 2014 the Swiss Parliament abandoned the idea of an amendment of the Law on Cartels. 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 and, with regard to merger control, the introduction of the SIEC test. However, it is not yet known if a formal reform of the Law on Cartels, including the merger control section, will really take place.

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