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Merger Control

Switzerland – Law & Practice

Contributed by
Prager Dreifuss

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Law & Practice

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Prager Dreifuss highly regarded competition law team has successfully represented domestic and international clients before the Swiss Competition Commission for more than ten years, and frequently collaborates with foreign law firms in cross-border competition matters. The team provides a full range of legal services with respect to competition law and represents both small domestic and large global enterprises in proceedings before the competition authority. The team's comprehensive knowledge of EU competition law and extensive language skills facilitate co-operation with foreign law firms, for example in parallel proceedings in Berne and Brussels, as well as advising clients on aspects of Swiss competition law in a comparative fashion.

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1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

The relevant merger control legislation is the Federal Law on Cartels and other Restraints of Competition (LCart) of 6 October 1995, which provides for mandatory notification of mergers if the undertakings concerned exceed certain turnover thresholds. The Merger Control Ordinance (MCO) supplements these rules.

Switzerland has no specific foreign investment law. The Swiss Constitution provides for economic freedom that allows nationals and foreigners to operate a business in Switzerland, form a company or hold an interest in one. Switzerland generally accords 'national treatment' of foreign investors and their investments. The main legal basis for operating a business in Switzerland, by both Swiss nationals and foreigners, is the Code of Obligations.

In general, for doing business in Switzerland, including making investments, there is no requirement for approval by the authorities. Exceptions apply in sectors which were traditionally served by former public monopolies (air and maritime transport, hydroelectric and nuclear power, operation of oil and gas pipelines, and transportation of explosive materials), and with respect to banks as well as real estate (namely if the primary purpose of the undertaking concerned is the holding of real estate in Switzerland).

1.2 Enforcement

The authority enforcing merger control legislation (as well as cartels and abuse of dominance) is the Competition Commission (ComCo). The ComCo is composed of 12 members (independent experts and representatives of business associations and consumer organisations) holding office on a part-time basis who are elected by the Federal Council. The ComCo is supported by a full-time Secretariat comprising more than 60 scientific collaborators (lawyers and economists). The Secretariat examines mergers and other restraints to competition and submits the outcome of its examination to the ComCo for decision. Furthermore, the Secretariat gives legal advice to undertakings and public ad-

ministrative bodies, and monitors competition in different markets.

Appeals against the ComCo's decisions may be addressed to the Federal Administrative Court in St Gallen, whose judgments can be appealed to the Federal Supreme Court in Lausanne.

2. Jurisdiction

2.1 Notification

Notification is compulsory if:

- the undertakings concerned achieve a cumulative worldwide turnover in the preceding business year of more than CHF2 billion or a cumulative turnover in Switzerland of more than CHF500 million ('first prong'); and
- if at least two of the undertakings concerned individually achieve a turnover in the preceding business year of CHF 100 million ('second prong').

In addition, a concentration must be notified irrespective of the turnover thresholds if at least one of the undertakings concerned has been held by the ComCo in a previous investigation to be dominant in a market in Switzerland, and if the concentration concerns either that market, an adjacent market or an upstream or downstream market.

2.2 Failing to Notify

See **2.11**. Any undertaking that implements a concentration that should have been notified without filing a notification *must* be charged up to CHF1 million Swiss francs. If such concentration is implemented, the ComCo may initiate merger control proceedings ex officio and order measures to restore effective competition.

2.3 Types of Transactions that are Caught

Provided that the undertakings concerned exceed the turnover thresholds, the merger control captures the (a) acquisition of control and (b) joint ventures.

Acquisition of control means the ability to exercise, directly or indirectly, decisive influence over another undertaking's activities. The means from which the decisive influence arises is irrelevant for purposes of merger control, ie it can be the acquisition of a majority of shares or any contractual agreement which confers decisive influence on the composition, deliberations or strategic decision of the organs of an undertaking.

Joint ventures are transactions aimed at two or more undertakings acquiring joint control over an undertaking that they previously did not jointly control, eg outsourcing a business unit in an entity jointly controlled by two independent undertakings. The joint venture must perform all the functions of an autonomous economic entity on a lasting basis; otherwise, the transaction might be considered a horizontal agreement. Also considered a concentrative joint venture is an undertaking newly established by two or more existing undertakings provided that (a) the newly established undertaking performs all the functions of an autonomous economic entity on a lasting basis and (b) business activities from at least one of the controlling undertakings are transferred to the newly established undertaking.

It becomes clear from the above that merger control legislation also captures change of control, eg as a matter of shareholder agreement with or amendments to the articles of association. Internal restructuring or reorganisation measures are not subject to the LCart.

Note that as a consequence of the bilateral air transport agreement between Switzerland and the EU, the European Commission now reviews mergers in the air transport sector if the notification thresholds specified in the EU Merger Regulation are reached. By virtue of this agreement, the ComCo lost its competence to review airline mergers.

2.4 Definition of Control

Transactions that give rise to a change in control are captured provided that the undertakings concerned exceed the turnover thresholds. Control means the ability to exercise decisive influence over another undertaking's activities, eg influencing strategic decisions. Generally, factual and legal circumstances must be analysed in order to determine whether a transaction results in a change of control.

Note that control can also be achieved through minority shareholdings, as shown by EU practice or, in rare cases, by dependency, which would require other structural connections. There is no clear Swiss practice on this issue and the ComCo would likely rely on EU case law for guidance.

2.5 Jurisdictional Thresholds

See **2.1**. There are no special jurisdictional thresholds applicable to particular sectors.

2.6 Calculating Thresholds

The relevant turnover comprises the turnover from the undertaking's own business activities plus:

- the turnover of any undertakings that it solely controls; plus
- the turnover of any parent and sister company; plus
- the proportionate turnover of any jointly controlled undertakings.

The MCO provides that all reductions – such as discounts, rebates, value added tax and other consumption taxes as well as other taxes directly related to turnover – shall be deducted

from the amount derived by the undertakings concerned from the sale of products and provision of services within ordinary business activities in the preceding financial year.

Turnover in foreign currencies shall be converted into Swiss francs in accordance with generally accepted accounting principles applicable in Switzerland; normally, this is the average exchange rate calculated from the exchange rates provided by the Swiss National Bank.

See **2.5** for the calculation of turnover and the corporate entities that have to be taken into account. The only criteria are the cumulative (see **2.1**) turnover thresholds; whether the undertakings concerned maintain presence in Switzerland is irrelevant as 'Swiss turnover' can be achieved through mere sales without maintaining physical presence in Switzerland. The seller's turnover need not be taken into account (but see below). Changes in the business during the reference period are treated similarly to under EU Merger Regulation.

Note that the seller's turnover must be taken into account in the case of a change of sole control to joint control.

2.7 Foreign-to-Foreign Transactions

Foreign-to-foreign mergers are caught by merger control legislation if the concentration has any effect in Switzerland. These are presumed if the notification thresholds are exceeded. However, if two foreign undertakings (even if both are active in Switzerland and exceed the notification thresholds) establish a joint venture which will neither have activities nor achieve turnover in Switzerland and such are not planned or expected in the future, no notification is necessary.

2.8 Market Share Jurisdictional Thresholds

Switzerland employs a turnover-based jurisdictional threshold.

2.9 Joint Ventures

See **2.3**. Joint ventures are generally caught by merger control and there are no special rules for joint ventures. The controlling and the controlled undertakings are the undertakings concerned whose respective turnover is relevant (except in the case of newly established joint ventures).

2.10 Powers to Investigate a Transaction

Concentrations can only be examined if the undertakings concerned satisfy the jurisdictional thresholds. Hence, no corrective measures can be imposed by the ComCo if a concentration that is not subject to mandatory notification results in a dominant undertaking. Dominance as such is not prohibited in the LCart, however, such an undertaking should be careful in observing the rules that are incumbent on dominant undertakings.

2.11 Closing Before Clearance

Completion of a transaction must be suspended until clearance (see **2.2**). Note that the acquisition of shares could be regarded as an act of execution. If the parties complete the transaction before obtaining clearance, a penalty of up to CHF1 million *must* be imposed (see **3.1**). Such penalties are made public. Only a few decisions exist.

2.12 Exceptions to Suspensive Effect

Upon motion of the undertakings concerned, the ComCo may authorise, provided the undertakings concerned demonstrate good cause (eg the transaction may otherwise not be reasonably completed or third parties may suffer if the transaction cannot be implemented immediately), implementing the concentration prior to clearance. The conditions for such exceptional authorisation are similar to those in the EU Merger Regulation. A special rule exists for banks. If the Swiss Financial Market Supervisory Authority (FINMA) deems a concentration of banks necessary for reasons related to creditor protection, it may, at the request of the banks involved or ex officio, allow implementation at any stage of the proceedings even before the transaction is notified to the ComCo.

There is no provision in the LCart for carving out the Swiss businesses from the transaction. Early jurisprudence of the Swiss competition authorities in the Mérial case would suggest, however, that carving out businesses or assets does not help avoid notification.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There are no specific deadlines. The undertakings concerned must submit a merger notification prior to implementing the transaction and the transaction must not be implemented prior to obtaining clearance or a failure-to-notify penalty shall be imposed on the undertaking liable for the notification (up to CHF1 million) and responsible individuals (up to CHF20,000). Unlike with individuals, there is no discretion for the authority to levy a fine on the undertaking liable for the notification; there is discretion, however, regarding the amount of the fine. The amount of the fine is calculated based on the importance in the market of the undertaking liable for the notification. This is calculated based on turnover achieved in Switzerland and whether the transaction entails a potential risk for competition. This will be assumed if two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland or if one holds a market share of 30% or more in Switzerland, whether:

- the transaction entails a possibility to eliminate effective competition, which is not the case if the undertakings concerned do not exceed the above mentioned market shares; and

- the undertaking liable to notify the transaction acted culpable.

Few decisions exist where undertakings have been fined and it is unheard of for any individuals to be fined.

3.2 Requirement for a Binding Agreement

As a matter of principle, a transaction can only be notified once a binding agreement has been reached. Exceptionally, any other document, such as a letter of intent or a memorandum of understanding, will suffice provided that the parties' intent to close and the fundamental conditions for the closing are sufficiently substantiated in the document. It should be noted, however, that parties notifying at an early stage on the basis of this document run the risk of further negotiation resulting in a change of circumstances relevant to the transaction. Such changes must be notified immediately and voluntarily to the ComCo. If these changes have a considerable effect on the assessment of the transaction, the time period for phase I may recommence only on the day after the ComCo receives the information on these material changes.

3.3 Filing Fees

Phase I is subject to a fee of CHF5,000, which is usually payable after the ComCo notifies the notifying party that the concentration may be implemented. For a phase II investigation, the ComCo levies fees based on time and effort (between CHF100 and CHF400 per hour).

In a merger, the merging parties are jointly responsible for filing.

3.4 Information Required for Filing

The ComCo uses a standard form that is similar to the Form CO. The notification can be submitted in German, French or Italian, and the supporting documents in English. The following information must be included in a notification:

- company name, domicile, power of attorney and a short description of the undertakings concerned;
- a description of the transaction and the transaction rationale;
- turnover information (globally and for Switzerland);
- information on the relevant product and geographic markets that are affected (note that this requires the undertaking liable to notify the transaction to explain why other markets are not affected) including market shares and competitor information for the preceding three years;
- actual and potential market entries as well as information on barriers to enter the market.

The notification must be accompanied by the following documents:

- copies of the most recent annual report and accounts of the undertakings concerned;
- copies of the relevant agreements relating to the transaction.

Further documents may be necessary, eg tender documentation in the case of a public tender, or reports containing material relevant to the transaction not already contained in the notification. Generally, there are no special requirements for the submission of documents, such as notarisation or affixing an apostille, unless this is required by law at the seat of the undertakings concerned, in order for them to be valid.

If a transaction must be notified to the European Commission, the ComCo *recommends* submitting the Form CO and a waiver allowing the exchange of information between the ComCo and the European Commission. Regularly, when Form CO is submitted to the ComCo, it suffices for purposes of the Swiss notification to provide Switzerland-specific information only and to provide references to Form CO for all other information.

3.5 Penalties for Incomplete Notification

There are no penalties but the period for the phase I review will only commence on the day following receipt of the complete notification.

3.6 Phases of the Review Process

There are two phases:

Phase I

Upon submission of a complete notification, the ComCo may decide, during a one-month period, to open an in-depth investigation of the notified transaction. The ComCo will open an investigation if there are indications that the notified transaction creates or strengthens a dominant position resulting in the elimination of effective competition and such is not outweighed by improved conditions of competition in another market.

Phase II

If an in-depth investigation has been opened, the ComCo must make a decision within four months from the opening of the investigation. Failure to do so means the notified transaction is deemed authorised, unless the ComCo asserts that it has been prevented from conducting the investigation for reasons attributable to the undertakings concerned.

Requests for information that are submitted to the undertakings concerned after confirmation of the completeness of the notification will not suspend the review period. The ComCo regularly submits such requests and it may also request affected third parties to provide relevant information for the assessment of the notified transaction. Many information requests can be avoided, however, if a draft notification is sub-

mitted well in advance of the formal filing. The ComCo will review and comment on a draft indicating what information is lacking so that a complete and comprehensive notification can be filed. In complex transactions, pre-notification and pre-notification discussions are generally welcomed by the ComCo.

3.7 Accelerated Procedure for Review

There is a procedure for a simplified notification but it must be agreed prior to the notification. The time periods remain the same, although the ComCo may grant an exemption from the duty to submit particular information or documents.

4. Substance of Review

4.1 Substantive Test

The substantive test (CSDP test) analyses whether the planned merger will create or strengthen a dominant position in affected markets that eliminates competition and the harmful effects cannot be outweighed by an increase of competition in other markets. This substantive test is similar to the one valid under the EC merger control before the introduction of the revised merger control regulation 2004.

4.2 Competition Concerns

The competition concerns investigated by the Swiss authorities are where actual and potential competition within a foreseeable period after the merger is eliminated. The rules prohibiting a merger are very strict compared with other merger control regimes. The Swiss Competition Commission is not allowed to prohibit a merger because of unilateral co-ordinated conglomerate or portfolio effects beyond the market dominance level. Due to this permissive Swiss merger control, in the last 20 years (the current merger control system was introduced in 1996), only two mergers have been prohibited by the Swiss Competition Commission. They are: BZ/20Minuten in 2004, where the prohibition decision of the ComCo was suspended by the Swiss Federal Administrative Court in 2006 and the Swiss Federal Court in 2007, and France Télécom/Sunrise Communications SA, in 2012.

4.3 Economic Efficiencies

As a consequence of the CSPD test, economic efficiencies are not taken into consideration in Swiss merger control.

4.4 Non-Competition Issues

With the total reform of the LCart in 1995 (entered into force in 1996), a paradigm change was introduced in that non-competition criteria should no longer be taken into consideration in proceedings before the Swiss Competition Commission. Such issues therefore cannot be applied in merger control proceedings either. An exception to this principle seems to be constituted by article 10 paragraph 3 in the LCart. This provision states that, when assessing a merger, the position of the merger parties in the international competition landscape has to be taken into consideration. This provision, however, which could be interpreted as a permission of 'national champions' even if they did create or strengthen a dominant position eliminating competition in Switzerland, has not yet been précised in the jurisprudence of the Swiss competition authorities.

In the event of a merger being prohibited, the parties may lodge a request with the Swiss Federal Council to exceptionally permit the prohibited merger for non-competition reasons. Such a request has never been lodged.

4.5 Joint Ventures

No special consideration is given to joint ventures (JVs). While the definition of 'joint control' is identical to the one in the EU, the description of the 'full function' requirement in newly created JVs is slightly different in that business activities from at least one of the controlling undertakings must be transferred into the JV. A further important difference is that the substantive assessment under Swiss merger control does not include the possible co-ordination issues between the JV parents. As with other mergers, the CSDP test is also applied to concentrative JVs without any difference.

5. Decision: Prohibitions and Remedies

5.1 Prohibition of Transactions

The Swiss Competition Commission may prohibit a merger only if it creates or strengthens a dominant position eliminating competition (see **4.1**). If a merger is been notified to the ComCo, even if the notification criteria are fulfilled, the ComCo may open an ordinary merger control proceeding causing implementation measures to be stopped immediately. If the merger has already been closed and the substantive test shows that it creates or strengthens a dominant position eliminating competition, the Swiss Competition Commission has the power, as ultima ratio, to order the dissolution of the merged entity.

5.2 Negotiation of Remedies

The parties are able to negotiate remedies any time during the merger control proceeding. In theory, the Swiss Competition Commission should focus on structural remedies like divestitures etc. As jurisprudence shows, however, a concrete distinction between behavioural and structural remedies has not always been made and behavioural remedies have been imposed inconsistently, as in the UBS merger very soon after the LCart came into force, and then Migros/Denner.

5.3 Typical Remedies

A review of the practice of the Swiss Competition Authorities shows that there are no typical remedies. A broad range of remedies is applied by the ComCo depending on the

industry and the kind of concerns the authorities have in the affected markets. For the reasons set out in **4.4**, non-competition issues cannot be taken into consideration by the ComCo. They can only be addressed by remedies in decisions of the Federal Council following a request for the exceptional permission of a merger prohibited by the competition authorities.

5.4 Remedial Procedures

Unlike in EU merger control, there are no procedural provisions in Swiss merger control law with regard to remedies. In particular, there are no limits to the delays that can be imposed. Parties can begin negotiating remedies any time in the course of the merger proceeding. The authorities are also entitled to propose remedies. The Federal Court has even explicitly confirmed that the Swiss Competition Commission can unilaterally order remedies, as in the Swissgrid case.

Remedies can be proposed and discussed during phase I of the Swiss merger control proceeding. Legal uncertainties regarding enforcement may arise if remedies are agreed or imposed in phase I and no formal decision is issued, as was the case with Denner/Pick Pay in 2006. The same is true if the Swiss Competition Commission, in its approval, simply refers to remedies of the European Commission in the same case without including them in a formal decision, as it did in the Sanofi-Synthélabo/Aventis merger. In the latter case, the Competition Commission simply stated that if the remedies should not be fulfilled it could open proceedings based on article 38 of the LCart (revocation and revision in case of non-compliance with remedies).

5.5 Standard Approach for Divestitures and Other Remedies

Swiss merger control distinguishes between two remedy categories: conditions and obligations. Conditions must be fulfilled before the merger can be closed, whereas obligations can be implemented after the closing. Obligations suit primarily behavioural remedies. The problems regarding supervision and fulfilment of obligations became obvious in the first big merger case filed under the current Swiss Cartels Act: the merger of the two Swiss banks Schweizerische Bankgesellschaft (SBG) and Schweizerischer Bankverein (SBV) into UBS. As formal supervision of compliance with obligations has been hitherto imposed only in rare individual cases (eg in Migros/Denner, Coop/Fust and Coop/Carrefour), these problems are still unresolved.

If remedies are not fully complied with, the Swiss Competition Commission may revoke an approval or (re-)open an investigation and may issue a fine of up to CHF1 million or, in the case of repeated failure, up to 10% of the aggregate turnover in Switzerland in the preceding three years.

5.6 Formal Decisions

A formal decision is normally only issued in phase II of the merger control proceeding. Approvals in phase I are normally issued in the form of a report. Only in exceptional cases, where the Competition Commission has linked its approval to remedies, have formal decisions been issued in phase I, as in Glaxo Wellcome/SmithKline Beecham and Pfizer/Pharmacia. In Coop/Waro, obligations were imposed in phase I without issuing a formal decision.

All reports and decisions are made publicly available in the Swiss competition authorities' official publications (RPW).

5.7 Examples of Prohibitions and Remedies

There have been no recent transactions that were prohibited or approved under remedies.

6. Ancillary Restraints

As with EU merger control, Swiss merger control clearance decisions may cover arrangements which are directly related to the transaction and are necessary for the functioning of the merger. The Swiss Competition Commission has with respect to the assessment of ancillary restraints adapted its practice to the respective European Commission notice. This adoption of the EU merger control law on ancillary restraints has very recently been explicitly confirmed.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third Parties' Involvement

In merger control, only the undertakings concerned enjoy party rights; there is no standing for third parties in the merger review process. However, the ComCo regularly sends out questionnaires to potentially affected third parties to obtain a better understanding of the market conditions and the competitive environment. Also, third parties have the right to comment on the notified transaction in the course of a phase II review process (see **7.2**).

7.2 Confidentiality

The mere act of a transaction being notified to the ComCo is not made public. If the ComCo decides not to open a phase II review process, it will publish a summary decision (including reasoning) that it deemed the transaction not to raise any competition concerns. The ComCo's decision to pursue a phase II review process shall be published in the earliest possible edition of the Federal Gazette and the Swiss Official Trade Journal during the period when third parties may comment on the notified transaction. The ComCo is bound by the official secrets ruling and the undertakings concerned will be involved in the redaction of business secrets for any version of the decision to be made public. In

the event of difference of opinion between the ComCo and the undertakings concerned on whether particular information constitutes a business secret, the ComCo will issue an appealable order.

7.3 Co-operation with Other Jurisdictions

In transactions that are subject to notification both in Switzerland and other European jurisdictions including the EU, the ComCo normally asks for a waiver letter allowing it to share information with the respective foreign authority/ies. Requesting such a waiver, however, is not mandatory. On 1 December 2014, the agreement between the EU and the Swiss Confederation on co-operation on the application of competition law (Co-operation Agreement) came into force, as well as an amendment to the LCart regarding the disclosure of data to foreign competition authorities. By virtue of these new provisions, information (including business secrets) may generally be shared with the European Commission without the consent of the undertakings concerned subject to strict conditions. Namely, the competition authority receiving the request shall determine, in consultation with the requesting competition authority, what information in its possession is relevant and may be transmitted. Unless there is an international agreement, the same would not be possible with other competition authorities.

8. Appeals and Judicial Review

A negative verdict on a transaction can be appealed within 30 days from the issuance of the verdict to the Federal Administrative Court. Decisions of the Federal Administrative Court can be appealed to the Federal Supreme Court. The Federal Administrative Court has full review powers. The Federal Supreme Court may only review questions of federal law. There is no strict deadline for the courts to hand down their decisions. Before each instance, it will likely take more than one year to obtain a decision.

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The undertakings concerned may also seek exceptional authorisation of a transaction that is of public interest and that has been prohibited by the ComCo from the Federal Council for compelling reasons. Such request can be lodged either within 30 days from the issuance of the ComCo's verdict or within 30 days from the entry into effect of a judgment of the Federal Administrative Court or the Federal Supreme Court. The Federal Council is called upon to issue its decision within four months; however, this is a non-binding time period.

9. Recent Developments

9.1 Recent or Impending Changes to Legislation

Last year, the Swiss parliament rejected a reform package that included a revision of the Swiss merger control section in the LCart. The proposal by the Swiss government regarding merger control was to change from the CSDP test to the SIEC test (in English, the International Society for Business Education), as applies in the EU. Furthermore, it stated that international mergers being notified both in Switzerland and the EU, in future, need only be assessed by the European Commission and no longer by the Swiss Competition Commission. Apart from an institutional change, the reform plan also addressed the adaptation of procedural rules and delays to those in the EU. The merger control revision was only one of several legislative measures contained in this LCart reform package, which was rejected after several years of discussions.

9.2 Recent Enforcement Record of Authorities

Only two mergers have been prohibited since the current preventive merger control system was introduced in 1996: France Télécom/Sunrise Communications and BZ/20Minuten, where the latter prohibition decision was suspended by the appeal instances. Recently, no significant remedies have been required in relation to mergers, and the last fine for not having notified a merger was imposed by the ComCo in September 2013. The subsequent sanction was later suspended by the appeal courts.

9.3 Current Competition Concerns

The concerns of the authority are mainly that the current Swiss merger control system, in an international context, is too permissive and that it should be adapted to follow the substantive and procedural rules of the EU merger control system. The recent co-operation agreement in competition matters, however, has given some relief in the co-ordination of parallel merger control proceedings in Brussels and Berne.