

Merger control in Switzerland: overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

The following laws, regulations and guidelines apply:

- Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act).
- Ordinance on the Control of Concentrations of Undertakings 1996 (Merger Control Ordinance).
- Explanatory Note and Form of the Secretariat of COMCO on the Notification of a Proposed Concentration of 21 October 2014 (Explanatory Note and Form of the Secretariat on the Notification of a Proposed Concentration).
- Note of the Secretariat of COMCO on the Practice regarding the Notification and Assessment of Concentrations of 25 March 2009 (Version of 19 September 2014) (Note of the Secretariat on Practice regarding Concentrations).
- ICN Merger Notification and Procedures Template (February 2015).

COMCO has not issued any guidelines on the substantive analysis of concentrations.

Regulatory authority

The Competition Commission (COMCO) and the Secretariat of the Competition Commission (Secretariat) have primary responsibility for enforcing the Cartel Act, including merger control proceedings. COMCO is the deciding body, while the Secretariat conducts the investigation and prepares the cases (COMCO may be involved in the proceeding in Phase II). The Secretariat is divided in four departments responsible for proceedings concerning products, services, infrastructure and construction.

In addition to merger control, special notifications and authorisations are required if the concentration involves, among others, banks, Swiss real estate companies or broadcasters of Swiss programme services.

See box, *The regulatory authority*.

TRIGGERING EVENTS/THRESHOLDS

2. What are the relevant jurisdictional triggering events/thresholds?

Triggering events

The following transactions are deemed to be a concentration of undertakings subject to merger control:

- Statutory merger of two or more previously independent undertakings.
- Acquisition of control over one or more previously independent undertakings or parts of it through any transaction, in particular the acquisition of an equity interest or the conclusion of an agreement.
- Acquisition of joint control over an undertaking (joint venture).

The following joint ventures are caught by merger control if the joint venture performs all the functions of an autonomous economic entity on a lasting basis:

- Acquisition of joint control over an existing undertaking (also an existing joint venture).
- Founding of a new joint venture, if business activities from at least one of the controlling undertakings are transferred to the joint venture.

Control is assumed if an undertaking can exercise a decisive influence over the activities of the other undertaking by the acquisition of rights over shares or by any other means. The means of obtaining control may, in particular, involve the acquisition of the following:

- Ownership rights or rights to use all or parts of the assets of an undertaking (if those assets constitute the whole or a part of an undertaking, which is a business with a market presence to which a market turnover can be attributed).
- Rights or agreements that confer a decisive influence on the composition, deliberations or decisions of the organs of an undertaking.

Partial interests and minority shareholdings are only covered if they allow an undertaking to exercise a decisive influence over another undertaking (this can also be in combination with contractual agreements between the parties or factual circumstances). There is a risk that the acquisition of a minority interest may qualify as an anti-competitive agreement if the undertakings concerned agree to co-operate.

Thresholds

Planned concentrations of undertakings must be notified to COMCO before their implementation if in the financial year preceding the concentration (cumulatively):

- The undertakings concerned together reported a worldwide turnover of at least CHF2 billion, or a turnover in Switzerland of at least CHF500 million.
- At least two of the undertakings concerned each reported a turnover in Switzerland of at least CHF100 million.

In the case of insurance companies "turnover" is replaced by annual "gross insurance premium income" and in the case of banks and other financial intermediaries by "gross income".

The Secretariat decided in a case that a joint venture is exempted from notification (even if the parent companies meet the thresholds) if the following two conditions are both met:

- The joint venture does not have activities in Switzerland or does not generate any revenues in Switzerland.
- Such activities or revenues are not planned in Switzerland and are not expected to take place in the future.

In addition to turnover, notification is mandatory if one of the undertakings concerned in proceedings under the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) in a final and non-appealable decision was 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 of that market.

NOTIFICATION

3. What are the notification requirements for mergers?

Mandatory or voluntary

Notification is mandatory. See *Question 2, Triggering events/thresholds*.

Timing

There is no triggering event or time limit applicable. However, notification must be made before the concentration is implemented.

For public bids for acquisitions of undertakings, the notification must be made immediately after the publication of the offer and before the acquisition is implemented. COMCO should be contacted in advance so that it can co-ordinate the proceeding with the Swiss Takeover Board.

The requirement to notify generally triggers when purchase agreements are concluded (or other relevant agreements). If the purchase agreement is not yet concluded and the concentration is merely intended, a notification is possible if the notifying parties can credibly demonstrate that the undertakings taking part in the concentration are willing to conclude the purchase agreement.

Formal/informal guidance

Undertakings can give a draft of the notification to the Secretariat in advance. The Secretariat will then evaluate whether the notification is complete. Additionally, if advisable in the particular case, it is possible to contact the Secretariat informally before filing a notification.

Responsibility for notification

For statutory mergers, notification must be made jointly by the undertakings concerned. For acquisitions of control, the filing must be made by the undertaking or undertakings acquiring control.

Relevant authority

Notifications as well as pre-notifications must be submitted to the Secretariat.

Form of notification

COMCO provides an explanatory note on its website (*Explanatory Note and Form of the Secretariat on the Notification of a Proposed Concentration*), which is available in German (www.admin.ch/opc/de/federal-gazette/2014/8321.pdf), French (www.admin.ch/opc/fr/federal-gazette/2014/8152.pdf) and Italian (www.admin.ch/opc/it/federal-gazette/2014/7232.pdf).

Filing fee

For the preliminary investigation (phase I) a flat fee of CHF5,000 must be paid by the undertakings concerned in the concentration (*see Question 4*). If COMCO decides to conduct an in-depth investigation (phase II), the fees from that point onwards are based on time, with rates per hour ranging from CHF100 to CHF400.

The fee for the evaluation of the pre-notification is included in the flat fee of CHF5,000 if a notification is subsequently filed. If no notification is filed, the fee for pre-notification is charged as for expert reports and other services. The latter fees are charged on a time spent basis.

Obligation to suspend

The undertakings concerned must refrain from implementing the concentration for one month following the notification of the concentration (unless, at their request, COMCO has authorised them to do so for good cause). If within the one month period no notice of the opening of an in-depth investigation is given (or if COMCO notifies the undertakings of the clearance of the transaction, whichever is earlier), the concentration can be completed.

If COMCO decides to initiate phase II, it must be completed within an additional four month period, during which the implementation of the concentration is prohibited, unless authorised by COMCO in exceptional cases (*see Question 4*).

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

Parties must notify a concentration to the Secretariat of the Competition Commission (Secretariat) if both of the following are established:

- There is a concentration within the meaning of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) including the applicable legislation.
- The undertakings concerned meet the relevant turnover thresholds or other triggering events (*see Question 2, Triggering events/thresholds*).

When a concentration is notified the Competition Commission (COMCO) conducts an investigation, as follows:

- **Phase I.** A preliminary investigation begins on receipt of the complete notification. COMCO must decide, within one month, whether the concentration may create or strengthen a dominant position. If within the one month no notice of the opening of an investigation is given (or if COMCO notifies the undertakings of the clearance of the transaction, whichever is earlier), the concentration can be completed.

- Phase II. If there are indications that the concentration may create or strengthen a dominant position, COMCO opens an in-depth investigation. COMCO notifies the undertakings concerned of this decision. The Secretariat publishes the principal terms of the notification of the concentration and states the time frame within which third parties may comment on the notified concentration. COMCO must make a final decision within four months from the opening of the in-depth investigation (unless the proceeding has been delayed by the undertakings concerned).
- The COMCO decision can be:
 - clearance of the concentration;
 - clearance of the concentration subject to conditions or obligations (remedies);
 - prohibition of the concentration.

For an overview of the notification process, see flowchart, *Switzerland: merger notifications*.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The opening of an in-depth investigation (phase II) must be published by law. The Secretariat of the Competition Commission (Secretariat) publishes the principal terms of the notification of the concentration. Furthermore, decisions or rulings are often published in the Competition Commission's (COMCO's) publication series (*Law and Policy on Competition*) and partly on COMCO's website.

Automatic confidentiality

COMCO and the Secretariat are bound by professional secrecy, which is why their publications cannot reveal any confidential information, such as business secrets and personal data. The Secretariat published an explanatory note on 30 March 2008 (*Explanatory Note "Business Secrets"*), which provides guidance on the handling of business secrets. Before publication, the Secretariat will eliminate confidential information, usually by consulting the parties beforehand.

Confidentiality on request

The undertakings concerned can request that certain information is kept confidential. If the Secretariat disagrees, the undertakings concerned may request a formal order, which can be appealed to the Federal Administrative Court.

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

In the preliminary investigation (phase I), third parties have no formal procedural rights and the Competition Commission (COMCO) is not bound by any submissions or answers in response to questionnaires, which may have been sent by the Secretariat of the Competition Commission (Secretariat) (*see Question 4*). If an in-depth investigation is opened (phase II), the Secretariat publishes the principal terms of the concentration and gives third

parties the right to state their position on the proposed concentration within a certain time limit. Third party hearings are usually held in the presence of the undertakings concerned.

Document access

In the preliminary investigation (phase I), third parties have no right to access the file (like the undertakings concerned). If an in-depth investigation is opened (phase II), the notifying parties have a right of access to the file concerning their concentration. Limitations may apply where confidential information, such as business secrets and personal data, and internal documents are concerned.

As a rule, third parties can request access to the files (including the parties' submissions) based on the Federal Act on Freedom of Information in the Administration. However, access to documents based on the Freedom of Information Act is granted only after an investigation has been closed by COMCO. Additionally, limitations apply to confidential information, such as business secrets and personal data. To date, COMCO discloses information to third parties only in a relatively restrained manner, as there is little practice concerning the relation between privacy and freedom of information in Switzerland.

Be heard

As third parties are not parties to the merger control proceedings, they have no right to be heard; however, see above *Representations*.

SUBSTANTIVE TEST

7. What is the substantive test?

The Competition Commission (COMCO) may prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration both:

- Creates or strengthens a dominant position liable to eliminate effective competition.
- Does not improve the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

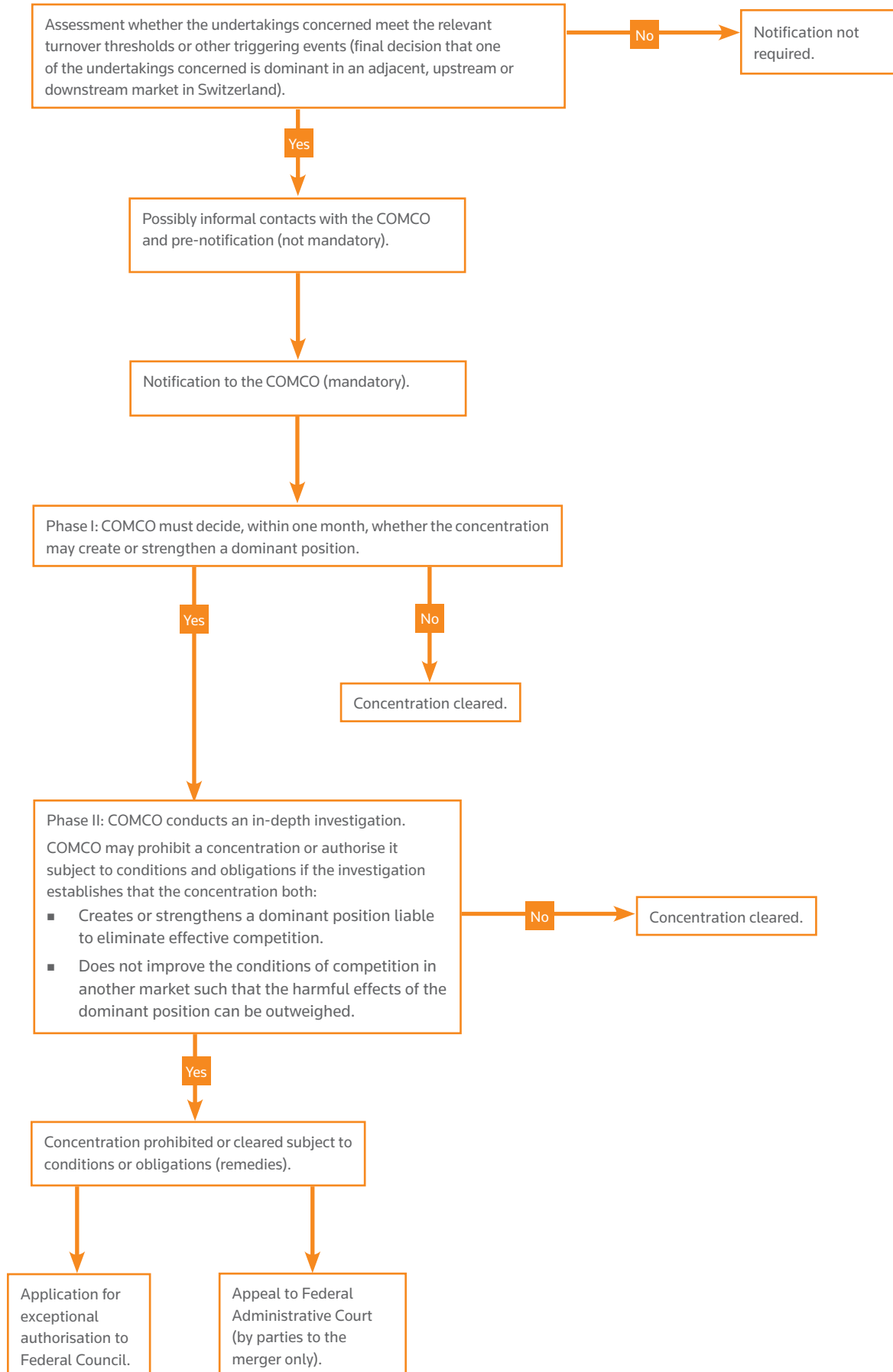
In practice, the key issues in the substantive analysis are:

- The definition of the relevant markets.
- The effect of the concentration on the position of the undertakings concerned in the market.

The analysis of the effect of the concentration can include the following elements:

- Market shares.
- Degree of concentration.
- Actual competition.
- Potential competition including barriers to entry and new market entries.
- Possible countervailing power of the opposite market side.
- Financial strength.
- Access to supply and sales markets.
- Development of offer and demand.
- Substitutive competition.
- Collective dominance (if applicable).
- Improvement of the conditions for competition in another market.

SWITZERLAND: MERGER NOTIFICATIONS



COMCO usually clears transactions if there are no product and geographic markets that are affected by the concentration in which either:

- Two or more of the undertakings concerned jointly hold a market share of 20% or more in Switzerland.
- If one of the undertakings concerned holds a market share of 30% or more in Switzerland.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

In particular, the following arguments can be used to counter any apparent reduction of competition caused by the concentration:

- There was no competition on the relevant market before the concentration. If so, the concentration cannot eliminate effective competition.
- The concentration results in efficiency gains that may positively affect competition and that are passed on to the consumers.
- The concentration improves the conditions of competition in another market such that the harmful effects of the dominant position can be outweighed.

9. Is it possible for the merging parties to raise a failing firm defence?

It is possible to raise a failing company defence. The Competition Commission usually considers the following criteria:

- The allegedly failing undertaking would, in the near future, be forced out of the market if not taken over by another undertaking.
- The market share of the failing undertaking would be absorbed by the acquiring undertaking if the failing undertaking exits the market.
- There is no less anti-competitive alternative concentration than the notified concentration.

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

There are no specific provisions or procedures for offering and assessing remedies. If remedies become a potential issue or solution, close contact is established between the Competition Commission (COMCO), the Secretariat of the Competition Commission (Secretariat) and the undertakings involved to define the scope of any potential remedies. The assessment of remedies has no impact on the timing of the investigation. However, with the parties' consent, for example, for finding possible remedies, the review period may be prolonged.

COMCO has in the past imposed structural remedies (such as divestments) as well as behavioural remedies. Structural remedies must be completed within a defined time period.

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Any undertaking that implements a concentration that should have been notified without filing a notification or fails to comply with a condition attached to the authorisation (remedial undertaking) is fined up to CHF1 million. For repeated failure to comply with a condition attached to the authorisation the undertaking is fined up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who implements a concentration that should have been notified without filing a notification or who violates rulings relating to concentrations of undertakings is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

Implementation before approval or after prohibition

Any undertaking that implements a concentration before approval or after prohibition is fined up to CHF1 million.

Any natural person who implements a concentration before approval or after prohibition is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

Failure to observe

Any undertaking that fails to comply with a condition attached to the authorisation (remedial undertaking), implements a prohibited concentration or fails to implement a measure intended to restore effective competition is fined up to CHF1 million. For repeated failure to comply with a condition attached to the authorisation the undertaking is fined up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned.

Any natural person who violates rulings relating to concentrations of undertakings is liable to a fine of up to CHF20,000. Individuals have not been fined to date.

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal

Decisions of the Competition Commission (COMCO) and Secretariat of the Competition Commission (Secretariat) are subject to appeal by the parties.

Procedure

Appeals must be filed to the Federal Administrative Court within 30 days from the notification of the decision of COMCO or the Secretariat. The Federal Administrative Court basically applies the same provisions as COMCO. Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court, again within 30 days from the notification of the decision.

There are no time limits for the Federal Administrative Court and the Federal Supreme Court to render their decisions on the appeal. The duration of the appeal proceedings can well be more than a year for each court (in certain cases significantly more).

Third party rights of appeal

In merger control proceedings, as opposed to other proceedings before COMCO, third parties have no procedural rights (Article 43(4), *Federal Act on Cartels and Other Restraints of Competition 1995*) and no appeal rights.

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

13. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?

The Competition Commission (COMCO) does not review restrictive provisions in the agreements ex officio, that is, automatically, but only on request by the parties. COMCO normally only reviews ancillary restraints, in particular, non-compete obligations that are directly related and necessary to the concentration. Other agreements that are not covered by the clearance decision are subject to the same rules applicable to any agreement. These agreements can be submitted to the Secretariat of the Competition Commission for a formal or informal ruling (separate proceeding).

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

There are particular rules for the calculation of the thresholds in relation to the following industries:

- For insurance companies, "turnover" is replaced by annual "gross insurance premium income".
- For banks and other financial intermediaries, "turnover" is replaced by "gross income".

Additionally, if a concentration of banks within the meaning of the Banking Act is deemed necessary by the Swiss Financial Market Supervisory Authority (FINMA) for reasons related to creditor protection, the interests of creditors may be given priority. In these cases, FINMA takes the place of the Competition Commission (COMCO) and FINMA invites COMCO to submit an opinion.

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

The Competition Commission has not issued any guidelines on the substantive analysis of a concentration.

JOINT VENTURES

16. How are joint ventures analysed under competition law?

The Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) and the respective regulations do not provide for any specific substantive rules on joint ventures. The same rules as outlined under *Question 7* apply. Joint ventures that are not covered by merger control are still subject to the rules applicable to agreements. For joint ventures covered by merger control, the co-ordinating effects between the parent companies as well as between each parent company and the joint venture are also subject to the rules applicable to agreements. However, with the exception of co-ordinating effects that result from the fact that every parent company has an interest in exercising its control in a way to maximise the profit resulting from its participation in the joint venture as well as the profit resulting from its own activity.

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

A co-operation agreement on competition between Switzerland and the EU was enacted on 1 December 2014. In relation to merger control it covers, in particular, the exchange of information obtained by the competition authorities in the course of merger proceedings, notifications of merger investigations and the co-ordination of merger enforcement activities. Additionally, the Secretariat of the Competition Commission (Secretariat) often asks the undertakings concerned for waivers allowing the Secretariat to contact other competition authorities (for example, national authorities in and outside the EU).

RECENT MERGERS

18. What notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable?

Recent merger cases include the following:

- The Competition Commission (COMCO) has conducted an in-depth investigation (phase II) of the merger between local.ch and search.ch. COMCO concluded that the merger led to a dominant position in the field of address directories. However, COMCO argued that no elimination of effective competition had to be expected and, therefore, the legal conditions for the prohibition were not fulfilled. Swisscom, which owns local.ch, was allowed to purchase search.ch from Tamedia. The two companies (platforms) will be operated by a company in which Swisscom will hold 69% and Tamedia will hold 31%.
- In a recent decision, the Federal Administrative Court interpreted the provision of Article 9(4) of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) narrowly. This provision stipulates that, in addition to the threshold requirements, notification is mandatory if one of the undertakings concerned has in proceedings under the Cartel Act in a final and non-appealable 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 of the market. COMCO had imposed a sanction on The Swatch Group SA under Article 9(4) of the Cartel Act for not having notified the acquisition of two companies active in the field of watchcases. The Federal Administrative Court held that a notification duty could not be assumed because of lacking specificity of the terms adjacent, upstream or downstream and because the notification duty would not correspond to the rationale of Article 9(4) of the Cartel Act, which is to prevent a restriction of competition in highly concentrated markets. The Federal Administrative Court annulled COMCO's decision.
- In a recent decision, COMCO revoked structural measures, which it had imposed on Ringier SA and Tamedia SA (formerly Edipresse) in decisions in 1997 and 2003 in connection with the joint (indirect) holding of, among others, the newspaper Le Temps. The structural measures had the purpose to ensure that, among others, the newspaper Le Temps remained independent from the two (indirect) parent companies Ringier SA and Tamedia SA. In 2014, Ringier SA notified the acquisition of Tamedia SA's holding of 50% in, among others, Le Temps and, at the same time, requested the revocation of the mentioned structural measures. COMCO held that the main purpose of the structural measures was to ensure that Le

Temps remained independent from Tamedia SA because Tamedia SA had a very strong position, in particular, in the market for newspapers in the regions of Geneva and Lausanne. Now that Tamedia SA had sold its holding in Le Temps and that Ringier SA was the 100% owner of Le Temps, which transaction had been cleared by COMCO, there were no longer any reasons why Le Temps would have to be independent from Ringier SA. For that reason, COMCO revoked the structural measures.

PROPOSALS FOR REFORM

19. Are there any proposals for reform concerning merger control?

A proposed revision of the Federal Act on Cartels and Other Restraints of Competition 1995 (Cartel Act) was rejected in Parliament in September 2014. In relation to merger control, the significant impediment to efficient competition test (SIEC test), which is commonly applied in the EU, should have been introduced. This amendment was uncontroversial and was widely accepted. It is still unclear which elements of the revision that was rejected as a package will again be taken up separately in a future revision.

ONLINE RESOURCES

Swiss Competition Commission (COMCO)

W www.weko.admin.ch

Description. This is the official website of COMCO where original language text of the legislation, case law, explanatory notes and forms referred to in this article, press releases, information and contact details of COMCO can be found. The website of COMCO is in the three official languages, that is German, French and Italian. Legislation is available in all three languages; case law is provided only in one of these languages. Unofficial English-language translations can be obtained for part of the legislation and some explanatory notes.

THE REGULATORY AUTHORITY

Swiss Competition Commission (COMCO)

Head. Professor Vincent Martenet (President of COMCO) and Rafael Corazza (Director of the Secretariat)

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Responsibilities. COMCO and the Secretariat have primary responsibility for enforcing the Cartel Act. COMCO is the deciding body, while the Secretariat conducts the investigations and prepares the cases.

Procedure for obtaining documents. Acts, ordinances, notices, explanatory notes, forms as well as decisions and rulings are available on COMCO's website and published in COMCO's publication organ Law and Policy on Competition (*Recht und Politik des Wettbewerbs*). Additionally, requests for documents can be made to the Secretariat.

Practical Law Contributor profiles



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Publications. Publications and speaking engagements, see www.nkf.ch/en/people/birkhaeuser-nicolas.php.