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Merger Control

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Switzerland

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Overview of merger control activity during the last 12 months

Statistics

In 2013, a total of 32 notifications were made to the Swiss Competition Commission (ComCo). A closer look at the ComCo's statistics reveals that no significant changes have occurred compared to previous years, in fact the number of notifications has stayed within more or less the same range: 28 notifications in 2012; 30 notifications in 2011; and 34 notifications in 2010.[1]

All concentrations notified were cleared after the preliminary investigation (phase I), since the ComCo came to the conclusion that none of the concentrations would lead to the creation or the strengthening of a dominant position and therefore did not open an in-depth investigation (phase II). No in-depth investigations took place in 2012 either. However, in both 2011 and 2010, the ComCo investigated one case in depth (see section, 'Procedure' below).

In one case the ComCo approved the implementation of a divestiture commitment that was part of a clearance decision of the ComCo in the year before[2] (see section below, 'Approach to remedies to avoid second stage investigation'). In another case, as part of its administrative sanctions proceedings, the ComCo imposed a fine of CHF 35,000 for the failure to notify a concentration.[3]

Key industry sectors

- infrastructure:
  - telecommunications;
  - media;
  - energy; and
  - other sectors;
- construction;
- services:
  - financial services; and
  - healthcare / pharmaceuticals;
- product markets:
  - consumer goods and retail markets;
  - watch / jewellery industry; and
  - agriculture.

Procedure

The investigation is divided into two phases that are comparable to the procedure under the EU regime:

- *Phase I (preliminary investigation):* phase I starts on the day following the receipt of the complete notification. The ComCo is then required to notify the parties within one month whether it intends to initiate an in-depth investigation. In most cases the ComCo will issue a so-called *comfort letter.* It can also authorise a concentration subject to *conditions and obligations* in the form of a formal decision (see section below, 'Approach to remedies to avoid second stage investigation'). Finally the law states that a concentration is deemed to be cleared if no notice is given within the period of one month.[4] This is a rather theoretical case, because in practice the ComCo always informs the notifying party that there is no reason to open an in-depth investigation.
- *Phase II (in-depth investigation):* The decision to enter phase II is officially published and the subsequent in-depth investigation has to be completed within an additional four months. Phase II may be terminated as follows: (i) unconditional authorisation; (ii) authorisation subject to conditions and obligations; (iii) prohibition; and (iv) withdrawal of notification.[5]

New developments in jurisdictional assessment or procedure

As regards the above-mentioned statistics, no in-depth investigations (phase II) have taken place during the last two years. Consequently, it is not surprising that no significant developments in jurisdictional assessment or procedure regarding merger control can be reported. The most recent developments are outlined in an updated version dated May 3, 2011 of the ComCo's *Merger Control Communication*:[6]

- *Mandatory notification for joint ventures:*
  A joint venture company is subject to merger control if the general jurisdictional thresholds are met and if it exercises all functions of an independent business entity on a permanent basis. Newly formed joint ventures are only subject to merger control if, in addition, some business activities of at least one of the controlling undertakings are included in the joint venture's business. According to Art. 9 CartA, the jurisdictional thresholds consist of the following two tests that must be fulfilled cumulatively for the last business year prior to the concentration:
  (i) the enterprises concerned must have reported an aggregate turnover of at least two billion Swiss francs worldwide or 500 million Swiss francs in Switzerland; and
  (ii) at least two of the enterprises concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.
  In principle, the Cartel Act is applicable whenever a specific conduct or a proposed concentration has effects on the Swiss market (*effects doctrine*).[7] The Swiss Federal Supreme Court has decided that any merger reaching the jurisdictional thresholds is deemed to have effects in Switzerland, irrespective of its actual effects.
  In respect thereof, a joint venture that meets the thresholds mentioned above, only via its parent companies exercising joint control, used to be subject to the notification requirements even if it did not have any further relation to Switzerland. In 2009, however, the ComCo revised its practice:[8] the notification requirements no longer apply if the joint venture itself does not have any activities or turnover in Switzerland (in particular, no deliveries to Switzerland) and if no such activities or turnover are expected or planned in the future. Such transactions are no longer considered to have effects on the Swiss market.
- *Reduction of the intermediate time period in case of interdependent transactions:*
  According to the ComCo's practice, a transaction that is carried out in several steps may be considered as a single economic transaction if the following conditions are met:

(i) joint control during a start-up period;
(ii) transformation of joint control into sole control based on a legally binding agreement; and
(iii) a maximum start-up period of one year, in which the transaction steps must all take place.

The start-up period used to be three years until the ComCo decided in 2011 to reduce the period to one year in order to strive for harmonisation with the European Commission's practice.[9]

- *Geographical allocation of turnover:*
  As already mentioned,[10] the Cartel Act is only applicable if the thresholds set out in Art. 9 (1) CartA are reached. The relevant turnover only consists of the amount that is realised in Switzerland. Yet, it is not required that the undertakings concerned maintain subsidiaries or branches in Switzerland. Since neither the Cartel Act nor the Merger Control Ordinance contain rules on how Swiss turnover shall be allocated, the ComCo applies Art. 5 (1) EC Merger Regulation[11] by analogy.[12] In terms of this practice, the Merger Control Communication outlines that turnover (for the sale of goods and for the provision of services) should usually be allocated to the state in which the customer is located (i.e. the place where the product must be delivered or where competition with alternative suppliers occurs). The invoicing address is not relevant for the allocation. This regulation results from the fact that Switzerland has established itself as a popular centre for commodity trading. Numerous commodity trading companies are domiciled in Switzerland that ship goods between the continents without having any connection to Switzerland other than the invoicing address. Such turnover shall not be allocated to Switzerland unless goods are actually delivered to a customer located in Switzerland.
  The Merger Control Communication further foresees that this rule applies to the supply of goods, and that exceptions for the provision of services may apply.
- *Definition of affected markets:*
  The Merger Control Communication specifies, having regard to the practice of the European Commission, the information requirements for markets affected by concentrations with a market share of at least 30% (as referred to in Art. 11 lit. d MCO). In such a case a market will be deemed to be affected:
  (i) if an undertaking involved is already active in an upstream or downstream product market or in a neighbouring market closely linked to the product market in which the relevant undertaking holds a market share of at least 30%;
  (ii) if an undertaking involved plans to enter the respective product market or if it has pursued this objective in the past two years;
  (iii) if an undertaking involved holds important intellectual property rights in this affected market; or
  (iv) if an undertaking involved is active on the same product market but not on the same geographic market.

Key economic appraisal techniques applied

The substantive test is based on a dominance test supplemented by an additional test on the remaining amount of competition.[13] Pursuant to this, so-called *dominance-plus test* concentrations may only be prohibited:

(i) if the transaction creates or strengthens a dominant position;
(ii) if the dominant position is liable to eliminate effective competition in the relevant market;[14] and

(iii) if the transaction does not strengthen competition in another market, which outweighs the negative effects of the dominant position.

In its assessment of the effects of a concentration, the ComCo considers market dynamics as well as the parties' market position at an international level.[15] According to the current practice, notably the following factors may be taken into account: market shares of the undertakings; structure of the relevant markets; barriers to entry; alternatives to suppliers and buyers; conditions of access to supplies and outlets; and future prospects for supply and demand. Generally, under the current law, the ComCo does not take efficiencies into consideration as a mitigating factor. However, efficiencies may be taken into consideration if they are likely to prevent the elimination of effective competition.[16] Furthermore, the enterprises concerned have the possibility to show an improvement in the competitive situations in *another* market that might offset the disadvantages of a dominant market position.[17]

Not only can the Swiss turnover thresholds be regarded as relatively high compared to international standards (see section above, 'New developments in jurisdictional assessment or procedure') but Swiss law also provides for a substantive test with an unusually high threshold to prohibit concentrations compared to other jurisdictions. Serious doubts as to whether a concentration actually could eliminate effective competition can hardly ever be excluded. Public policy issues are not considered, but if the ComCo refuses clearance for a concentration, the undertakings concerned may seek exceptional approval from the Federal Council for reasons of public interest.[18] In such a case, the Federal Council may take into account both competition-related and non-competition-related issues in assessing a concentration. Up to now, such authorisation has never been granted.

In the context of the partial reform of the Cartel Act (see section below, 'Reform proposals'), the *dominance-plus test* shall be replaced by the so-called *SIEC-test* (substantial impediment of effective competition) that is currently used within the EU merger regime.

Approach to remedies (i) to avoid second stage investigation and (ii) following second stage investigation

Pursuant to Art. 10 (2) CartA, the ComCo may authorise a concentration subject to conditions and obligations. Generally, the ComCo may ask the enterprises concerned to make binding proposals with a view to re-establishing effective competition within a given deadline. The parties can also propose remedies for potential competition issues. There is, however, no right to have a particular remedy considered. If the ComCo does not receive any proposals or rejects them, it may impose the remedies to be implemented by the enterprises in its decisions. The Cartel Act does not specify the types of conditions or obligations and contrary to the EU law,[19] Switzerland does not have a specific remedy regulation. Therefore, remedies are negotiated with the ComCo on a case-by-case basis. Basically, remedies may involve both behavioural and structural undertakings, yet the ComCo generally prefers structural undertakings (i.e. divestitures), but is more liberal in accepting behavioural remedies than the European Commission. The most appropriate moment for the commencement of remedy negotiations has to be determined in each case depending on the specific circumstances, whereby it often may be advisable to start early on, i.e. prior to, upon or shortly after the notification.

According to the statistics (see section above, 'Overview of merger control activity during the last 12 months'), the ComCo did not decide on any conditions or obligations in 2013. Yet, with a decision dated January 28, 2013 the ComCo approved the implementation of a divestiture commitment that was stated in a ComCo decision in 2012. *Swiss Post and France's La Poste* notified the ComCo in June 2012 of their plan to set up a joint venture.

The main object of the joint venture was to provide cross-border physical letter post services for mail up to a weight of two kilograms. The ComCo approved the venture, subject to the condition that the activities of the subsidiaries of La Poste in relation to outgoing letter post for business customers in Switzerland are sold to a third party by way of divestiture. In this manner the concerns that the proposed merger could result in the creation or strengthening of a dominant position in these markets could be alleviated so that an in-depth investigation (phase II) was not required.[20]

Reform proposals

Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws

On May 17, 2013, the Swiss Federal Council and the European Commission signed a bilateral agreement concerning cooperation in the application of their competition laws (*the Agreement*). Before entering into force, the Agreement must be ratified by the Swiss Parliament and the European Parliament.[21] Apart from the Bilateral Agreement on Air Transport,[22] which entitles the European Commission to conduct investigations on Swiss territory on the basis of EU competition law, there are no other agreements that allow formal cooperation with foreign competition authorities. Since Switzerland is neither a member of the EU nor of the EEA, the ComCo is not part of the European Competition Network (ECN). Due to this lack of a statutory basis, the ComCo is not permitted to exchange information that is subject to official secrecy with other jurisdictions. In order to directly liaise with other jurisdictions, in particular with the European Commission, the ComCo may request a so-called *waiver letter* from the investigated companies. The current situation has been exposed to criticism in recent years since globalisation is increasing and many anticompetitive practices have cross-border effects on trade between the EU and Switzerland.[23]

The Agreement regulates cooperation between the Swiss and the European competition authorities. It is a purely procedural agreement and does not provide any substantive harmonisation of competition laws. Thus, both competition authorities retain complete autonomy in the application of their competition laws. The purpose of the Agreement is described as follows (Art. 1): "The purpose of this Agreement is to contribute to the effective enforcement of the competition laws of each Party through cooperation and coordination, including the exchange of information between the competition authorities of the Parties, and to avoid or lessen the possibility of conflicts between the Parties in all matters concerning the application of the competition laws of each Party".

The Agreement establishes a framework for general information duties to facilitate coordination and cooperation of transnational procedures. The competition authorities shall notify each other of their enforcement activities if such activities could significantly affect important interests of the other party (*negative comity*). Furthermore, the other competition authority may be asked to initiate or expand enforcement activities (*positive comity*). The main part of the Agreement is the exchange of case-specific information between the ComCo and the European Commission, especially provisions regarding the discussion, transmission and use of information, and provisions on the protection of the information discussed or transmitted. Finally, the Agreement allows the disclosure of information transmitted under certain limited circumstances.[24]

Partial revision of the Cartel Act

On February 22, 2012, the Swiss Federal Council submitted a draft bill for a partial reform of the Cartel Act to the Federal Parliament, where it is currently still pending.[25] The proposed legislation contains, *inter alia*, amendments of the merger control regime. First and foremost, the revision targets a harmonisation of the Swiss merger control system with EU merger control, and the implementation of a modern substantive test with regard to the prohibition of concentrations. Thus, the proposed reform comprises the implementation of the SIEC-test (substantial impediment of effective competition) as it is presently used under the EU merger regime. As already mentioned,[26] the Swiss merger control regime presently comprises a dominance-plus test that has been exposed to criticism in recent years for not adequately taking negative and positive effects into account. The introduction of the SIEC-test shall ensure a broader and more comprehensive assessment of problematic mergers rather than limiting the focus on cases of dominance. According to the Federal Council, the new test shall therefore provide for an adequate assessment of all effects and efficiencies brought about by the concentration that may counteract the adverse effects on competition.

Further, the revision aims at facilitating cross-border proceedings by either eliminating duplicate proceedings or by providing more flexible review periods (request for extension of time limit) in order to improve the coordination of parallel proceedings.[27]

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Endnotes

1. The Annual Reports are available on the ComCo's website: http://www.weko.admin.ch/dokumentation/00157/.
2. RPW 2013|1, p. 105 Dispositiv, *Schweizerische Post|La Poste*; RPW 2012|4, p. 880 Dispositiv, *Schweizerische Post|La Poste*.
3. RPW 2013|2, p. 234 Dispositiv, *ProVAG Versicherungen AG|PROVITA Gesundheitsversicherung AG.*
4. Art. 10 (1) Federal Act on Cartels and other Restraints of Competition of 6 October 1995, SR 251 (Cartel Act, CartA); Art. 32 (1) CartA; Art. 14 Ordinance on the Control of Concentrations of Undertakings of 17 June 1996, SR 251.4 (Merger Control Ordinance, MCO); and and Art. 20 MCO.
5. Art. 10 (2) CartA; and Art. 33 (1|3) CartA.
6. Neue Praxis bei Zusammenschlussverfahren: http://www.weko.admin.ch/dokumentation/01007/index.html?lang=de.
7. Art. 2 (2) CartA.
8. RPW 2010|3, p. 562 N 6, *Ringier AG|Springer AG*.
9. See the Commission's Consolidated Jurisdictional Notice under Council Regulation (EC) N° 139|2004 on the control of concentrations between undertakings, N 34.
10. See section, 'New developments in jurisdictional assessment or procedure'.
11. Council Regulation (EC) No 139|2004 of 20 January 2004 on the control of concentrations between undertakings.
12. RPW 2007|4, p. 631 N 12, *Dnata|Jet Aviation Handling AG.*
13. Art. 10 (2) CartA.
14. According to the Swiss Federal Supreme Court, the *elimination of competition* has to be satisfied as a separate element.

15. Art. 10 (4) CartA.
16. RPW 2010|3 p. 559 N 409, *France Télécom SA|Sunrise Communications AG.*
17. Art. 10 (2) lit. b CartA.
18. Art. 36 CartA.
19. COMMISSION NOTICE on remedies acceptable under Council Regulation (EC) No 139|2004 and under Commission Regulation (EC) No 802|2004.
20. RPW 2013|1, p. 105 Dispositiv, *Schweizerische Post|La Poste*; RPW 2012|4, p. 880 Dispositiv, *Schweizerische Post|La Poste.*
21. http://europa.eu/rapid/press-release_IP-13-444_de.htm.
22. SR 0.748.127.192.68.
23. Ducrey Patrik, the Agreement between Switzerland and the EU Concerning Cooperation in the Application of their Competitions Laws, in: *Journal of European Competition Law & Practice* (2013) 4 (5); 437-444.
24. EUROPEAN COMMISSION, Proposal for a COUNCIL DECISION on the conclusion of an Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws: http://ec.europa.eu/competition/international/bilateral/agreement_eu_ch_en.pdf.
25. http://www.seco.admin.ch/themen/02860/04210/.
26. See section, 'Key economic appraisal techniques applied'.
27. Dispatch of the Federal Council of 22 February 2012, p. 3929 f.: http://www.news.admin.ch/NSBSubscriber/message/attachments/25965.pdf.

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