



Merger Control

2020

Ninth Edition

Editor:
Nigel Parr

CONTENTS

Preface	Nigel Parr, <i>Ashurst LLP</i>	
General chapter	<i>COVID-19: Avoiding the failure of the failing firm defence</i> John Bruce & Mat Hughes, <i>AlixPartners UK LLP</i>	1
Country chapters		
Austria	Dr. Lukas Flener, <i>Fellner Wratzfeld & Partner Rechtsanwälte GmbH</i>	17
Belgium	Hendrik Viaene, David Wouters & Karolien Van der Putten, <i>Deloitte Legal – Lawyers</i>	27
Brazil	Leonardo Rocha e Silva, José Rubens Battazza Iasbech & Fernanda Ribeiro Vasconcelos Merlo, <i>Pinheiro Neto Advogados</i>	35
Canada	Micah Wood, Kevin H. MacDonald & Chris Dickinson, <i>Blake, Cassels & Graydon LLP</i>	44
China	Zhan Hao & Song Ying, <i>AnJie Law Firm</i>	57
Denmark	Olaf Koktvedgaard, Søren Zinck & Frederik André Bork, <i>Bruun & Hjejle Advokatpartnerselskab</i>	66
France	Bastien Thomas & François Aubin, <i>Racine</i>	73
Germany	Dr. Christian Bürger & Miroslav Georgiev, <i>GÖRG Partnerschaft von Rechtsanwälten mbB</i>	87
Greece	Efthymios Bourtzalas, <i>MSB Associates</i>	99
Israel	Dr. David E. Tadmor & Shai Bakal, <i>Tadmor Levy & Co.</i>	109
Japan	Tomoya Fujita & Hiromu Suemasa, <i>Mori Hamada & Matsumoto</i>	119
Korea	Joohyoung Jang, Jisu Kim & Jihyun Youn, <i>Barun Law LLC</i>	128
Malaysia	Janet Looi Lai Heng & Tan Shi Wen, <i>Skrine</i>	137
Netherlands	Joost Houdijk & Robbert Jaspers, <i>AKD Benelux Lawyers</i>	148
Russia	Anastasia Kayukova & Olga Gorokhova, <i>ALRUD Law Firm</i>	153
Singapore	Daren Shiau, Elsa Chen & Scott Clements, <i>Allen & Gledhill LLP</i>	162
Slovakia	Andrej Schwarz, <i>SCHWARZ advokáti s.r.o.</i>	174
South Africa	Marianne Wagener & Julia Sham, <i>Norton Rose Fulbright</i>	180
Switzerland	Michael Tschudin, Frank Scherrer & Urs Weber-Stecher, <i>Wenger & Veli Ltd.</i>	195
Turkey	Gönenç Gürkaynak & Öznur İnanlıır, <i>ELIG Gürkaynak Attorneys-at-Law</i>	202
United Kingdom	Ruchit Patel, Lisa Kaltenbrunner & Charlotte Brunson, <i>Ropes & Gray LLP</i>	209
USA	Kara Kuritz, Matthew S. Wheatley & Brian N. Desmarais, <i>Goodwin Procter LLP</i>	222

Switzerland

Michael Tschudin, Frank Scherrer & Urs Weber-Stecher
Wenger & Vieli Ltd.

Key features of the Swiss merger control regime

The Swiss merger control regime is distinct from other regimes in mainly three aspects: 1) high thresholds regarding the filing obligation, which leads to a relatively small number of merger control cases; 2) high thresholds for the intervention of the Competition Commission (“ComCo”), which is the reason for only a few prohibited mergers to date; and 3) the relationship with the EU merger control regime.

Thresholds for filings

Article 9 Cartel Act (“CartA”) provides for the mandatory notification of a merger or, more broadly speaking, a concentration, if certain thresholds are met. There are two alternative sets of thresholds:

- a. Turnover thresholds: an aggregate turnover of all undertakings concerned of at least 2 billion Swiss francs worldwide or an aggregate turnover in Switzerland of at least 500 million Swiss francs; and additionally, individual turnover in Switzerland of each of at least two of the undertakings concerned, of at least 100 million Swiss francs.
- b. Dominance threshold: if, in a previous investigation, the ComCo found that a specific undertaking holds a dominant position in a certain market, every concentration involving that undertaking in that market, or in a neighbouring, upstream or downstream market, is subject to the notification requirement. The Federal Administrative Court specified, in a decision in April 2014, that a neighbouring market includes: (i) markets concerning products that are to some extent substitutes; or (ii) markets concerning products with parallel demand.

Substantive test

The substantive merger test which allows ComCo to fully prohibit a transaction or to approve a transaction on certain conditions is rather limited. The merger review is based on a dominance test. ComCo may prohibit a transaction if:

- a. the transaction creates or strengthens a dominant position, which could eliminate effective competition; and
- b. the transaction does not strengthen competition in another market, which outweighs the negative effects of the dominant position.

This limited test is interpreted by the courts in a narrow way. For example, the Federal Court found that ComCo has to demonstrate a causal link between a notified transaction and the elimination of effective competition. That is, in a situation of pre-existing dominance (which already eliminated effective competition), the merger control regime does not provide for the possibility of intervention. This limited test is subject to a current revision project which aims at introducing the “significant impediment to effective competition” test (“SIEC test”) (see the section below on “*Reform proposals*”).

Two prohibition decisions of ComCo are worth mentioning. In 2010, ComCo prohibited the planned concentration between Orange and Sunrise, which would have reduced the number of competitors from three to two on the mobile communication market. According to ComCo, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telephony market. The parties' argument, that the merger was needed to challenge the dominant position of Swisscom (the former monopoly in the market, whereas the Swiss Federal State still is the majority shareholder), did not convince ComCo. In a ruling dated 22 May 2017, ComCo refused to clear the planned merger between Ticketcorner and Starticket. These companies sell tickets for the promoters of concerts, shows, etc. Their services include the physical and online sale of tickets (primary ticketing) and the marketing of events (such as advertising in the media and a presence on social networks). In addition, Ticketcorner and Starticket provide promoters with software that allows them to sell tickets themselves (direct sales). The detailed review carried out by ComCo revealed that although the market for direct sales did not present any problems, in the market for primary ticketing there was evidence that Ticketcorner already had a dominant position. The merger would have allowed the two companies to control the Swiss market for primary ticketing and to eliminate effective competition. Ticketcorner has appealed ComCo's decision. The appeal is still pending.

Relationship with EU regime

The Swiss Competition Authorities may communicate with the EU authorities based on the agreement between Switzerland and the EU on cooperation and exchange of information between their respective competition authorities. This agreement allows them to mutually exchange specific case-related confidential information. The scope of this information exchange agreement is broader than in previous EU cooperation agreements with non-EU Member States and is therefore called a "Second Generation Agreement" in the EU. The crucial point in this new generation of agreements is that confidential information can be transmitted without the parties' consent, subject to exceptions. ComCo frequently makes use of the opportunity to informally exchange information on specific cases, such as merger control cases.

This information exchange enables the authorities to make a faster evaluation of the concentration as well as to coordinate with the proceedings of the EU. Generally, a simplified notification procedure may be discussed with the authorities if the EU filing form is attached to the Swiss filing form. ComCo is committed to avoiding inconsistencies in relation to EU merger proceedings, which are conducted in parallel. Where the EU decision imposes remedies, ComCo tends to request that such remedies are also applied to the Swiss market.

Overview of merger control activity during the last 12 months

Statistics

The number of mergers notified to ComCo increased in the past year to a total of 40 (total amount of filings in 2018: 34). Thirty-seven merger projects were cleared in Phase I (one-month review after confirmation of completeness of the draft filing) and three transactions were cleared in Phase II (after an additional four-month review subsequent to Phase I). ComCo did not prohibit any merger projects, nor were any conditions requested in a clearing decision in the year under review.

The number of notifications in the year under review is above the long-term average of around 30 notifications.

Phase II investigations

In 2019, ComCo examined the planned merger between Sunrise and Liberty Global in detail. With the takeover of UPC and its cable network infrastructure, Sunrise would have become the second-largest telecommunications company in Switzerland. Like Swisscom (market leader), Sunrise would have been able to offer fixed network, broadband internet and mobile telephony services, and digital television on its own infrastructure in Switzerland. ComCo examined the planned merger in detail to determine whether there was potential for joint market dominance with Swisscom. It concluded that there would not be any collective dominance and that coordination between the two companies was unlikely, because the parties to the mergers and Swisscom are differently positioned. ComCo took the view that the merger would not lead to the creation or consolidation of a dominant position in any of the markets analysed. It therefore approved the planned merger in September 2019.

This merger is noteworthy in particular for two reasons: firstly, as stated above, in 2010 ComCo prohibited the planned concentration between Orange and Sunrise, which would have reduced the number of competitors from three to two on the mobile communication market. According to ComCo, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telephony market. Since UPC is mainly active on its cable network and not in the mobile communication market, the current merger project arguably would not have resulted in a three-to-two merger. The companies were able to convince ComCo that the merger was needed to challenge the strong position of the market leader, Swisscom. Secondly, ComCo did not require conditions. This may be seen against the background that remedies against the merged undertaking would have most probably weakened the merged undertaking in its competition with Swisscom. Since Swisscom was not party to the merger, remedies against the collective dominance could obviously not be imposed on Swisscom. The planned transaction was not completed, because Sunrise's shareholders did not approve the deal.

The second Phase II merger control proceedings in 2019 concerned the infrastructure project Gateway Basel North ("GBN"), between the parties SBB (state-owned railway company), Hupac and Rethmann (both logistics companies). With GBN, the parties intend to create a hub for import and export movements and the trans-Alpine transit traffic of goods. When finally completed, the GBN should provide both landside (road and track) and ship-loaded goods-handling services. ComCo examined the infrastructure project in detail and decided not to raise any objections. Although the project may remove effective competition in several markets, the GBN will, according to ComCo, also result in substantial cost and time savings in combined transport. The substantive test in Switzerland provides that a strengthening of competition in another market may be taken into account. ComCo has to weigh the negative and the positive effects, whereas the authority has a certain degree of discretion. Since competitors are not allowed to appeal against a merger decision, the clearance decision is final. However, a supervisory complaint against ComCo in this matter is pending, although such complaints rarely have an impact. Although or rather because this was the first case which considered efficiency arguments in detail, ComCo did not clarify the legal provisions by specifying how efficiency arguments will be considered in general. Remarkably, ComCo failed to quantify the efficiency arguments. Consequently, the weighing of the negative and positive effects of the merger was based on plausibility considerations instead of economic evidence.

Finally, ComCo cleared a participation of Planzer and Campion-Transport (both logistics providers) with SBB Cargo (the branch of the state-owned railway company providing

transportation services for goods). The full decision has not been published to date. The media release of ComCo mentions that the merger leads to a dominant position in relation to handling services in combined transport in a local area (north-east Switzerland). However, ComCo stated that this dominant position would not lead to elimination of effective competition. This is surprising, since merger control has a future-oriented focus. It is not evident that a negative effect of the dominant position may be ruled out *ex ante*. It is conceivable that ComCo wanted to avoid any discussion of efficiencies, which were criticised in the case outlined above regarding Gateway Basel North. This could be the reason that the merger was cleared on the basis that the elimination of effective competition was not probable.

New developments in jurisdictional assessment or procedure

Joint ventures

Corporate joint ventures are subject to merger control if the joint venture performs all the functions of an autonomous economic entity on a lasting basis. If two or more undertakings establish an undertaking that they intend to control jointly, this constitutes a concentration of undertakings if the joint venture performs the aforementioned functions and if business activities from at least one of the controlling undertakings are transferred to the joint venture.

According to an update of the merger guidelines regarding merger notifications dated October 2019, in the case of a joint venture purchasing the target company, generally, only the joint venture (not its holding companies) is considered as involved companies. Therefore, the turnover of the holding companies is irrelevant in relation to the notification thresholds. However, the holding companies of a joint venture purchasing a target have to be taken into account if: (i) the joint venture is established specifically for the acquisition of the target company or has not yet commenced its business activities; (ii) the existing joint venture is not a full-function joint venture; (iii) the joint venture is an association of undertakings; or (iv) the parent companies are the actual actors in the operation.

The Secretariat of ComCo has decided in a case that a merger is exempted from notification even if the parties involved meet the turnover thresholds if the following two conditions are both met: firstly, the joint venture neither has activities in Switzerland nor generates any revenue in Switzerland; and secondly, such activities or revenues in Switzerland are neither planned nor expected in the future.

Key industry sectors reviewed

ComCo has no specific focus in relation to its enforcement policy in merger cases.

In relation to mergers in the digital economy, there have been no changes to law, process or guidance. However, in the annual report of ComCo 2016, it was stated that the turnover-based thresholds in merger control could lead to a situation wherein mergers are not controlled, even though in relation to customer data, a dominant position exists. Following this statement of ComCo, the Swiss Government explained, in the report on the legal framework of the digital economy in 2017, that it may be necessary and useful to adapt the merger notification criteria so that the authorities can examine mergers or acquisitions of young internet platforms that could possibly impact competition. The introduction of a SIEC test when examining mergers could also help to consider the improved efficiency of merged platforms according to the Government (see section below on “*Reform proposals*”).

While various legal tests and reform proposals are discussed in legal commentaries on the digital economy, the Swiss Government is generally reluctant to take the lead in relation to

new legal concepts. Generally, the approach is to leave it up to the authorities and courts to concretise the existing legal provisions in view of new technological developments.

Key economic appraisal techniques applied

In its assessment of the effects of a concentration, ComCo generally relies on well-established concepts. However, economic appraisal techniques are not always used in a detailed way. For example, when reviewing coordinated effects, ComCo relies on the following factors: number of companies involved; market shares of the companies involved; market concentration; symmetries; market growth; market transparency; multimarket relations; market position of the demand side; and potential competition. Of particular interest are often symmetries between the merging undertakings, i.e. characteristics of the companies, which ultimately lead to extensive symmetry with regard to the market appearance and the available market parameters concerning the offered products and services. For example: technology; number of products in the product portfolio; market shares; capacities; or costs are considered. However, these factors are generally not reviewed and balanced in a systematic economic framework, but rather in a legal assessment based on various factual assumptions.

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

Parties may propose remedies for potential competition issues at any stage of the merger control proceedings. The most appropriate moment for the commencement of remedy negotiations should be assessed in each case depending on the specific circumstances at hand. Should parties want to discuss remedies in Phase I, corresponding proposals should be included in the draft filing, because otherwise the risk is that ComCo would enter into a Phase II investigation to gain more time to assess the likely effects of such remedies. Then again, by including remedies in the draft filing, ComCo most likely would ask for further information in relation to the effects of remedies proposed, before confirming the completeness of the draft filing. Therefore, starting negotiations in a Phase I investigation involves the risk that the Phase I investigation will be delayed, while the opening of a Phase II investigation may not be avoided for certain. Consequently, to date, proposals for remedies have only rarely been offered by the parties in a Phase I investigation.

Another reason why parties generally wait until Phase II for introducing proposals for remedies is that the report of the ComCo outlining the reasons for the opening of a Phase II investigation may be specifically addressed by the proposed remedies. ComCo sends its Phase I report within the one-month deadline of Phase I to the parties involved. Issues which are not raised in the report do not need to be addressed by remedies. Moreover, the parties may invest more time and energy in the reasoning for the remedies addressing the specific arguments outlined by ComCo in its Phase I report.

Key policy developments

According to the Cartel Act, ComCo is obliged to refrain from considering public policy arguments. Corresponding arguments may be heard by the Government which may clear a proposed merger after a prohibition decision by ComCo, should public interest be considered more important than the negative effects on competition. ComCo's understanding of its role is focused on the economic effects of a merger. Non-industrial economic reasons, such as the protection of jobs or the easing of the negative effects of structural changes, are therefore not taken into account.

An exception to this rule might be the merger case regarding the infrastructure project Gateway Basel North (see the section above on “*Overview of merger control activity during the last 12 months*”). In this case, it seems that public policy consideration might have influenced the clearance decision, because ComCo apparently was not intending on preventing a large infrastructure project of national significance of the state-owned railway company SBB.

Reform proposals

After the Swiss Parliament rejected the revision project of the CartA in 2014, which proposed significant changes strengthening merger control, ComCo repeatedly stated that mergers were only cleared because of the currently high thresholds. It appears that ComCo would prefer to intervene more rigorously; however, it is not willing to do so without a revision of the CartA.

In February 2020, the Government mandated the competent governmental department to draft a legislative project regarding the revision of the CartA, where the modernisation of merger control will be a key element. The Government stated that it intends on changing the substantive test from the current dominance test to the SIEC test. This revision aims at aligning the Swiss intervention threshold with the international standard in merger control. The current revision project is based on two studies conducted by economists which show that positive effects on competition in Switzerland are to be expected from such a change.

It is expected that the Department will be working on the draft revision project until the fourth quarter of 2020. At this time all interested parties will be able to comment on the revision project before Parliament deliberates on the matter.

**Michael Tschudin****Tel: +41 58 958 53 36 / Email: m.tschudin@wengervieli.ch**

Michael Tschudin is specialised in Swiss and European competition law, regulated markets and competition law litigation. He heads the ICT/IP/Competition Law practice group at Wenger & Vieli Ltd. Michael Tschudin assists Swiss and international companies in all questions of competition law. He represents companies in various industries before authorities and courts and advises clients on distribution systems, licences, joint ventures and other forms of cooperation, as well as merger control. Having worked at the Competition Commission (2005–2006) and the court of appeal for competition law cases, the Swiss Federal Administrative Court (2013–2014), he is able to draw on his practical experience when advising clients. Since completing his Ph.D. in competition law, he has regularly published articles on related issues. He focuses particularly on economic principles and in 2014, he obtained a postgraduate diploma in “Economics for Competition Law” from King’s College London. Michael Tschudin is ranked by *The Legal 500* as a “Next Generation Partner” and by *Who’s Who Legal Competition* as a future leader in 2019.

**Frank Scherrer****Tel: +41 58 958 58 58 / Email: f.scherrer@wengervieli.ch**

Frank Scherrer is specialised in pharmaceutical and healthcare law and competition law. He has many years of experience in advising clients on competition matters and representing them in proceedings before ComCo and the courts. He has written several publications in competition law, including his thesis on the Swiss and European merger control procedure.

**Urs Weber-Stecher****Tel: +41 58 958 58 58 / Email: u.weber@wengervieli.ch**

Urs Weber-Stecher is specialised in international dispute resolution (mainly arbitration) and competition law. He has long-standing experience in advising companies on competition law matters, representing them in proceedings before ComCo and state courts, and handling competition law disputes in arbitral proceedings (as counsel or as an arbitrator).

Wenger & Vieli Ltd.

Dufourstrasse 56, PO Box, 8034 Zurich, Switzerland

Tel: +41 58 958 58 58 / URL: www.wengervieli.ch

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

- **AI, Machine Learning & Big Data**
- **Banking Regulation**
- **Blockchain & Cryptocurrency Regulation**
- **Bribery & Corruption**
- **Cartels**
- **Corporate Tax**
- **Employment & Labour Law**
- **Energy**
- **Fintech**
- **Fund Finance**
- **Initial Public Offerings**
- **International Arbitration**
- **Litigation & Dispute Resolution**
- **Mergers & Acquisitions**
- **Pricing & Reimbursement**



Strategic partner