Merger Control 2024

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Key features of the Swiss merger control regime

The Swiss merger control regime is predominantly distinct from others in three key aspects: (1) high thresholds regarding filing obligations, 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 why only a few mergers have been prohibited to date; and (3) its relationship with the EU merger control regime.

Thresholds for filings

Art. 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 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 each of at least two of the undertakings concerned, of a minimum of 100 million Swiss francs.

b. Dominance threshold: if, in a previous investigation, 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 that 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 that:

a. creates or strengthens a dominant position, which could eliminate effective competition; and

b. 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 Supreme Court found that ComCo must demonstrate a causal link between a notified transaction and the elimination of effective competition. This means that in a situation of pre-existing dominance (in which effective competition has already been eliminated), the merger control regime does not provide for the possibility of intervention. This limited test is subject to a current revision project that aims to introduce the "significant impediment to effective competition" ("SIEC") test (see the section below on "Reform proposals").

Three of ComCo's prohibition decisions 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 telecommunications market. According to ComCo, the merger between Orange and Sunrise would have created a collectively dominant position with Swisscom in the mobile telecommunications market. The parties' argument, that the merger was needed to challenge the dominant position of Swisscom (the former monopolist in the market, whereas the Swiss Federal State is still 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, there was evidence in the market for primary ticketing 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. In its decision of 12 December 2023, the Federal Administrative Court did not uphold Ticketcorner's appeal on the grounds that there was no current and practical interest in legal protection. The former owner of Starticket withdrew from the transaction agreement in 2020 and Starticket was sold to See Tickets in 2020.

In 2024, ComCo prohibited the planned merger between Swiss Post and Quickmail Holding AG as the merger would have resulted in the elimination of competition in a specific market and would have created a *de facto* monopoly of Swiss Post (see the section below on "Important Phase II investigation").

Relationship with the 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.

On 1 November 2022, Switzerland and Germany signed an agreement on cooperation and coordination of the competition authorities. This agreement entered into force on 1 September 2023. The agreement aims to ensure efficient cross-border enforcement of competition law, to facilitate the service of official notices and orders, and allows the parties to exchange confidential information subject to strict conditions for the protection of business secrets and personal data.

Overview of recent merger control activity

Statistics

In the past year, 33 merger projects were notified to ComCo (total amount of filings in 2022: 49). Of these, 32 mergers were cleared in Phase I (one-month review after confirmation of completion of the draft filing) and one merger was notified in 2023 and prohibited in Phase II (four-month review after service of the decision by ComCo to open an investigation in accordance with art. 10 CartA (Phase II)) in January 2024.

Important Phase II investigation

In January 2024, ComCo prohibited the planned merger between Swiss Post (the national postal service of Switzerland) and Quickmail Holding AG, a private Swiss service provider responsible for delivering letters, unaddressed items and parcels throughout Switzerland, in a Phase II investigation. Swiss Post and Quickmail Holding AG claimed that the potential merger was a necessary turnaround measure for Quickmail Holding AG and referred to the Failing Company Defence. According to ComCo's practice, the Failing Company Defence only applies if (i) one or more of the merging firms would disappear from the market within a short period of time without the merger, (ii) the other merging firm would absorb most or all of the market share of the disappearing firm, and (iii) there is no less restrictive solution than the proposed merger. ComCo found that a potential merger of Swiss Post and Quickmail Holding AG would result in the elimination of competition in the Swiss market for national addressed mail items weighing over 50 grams for business customers. Additionally, the merger would significantly strengthen Swiss Post's market position for the delivery of magazines and newspapers, creating a *de facto* monopoly. Consequently, this monopoly would have a negative impact on competition, to the disadvantage of consumers and business customers. Based on the Failing Company Defence, ComCo may only authorise a potentially restrictive takeover if the negative effects on competition would still occur even without the takeover. Due to an alternative potential buyer for Quickmail Holding AG, which may enable it to continue to exist independently on the market and which may be a more competition-friendly option, ComCo concluded that the requirements of the Failing Company Defence were not met and prohibited the merger. This decision is interesting, since in the end the potential buyer taken into account by ComCo did not purchase Quickmail Holding AG, but another logistics provider, which was not interested before and during the filing procedure.

New developments in jurisdictional assessment or procedure

Mergers involving banks

In March 2023, the Federal Council approved a package of measures to ensure the successful implementation of the acquisition of Credit Suisse by UBS. The Swiss Financial Market Supervisory Authority ("FINMA") was responsible for approving the merger on the basis of art. 10 para. 3 CartA. Art. 10 para. 3 CartA provides for a special regime for mergers in the banking sector. If a concentration of banks within the meaning of the Banking Act is deemed necessary by FINMA for reasons related to creditor protection, the interests of creditors may be given priority. In these cases, FINMA takes the place of ComCo, which shall invite ComCo to submit an opinion. FINMA made use of this option in the context of the takeover of Credit Suisse by UBS and authorised the concentration. To date, there have been only a few applications of art. 10 para. 3 CartA, an earlier example being the takeover of Bank Wegelin by Raiffeisen Switzerland in 2012. ComCo's opinion of this case has not been published to date.

Undertakings concerned in a merger

In April 2023, ComCo was notified of a merger, whereby SA. Europe B.V. ("Shop Apotheke") and Galenica AG ("Galenica") aimed to create a jointly controlled full-function joint venture MediService AG ("MediService") by Shop Apotheke acquiring shares in MediService, which until this point was solely controlled by Galenica. The obligation to notify the proposed merger pursuant to art. 9 CartA depended on whether MediService also qualified as an undertaking concerned within the meaning of art. 9 CartA.

The parties involved argued that the turnovers are attributable to the undertakings that control the respective companies. As a result, MediService would only be considered an independent company after the merger, and MediService's turnover before the merger is attributable to Galenica.

ComCo stated that according to its previous practice, both the companies acquiring joint control and the pre-existing company that will be jointly controlled in the future are concerned undertakings within the meaning of art. 9 CartA. This practice is also in line with the information sheet of ComCo on the notification of a merger.

Further, ComCo clarified whether this practice was in line with the practice of the EU Commission. According to point 139 of the Consolidated Jurisdictional Notice on the control of concentrations between undertakings ("Consolidated Jurisdictional Notice"), undertakings concerned are in cases of acquisition of joint control of a newly created undertaking, each of the companies acquiring control of the newly set-up joint venture (which, as it does not yet exist, cannot be considered to be an undertaking concerned and moreover, as yet, has no turnover of its own). The same rule applies where one undertaking contributes a pre-existing subsidiary or a business (over which it previously exercised sole control) to a newly created joint venture. However, the situation is different if undertakings newly acquire joint control of a pre-existing undertaking or business. In this case, the pre-existing acquired undertaking or business is also an undertaking concerned (point 140 of the Consolidated Jurisdictional Notice). ComCo stated, that in previous consultations it took the view that point 140 refers to cases involving the acquisition of joint control over an existing company, whereas point 139 refers to cases involving the formation of a new joint venture. ComCo stated that these conclusions were in line with the EU Commission's practice. However, ComCo left open whether this practice of the EU Commission had been relativised due to the more recent case law of the European Court of Justice. In Switzerland, art. 3 para. 1 let. b of the Ordinance on the Control of Concentrations of Undertakings

(Merger Control Ordinance, "MCO") does not differentiate between companies of a third party and those that are already controlled by another undertaking concerned. According to art. 3 para. 1 let. b MCO, the undertakings concerned within the meaning of art. 9 CartA are in an acquisition of the controlling and controlled undertakings. Consequently, ComCo concluded that the target company is an undertaking concerned within the meaning of art. 9 CartA, even if it is part of or controlled by another undertaking concerned.

Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.

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 ComCo's 2016 annual report, 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, the Swiss Government explained, in the 2017 report on the legal framework of the digital economy, 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, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers

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. Often symmetries between the merging undertakings are of particular interest, 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 case by 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; otherwise, the risk is that ComCo may 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 would most likely 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 may 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 ComCo's report 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 that 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 CartA, ComCo is obliged to refrain from considering public policy arguments. Corresponding arguments may be heard by the Swiss 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 may be the merger case regarding the infrastructure project Gateway Basel North, decided in 2019. In this case, it seems that public policy consideration might have influenced the clearance decision, because ComCo apparently was not intending to prevent a large infrastructure project of national significance of the state-owned railway company SBB.

Reform proposals

CartA

A proposal of a partial revision of the CartA regarding the modernisation of merger control has been drafted by the Swiss Government. This proposal comprises several essentially undisputed elements of the last reform attempt, which failed in 2014. In addition, the proposal addresses several parliamentarian motions filed after the failure of the last revision project. The corresponding public consultation process took place from November 2021 to 11 March 2022.

On 1 March 2023, the Swiss Government published its report on the public consultation process. The vast majority of the participants in the consultation are in favour of the proposed modernisation of merger control. One of the reasons mentioned is that the SIEC test is more suitable for assessing mergers in the digital economy, and that it is aligned

with the EU law. As a downside, it is expressed that the introduction of the SIEC test leads to additional workloads for authorities and undertakings.

On 24 May 2023, the Federal Council handed its proposal on the partial revision of the CartA over to Parliament.

An important part of the planned revision will be the introduction of the SIEC test as the relevant standard for merger control proceedings. This revision aims to align the Swiss intervention threshold with the international standard in merger control. The current revision project is based on two studies conducted by economists showing that positive effects on competition in Switzerland are to be expected from such a change. ComCo welcomed the new possibility to exclude mergers with at least EEA-wide markets from the obligation to notify ComCo, as well as the extension of deadlines for international mergers in order to harmonise them with the deadlines of the European competition authorities, as this will reduce the administrative burden for companies and the authorities in the relevant case.

The Swiss regime in relation to foreign direct investment is rather liberal. Certain relations apply across sectors, such as restrictions on foreign persons purchasing real estate in Switzerland, whereas certain regulations concern specific sectors, such as the financial and telecommunications sectors. However, no foreign direct investment review process has been established to date. In 2020, Parliament instructed the Swiss Government to draft a proposal for such legislation. On 18 May 2022, the Federal Council published the preliminary draft of an independent Federal Act on Foreign Investment and opened the consultation. The consultation period lasted until September 2022. On 15 December 2023, the Federal Council presented its proposal of the Investment Screening Act, which contains significant changes to the preliminary draft. The new legislation aims to prevent threats to public order and security posed by foreign investors acquiring Swiss companies. The scope is limited to takeovers of Swiss companies operating in a particularly critical sector by foreign state-controlled investors. The particularly critical sectors include defence equipment and goods for civil and military use, power grids and production, water supply and health, telecommunications and transport infrastructures. It is no longer envisaged that a significant distortion of competition with an effect on the public order or safety will be part of the assessment. However, if in individual cases such a distortion of competition is found to be a risk, this could still be taken into account when granting approval, as the draft bill contains a non-exhaustive list of approval criteria.

Competition authority reform

On 15 March 2024, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research ("EAER") to submit a consultation draft for a reform of the competition authorities by mid-2025. Currently, ComCo makes administrative decisions in the first instance in cases of violations of the CartA. However, investigations are carried out by the Secretariat of ComCo. In future, the Federal Council intends to make the separation between investigation and decision more effective and strengthen the independence of ComCo in its decision-making. The number of ComCo members is to be reduced from the current 11–15 to 5–7 members, and the workload of the members is to be increased. This will make ComCo more professional. In addition, specialised judges are to be appointed to the Federal Administrative Court, which is responsible for appeals in antitrust cases. This should speed up proceedings and strengthen the economic expertise of the Federal Administrative Court.

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- Key policy developments
- Reform proposals

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