

NEWSLETTER

July 2008



Swiss Merger Control – the newest developments

The threshold above which mergers have to be notified (formal criterion) is considered to be relatively high in comparison to international standards. Therefore, the Swiss Competition Commission can examine relatively few mergers in the framework of preventive merger control as provided for in the Federal Act on Cartels (ACart). The recent practice of the Swiss Federal Supreme Court, in the merger cases Swissgrid and Berner Zeitung AG, Tamedia AG/20 Minuten (Schweiz) AG, reveals that even substantive law calls for a very high intervention threshold. The mere possibility of the merger creating or strengthening a dominant position is not sufficient for an intervention. The merger must also eliminate effective competition. Thus Switzerland is taking a different approach to that of the European Union. In EC competition law, the intervention threshold was reduced, so that for intervention in a merger considerable impediment of effective competition is now sufficient. Furthermore, the Swiss Competition Commission recently had to decide on mergers taking place on the retail market. This gave the Commission an opportunity to further define and develop its position on collective dominance.

1 Market dominance

1.1 Relevance

Under Swiss law, planned mergers can only be prohibited or authorized subject to certain conditions and/or obligations if the merger (i) creates or strengthens a dominant market position, (ii) which might eliminate effective competition, and (iii) does not lead to strengthening competition in another market, in a way that outweighs the harmful effects of the dominant position. (art. 10 para 2 ACart).

In practice, the third criterion, the so-called global market analysis, has played no role so far. In the material assessment

of mergers, the decisive factor has been the creation or the strengthening of a dominant position. Two recent decisions of the Swiss Federal Supreme Court, in the cases Swissgrid merger as well as the Berner Zeitung AG/ 20 Minuten (Schweiz) AG merger, placed the emphasis on the criterion of potential elimination of efficient competition, thus making this criteria a central factor.

1.2 The various levels of market power in antitrust law

The ACart applies to companies which are active on a "market". Duties arising from antitrust law refer to the market position of a company. Thus, antitrust law only applies to companies coordinating market behaviour (illicit agreement), to companies' unilateral conduct if they are "powerful on the market" (control of abuse) or if they engage in a merger (merger control).

Regarding market power, antitrust law, in accordance with the interpretation of the Federal Supreme Court, provides for three levels of market influence, which will be addressed below.

The concept of a company with market power is not defined in the law (art. 2 para 1 ACart). A company which is under the scope of the ACart and has considerable influence on the market but with no tangible consequences, falls under the scope of the ACart as it is potential danger to the fundamental structure of the market.

Companies that are individually or jointly able, as offering or demanding entities, to behave in an essentially independent manner with regard to other participants in the market (competitors, suppliers or customers) are considered to be dominants (art. 4 para 2 ACart). Due to their position in the given market, they have particular responsibilities which justify the statutory control of their behaviour (art. 7 ACart) so that they do not abuse their market position.



When determining the merger control intervention threshold, the legislator not only required that the company must have a dominant position in the market, but, in addition, that the dominant position after the merger must be such that it may lead to the elimination of competition (art. 10 para 2 lit. ACart).

1.3 Determining the Intervention Threshold

The starting point for the analysis of the intervention threshold is the principle that the creation or strengthening of a dominant position is not forbidden under the ACart. In a dynamic and competitive market, it is naturally a goal of every market participant to comprehensively improve its own market position, up to and including dominating the market. Thus internal growth of a company is not regulated by antitrust law. It only becomes a problem, thus triggering the anti-trust laws, when a dominant market position is utilized for gain through abuse (art. 7 ACart).

While, on the one hand, the internal growth of a company is exposed to market dynamics, on the other hand, external growth through mergers can overnight create a situation on a market that could not have been reached by internal growth in such a short period of time. Therefore, preventive merger control eliminates those harmful effects that the external growth of a corporation could have on the market. Enterprises in a dominant position can jeopardize the basic mechanisms of competition and when this is the case, intervention through merger control is justified.

Antitrust law requires, as a prerequisite to intervention, the creation or strengthening of a dominant position and, in addition, the elimination of effective competition. Therefore, this latter criterion should be examined whether it has an independent meaning besides the dominance criterion.

The question of the elimination of effective competition has considerable practical significance. If it is to be given an independent meaning in the sense of requiring qualified market dominance, Swiss authorities could only intervene in situations where a quasi-monopoly will be created by the merger.

1.4 Interpretation in light of the new decisions: position in the market must be able to eliminate competition

The aim of the ACart, to protect effective market competition is the overall goal of the ACart and the basic principle to be protected.

Based on this concept, the Swiss Federal Supreme Court has taken its decision of February 13, 2007 regarding Swissgrid (BGE 133 II 104). This case involved seven Swiss electricity companies that wanted to integrate their electricity-carrying network under a common company. The Court held that, in addition to market dominance, the possibility of existing competition disappearing or of potential competition being inhibited was an independent prerequisite for an intervention under merger control.

According to the Federal Supreme Court, merger control is part of the control of market structure. Thus the examined merger must result in a concrete negative change in the market structure and the competition in the market must be altered to justify administrative intervention. This condition was not met in the Swissgrid merger case where the Swiss Federal Supreme Court concluded that on the relevant market competition did not exist prior to the merger and nor would it exist after. Accordingly, since the planned merger did not change the market conditions, intervention by the competition authorities was not justified. For a justified intervention the competition authorities must find a creation or strengthening of a dominant position in the market and a concrete negative change in the market structure that could potentially end effective competition.

Nine days after its decision regarding the Swissgrid merger, the Swiss Federal Supreme Court affirmed its holding in the Berner Zeitung AG and Tamedia AG/20 Minuten (Schweiz) AG case. The Court reiterated that, it held that the creation or strengthening of a dominant position alone does not justify an intervention of the authorities. The dominant position must also create a real risk of effective competition disappearing. In the case of Berner Zeitung AG and Tamedia AG/20 Minuten AG, the Swiss Competition Commission had prohibited the merger on the grounds that the market for commuter newspapers was not a competitive one, that the potential competition was very low and that a disciplinary effect on other media was unlikely. Thus the merging companies would take a dominant position in the market. The Appeals Commission for Competition Law, however, lifted the prohibition and the Federal Supreme Court affirmed this decision.

The Swiss Competition Commission, as the authority of first instance for competition law matters, had only half-heartedly followed the principles set by the Federal Court. In more recent cases, the Commission tested the additional criteria of effective disappearance of competition (c.f. infra on collective dominance), however, in these cases the substantive examination was circular and again the Commission failed to fully follow the principles set by the Federal Court.

2 Two specific situations: collective dominance in a market and unilateral effects

The legal definition of market dominance (art. 4 al. 2 ACart) includes situations where not only one but several entities dominate the market. This is the case in an oligopoly when, according to economic doctrine, there is a risk that two or more entities will tacitly adapt their behaviour to each other in such a way that the market will lose its dynamics. An example of this is where competitive conduct is avoided due to foreseeable reactions of competitors.

A determination of whether collective dominance is present is an ambitious undertaking which requires a comprehensive market analysis. In the recent Migros/Denner case (published in *Recht und Politik des Wettbewerbs* 2008/1, 129 ff.), and in two subsequent decisions concerning retail business - Coop/Fust and Coop/Carrefour –, the Competition Commission attempted to establish a case of collective dominance.

In the two retail business cases the Commission established some aspects to determine the assessment of unilateral effects in mergers. A merger will create negative unilateral effects when, as a result of the merger, a competitor is eliminated and there is a substantial worsening of the competitive situation. Therefore unilateral effects do not result in the creation of a dominant position or tacit collusion.

2.1 Collective Dominance

In the case of the discussed oligopoly, the Competition Commission examined whether, from an economic perspective, there were incentives for collusive behaviour and whether the behaviour was stable. This was verified using the following criteria:

- | The number of participants involved, market share and market concentration
- | Symmetries (for example customer loyalty programs, sales areas, distribution channels)
- | Market growth
- | Market transparency
- | Multi-market relations
- | Position of market competitors
- | Potential competition.

Surprisingly the Competition Commission did not examine the features distinguishing the product on the relevant market. One can surmise that it probably neglected to do so because of the thousands of products offered on the retail market and because of the difficult evidentiary burden of proving coordination of behaviour. The Commission also failed to analyze the penalty mechanisms, although such mechanisms are central in determining whether the collusion is stable and long-lasting or not. Indeed, a dominant position can only be stable if there is an efficient, responsive and perceivable penalty mechanism.

While the Competition Commission provided extensive considerations to support its decisions, it failed to bring strict proof on all of the criteria needed to establish a dominant position. Its reasoning was also, in part, based on speculation rather than fact. Nevertheless, despite such evidentiary shortfalls in

the Migros/Denner decision, it found that collective dominance was proven. Whereas in the Coop/Carrefour case, it was unclear whether the intervention took place because of the creation of a dominant position or because of the strengthening of a pre-existing collective dominant position.

2.2 Unilateral effects

Given that the Swiss retail market is a duopoly (Migros and Coop), the Swiss Competition Commission based its Migros/Denner decision on collective dominance as well as unilateral effects. The Competition Commission considered that in an oligopolistic market where there are a variety of products, a merger invariably leads to an increase in price as it eliminates direct competition between the merging companies. While generally it should be possible to calculate the increase in price caused by the merger using an empirical method, in this case the Commission could not do so because it was missing necessary data.

Thus, aside from this exceptional case of missing data and the attendant evidentiary problems, it is extremely questionable whether under Swiss law, the Competition Commission can intervene in a merger solely on the basis of the unilateral effects created by the merger. According to art. 10 para 2 ACart, the Competition Commission shall only intervene when the merger creates or strengthens a dominant position and, as required by the Swiss Federal Supreme Court, this leads to the elimination of effective competition. Unilateral effects alone, even when they lead to a worsening of competition, are not sufficient.

3 Conclusion

The Competition Commission authorized the three above mentioned retail market mergers, subject to certain obligations. This was essentially permitted in the hope that the entry of two foreign competitors on the Swiss retail market, Aldi and Lidl, would stimulate competition. Since the involved parties did not challenge the decisions of the Competition Commission it is not clear whether the Federal Supreme Court would have accepted the analysis of the Competitive Commission on collective dominance and the weight given to unilateral effects to justify an intervention.

Prior decisions of the Federal Supreme Court suggest that the Competition Commission should have taken an extensive effort to support its rulings. Even if the Commission did not want to follow the strict approach of the Federal Supreme Court, whereby a qualified market dominance is necessary for an intervention, and rather wanted to see the elimination of effective competition as to be understood as the dynamic element for the substantive test in merger control cases (as an indicator as to the evolution of the situation), the procedure of the Competition Commission in the above-mentioned retail business cases can still be criticized.



For an intervention in a merger to be justified, the facts of the case must be narrowly controlled and tested using a comprehensive set of criteria. There should not be any doubt as to the facts and the evidence should be undisputed. If this is not the case, an intervention should not occur.

The same holds true for the Competition Commission's attempt to lower the intervention threshold through the use of unilateral effects. Interventions within the framework of merger control are serious restrictions on private autonomy and, as such, should not take place on the basis of an economic approach that is not in strict compliance with the legal requirements.

Contacts

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| In Geneva:

LIONEL AESCHLIMANN
lionel.aeschlimann@swlegal.ch

OLIVIER HARI
olivier.hari@swlegal.ch

| In Zurich:

JÜRIG BORER
juerg.borer@swlegal.ch

EVA RÜFENACHT
eva.ruefenacht@swlegal.ch

This Newsletter is available on our website www.swlegal.ch in English, German and French.

15bis, rue des Alpes
Case postale 2088
CH-1211 Genève 1
Tél. +41 (0) 22 707 8000
Fax +41 (0) 22 707 8001

Löwenstrasse 19
Case postale 1876
CH-8021 Zurich
Tél. +41 (0) 44 215 5252
Fax +41 (0) 44 215 5200

www.swlegal.ch