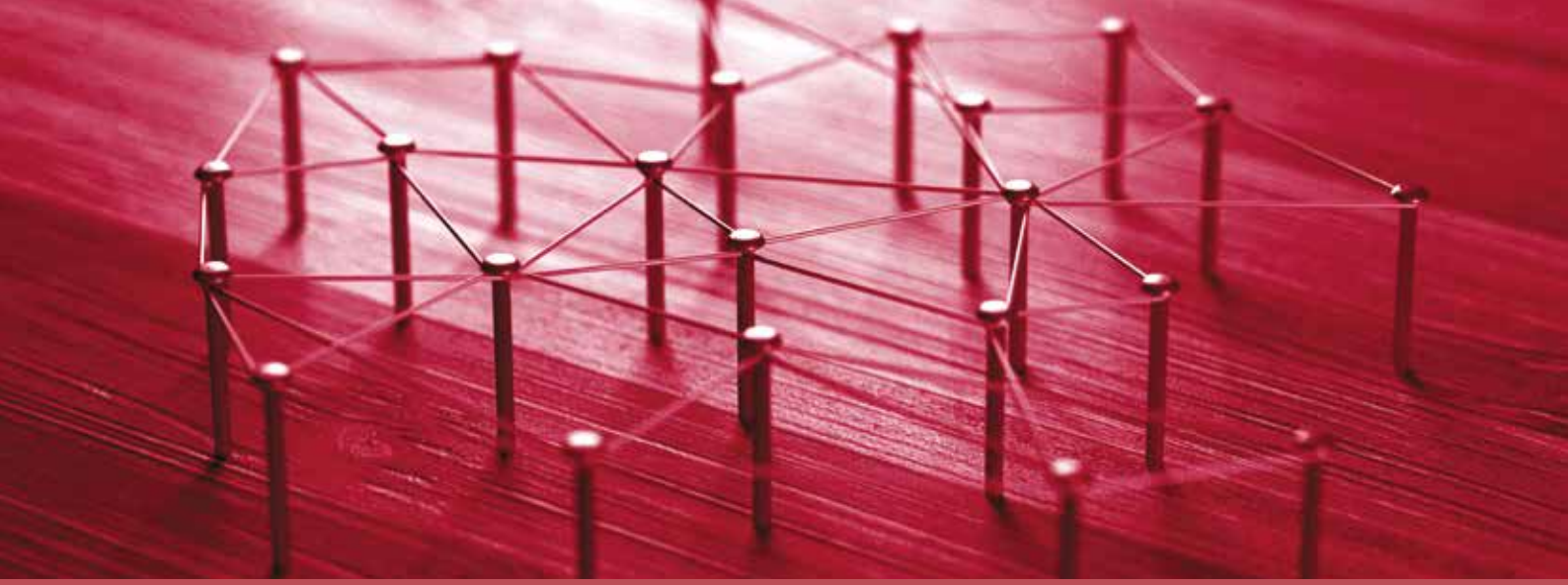

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The International Comparative Legal Guide to:

Merger Control 2019

15th Edition

A practical cross-border insight into merger control issues

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the fifteenth edition of *The International Comparative Legal Guide to: Merger Control*.

This guide provides the international practitioner and in-house counsel with a comprehensive worldwide legal analysis of the laws and regulations of merger control.

It is divided into two main sections:

Four general chapters. These chapters are designed to provide readers with an overview of key issues affecting merger control, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in merger control laws and regulations in 55 jurisdictions.

All chapters are written by leading merger control lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor, Nigel Parr of Ashurst LLP, for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.com.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

The Swiss Competition Commission (ComCo) is the competition authority that is in charge of merger control procedures. The ComCo receives support from its investigative body, the Secretariat of the Competition Commission (Secretariat). The Secretariat carries out merger control-related investigations, and is the primary counterpart of undertakings that notify a transaction. The Secretariat comprises four divisions, dealing with services, infrastructure, construction and product markets. The ComCo consists of 11–15 members (currently, it comprises 13 members), the majority of whom are independent experts, such as university professors in the fields of law or economics. The remaining members are representatives of business and consumer organisations. The competition authorities are not political bodies but remain independent from the Government and the administrative authorities (Art. 19 (1) CartA). The offices of the ComCo and the Secretariat are in Berne, the capital of Switzerland. Further information about the ComCo is available at: https://www.weko.admin.ch/weko/en/home.html.

1.2 What is the merger legislation?

Swiss merger control procedures are governed by the Federal Act on Cartels and other Restraints of Competition (CartA), and the Merger Control Ordinance (MCO). Furthermore, the ComCo has issued a standard merger notification form and has published a notice on certain practices regarding the notification of joint ventures (*cf.* questions 2.7 and 2.8), the geographical allocation of turnovers and the necessary information on affected markets (*cf.* question 3.9).

The CartA was originally enacted in 1996 and was revised in 2004. A proposed second revision was rejected by the Swiss Parliament in 2014.

1.3 Is there any other relevant legislation for foreign mergers?

There is no specific relevant legislation for foreign mergers. However, there are certain specific rules that are applicable to regulated industries, where special requirements, regulatory approvals or notification duties may apply (*cf.* question 1.4).

Furthermore, certain restrictions may apply to the direct or indirect acquisition of real estate in Switzerland by foreigners. While there have been continuous liberalisations over recent years, there are still some restrictions, e.g., passive capital investments in Swiss real estate can be executed without approval, unless such real estate is used for residential purposes.

1.4 Is there any other relevant legislation for mergers in particular sectors?

There may be the need for additional notifications or consent in the following industry sectors:

- Banking and Insurance: In Switzerland, banks and insurance companies require a licence issued by the Swiss Financial Market Supervisory Authority (FINMA) pursuant to the Banking Act and the Insurance Supervisory Act. Once licensed, they are subject to ongoing supervision by FINMA. One requirement to obtain and maintain the licence is that each individual or entity which (i) directly or indirectly holds at least 10% of the capital or the votes in a bank or insurance company, or (ii) otherwise has significant influence on the management (collectively: "Qualified Participations"), must ensure that its influence does not adversely affect the prudent and solid management of the bank or insurance company in question. Changes with respect to Qualified Participations must be reported to FINMA by the selling and the acquiring party prior to the transaction.
- Air Transport: According to Art. 11 of the Bilateral Agreement between Switzerland and the EU on Air Traffic, the EU Commission will assess merger control procedures in this sector in cooperation with the Swiss ComCo. The authorities will apply the EU Merger Control Regulation No. 139/2004.
- Radio/TV, Telecommunications, and Rail Transport: The acquisition of a company which holds a licence in these sectors must be notified and approved by the relevant authority.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

Under Art. 4 (3) CartA, the following types of transactions are subject to the merger control provisions:

- statutory mergers: a merger in the sense of the company law of two or more previously independent undertakings; or

- acquisition of control: any transaction by which one or more undertakings acquire direct or indirect control over one or more independent undertakings, or over a part thereof.

The acquisition of "control" is further defined in Art. 1 MCO, according to which an undertaking acquires control if it may exercise decisive influence over another undertaking. This may be based on ownership or similar rights, as well as contractual agreements, which allow decisive influence on key governance areas, and might even be based on a significant loan, combined with additional contractual rights. Joint control by more than one undertaking is, in particular, assumed if the controlling undertakings have a veto right for strategic decisions, such as decisions regarding the management of the company, its budget, its business plan, significant investments, market-specific rights, etc. Under certain conditions, a change in the quality of control may also be considered to be an acquisition of control (e.g. change from sole to joint control and *vice versa*, the increase of jointly controlling undertakings, or if one jointly controlling undertaking is replaced by another). Whether the reduction of the number of jointly controlling undertakings leads to a change in the quality of control needs to be assessed on a case-by-case basis.

2.2 Can the acquisition of a minority shareholding amount to a "merger"?

The acquisition of minority shareholdings may qualify as an acquisition of control if there are additional agreements that confer control or a veto right, or if the shareholder structure or quota of presence is such that the minority shareholding regularly allows for a majority at the annual general meetings. According to the ComCo, control can be acquired even without acquisition of shares if contractual agreements or factual circumstances lead to *de facto* control, e.g., based on a loan agreement together with additional contractual rights (such as distribution agreements, information rights, etc.).

2.3 Are joint ventures subject to merger control?

Yes. According to Art. 2 (1) MCO, the acquisition of joint control by two or more undertakings over an undertaking that was previously not jointly controlled is a transaction that is subject to a merger control notification if the thresholds are exceeded (*cf.* question 2.4). In order to be a joint venture in this sense, the joint venture company must perform all functions of an economic entity on a lasting basis. In past cases, the authority has, in particular, closely scrutinised whether or not the joint venture will be dependent on sales to the parent companies, and held that a joint venture which will supply goods and/or services only to the parent businesses, and which has no presence on the market or dealings with third parties, may not qualify as a full-function joint venture.

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 (Art. 2 (2) MCO). In practice, this criterion has generally been considered to be fulfilled in most cases.

For joint control that is part of multiple transactions in succession, *cf.* question 2.8. Furthermore, there are specific rules on the jurisdictional thresholds that may be applicable to joint ventures (*cf.* question 2.7).

2.4 What are the jurisdictional thresholds for application of merger control?

A transaction that is caught by the definition of the CartA is subject to a notification duty if the following turnover thresholds are met (Art. 9 CartA):

- the undertakings concerned had, in the last business year prior to the transaction, an aggregated worldwide turnover of at least CHF 2,000 million (approx. EUR 1,800 million or USD 2,030 million), or an aggregated turnover in Switzerland of at least CHF 500 million (approx. EUR 450 million or USD 508 million); and
- at least two of the undertakings concerned had, in the last business year prior to the transaction, an individual turnover in Switzerland of at least CHF 100 million. (approx. EUR 90 million or USD 102 million according to average reference rates published by the Swiss National Bank for 2017: 1 EUR = 1.1114 CHF and 1 USD = 0.9847 CHF).

Furthermore, a transaction must be notified, independent of the turnovers, if the ComCo has previously established in a binding and final decision under the CartA that one of the undertakings concerned has a dominant position in a market in Switzerland, and where the transaction concerns this market, an adjacent market or a market either upstream or downstream. There is no official registry for dominant companies. In a decision from 2014, the Federal Administrative Court restricted the interpretation of the notions of downstream markets and adjacent markets. The scope of application of this notification threshold has accordingly been limited, but remains in force.

In a merger, the turnover of the merging undertakings (Art. 3 (1) (a) MCO) and in an acquisition of control, the turnover of the controlling and controlled undertakings (Art. 3 (1) (b) MCO) have to be taken into account. If only a part of an undertaking is the subject of the concentration, it is that part which constitutes the undertakings concerned and is relevant for the calculation of the turnover (Art. 3 (2) MCO). The turnover is calculated on a consolidated basis, taking into account the turnover of the entire group of the undertakings concerned, excluding "internal" turnover (Art. 5 (2) MCO). According to Art. 5 (1) MCO, a group consists of the subsidiaries, the parent companies, the sister companies and joint venture companies.

The turnover of a joint venture that is jointly controlled by one of the undertakings concerned is apportioned among those undertakings in equal parts (Art. 5 (3) MCO).

Specific rules for the calculation of turnover of banks and insurance companies apply. Foreign currencies are to be converted in accordance with generally accepted accounting principles, such as, e.g., on the basis of the Swiss National Bank's published average exchange rates.

The geographic allocation of the turnover is based on the customer's location, i.e. the place where the characteristic action under the contract is to be performed. Different rules may apply to services.

2.5 Does merger control apply in the absence of a substantive overlap?

The obligation to notify a transaction does not depend on the existence of any kind of substantive overlap. Insofar as the thresholds under question 2.4 are fulfilled, a transaction must be notified. *Cf.* the exception under question 2.7.

2.6 In what circumstances is it likely that transactions between parties outside your jurisdiction ("foreign-to-foreign" transactions) would be caught by your merger control legislation?

Any transaction that fulfils the turnover thresholds under question 2.4

is caught by Swiss merger control legislation and must be notified. *Cf.* the exception under question 2.7. In the past, the ComCo has issued fines in cases of "foreign-to-foreign" transactions that were not notified, even though they fulfilled the turnover thresholds (Art. 9 CartA and Art. 51 CartA).

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

Art. 2 (2) CartA indicates that the CartA is only applicable to situations that have an effect in Switzerland. This has been interpreted in a very restrictive manner by the Swiss Federal Supreme Court. According to the Swiss Federal Supreme Court's practice, an effect in Switzerland is given whenever the turnover thresholds (*cf.* question 2.4) are met.

However, a notice published by the Swiss competition authority indicates an exception in the case of the acquisition or creation of a joint venture company that has neither any turnover in Switzerland, nor any current or future business activities in Switzerland. The Swiss competition authority considers that such transactions do not have any effect in Switzerland, even if the controlling undertakings fulfil the turnover thresholds. Therefore, such transactions generally do not need to be notified in Switzerland. Each case under this exception should, however, be carefully evaluated.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The Swiss competition authority will take into consideration whether several transactions should be considered as one single economic transaction. The authority generally assesses this on the basis of the legal interdependence of the transactions, and will also take into consideration facts such as a single purchase price, single contractual document and concurrence of the timing.

For the purposes of calculating the turnover, Art. 4 (3) MCO indicates that if two or more transactions take place between the same undertakings within a period of two years, resulting in the acquisition of control over parts of these undertakings, these transactions shall be treated as a single transaction. Furthermore, the Swiss competition authority's notice confirms that transactions carried out in several steps may be considered a single economic transaction if there is joint control during a start-up period, which is transformed into sole control based on a legally binding agreement. Such transactions may be notified as a single transaction, resulting in the sole control of the ultimate parent company if the start-up period does not exceed one year.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

Subject to the exception under question 2.7 above, any transaction that meets the jurisdictional thresholds of question 2.4 must be notified.

There is no deadline for the notification, but the transaction may not be closed prior to the clearance by the ComCo. While not defined in the CartA, the ComCo generally requests that Swiss merger notifications are coordinated with the EU notification if a transaction is also notified in parallel to the EU Commission.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

With the exception of the situation under question 2.7, clearance is required if the jurisdictional thresholds are met.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

Any undertaking that is obliged to notify the transaction (i.e. the merging undertakings, or the undertakings acquiring control) may be fined with an amount of up to CHF 1 million (approx. EUR 0.9 million or USD 1 million) if it completes a transaction that should have been, but was not, notified. The ComCo has, in the past, issued such fines. In addition, members of the management may personally be fined with an amount of up to CHF 20,000 (approx. EUR 18,000 or USD 20,300). Such fines have not been issued to date.

On the procedural side, the Swiss competition authority can directly initiate a merger control procedure if a transaction has been completed without any notification.

In one case in 2012, the ComCo imposed a fine of CHF 35,000 (approx. EUR 31,500 or USD 35,500) for the failure to notify a concentration. The highest fine published to date was imposed in 1998 and amounted to CHF 68,400 (approx. EUR 61,500 or USD 69,500).

The risk of sanctions rests with the undertakings that are obliged to notify the transaction. In the case of a merger, this would be the merging undertakings jointly, and in the case of an acquisition of control, this would be the undertaking or undertakings acquiring control.

3.4 Is it possible to carve-out local completion of a merger to avoid delaying global completion?

At the request of the undertaking(s) concerned, the ComCo may grant an exemption from the prohibition to complete the transaction prior to its clearance (*cf.* question 3.7). This has, in the past, been accepted particularly in the case of the reorganisation of a failing company, as well as in pending public takeover bids. However, there is no general exception for public bids (*cf.* question 3.11).

Except for these situations, there are no provisions in the CartA that allow a local hold-separate agreement in order to close a foreign-to-foreign transaction prior to the ComCo's decision. While there is no formal guidance in this regard, it is possible that the ComCo may be approached on a case-by-case basis in order to discuss such a possibility. However, there are no published precedents in this regard.

3.5 At what stage in the transaction timetable can the notification be filed?

The transaction can be notified based on the final transaction agreement, as well as prior to the conclusion of the final agreement (such as after the signing of a memorandum of understanding or a letter of intent) if the parties can demonstrate a good faith intention to enter into a binding agreement and to complete the transaction.

With regards to public bid offers, it may be possible to notify a transaction already based on the intention to make such an offer, subject to the conditions above.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

The overall review time for the competition authority is limited to five months. Following the notification, the ComCo has one calendar month (Phase I) in order to decide whether the transaction raises any competition concerns and whether an investigation procedure should be initiated. The subsequent in-depth investigation procedure (Phase II) must be completed within four months.

The ComCo will not publish the fact that a transaction has been notified. However, an official publication will be made in cases where the ComCo decides to initiate an in-depth investigation (Phase II). All final decisions of the ComCo authorising or prohibiting a transaction are generally published (*cf.* question 3.12).

Pre-notification procedure: the CartA does not provide for a statutory pre-notification procedure. However, approaching the Secretariat prior to a notification in order to discuss the scope of information to be provided is a common and accepted practice. Generally, the Secretariat is willing to indicate whether a draft notification would be considered complete during the pre-notification procedure.

Phase I: Phase I starts on the day following the receipt of the complete notification by the competition authority. The Secretariat has 10 calendar days in order to confirm the receipt and completion of the notification (Art. 14 MCO). If the Secretariat considers the notification to be incomplete, it will request the necessary information, and the one-month period will only start upon receipt of the completed notification. The competition authority can issue either a clearance notice or information about the initiation of an in-depth investigation within the deadline for the Phase I procedure. If no such notice is given within the time period, the transaction will be deemed cleared and may be implemented without reservation.

Phase II: the ComCo has four months in order to complete an in-depth investigation. The CartA does not provide any specific rules regarding the procedure of the investigation. In practice, the ComCo will decide on the basis of a proposal by the Secretariat. The parties can comment on the Secretariat's proposal before it is provided to the ComCo. In addition, the ComCo also has the possibility to conduct hearings and to instruct the Secretariat to make additional investigations.

Suspension: the timeframe of Phase II may only be suspended by the authority if the assessment is hindered due to circumstances for which the undertakings concerned are responsible (Art. 33 (3) CartA). Otherwise, the ComCo may not decide on an extension on its own. Furthermore, the timeframe may be amended if there are any material changes in the actual circumstances that have been described in the notification. If such changes are significant for the assessment, the Secretariat or the ComCo may decide in Phase I or Phase II that the timeframes shall only start after the information on the material changes has been received (Art. 21 MCO).

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The CartA provides for a standstill obligation. If a transaction has to be notified, this has the effect that the undertakings concerned are prohibited from closing and implementing the transaction during Phase I and Phase II, if applicable. The undertakings concerned can request the ComCo to waive this standstill period. Such exemptions are possible in cases of important reasons, such as the reorganisation of failing companies or pending public takeover bids (*cf.* question 3.4). Furthermore, once the ComCo initiates the Phase II investigation, it must render a decision on whether the transaction may be carried out provisionally.

If the undertakings concerned carry out a transaction without clearance, the ComCo will initiate the merger proceedings *ex officio* (Art. 35 CartA). The ComCo may order (amongst other measures) divestments if the ComCo ultimately prohibits the transaction (Art. 37 (4) CartA).

From a civil law perspective, the validity of a transaction completed before clearance is suspended until the deadline for Phase I and if the applicable Phase II has expired (Art. 34 CartA).

3.8 Where notification is required, is there a prescribed format?

The necessary information for a notification is described in Art. 11 MCO. Additionally, based on Art. 13 MCO, the ComCo has issued a standard notification form together with explanatory notes. This form was updated on 21 October 2014, and can be downloaded in the official Swiss languages of German, French and Italian at: https://www.weko.admin.ch/weko/de/home/dienstleistungen/meldeformulare.html. The notification must be made in one of the official Swiss languages, but the annexes may also be submitted in English. Foreign notification forms, such as the European Form CO, may also be submitted if the Swiss notification provides for the additional necessary information.

Even after confirmation of the completion of the notification, the Secretariat may request additional information from the undertakings concerned, associated undertakings, the sellers and affected third parties (Art. 15 MCO). Such requests do not stop the clock.

Pre-notification discussions are not mandatory, but constitute a common and accepted practice (*cf.* question 3.6).

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no short form or simplified procedure for certain types of mergers. However, the undertakings concerned may, at any time prior to the notification of the transaction, discuss with the Secretariat the scope of the information that must be provided (Art. 12 MCO). In particular, the Secretariat may exempt the parties from providing certain information that is not required for its assessment.

Such simplified notifications can, in particular, be used in foreign-to-foreign transactions, and in transactions that are notified in parallel to the EU Commission. Furthermore, the Secretariat has indicated in an explanatory notice that certain detailed information about markets, in which only one undertaking has a market share on its own of more than 30% in Switzerland, must not be provided, unless another undertaking concerned (i) is active on a closely linked market that is upstream, downstream, or neighbouring to the other market in which one undertaking has a market share of 30%, (ii) is planning a market entry into the market in which one undertaking has a market share of 30% or has been pursuing such plans for the last two years, (iii) has intellectual property rights on the market in which one undertaking has a market share of 30%, or (iv) is active on the same product market but not on the same geographic market.

In clearly urgent cases, the authority may be approached to informally discuss an acceleration of the process. In rare cases, clearance decisions have been issued in fewer than 10 days. However, there is no obligation for the authority to do so.

3.10 Who is responsible for making the notification?

The notification must be filed to the ComCo (i) in the case of a merger, jointly by the merging entities, and (ii) in the case of an acquisition of control, by the undertaking(s) acquiring control. If the notification is made jointly, the undertakings concerned must designate at least one joint representative. Furthermore, they must designate an address in Switzerland for service of documents.

In the case of an acquisition of control, the transaction has to be notified either by the directly controlling company and/or by any other indirectly participating company who will gain control over the target company via the directly controlling company.

3.11 Are there any fees in relation to merger control?

There are no filing fees as such. However, the ComCo will charge a lump-sum fee of CHF 5,000 (approx. EUR 4,500 or USD 5,100) for its Phase I investigation. For the Phase II investigation, the fee is based on hourly charges of CHF 100–400 (approx. EUR 90–360 or USD 100–406).

In general, the fees have to be paid within 30 days after receiving the bill. The bill is normally sent within days after the authority issues its decision. There is no established practice regarding exceptions from paying the fee.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The problem of coordination exists (only) in those cases in which a public offer needs to fulfil the rules according to the Federal Act on Stock Exchanges and Securities Trading (Stock Exchange Act, SESTA) as well as the CartA. Generally in these cases, the following possibilities of coordination can be distinguished:

- Notification prior to publication of the public offer: A transaction may be notified prior to the publication of the public offer if the parties can demonstrate a good faith intention to complete the transaction. In particular, this is possible if the offeror submits the announcement to the takeover board according to Art. 7 *et seq*. of the Ordinance of the Takeover Board on Public Takeover Offers, and makes his offer binding.
- Public offer with a resolutive condition: In this case, the notification of a public offer is agreed under the resolutive condition that if the ComCo does not clear the transaction, the public offer is annulled. However, this possibility of coordination requires a request to the ComCo to implement the merger/transaction provisionally, due to the fact that there is a public offering. Such a provisional implementation may not be granted in all cases.
- Public offer with a suspensive condition: If a public offer is made under a suspensive condition, it may only come into effect in cases where the ComCo does not prohibit the transaction.

In most cases, an informal contact of the Secretariat may prove to be helpful. Prior to the official notification of a transaction, the parties concerned may contact the Secretariat by way of a pre-notification and discuss the best way of coordinating both procedures. However, such a pre-notification is not legally binding (*cf*. question 3.6).

3.13 Will the notification be published?

The ComCo publishes neither the notification nor the fact that a notification has been made. However, the ComCo publishes its decision to open a Phase II investigation. Moreover, the final decisions (clearance, clearance subject to conditions or obligations, prohibition) are published.

In transactions of public interest, the ComCo may issue a press release or hold a press conference in order to inform on the opening of a Phase II investigation or to explain its decision.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

The substantive merger test under Swiss law is more limited than in other jurisdictions, e.g., in the EU. The review is based on a dominance test, which is extended by an additional test on the remaining amount of competition. On the basis of Art. 10 (2) CartA, the ComCo may prohibit a transaction if:

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

The Federal Supreme Court has held that the mere creation or strengthening of a dominant position is not sufficient for a prohibition of the transaction, and has confirmed that the "elimination of competition" requirement has to be satisfied as a separate element.

The assessment by the ComCo must be made on the basis of the market dynamics and the specific economic situation of the transaction. However, the ComCo may not consider public policy issues. The ComCo has not issued any guidelines about its approach to substantive assessment.

Should a concentration be prohibited by the ComCo, the undertakings concerned may request a special authorisation based on public interest reasons from the Federal Council (Art. 36 CartA). Such an authorisation has, to date, never been granted (*cf*. question 5.9).

4.2 To what extent are efficiency considerations taken into account?

Based on the legal test, the ComCo may only take efficiency considerations into account if they are suitable to prevent the elimination of competition, and only if they occur in another market than the one affected by the merger. Art. 10 (2) CartA provides that, under the Swiss substantive test, efficiencies in one market may outweigh the detrimental effect of a merger in another market.

4.3 Are non-competition issues taken into account in assessing the merger?

By law, the ComCo does not take into account non-competition issues when assessing mergers (*cf*. question 4.1). An authorisation based on compelling public interests may only be granted by the Federal Council (*cf*. question 5.9). However, in some past cases, a certain influence may have been noticed.

If a concentration of banks is deemed necessary by the FINMA for reasons related to creditor protection (in the case of a failing bank), the interests of creditors may be given priority. In these cases, FINMA shall take the place of the Competition Commission, which it shall invite to submit an opinion (*cf.* Art. 10 (3) CartA).

4.4 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

Third parties do not have any party rights in merger control procedures (Art. 43 (4) CartA.). They may, however, provide their opinion in Phase II procedures, and may also be requested to provide their views in Phase I procedures. Once the ComCo has initiated an in-depth Phase II investigation, this will be published in the Official Gazette and third parties may submit their view. However, in Phase I procedures, there is no statutory right to provide such observations. The Federal Supreme Court has confirmed that third parties have no procedural rights in such investigations. In addition, third parties have no legal standing to appeal the merger control decisions of the ComCo.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The undertakings concerned, as well as affected third parties, are obliged to provide the Secretariat and the ComCo with all of the necessary information for their investigation, as well as to produce the respective documents (Art. 40 CartA). The Secretariat may request information and documents, such as information on past or projected sales or turnover figures, on the market development and on the undertakings' position in an international context. Such information must be provided even if the notification is confirmed to be complete (Art. 15 MCO). According to Art. 15 (2) MCO, the right to request information also extends to third parties to a merger transaction. In the absence of international agreements, the respective obligation is not enforceable outside of Switzerland. In cases of parallel notifications in Switzerland and with the European Commission, it should be noted that the EU/Swiss cooperation agreement in competition matters (which entered into force on 1 December 2014) also allows the authorities to exchange information in parallel merger control procedures (*cf.* question 6.1).

An undertaking that fails to fulfil its obligation to provide information or produce documents may be fined an amount of up to CHF 100,000 (approx. EUR 90,000 or USD 101,500). In addition, natural persons may personally be fined with an amount of up to CHF 20,000 (approx. EUR 18,000 or USD 20,300). Such fines have not been issued to date.

4.6 During the regulatory process, what provision is there for the protection of commercially sensitive information?

The Secretariat and the ComCo are obliged by law not to disclose any business secrets (Art. 25 CartA). However, the undertakings concerned are requested to indicate in their notification, as well as other submissions, which information is deemed to be a business secret. The ComCo has issued a notice regarding business secrets, which is available in German, French, and Italian at https://www.weko.admin.ch/weko/de/home/dokumentation/bekanntmachungen---erlaeuterungen.html. According to this notice, the competition authority will apply, by analogy, the criminal law standard with regard to business secrets. Therefore, in order to qualify as a business secret, a fact must not be obvious, the parties must have demonstrated their subjective will to keep the fact confidential, and there must be an objective interest in keeping the fact confidential (the fact must have an economic value and must relate to one single entity).

Generally, the Secretariat prefers that parties simultaneously provide a non-confidential version of any notifications or submissions. Furthermore, prior to the publication of the final decision, the Secretariat will provide the undertakings concerned with a draft of the publication, so that they may comment on whether the text includes any business secrets.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

In Phase I, the regulatory process may end either by: (i) a clearance decision; (ii) a clearance decision subject to conditions or obligations; (iii) the opening of an in-depth investigation (Phase II); or (iv) the transaction will be automatically cleared if the authority does not make any decision within the Phase I timeframe.

If the ComCo has decided to initiate an in-depth investigation (Phase II), the ComCo can issue a final decision (i) clearing the transaction unconditionally, (ii) allowing the transaction subject to certain conditions or obligations, or (iii) prohibiting the transaction. In the case of a withdrawal of the notification, the regulatory process will end with such withdrawal.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

The ComCo can accept behavioural remedies as well as structural remedies. Such remedies may be agreed as conditions, which must be fulfilled prior to the closing of the transaction, or as obligations for future behaviour following the closing of the transaction. The remedies are part of the binding decision of the ComCo. According to the Federal Supreme Court, it is for the ComCo to decide on the necessary remedies. In practice, the parties can propose remedies.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

So far, the ComCo has imposed remedies in few foreign-to-foreign mergers in parallel proceedings with the EU Commission. In some of these cases, the ComCo has requested that the remedies of the EU Commission be extended to Switzerland.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The CartA does not provide for any rules on the timing of the negotiation of remedies. Remedies may be negotiated in Phase I, as well as Phase II procedures. In order to allow sufficient time for discussing the remedies, as well as possible market-testing by the competition authorities, negotiations should be initiated as early as possible.

5.5 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

There is no standard approach with regard to the terms and conditions for divestment remedies.

5.6 Can the parties complete the merger before the remedies have been complied with?

The parties may complete the transaction only if the remedies are not designed as a condition precedent for the closing. According to the practice of the Swiss competition authorities, structural remedies may either be a condition for the closing, or may be designed as an obligation following the closing of the transaction.

5.7 How are any negotiated remedies enforced?

The remedies will become part of the binding clearance decision of the ComCo. Any failure to comply with such decision and remedies can trigger sanctions.

If an undertaking concerned fails to comply with a remedy attached to the authorisation decision, it may be sanctioned with a fine of up to CHF 1 million (approx. EUR 0.9 million or USD 1 million; Art. 51 (1) CartA). In the case of repeated failure to comply with the remedy, the undertaking concerned may be sanctioned with a fine of up to 10% of the total Swiss turnover (Art. 51 (2) CartA). Individuals may be sanctioned with a fine of up to CHF 20,000 (approx. EUR 18,000 or USD 20,300; Art. 55 CartA).

The risk of sanctions rests with the undertakings that are obliged to notify the transaction. In the case of a merger, this would be the merging undertakings jointly, and in the case of an acquisition of control, this would be the undertaking or undertakings acquiring control.

5.8 Will a clearance decision cover ancillary restrictions?

The assessment by the ComCo will also include the assessment of ancillary restraints, which are necessary for, and linked to, the transaction. This concerns, e.g., non-compete obligations, licence agreements and interim purchase-and-supply obligations. Other restrictions will not be assessed within the merger control procedure, but may be submitted individually to the competition authorities for informal (Art. 23 (2) CartA) or formal review (Art. 49a (3) (a) CartA). The ComCo has not issued any guidelines about its approach to ancillary restraints.

5.9 Can a decision on merger clearance be appealed?

The decisions of the ComCo may be appealed by the undertakings concerned to the Federal Administrative Court. Judgments of the Federal Administrative Court can be appealed to the Federal Supreme Court. While the appeal to the Federal Administrative Court is a full appeal on the merits, the appeal to the Supreme Court is, in principle, limited to a judicial review.

Furthermore, the undertakings concerned can apply for an exceptional authorisation by the Federal Council within 30 days following the ComCo's prohibition decision. Exceptional authorisation can only be provided for important public interest reasons. The period for appeal to the Federal Administrative Court will, in this case, only begin after the notification of the Federal Council's decision (Art. 36 (1) CartA). An exceptional authorisation may also be requested following the decision by the Federal Administrative Court or the Federal Supreme Court, and once the respective decision has become non-appealable (Art. 36 (2) CartA). The Federal Council has to decide within a non-binding timeframe of four months.

5.10 What is the time limit for any appeal?

An appeal must be submitted to the Federal Administrative Court (or against a judgment of the Federal Administrative Court to the Federal Supreme Court) within 30 days after notification of the decision. See also question 5.9.

5.11 Is there a time limit for enforcement of merger control legislation?

With regard to sanctions against individuals, the law foresees a limitation period of two years (Art. 56 (2) CartA). The CartA does not, however, provide for any rules on the time limit for enforcement of administrative procedures against the undertakings concerned. Furthermore, there is no decision practice by the authority or the courts. In legal writing, it is generally argued that the time limit for administrative sanctions is five years, i.e. if within five years following an infringement there has been no initiation of a procedure, the sanction could no longer be applied.

6 Miscellaneous

6.1 To what extent does the merger authority in your jurisdiction liaise with those in other jurisdictions?

Currently, there are two bilateral agreements in place regarding information exchange with competition authorities from other jurisdictions: (i) the bilateral agreement between the European Community and the Swiss Confederation of 21 June 1992 on Air Transport, which allows for investigations in cooperation with the EU Commission in this sector; and (ii) the Agreement between the European Union and the Swiss Confederation concerning cooperation on the application of their competition laws. Based on the latter agreement, which entered into force on 1 December 2014, the Swiss and European competition authorities are entitled to exchange specific case-related information, even without the consent of the undertakings concerned or affected third parties which provided the information, in cases where the respective information is already in possession of the requested competition authority and the authorities are investigating the same transaction. However, the authorities are not obliged to transmit any information. With other jurisdictions, the Swiss authority could possibly request the parties to issue a waiver letter, in order to allow the exchange of information with a foreign authority.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to the statistics published annually by the Swiss competition authority, the ComCo received 32 merger control notifications for the year 2017, out of which 27 were approved without reservation in the preliminary investigation (Phase I) and two were approved without reservation after an in-depth investigation (Phase II). One concentration was prohibited.

Compared to 2016, it can be noted that in 2017 there was a significant increase in the number of merger control notifications (32 in 2017 *vs.* 22 in 2016) as well as in the number of in-depth investigations (three in 2017 *vs.* none in 2016).

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

In February 2012, the Federal Council proposed a reform of the CartA, including changes to the merger control regime. However, these proposed reforms were rejected by the Swiss Parliament during its autumn 2014 session. After this failed revision, the Swiss Federal Administration intends to introduce the uncontested changes of the failed revision, in particular, the introduction of the SIEC test ("significant impediment to effective competition") as a new substantive merger control test. The contents of a new revision proposal is currently in the early stages of discussion and a draft for the amended law is likely to be published before the end of 2018.

6.4 Please identify the date as at which your answers are up to date.

These answers are up to date as of 20 August 2018.

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