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Merger Control 2025

21st Edition

Contributing Editors:
Nigel Parr & Steven Vaz
Ashurst LLP

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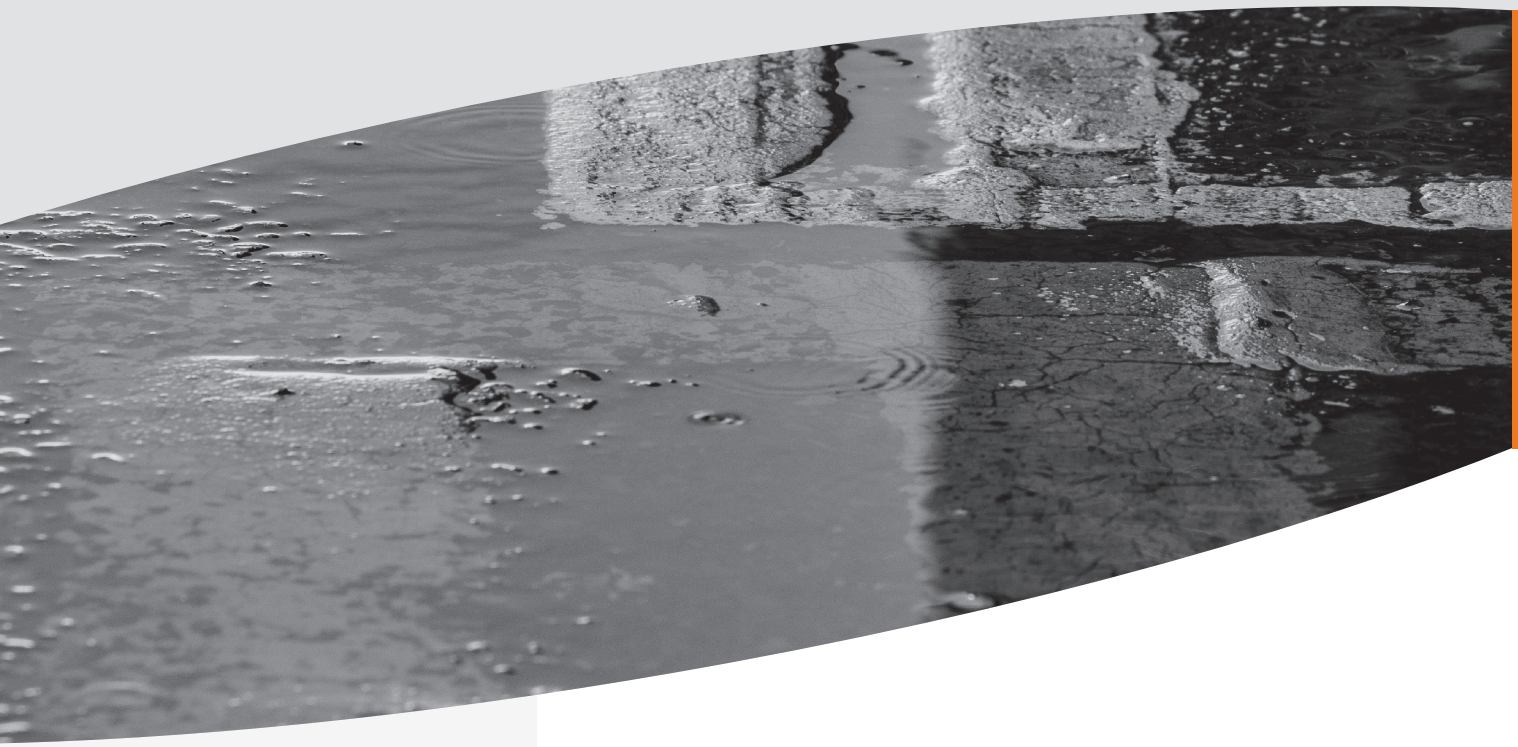

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Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

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From the Publisher

Welcome to the 21st edition of *ICLG – Merger Control*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to merger control laws and regulations around the world, and is also available at www.iclg.com.

The publication begins with three expert analysis chapters written by Ashurst LLP, AlixPartners, and CMS that provide further insight into merger control developments.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with merger control laws and regulations.

As always, this publication has been written by leading merger control lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Nigel Parr & Steven Vaz of Ashurst LLP for their leadership, support and expertise in bringing this project to fruition.

Jon Martin
Publisher
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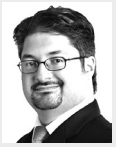
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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).

The Swiss Competition Commission (ComCo) is the competition authority that oversees 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 and is headed by its Executive Board, made up of a Director, a Deputy Director and three Vice-Directors. The ComCo is a part-time body and consists of 11–15 members (currently, it comprises 12 members), appointed by the Federal Council. The members are each elected for four years and the tenure is limited to 12 years. The majority 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 Bern, 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 below), the geographical allocation of turnovers and the necessary information on affected markets (*cf.* question 3.11 below).

The CartA was originally enacted in 1996 and revised in 2004. A proposed second revision was rejected by the Swiss Parliament in 2014. Currently, there is a new attempt at a partial reform of the CartA with some aspects of the reform also relating to merger control (*cf.* question 6.3 below).

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 below).

Furthermore, certain restrictions may apply to the direct or indirect acquisition of real estate in Switzerland by foreigners. While there has 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 that (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 ComCo. The authorities will apply the EU Merger Control Regulation No. 139/2004.

- Radio/TV, telecommunications, and rail transport: The acquisition of a company that holds a licence in these sectors must be notified and approved by the relevant authority.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

In May 2022, the Swiss Federal Council initiated the consultation procedure on a new legislation to screen foreign direct investments (FDI) in Switzerland. The proposed FDI control regulation seeks to prevent threats to public order and security as a potential consequence of foreign investors acquiring control of Swiss companies. The draft legislation is currently pending before the Swiss Parliament.

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 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 must be assessed on a case-by-case basis.

2.2 Can the acquisition of a minority shareholding or other form of influence amount to a "merger"?

The acquisition of minority shareholdings or other forms of influence may qualify as an acquisition of control if there are additional agreements that confer control or a veto right on the acquirer, or if the shareholder structure or quota of presence is such that the minority shareholding regularly allows for a majority of the acquirer 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 of the acquirer, 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 below). 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 the joint venture will be dependent on sales to the parent companies, and has held that a joint venture that will supply goods and/or services only to the parent businesses, and that 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 fulfilled in most cases.

For joint control that is part of multiple transactions in succession, please refer to the answer to question 2.8 below. 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 (approximately EUR 2,060 million or USD 2,225 million according to average reference rates published by the Swiss National Bank for 2023: EUR 1 is equal to CHF 0.9717; and USD 1 is equal to CHF 0.8985) or an aggregated turnover in Switzerland of at least CHF 500 million (approximately EUR 515 million or USD 556 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 (approximately EUR 103 million or USD 111 million).

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 Swiss 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; however, it 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) must be considered. If only a part of an undertaking is

the subject of the concentration, it is that part that 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 consideration 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 the 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 generally 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 above are fulfilled, a transaction must be notified (*cf.* the exception which is discussed in question 2.7 below).

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 above is caught by Swiss merger control legislation and must be notified (*cf.* the exception, which is discussed in question 2.7) below. 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 (Arts 9 and 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 transactions that have an effect in Switzerland. This has been interpreted in a very restrictive manner by the Federal Supreme Court. According to the Federal Supreme Court's practice, an effect in Switzerland is given whenever the turnover thresholds (*cf.* question 2.4 above) are met.

However, a notice published by the Swiss competition authority indicates that an exception may be made in the case of the acquisition or creation of a joint venture company that neither has any turnover in Switzerland, nor any current or future business activities in Switzerland. The Swiss competition authority takes the view 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. In particular, since the Swiss competition authority has recently noted that the notification exception should be interpreted narrowly and only applies if the activity of the JV clearly has no relation to competition in Switzerland. The circumstances of the individual case are decisive, and in case of doubt whether a merger transaction is notifiable in Switzerland, a notification obligation is to be assumed.

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 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 indicated in the answer to question 2.4 must be notified.

There is no deadline for the notification; however, 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 described in the answer to question 2.7, clearance is required if the jurisdictional thresholds are met.

3.3 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

The Swiss competition authority may not, in general, investigate merger transactions where the jurisdictional thresholds as indicated in question 2.4 above are not met. However, there may be one

exception in the case of so-called structural abuse. It is possible that this concept, which is inspired by the Court of Justice of the European Union (CJEU) judgment relating to *Europemballage Corporation and Continental Can Company vs. Commission* (CJEU, Case 6-72, judgment of 21 February 1973), could be used by the Swiss competition authority to investigate certain merger transactions where it believes that a dominant company is attempting to strengthen its market position – regardless of the means and procedures used – in such a way that the degree of dominance achieved substantially impedes competition. However, to date, this remains a theoretical possibility and we are not aware of merger control cases where the concept of structural abuse has been used to initiate a merger control investigation.

3.4 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 (approximately EUR 1.03 million or USD 1.1 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 up to CHF 20,000 (approximately EUR 20,600 or USD 22,300). 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 (approximately EUR 36,000 or USD 39,000) for the failure to notify a concentration. The highest fine published to date was imposed in 1998 and amounted to CHF 68,400 (approximately EUR 70,400 or USD 76,000).

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.

3.5 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 from completing the transaction prior to its clearance (*cf.* question 3.8 below). This has previously 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 3.14 below).

Except for these situations, there are no provisions in the CartA that permit a local hold-separate agreement 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.

3.6 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 regard 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.

3.7 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 3.15 below).

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 which to confirm the receipt and completeness of the notification (Art. 14 MCO). If the Secretariat considers the notification 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 a notice about the initiation of an in-depth investigation within the deadline for the Phase I procedure. If no such notice is given within the timeframe, the transaction will be deemed cleared and may be implemented without reservation.

Phase II: The ComCo has four months in which to conduct and 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 conduct 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).

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

The CartA provides for a standstill obligation. If a transaction must be notified, this has the effect of the undertakings concerned being prohibited from closing and implementing the transaction during Phase I as well as Phase II, if applicable. The undertakings concerned can request the ComCo to waive this standstill period. Such exemptions are possible for important reasons, such as the reorganisation of failing companies or pending public takeover bids (*cf.* question 3.5 above). 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). Additionally, as indicated in question 3.4 above, the ComCo may fine companies that complete a transaction before clearance with an amount of up to CHF 1 million (approximately EUR 1.03 million or USD 1.1 million). In case of repeated infringements against the standstill obligation, the fine can be increased to up to 10% of the total turnover in Switzerland achieved by all the undertakings concerned. Of the sanctions issued to date, the highest fine amounted to CHF 68,400 (approximately EUR 70,400 or USD 76,000).

3.9 Is a transaction which is completed before clearance is received deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

From a civil law perspective, the validity of a transaction completed before clearance is suspended until the deadline for Phase I and, if applicable, Phase II has expired (Art. 34 CartA). Civil law validity is only given if the transaction has been cleared by the Swiss competition authority.

3.10 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 French, German and Italian at the ComCo's website: https://www.weko.admin.ch/weko/en/home.html. The notification must be made in one of the official Swiss languages; however, the annexes may also be submitted in English. In cases of parallel notifications in Switzerland and the EU, it is general practice to submit the European Form CO as an annex to the Swiss notification.

Even after confirmation that the notification is complete, 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; however, they constitute a common and accepted practice (*cf.* question 3.7 above).

3.11 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, does not have to 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.

3.12 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 the service of documents.

In the case of an acquisition of control, the transaction must 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.

3.13 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 (approximately EUR 5,150 or USD 5,570) for its Phase I investigation. For the Phase II investigation, the fee is based on hourly charges of CHF 100–400 (approximately EUR 103–412 or USD 111–445).

In general, the fees must be paid within 30 days after receiving the ComCo's invoice. The invoice is normally sent within days after the authority issues its decision. There is no established practice regarding exceptions from paying the fee.

3.14 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 must 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, informal contact with 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 3.7 above).

3.15 Are notifications published?

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

In transactions of public interest, the ComCo may issue a press release or hold a press conference 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 must 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. The ComCo may not consider public policy issues. To date, 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 never been granted to date (*cf.* question 5.10 below).

4.2 To what extent are efficiency considerations taken into account?

Based on the applicable legal test, the ComCo may only take efficiency considerations into account if they are suitable in order to prevent the elimination of competition, and only if they occur in a market other 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 consider non-competition issues when assessing mergers (*cf.* question 4.1); however, in some past cases, a certain influence of non-competition issues could be noticed. An authorisation based on compelling public interests may only be granted by the Federal Council (*cf.* question 5.10 below).

If a concentration of banks is deemed necessary by 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 ComCo, 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 views. 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 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 EU Commission, it should be noted that the agreement between the EU and Switzerland concerning cooperation on the application of their competition laws (which entered into force on 1 December 2014) also permits 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 up to CHF 100,000 (approximately EUR 103,000 or USD 111,300). In addition, natural persons may personally be fined up to CHF 20,000 (approximately EUR 20,600 or USD 22,300). 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 a business secret. The ComCo has issued a notice regarding business secrets, which is available in French, German and Italian at the ComCo's website: https://www.weko.admin.ch/weko/en/home.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 along with the formal confidential 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 decides to initiate an in-depth investigation (Phase II), the ComCo can issue a final decision: (i) clearing the transaction unconditionally; (ii) permitting 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 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

No such formal or informal policies have been published.

5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

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

5.5 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 include any rules on the timing of the negotiation of remedies. Remedies may be negotiated in Phase I, as well as in 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.

5.6 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.

5.7 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.

5.8 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 (approximately EUR 1.03 million or USD 1.1 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 its total Swiss turnover (Art. 51 (2) CartA). Individuals may be sanctioned with a fine of up to CHF 20,000 (approximately EUR 20,600 or USD 22,300; 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.

5.9 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, provided that the undertakings concerned apply for an assessment. 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; however, they 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.

5.10 Can a decision on merger clearance be appealed?

The decisions of the ComCo may be appealed by the undertakings concerned with 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 Federal 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 significant 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 must decide within a non-binding timeframe of four months.

5.11 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 (*cf.* question 5.10).

5.12 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. Legal scholars generally argue 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 Switzerland and the EU on air transport, which allows for investigations in cooperation with the EU Commission in this sector; and (ii) the agreement between Switzerland and the EU 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 EU competition authorities are entitled to exchange specific case-related information, even without the consent of the undertakings concerned or affected third parties that provided the information, in cases where the respective information is already in the possession of the requested competition authority and the authorities are investigating the same transaction. However, the authorities are not obliged to transmit any information. The Swiss Confederation is currently finalising a similar agreement with Germany.

With other jurisdictions, the Swiss authority could possibly request the parties to issue a waiver letter, in order to permit 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 33 merger control notifications in the year 2023, 32 of which were approved without reservation in the preliminary investigation (Phase I). Two merger control notifications went into the Phase II investigation and one transaction, *Post/Quickmail*, was prohibited in January 2024.

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 significant impediment to effective competition (SIEC) test as a new substantive merger control test. The contents of a new revision proposal are

currently under discussion and the changes related to merger control have been approved by the first chamber of the Swiss Parliament. The second chamber of the Swiss Parliament will likely deliberate on the reform in 2025.

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

These answers are up to date as at 19 August 2024.

7 Is Merger Control Fit for Digital Services & Products?

7.1 In your view, are the current merger control tools suitable for dealing with digital mergers?

The suitability of the current CartA to address digital mergers is subject to debate by legal scholars and competition law practitioners. However, there are currently no concrete proposals on revisions to the CartA to address digital mergers.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

To date, there have been no changes to law, process or guidance in relation to digital mergers. The most recent discussions regarding a possible amendment of the merger control rules focus mainly on the applicable substantive test, i.e., the switch to the SIEC test, as applied in the EU (*cf.* also question 6.3 above).

7.3 In your view, have any cases highlighted the difficulties of dealing with digital mergers? How has the merger authority dealt with such difficulties?

To date, there have been no cases similar to *Facebook/WhatsApp*, highlighting the difficulties of dealing with digital mergers. The lack of such cases is likely to be attributable to the current turnover thresholds in Switzerland and the absence of specific criteria such as transaction value thresholds as introduced in Austria and Germany.

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