The Merger Control Review

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Editor
Ilene Knable Gotts

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THE MERGER CONTROL REVIEW

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PREFACE

Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. For instance, in 2009, China blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the entire merger, even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

Some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency this year. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. However, there are some jurisdictions that take a more expansive view. For instance, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. Germany also takes an expansive view by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many of these jurisdictions can impose a significant fine for failure to notify before closing, even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, the Netherlands, Romania, Spain and Turkey). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

Some jurisdictions impose strict time frames within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina, Indonesia, and Serbia). Most jurisdictions also have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover. In Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

Most jurisdictions more closely resemble the EC model than the United States model. In these jurisdictions, pre-filing consultations are more common (and even encouraged); parties can offer undertakings during the initial stage to resolve competitive concerns; and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japan Federal Trade Commission (JFTC) announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC model. For instance, in Austria, the obligation to file can be triggered if only one of the involved undertakings has sales in Austria, as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan), there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with Brazil's CADE, which in turn has worked with the Chilean authority. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia, and Turkey similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. In transactions not requiring filings in multiple European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include, as a reportable situation, the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., the EC and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise at 20 per cent of a target; and Japan and Russia at any amount exceeding 20 per cent of the target). Others use, as the benchmark, the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. Moreover, the need to coordinate is particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

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Wachtell, Lipton, Rosen & Katz
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July 2018

Chapter 38

SWITZERLAND

Pascal G Favre and Marquard Christen[1]

I INTRODUCTION

Merger control in Switzerland is governed by the Federal Act on Cartels and Other Restrictions of Competition (ACart) and the Merger Control Ordinance (MCO). These competition regulations came into force on 1 July 1996 and were first revised in 2003.

Concentrations are assessed by the Competition Commission,[2] an independent federal authority based in Bern that consists of up to 15 members. There are currently 12 members who were nominated by the federal government, the majority of which are independent experts (i.e., law and economics professors). Deputies of business associations and consumer organisations take the other seats. Cases are prepared and processed by the Secretariat of the Competition Commission (with a staff of 72 employees at the end of 2017 (full-time and part-time), mostly lawyers and economists), divided into four departments: product markets, services, infrastructure and construction.

The types of transactions that are subject to merger control are mergers of previously independent undertakings; and direct or indirect acquisitions of control by one or more undertakings over one or more previously independent undertakings, or parts thereof. Joint ventures are also subject to merger control if the joint venture company exercises all the functions of an independent business entity on a lasting basis; if a joint venture company is newly established, it is subject to merger control if, in addition to the above criteria, the business activities of at least one of the controlling shareholders are transferred to it.

Pursuant to Article 9 ACart, pre-merger notification and approval are required if two turnover thresholds are reached cumulatively in the last business year prior to the concentration:

a the undertakings concerned must have reported a worldwide aggregate turnover of at least 2 billion Swiss francs or a Swiss aggregate turnover of at least 500 million Swiss francs; and

b at least two of the undertakings concerned must have reported individual turnovers in Switzerland of at least 100 million Swiss francs.

These thresholds are considered to be relatively high in comparison with international standards. Alternatively, a particularity of the Swiss regime is that if the Competition Commission has previously issued a legally binding decision stating that an undertaking holds a dominant position in a particular market, such undertaking will have to notify all

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2 www.weko.admin.ch.

its concentrations, regardless of the turnover thresholds, provided that the concentration concerns that particular market or an upstream, downstream or neighbouring market. According to Article 4(2) ACart, an undertaking is considered to hold a dominant position if it is 'able, as regards supply and demand, to behave in a substantially independent manner with regard to the other participants in the market (competitors, suppliers, buyers)'.

If the thresholds are met, or in the case of a dominant undertaking as explained above, the concentration must be notified to the Competition Commission prior to its completion. If a transaction is implemented without notification or before clearance by the Competition Commission (or if the remedies imposed are not fulfilled), the companies involved may be fined up to 1 million Swiss francs. Members of the management may also be fined up to 20,000 Swiss francs. So far, the Competition Commission has imposed several fines on companies for failure to notify, but there has been no criminal sanction of members of management. Furthermore, the Competition Commission may order the parties to reinstate effective competition by, for instance, unwinding the transaction.

The ACart does not stipulate any exemptions to the notification requirements. However, if the Competition Commission has prohibited a concentration, the parties may in exceptional cases seek approval from the federal government if it can be demonstrated that the concentration is necessary for compelling public interest reasons. Such approval has, however, not been granted so far.

Specific rules apply to certain sectors. Thus, a concentration in the banking sector may be subject to a review by the Swiss Financial Market Supervisory Authority, which may take over a case involving banking institutions subject to the Federal Law on Banks and Saving Banks, and authorise or refuse a concentration for reasons of creditor protection, irrespective of the competition issues. If the parties involved in a concentration hold special concessions (e.g., radio, television, telecommunications, rail, air transport), a special authorisation by the sector-specific regulator may be required. Moreover, under the Federal Law on the Acquisition of Real Estate by Foreign Persons, for any concentration involving a foreign undertaking and a Swiss real estate company holding a portfolio of residential properties in Switzerland, the approval of the competent cantonal or local authorities may also be necessary.

The Swiss merger control regime features a very high standard of assessment compared with other jurisdictions, which is sometimes called the 'dominance-plus test'. Pursuant to Article 10 ACart, the Competition Commission must prohibit a concentration or authorise it subject to conditions and obligations if the investigation indicates that the concentration:

a creates or strengthens a dominant position;
b is capable of eliminating effective competition; and
c causes harmful effects that cannot be outweighed by any improvement in competition in another market.

In two decisions issued in 2007, *Swissgrid and Berner Zeitung AG/20 Minuten (Schweiz) AG*, the Swiss Supreme Court had to determine whether a concentration could be prohibited if there was a mere creation or strengthening of a dominant position or whether conditions (a) and (b) (i.e., creation or strengthening of a dominant position and elimination of effective competition) were cumulative. This question has significant practical consequences, because if the two conditions are cumulative, then a concentration must be authorised even if a dominant position is created or strengthened if it cannot be established that the concentration will eliminate effective competition. In the *Swissgrid* case, seven Swiss electricity companies wanted to integrate their electricity-carrying network under a common company. The Swiss

Supreme Court held that conditions (a) and (b) were cumulative. The reasoning followed by the Supreme Court was that merger control is part of the control of market structure. Therefore, to justify an administrative intervention, the concentration must result in a concrete negative change in the market structure and the competition must be altered. In this case, the Court found that competition did not exist prior to the concentration. Accordingly, the concentration would not change the market conditions and the administrative intervention was not justified. In more recent cases (notably the *Tamedia/PPSR (Edipresse)* case), the Competition Commission examined whether the concentration could eliminate effective competition, but in a way that might indicate that it is in fact reluctant to give an autonomous scope to that criterion. In practice, the efficiency gains provided in condition (c) have so far played no role.

II YEAR IN REVIEW

2018 opened with the changing of the guard at the Competition Commission. Vincent Martinet, who had been leading the efforts of the federal enforcer since 2010, stepped down after 12 years of service with the Commission. He handed over the baton to Andreas Heinemann, his former deputy for the past six years.

In 2017, there was an increase in the number of notifications of company mergers, with 32 reports (in contrast to 22 the previous year), reflecting increasing M&A activity. Twenty-seven cases were cleared after a preliminary investigation (Phase I). Three in-depth investigations (Phase II) were launched.

Considering the substantive test applicable to Swiss merger control (see Section I above), in the past, the Competition Commission prohibited only two concentrations back in 2004 and 2010, namely the acquisition of (joint) control of Berner Zeitung over free newspaper *20 Minuten* (the prohibition had been overturned on appeal) and the intended takeover of telecommunication company Sunrise by competitor Orange (now Salt). In 2017, the Commission vetoed a deal for the third time in its history. In the spotlight was the acquisition of a joint control by Ticketcorner Holding AG and Tamedia AG over Ticketcorner AG and, indirectly (as a 100 per cent subsidiary of Ticketcorner AG post-transaction), Starticket (a subsidiary of Tamedia). In addition to being the two most popular brokers for the sale of show tickets online and offline to audiences across Switzerland, both Ticketcorner and Starticket provide marketing services to promoters in the show business via advertising campaigns in the media and social networks and by giving promoters access to a software allowing them to do direct sales. While the Competition Commission's detailed review of the deal revealed no threats to the markets for direct sales, it provided enough evidence to show the already dominant position of Ticketcorner in the market for primary ticketing. The Commission determined that the merger would give the two companies unchallenged control over that market in Switzerland. The Commission's ban was prompted by an in-depth analysis of both companies already present in the market and potential entries of future competitors, as well as market trends and the increasing clout of global players such as Spotify, Facebook and Google. The Commission concluded that, in spite of clear technological advances, the newly merged companies could still easily withstand behavioural pressure from competitors and thus refused to grant approval. The decision has been challenged by Ticketcorner in the Federal Administrative Court.

Another merger received a great deal of publicity, involving in-patient hospital services: On 18 September 2017, the Competition Commission approved the planned merger between the University Hospital of Basel and the Cantonal Hospital of Baselland resulting in the creation of a joint hospital group. At the outset, the Competition Commission dealt quite extensively with the material scope of the ACart and its applicability in the healthcare sector. It considered that all activities of the concerned hospitals fall under the ACart, except for the creation of hospital lists as well as the control of the SwissDRG and TARMED. While the Commission determined that the newly created hospital group may attain an important competitive edge in the market for acute in-patient services in the Basel area, the enforcer failed short of proving that the merger would create a dominant position liable to eliminate effective competition in that region. Thus, lacking the necessary statutory requirements, the Commission could not intervene – the planned merger received a green light.

The Competition Commission also had the opportunity to provide useful clarification in relation to undertakings in the financial sector willing to create a full-function joint venture structured under French law, the purpose of which was to set up and provide SMEs a post-trade blockchain infrastructure for securities on Euronext markets. The parent companies planned to invest in the joint venture but would not transfer any commercial activity, assets, know-how or human capital to the said joint venture. As a matter of principle, such transaction would fall under Swiss merger control. However, since the capital injected by the parent companies was not intended to be used as a means for commercial activities but rather to help set up an independent entity and an IT solution, the Competition Commission considered that the transaction was not subject to Swiss merger control.

Several other green lights were granted by the Commission across a variety of sectors in the course of 2017.

In the telecommunications sector, after a preliminary examination, the Commission allowed the entry of BuyIn SA as an autonomous entity into the market. BuyIn SA had been set up in 2011 as a non-full function joint venture between German Telecom AG and Orange SA.

A similar outcome was enjoyed by two notable mergers in the media and advertising sector, as Tamedia received the coveted 'go-ahead' of the Commission on the account of acquiring exclusive controls both over Tradono Switzerland, active in the market for small ad apps, and over Neo Advertising, operating in the field of outdoor communications.

In the energy sector, a couple of mergers successfully underwent the scrutiny of the Swiss federal competition authorities. Among those, the joint venture between Energiedienst Holding AG, Hälg & Co AG and Inretis Beteiligungen AG aiming to provide solutions to network energy systems architecture. The other notable case that received the Commission's approval was the acquisition of joint control by Electricité de France (EDF) and Caisse des dépôts et consignations (CDU) of the Reseau de transport d'électricité (RTE), previously under EDF's exclusive control.

Other sectors across the industry, including transportation, digital security, IT and data protection, have also kept the Commission busy over concentration notices, all of which eventually received a green light. In the container shipping industry, it was the takeover of the Hamburg Südamerikanische Dampfschifffahrts-Gesellschaft KG (HSDG) by Maersk Line A/S, while in freight rail transportation it was the merger by BLS AG and Transport Ferroviaire Holding SAS (a subsidiary of SNCF Mobilités). In the digital world, approvals were granted to the joint acquisition by SwissPost AG and the Swiss Federal Railways (SBB) of SwissSign AG, identity and certification services provider, and to Tech Data Corporation for its acquisition of the Avnet Technology Solutions business division from Avnet Inc.

III THE MERGER CONTROL REGIME

If the turnover thresholds are reached by the undertakings concerned or if the concentration involves a company holding an established dominant position (see Section I, above), the filing of a merger notification is mandatory prior to the completion of the transaction. Under Swiss law, there are no deadlines for filing. A transaction can be notified prior to the signing of the final agreements. However, the parties must demonstrate a good faith intention to enter into a binding agreement and to complete the transaction (in practice, the standard is similar to that of the European Commission). The Secretariat of the Competition Commission can be contacted on an informal basis before the notification. This can speed up the notification procedure (for example, the Secretariat can agree to waive some legal requirements in relation to the content of the notification).

In the case of mergers, the notification must be made jointly by the merging undertakings. If the transaction is an acquisition of control, the undertaking acquiring control is responsible for the filing. The filing fee for a Phase I investigation is a lump sum of 5,000 Swiss francs (but the Secretariat of the Competition Commission announced in 2015 that if the assessment of incomplete draft notifications involves a large amount of work, in future the Secretariat would invoice this work as chargeable advisory activity). In Phase II investigations, the Secretariat of the Competition Commission charges an hourly rate of 100 to 400 Swiss francs.

Once the notification form has been filed, if the Competition Commission considers that the filing was complete on the date of the filing, it will conduct a preliminary investigation and will have to decide within one month whether there is a need to open an in-depth investigation (Phase I). If the Competition Commission decides to launch an in-depth investigation (Phase II), it will have to complete it within four months. As regards the internal organisation, under its internal rules of procedure (revised on 15 June 2015) the Competition Commission has created a Chamber for merger control, which has been granted the power to decide whether a detailed examination (Phase II) should be started and whether the merger can be implemented ahead of the normal schedule. However, the Competition Commission retains a certain residual power in the preliminary assessment, in that it will be informed of the Chamber's decision and may conduct an examination independent of the Chamber (and, as the case may be, overrule the Chamber's decision). The Commission can also delegate other tasks to the Chamber if practical considerations indicate that this is appropriate. Pursuant to the new internal rules of procedure (in force since 1 November 2015), Andreas Heinemann (President), Armin Schmutzler and Danièle Wüthrich-Meyer (both Vice-Presidents of the Competition Commission) have been appointed as members of the Chamber for merger control (effective as of the beginning of 2018).

As a rule, the closing of a transaction should not take place prior to the competition authorities' clearance. However, in specific cases, the authorities may allow a closing prior to clearance, for important reasons. This exception has been mainly used in cases of failing companies and, more recently, in the case of a pending public takeover bid. Contrary to the European merger control rules (Article 7, Paragraph 2 of Council Regulation (EC) No. 139/2004), no exception for public bids is provided under Swiss law. Therefore, each case will be assessed individually. In the *Schaeffler/Continental* case (where Schaeffler and Continental eventually agreed on the conditions of a public takeover), the Competition Commission decided that a request for an early implementation of a concentration can be granted before the notification is submitted if three conditions are fulfilled:

a the Competition Commission must be informed adequately about the concentration;
b specific reasons must be given on why the notification cannot be submitted yet; and
c whether the transaction can be unwound must be assessed in the event that the concentration is not allowed by the Competition Commission after its review.

In that case, these conditions were fulfilled. However, the Competition Commission imposed two additional conditions: the obligation not to exercise the voting rights except to conserve the full value of the investment, and the obligation to submit a full notification within a relatively short period of time.

In practice, the one-month period for the Phase I investigation can be shortened in less complex filings, especially if a draft filing was submitted to the Competition Commission for review prior to the formal notification.

If the Competition Commission decides to launch a Phase II investigation, it will publish this decision. It will then send questionnaires to the parties, as well as their competitors, suppliers and clients. Usually, a Phase II hearing with the parties takes place. If the parties propose remedies, close contact is established between the Secretariat of the Competition Commission and the undertakings involved to determine the scope. Ultimately, however, the authority to impose remedies lies with the Competition Commission, which enjoys a wide power of discretion (subject to compliance with the principle of proportionality).

Third parties have no formal procedural rights at any point in the procedure. If the Competition Commission opens a Phase II procedure, it will publish basic information about the concentration and allow third parties to state their position in writing within a certain deadline. The Competition Commission is not bound by third-party opinions, or by answers to questionnaires. Third parties have no access to documents and no right to be heard. Moreover, the Swiss Supreme Court has held that third parties are not entitled to any remedy against a decision of the Competition Commission to permit or prohibit a concentration.

A decision of the competition authority may be appealed within 30 days to the Federal Administrative Tribunal and ultimately to the Swiss Supreme Court. The duration of an appeal procedure varies, but may well exceed one year at each stage. On 28 February 2018, the Secretariat of the Competition Commission published an updated version of its communication dated 25 March 2009 on the notification and assessment practice regarding merger control (Merger Control Communication).

The Merger Control Communication first clarifies the concept of 'effect' in the Swiss market in the case of a joint venture. Article 2 of the ACart provides that the Act 'applies to practices that have an effect in Switzerland'. Until the Merger Control Communication, the Competition Commission and the Swiss courts held that if the turnover thresholds of Article 9 ACart were reached, it should always be considered that there was an effect in the Swiss market. Thus, in the case of the creation of a joint venture with no activity in Switzerland but where the turnover thresholds were met by the parent companies, a notification was required (see, e.g., the *Merial* decision of the Swiss Supreme Court of 24 April 2001). However, in the Merger Control Communication, the Competition Commission takes a different approach: if the joint venture is not active in Switzerland (no activity or turnover in Switzerland – in particular no deliveries in Switzerland) and does not plan to be active in Switzerland in the future, then the creation of this joint venture does not have any effect in Switzerland and accordingly no notification is required, even if the turnover thresholds are met by the parent companies. In the *Axel Springer/Ringier* case (dated May 2010), Ringier AG and

Axel Springer AG formed a joint venture in Switzerland, in which they concentrated all the printed and electronic media activities they had in eastern European countries. In light of the criteria set out in the Merger Control Communication, the Competition Commission took the view that the joint venture was subject to Swiss merger control, since some of the entities concentrated in it had achieved a turnover in Switzerland in the year preceding the concentration, while others had made deliveries in Switzerland.

The second jurisdictional issue dealt with by the Merger Control Communication generalises the position taken by the Competition Commission in its *Tamedia/PPSR (Edipresse)* decision dated 17 September 2009. In this case, the deal was structured into three phases over a period of three years, with a shift from joint to sole control by Tamedia over that period. The Competition Commission decided that the deal could be regarded as a single concentration only if the three following conditions were met:

a constitution of a joint control during a transition period;
b a shift from joint control to sole control concluded in a binding agreement; and
c a maximum transition period of one year.

Until that decision, the Competition Commission considered that a transition period of up to three years was acceptable to analyse a case as a single concentration. However, to align its practice with that of the European Commission in its Jurisdictional Notice of 10 July 2007, the Competition Commission decided to reduce the transition period to one year.

On a related topic, the Secretariat of the Competition Commission provided in an informal consultation dated 2017 a clarification in relation to a series of transactions according to which the first transaction would lead to the sole acquisition of a target company by one undertaking and a second transaction to the acquisition of joint control over the same target by several undertakings (including the undertaking that acquired sole control in the first place). The Secretariat of the Competition Commission held that only the second transaction would trigger a duty to notify, provided the various transactions are dependent on each other and together form a single operation.

The Merger Control Communication also addresses the subject of the geographic allocation of turnovers. In general, the test for the geographic allocation of the turnover is the contractual delivery place of a product (place of performance) and the place where the competition with other alternative suppliers takes place respectively. The billing address is not relevant. Special rules apply to the calculation of turnovers based on the provision of services.

The Merger Control Communication also clarifies the examination criteria and the notification requirements for markets affected by concentrations in which only one of the participants operates, but has a market share of 30 per cent or more. The issue is the extent to which the other companies involved in the concentration may be categorised as potential competitors. According to the Competition Commission's practice, a planned takeover leads to the exclusion of potential competitors if an undertaking involved plans to enter the problematic market or if it has pursued this objective in the past two years (e.g., the development of competing medicines that has entered an advanced phase may be interpreted as the intention to enter a new market). An exclusion of potential competitors is also possible if an undertaking involved holds important intellectual property rights in this market, even where it is not active in the market concerned. Special attention must be given to cases in which another undertaking involved is already active in the same product, but not geographic market or in an upstream, downstream or neighbouring market closely linked with the market in which the relevant undertaking holds a market share of at least 30 per cent.

IV OTHER STRATEGIC CONSIDERATIONS

The Competition Commission maintains close links with the European Commission. It accepts that, in cases where a notification has also been filed with the European Commission, the parties provide the Form CO filing, annexed to the Swiss notification for reference. This reduces the workload for the drafting of the Swiss notification, as the parties therefore only have to add specific data regarding the Swiss market. That said, while annexes to the Swiss notification may be provided in English, the main part of the notification must be drafted in one of the Swiss official languages (French, German or Italian).

The Competition Commission aims to give a decision coherent with that of the European Commission if a case has been notified both in Brussels and in Bern. To ensure compatible decision-making, it is advisable for the parties to provide a waiver that allows the Competition Commission to liaise directly with the European Commission.

More generally, the report of the Taskforce Cartel Act presented in January 2009 (see Section V, below) states that in the context of growing globalisation, it would be appropriate for Switzerland to conclude cooperation agreements with its main trading partners to make possible the exchange of confidential information between competition authorities. On 17 May 2013, the government signed an agreement between the Swiss Confederation and the European Union concerning cooperation on the application of their competition laws (Agreement). In essence, the Agreement regulates cooperation between the Swiss and European competition authorities. It is a purely procedural agreement and does not provide for any substantive harmonisation of competition laws. The two competition authorities shall notify each other in writing of enforcement activities that could affect the important interests of the other contracting party. A list is given of examples of cases in which notification must be given, and the time for notifications in relation to mergers and other cases is also set out (Article 3, Paragraphs 3 and 4). Furthermore, the Agreement creates the legal basis for the competition authorities to be able to coordinate their enforcement activities with regard to related matters. The Agreement entered into force on 1 December 2014.

The Competition Act does not contain any specific rules regarding public takeover bids. The Competition Commission should be contacted in advance so that it can coordinate its course of action with the Swiss Takeover Board. This is particularly important for hostile bids. Past practice has shown that in most cases the Competition Commission substantially follows the rules of the EU Merger Control Regulation on public takeover bids. In addition, it is possible to request provisional completion specifically in public takeover bids (see Section III, above).

V OUTLOOK & CONCLUSIONS

On 14 January 2009, the federal government was presented with a synthesis report issued by the Taskforce Cartel Act, a panel formed in 2006/2007 by the head of the Federal Department of Economic Affairs to evaluate the ongoing effects and functioning of the ACart. Article 59a of the ACart requires the federal government to evaluate the efficiency and conformity of any proposed measure under the Act before submitting a report and recommendation to Parliament in relation to such measure. As regards concentrations, the Taskforce Cartel Act took the view that, compared with other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition ('dominance-plus test'), is deficient and provides a relatively weak arsenal to enhance competition effectively. According to the experts, a risk exists that concentrations adversely impacting competition might be approved.

They recommended a harmonisation of the Swiss merger control system with the EU merger control system to eliminate that risk and to reduce the administrative workload with respect to transnational concentrations, as well as the implementation of modern instruments to control the criteria governing intervention in the case of concentrations (the SIEC test, efficiency defence and dynamic consumer welfare standard).

On 30 June 2010, the federal government published a set of draft amendments to the ACart for public consultation. The government proposed, *inter alia*, to replace the currently applied 'dominance-plus test' either with a simple dominance test (whereby the criterion of a possible elimination of competition would be dropped) or with a significant impediment to effective competition (SIEC) test analogous to EU law. As regards notification obligations, the government proposed maintaining the existing turnover thresholds, but suggested a new exception to eliminate duplicate proceedings where every relevant market geographically extends over Switzerland plus at least the European Economic Area and the concentration is being appraised by the European Commission.

Based on the results of the consultation procedure, on 22 February 2012 the federal government released a dispatch to Parliament on the revision of the ACart together with a set of draft amendments. Regarding merger control, the draft amendments confirmed the willingness of the federal government to change the assessment criteria for the merger control procedure (introduction of the SIEC test) combined with a relaxation of regulations on undertakings in the case of concentrations with defined international markets and in relation to deadlines (harmonisation with conditions in the EU). Additional changes in the merger regime included more flexible review periods. The present review periods in Switzerland are one month for Phase I and an additional four months for Phase II (see Section III, above). The reform would have introduced the possibility to extend the review period in Phase I by 21 days and in Phase II by two months. Such extension would have to be agreed between the authorities and the undertakings concerned. Finally, the reform would have included a waiver of the notification obligation in the case of a concentration where all relevant geographic markets would comprise at least the EEA plus Switzerland and the concentration is assessed by the European Commission. In such cases, the filing of a copy of Form CE with the Swiss authorities for information purposes but without review would have been sufficient.

In the parliamentary debate, the Council of States approved the Federal Council draft for the revision of the Cartel Act at its first reading in March 2013, subject to various amendments. However, the National Council at its first reading in March 2014 decided not to consider the revision. After the Council of States adhered to its decision in June 2014, but the National Council again decided not to consider the revision in its second reading in September 2014, the final outcome was that the Cartel Act would not be revised.

According to the Competition Commission, rejection of the revised Cartel Act without even considering it was a missed opportunity to meet the need for reform highlighted in the evaluation. It also means that several changes proposed by the Council of States, including changes to the merger control procedure, are no longer on the table.

In the course of 2014, 2015 and 2016, individual parliamentary proposals were submitted with the aim of revising specific points in the Cartel Act. Based on its report on preventing parallel imports dated 22 June 2016, the Federal Council instructed the Federal Department of Economic Affairs, Education and Research to prepare a consultation bill on modernising the merger control procedures in the Cartel Act. The Federal Council takes the view that the current merger control procedures take too little account of the negative and positive effects of mergers, and that the test for market dominance currently provided for in the Cartel Act could be replaced by the SIEC test. The Federal Council expects this possible change to have positive effects in the medium to long term on the competitive environment in Switzerland. The State Secretariat for Economic Affairs has overall responsibility for drafting the bill to be submitted for consultation; it commissioned a report on the implications of the introduction of the SIEC test on the Swiss control regime, which was released on 27 October 2017 and which, among other conclusions, recommends that such test be introduced. Also, the Buman Parliamentary Initiative of 30 September 2016 demands that four specific undisputed points in the rejected revision of 2014 be reintroduced, namely the merger control procedure for companies. The initiative has not yet been debated in Parliament.

Appendix 1

ABOUT THE AUTHORS

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Dr Pascal G Favre is the head of the competition practice group in Geneva. Pascal focuses his practice on Swiss competition and distribution laws, in addition to corporate and M&A. He frequently handles, on behalf of corporate clients, the competition law aspects of their domestic or cross-border M&A transactions. Pascal is valued and sought after by corporate clients for his solid experience in notifications on concentrations and merger control procedures involving Swiss or foreign companies operating in Switzerland. He also regularly represents companies in complex antitrust proceedings brought before the Swiss Competition Commission. In addition to advising on matters involving searches and internal investigations, Pascal counsels companies on compliance and leniency programmes in the context of a continuously evolving competition regulatory environment.

Pascal achieved a doctor of laws, *summa cum laude* (Fribourg, 2005; awarded three prizes). He regularly publishes articles and updates on a wide range of legal issues. He is a co-author of a legal essay on the main principles of Swiss dominance law (Fiches juridiques suisses, No. 337, 'L'abus de position dominante en droit de la concurrence') and has drafted the second edition of a chapter dedicated to Swiss merger control in the *Commentaire romand*, the most comprehensive French-language commentary on Swiss competition law (co-author). He has also co-edited with Professor Pierre Tercier (honorary chair of the International Chamber of Commerce's International Court of Arbitration and former chair of the Swiss Competition Commission) the fourth edition of *Les Contrats Spéciaux*, which serves as a standard book in the field of Swiss contract law.

Pascal is a well-established competition practitioner recognised both by clients and ranking publications. Most recently, he has been identified by *Global Competition Review* in 2018 and the *SNCF Mobilités* deal led by Pascal was highlighted in the 18th edition of *GCR 100 Global Elite*. Pascal is fluent in French, English and German.

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Marquard Christen is a partner at CMS von Erlach Poncet Ltd specialising in competition law (antitrust law). He advises on all matters related to Swiss and EU competition law and represents companies in investigations of competition authorities and in court proceedings. Apart from competition law, Marquard practices in the field of public procurement law and heads CMS Switzerland's public procurement practice group. He is also the co-founder of a competition law roundtable consisting of senior associates and young partners from major Swiss law firms.

Apart from merger control proceedings (including the coordination of multi-jurisdictional filings), Marquard's relevant experience includes representing clients in investigations of the Swiss Competition Commission and in appeal proceedings related to, *inter alia*, horizontal price fixing, bid rigging, information exchange, vertical allocation of territories, resale price maintenance and abuse of dominance, advising on complex cooperation projects related to technology transfer, specialisation and joint R&D (recently in the payment, telecommunications, electricity and retail sectors), developing and implementing antitrust compliance programmes and supporting companies in the (re)organisation of their distribution systems. Due to his other practice area of public procurement law, Marquard is particularly experienced in competition law matters related to public tenders such as bid rigging.

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