The Merger Control Review

Sixth Edition

Editor
Ilene Knable Gotts

Law Business Research

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For further information please email
Nick.Barette@lbresearch.com

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Editor
Ilene Knable Gotts

Law Business Research Ltd

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Gideon Roberton

BUSINESS DEVELOPMENT MANAGER
Nick Barette

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EDITOR'S 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, particularly in Asia, are poised to add pre-merger notification regimes in the next year or so. The 10 Member States of the Association of Southeast Asian Nations, for example, have agreed to introduce national competition policies and laws by year-end 2015. We have expanded the jurisdictions covered by this book to include the newer regimes as well in our endeavour to keep our readers well informed.

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. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese 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 a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, this book provides an overview of the process in 43 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 pharma and high-technology companies, we have added to this year's edition chapters focusing on the US and EU 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 discussing 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 clients on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The US and China may end up being the exceptions in this regard. 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, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). 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, Turkey recently issued a decision finding that a joint venture (JV) that produced no effect in Turkish markets was reportable because the JV's products 'could be' imported into Turkey. 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 UK and Venezuela), the vast majority impose mandatory notification requirements.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. 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 Authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of Patriache group. 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 and India provide for 15 days after signing the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit commencing with the entering into the agreement for filing the notification. 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, India 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., Greece, Portugal, Ukraine and the US). 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 addition, other jurisdictions have joined the EU and US in focusing on interim conduct of the transaction parties. Brazil, for instance, issued its first 'gun jumping' fine last year and recently issued guidelines on gun jumping violations. In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review and challenge by the competition authority. In Canada – like the US – however, the agency can challenge mergers that were not required to be notified under the pre-merger statute. In 2014 alone, the Canadian Competition Bureau took enforcement action in three non-notifiable mergers.

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 EU model than the US 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 Japanese 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 process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU 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 are to 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 EU and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EU and the US), 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 US 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, in that the Authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The Korean Fair Trade Commission 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 EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and the EU on some mergers and entered into a cooperation agreement with the US authorities in 2011. The US also has recently entered into a cooperation agreement with India.

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 EU 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 UK 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 standalone 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. Multijurisdictional 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 US 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 environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EU or the US. 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 EU, France, the Netherlands, Norway, South Africa, Ukraine and the US). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing antidumping 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*, 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.

Ilene Knable Gotts
Wachtell, Lipton, Rosen & Katz
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Chapter 36

SWITZERLAND

Pascal G Favre and Patrick Sommer[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 85 employees at the end of 2013, 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.

1 Pascal G Favre and Patrick Sommer are partners at CMS von Erlach Poncet Ltd.

2 www.weko.admin.ch.

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 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 (Schweitz) 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 may 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

In 2014, the numbers of merger notifications remained stable, with 30 notifications of concentrations being filed to the Competition Commission (there were 32 notifications of concentrations in the previous year). Thirty-five cases (including a notification received in December 2013 but not declared unobjectionable until the start of 2014) were cleared after a preliminary investigation. One decision was rendered after an in-depth investigation (Phase II).

In the telecommunications sector, the Competition Commission assessed the merger between Swisscom Directories AG and Search.ch AG. In this case, Swisscom and Tamedia, following the takeover of Publigroupe SA, planned to merge its subsidiaries local.ch and search.ch into a joint subsidiary undertaking. The Competition Commission's preliminary investigation at the end of November 2014 revealed that the merger might establish or increase a dominant position in relation to address directories. Accordingly, and under Article 10 of the Cartel Act, the planned merger was the subject of an investigation that was completed in March 2015. Although the Competition Commission arrived at the conclusion that this merger would result in the creation of a dominant position on the directories market, it found that such dominant position was not capable of eliminating effective competition.

The Competition Commission was also called on to assess several company mergers in the media sector. In the merger planned between Tamedia AG and the B2C division of Ticketportal AG, Tamedia reported its intention to take over the B2C division of Ticketportal via its subsidiary Starticket AG. In the case of *Aurelius/Publicitas*, Aurelius AG planned to take over the activities of Publigroupe in the field of media sales. In the case of *Ringier/Le Temps*, Ringier AG planned to acquire sole control of HE Publishing SA; this would result in Ringier having the sole control of Le Temps SA. In the case of *Thomas Kirschner/Valora Mediaservices AG*, Thomas Kirschner announced its intention to acquire indirect control of the Swiss press wholesaler Valora Mediaservices AG via its subsidiary Brillant Media Services GmbH. Subsequently, Thomas Kirschner/A and B XY/Valora Mediaservices AG reported their acquisition of joint control of Valora Mediaservices AG by Thomas Kirschner and the spouses XY – the latter via ATLAS Beteiligungen GmbH & Co KG. In the case of *Swisscom (Switzerland) AG/Publigroupe SA*, Swisscom announced its intention, as part of a public takeover bid, to gain the sole control of the Publigroupe group of companies. In the case of *Tamedia/home.ch*, Tamedia planned to take over sole control of the home.ch division. In relation to all these cases, the Competition Commission approved the mergers following a provisional assessment.

Following on from the merger proceedings in the case of *Ringier/Le Temps*, in a ruling dated 8 September 2014 the Competition Commission also lifted the conditions imposed by its decision of 20 October 2003 in the case of *Edipresse/Ringier – Le Temps*. The conditions were imposed due to the joint control of Ringier and Tamedia over HE Publishing (and thus the newspaper Le Temps) in order to guarantee the independence of Le Temps and to be able to control the effects of the cooperation in other media markets. With Ringier taking over sole control of Le Temps, the conditions were no longer required and thus had to be lifted.

In addition, on 3 September 2014, the conditions that the Competition Commission imposed in 2007 in the *Migros/Denner* merger proceedings all expired, with one exception. The exception relates to the permanent requirement that Migros is basically not permitted to enter into exclusive agreements with its suppliers. The conditions were ordered on the one hand with the aim of ensuring that other operators in the market could take over Denner's previous role as Migros' most significant fringe competitor. On the other, the conditions were supposed to prevent it becoming more difficult for suppliers to gain access to sales markets. In the Competition Commission's view, the conditions have served their purpose; the conditions were enforced without any significant irregularities.

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, *supra*), 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. 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. If the Competition Commission decides to launch an in-depth investigation, it will have to complete it within four months.

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 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.

In September 2014, the Competition Commission published an updated version of its communication dated 25 March 2009 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 the 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.

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 with 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 an upstream or downstream product market or in a neighbouring market closely linked with the product 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 decisions 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, *infra*) 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.

V OUTLOOK AND 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 takes the view that, compared with other countries, the Swiss system, which only prohibits concentrations that can eliminate effective competition, 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 recommend 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 an 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, *supra*). 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 be 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 is that the Cartel Act will not be revised.

According to the Competition Commission, rejection of the revised Cartel Act without even considering it is 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.

Appendix 1

ABOUT THE AUTHORS

PASCAL G FAVRE

CMS von Erlach Poncet Ltd

Dr Pascal G Favre heads the competition practice of the Geneva offices of CMS von Erlach Poncet Ltd. He regularly represents companies in complex proceedings brought before the competition authorities. He has solid experience in competition and antitrust law, particularly with regard to concentrations involving Swiss or foreign companies. He also advises companies in connection with issues involving searches, internal control, and compliance and leniency programmes. The distribution sector particularly values his knowledge of contract law coupled with his competition law practice. Mr Favre achieved a doctor of laws, *summa cum laude* (Fribourg, 2005; awarded three prizes). He was admitted to the Geneva Bar in 2004, where he was ranked first. 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). Mr Favre 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*. It serves as a standard book in the field of Swiss contract law. Mr Favre is fluent in French, English and German.

PATRICK SOMMER

CMS von Erlach Poncet Ltd

Dr Patrick Sommer is head of CMS von Erlach Poncet's competition & EU practice group. He represents major Swiss and international companies in all aspects of antitrust law, including Swiss and multi-jurisdictional merger control filings, investigations of the Swiss competition authorities and dawn raids. He has represented a wide range of companies and trade associations in proceedings before the Swiss competition authorities. He is a frequent speaker at conferences and regularly publishes on antitrust issues. Mr Sommer graduated from the University of St. Gallen in 1987 and was admitted to the bar in 1989. He wrote his doctoral thesis on the relationship of Switzerland to the European Union and completed postgraduate studies at the College of Europe in Bruges.

Before joining CMS, he worked for seven years in the legal department of the Swiss multinational group Holcim where he has been promoted to the offices of General Counsel and Secretary of the Board of Directors. Mr Sommer is a member of the international advisory board of the 'St. Gallen International Competition Law Forum' and of the 'Studienvereinigung Kartellrecht'.

Other areas of practice include corporate and commercial law. Mr Sommer is fluent in German, English and French.

CMS VON ERLACH PONCET LTD
Rue Bovy-Lysberg 2
PO Box 5824
1211 Geneva 11
Switzerland
Tel: +41 22 311 00 10
Fax: +41 22 311 00 20

Dreikönigstrasse 7
PO Box 2991
8022 Zurich
Switzerland
Tel: +41 44 285 11 11
Fax: +41 44 285 11 22

pascal.favre@cms-vep.com
patrick.sommer@cms-vep.com
www.cms-vep.com